

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Barry Angel (First Applicant)  
AND Ken Hutton (Second Applicant)

**AND** Fonterra Co-operative Group (Respondent)

**REPRESENTATIVES** Andrew McKenzie, Counsel for First Applicant  
Andrew McKenzie, Counsel for Second Applicant  
Garry Pollak, Counsel for Respondent

**MEMBER OF AUTHORITY** Paul Montgomery

**INVESTIGATION MEETING** 30 January 2006

**DATE OF DETERMINATION** 6 April 2006

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

- [1] The applicants were employed as Senior Packing and Blending Operators in the respondent's milk powder plant at Clandeboye. Mr Angel had been employed by the respondent and its predecessors for some eight years while Mr Hutton had been employed by the respondent and its predecessors for approximately 10 years.
- [2] Both were summarily dismissed from their employment on 16 December 2005 after the respondent had found they had breached a Critical Control Point (CCP) in the production process.
- [3] An application for interim reinstatement was lodged with the Authority on 4 January 2006. Following a teleconference with counsel, the Authority fixed a fixture date of 23 January to hear both the interim and substantive matters.
- [4] Each applicant seeks permanent reinstatement to his former position, wages and benefits lost as a result of the alleged grievances, compensation for hurt and humiliation in the sum of \$10,000 and costs.
- [5] The respondent denies the applicants were unjustifiably dismissed and declines to meet their remedies.

### ***What caused the problem***

[6] The packing plant uses a relatively sophisticated system of integrated components to check the outbound products for metal contamination and for correct bag weights. After filling, the individual bag is then sealed and moved through the metal detector onto a weighing station. If metal is present in the bag or if the bag is over or under the correct weight, the reject arm is automatically activated and pushes the bag off the conveyor. If metal is detected an audible alarm is set off to alert staff that the bag has to be isolated for inspection. The reject arm is operated by a compressed air supply.

[7] The company has a Standard Operating Procedure (SOP) Manual which complies with the regulatory regimes under which the company operates and this manual establishes the training required by operational staff in the plant. A key training document is the Planning and Assessment Workbook and each employee has such a workbook prepared for him or her to ensure that the appropriate training has been given and to record the assessment of the employee's understanding of the process and the specific tasks he or she is required to undertake in the course of their duties. In addition, there is a Blending and Packing Reference Manual which sets out step-by-step the tasks that must be done, including pre-start checks, and the key points of those checks.

[8] At a plant meeting on 18 November 2005, the Senior Packer on one shift, a Mr Alan Perrin, raised the issue of the reject arm being turned off. Mark Leith, the Manufacturing Manager, was seriously concerned at this and instructed Mark Walter, the Process Manager, to undertake an investigation. At the outset of the investigation, Mr Walter went through the diary in the packing plant and found an entry on 13 November 2005 which read: *Bag picker (reject) who keeps turning the air off at the bag reject station, and why?*

[9] On 18 November 2005, there is a further entry in the same handwriting of Mr Perrin: *Bag reject blade switched off again this morning. Please leave on.* On the same day, Mr Walter entered the following in the diary: *On inspection of the packing documentation today I found that the air to the bag reject arm was turned off. This is a failure of the CCP. On looking back in the diary it was found another instance of this practice. Two cyphers will be placed on hold and then rechecked through the metal detector. Under no circumstance can this practice continue. This will be investigated on Monday to check if any other cyphers are effected [sic]. Signed Mark Walter 18 November 05.*

[10] Following this entry on the same day was another placed by Mr Angel: *The reject station was turned off at 5.30 because we were going to do stock food and sweepings but by the time dust extractor was cleaned it was too late. I forgot to tell AP that I had just turned off for this procedure. There was no failure of CCP during packing.*

[11] Having reported these initial findings to Mr Leith, Mr Walter and Mr Leith met with Mr Chris Billen, the Product Safety Coordinator, to discuss the affected product. Mr Leith says that he met Mr Angel in a corridor of the plant at around 5.30 on 18 November 2005 and raised his concerns about the incident and told him to read the diary before he started work that evening. Mr Leith then advised Alan Bennett, the respondent's Hub Operations Manager, of the incident on 21 November 2005 and the following day all the WPC/Lactose stock food produced in the season was put on hold. At that point, the company was aware the problem related only to stock food and sweepings.

[12] The following day Mr Leith met with Mr Mark Walter and Alle Worner, the HR Adviser. It was decided to undertake a formal investigation beginning with an interview with Mr Angel. At that interview, Mr Angel admitted that he had disabled the reject arm while packing stock food. As a result of this, and to evaluate the extent of the practice, Mr Leith decided to widen his

investigation to cover other shifts. Mr Leith says he closed the meeting by advising Mr Angel and the Union representative that he would update them later in the week.

[13] That update did not occur in the time indicated because one of the Senior Packers, the other applicant in this case, Mr Hutton, was absent on parental leave and a meeting with him could not be scheduled until 2 December 2005.

[14] In the meantime, 974 bags of stock food and sweepings were metal detected and re-weighed. Twenty six stock food bags were detected with metal and 175 bags weighed either over 21kg or under 19kg. The exercise established that 33.67% of the season's stock food was not the correct weight.

[15] Mr Leith spoke with Mr Angel by telephone on 29 November 2005 and the latter asked what was happening with the investigation. He was told that it was still in progress and that Mr Leith would see him when Mr Angel returned to work the following day. Mr Angel called in sick on 30 November 2005 and was on sick leave up until his return on 4 December 2005.

[16] The meeting with Mr Hutton took place on 2 December as scheduled. At that meeting Mr Hutton also said he had disabled the reject arm while packing stock food. This led Mr Leith to decide to extend the investigation to all shifts. A report from an automation engineer to Mr Leith regarding a metal detection problem encountered when lactose was being packed had occurred on Darren Fitzgerald's shift. Darren had signed the log sheet on a given morning stating the detector was working correctly when a diary entry later the same day by Alan Perrin stated that it was not. This suggested the detector could have been switched off during Mr Fitzgerald's shift. Following interviews with all Senior Packers conducted by Mr Walter and Ms Worner, no further evidence of interference with the reject arm came to light.

[17] Accordingly, on 12 December 2005, the respondent advised both applicants in writing of their need to attend a disciplinary meeting. The letters clearly notified the allegations, the seriousness of the allegations and the applicants' rights to Union or legal representation. Documents relating to earlier meetings, reprocessed stock food and blending and packing workbooks were sent with the letters to the applicants.

[18] The relevant meetings took place in Mr Bennett's office on 16 December 2005. The company was represented by Mr Bennett, Mr Leith, Ms Worner and Mr Walters at both meetings. Mr Angel was accompanied by Mr Stephen Wallace, a Union delegate who asked if the 10am meeting could be postponed as Mr Faulkner, the Senior Site Delegate, was not due back on site until after 11am. This request was declined and the meeting proceeded. Mr Angel's explanation was that he had never turned off the metal detector which he said was the only CCP he was aware of in the packing area. Mr Wallace also urged the company to consider Mr Angel's commitment to it and his involvement in wider site issues. Essentially, Mr Angel stated that he was not aware that the reject arm was part of the CCP. His evidence is that he did *not agree that turning off the reject arm compromised the CCP*.

[19] At 3.30pm that day, Mr Angel was recalled to the meeting and was advised of the summary dismissal. By that time, Mr Faulkner had returned to the plant and was present at that meeting.

[20] The meeting with Mr Hutton took place at 12pm. By this time, as noted above, Mr Faulkner had returned and represented the applicant. Mr Hutton affirmed that he had admitted at the preliminary meeting that he had turned off the reject arm and outlined the reasons he had for doing so. Those reasons focused on problems encountered in packing stock food/sweepings due to different powder density. His evidence was that *there were occasions when employees would turn off the reject arm due to the underweight bags and other abnormalities which see such product*

*rejected. It was only on the more problematic ones that one might turn of [sic] the reject arm. As mentioned, this did not compromise product safety as the metal detector still detects any metal in the product and, if detected, such bags are taken off manually and checked as per procedures.*

[21] At the end of this meeting, Mr Hutton was told that Mr Bennett would make a decision that afternoon and he went to the cafeteria to wait as he was rostered off that day. He was also recalled to the meeting at about 3.30pm and was advised of his summary dismissal.

[22] The company says that those managers involved in the investigation and the disciplinary interviews seriously considered the explanations given by the applicants and other relevant matters such as service records and personal circumstances. Its evidence is that the explanations were unacceptable from senior packers, that the decision to dismiss was made following discussions between the management staff and that Ms Worner had typed the dismissal notices *at approximately 3pm on 16 December 2005.*

[23] Subsequent to the dismissals, the Union brought to the respondent's attention an incident involving similar facts at the Takaka plant. In that instance, the two employees were found to be guilty of serious misconduct but were not dismissed. The respondent justified its apparently inequitable treatment in that instance by pointing out that those employees were relatively inexperienced and no product contamination occurred. They were issued with final written warnings.

### ***The investigation meeting***

[24] The Authority appreciated the assistance of Messrs Bennett, Leith, Walter and Ms Worner for the respondent and of Messrs Angel, Hutton, Faulkner and Ms Cook for the applicants in conducting its investigation. All participated earnestly and positively in spite of strongly held opposing views. I was further assisted by counsel for the parties and thank them for their concise and on-point submissions.

### ***The issues***

[25] In the matter presently before the Authority, it is taxed with resolving the following issues:

- Does the reject arm in fact constitute an integral part of the CCP; and
- Did the respondent undertake a full and fair investigation into the alleged actions of the applicants; and
- Are the actions of the applicants capable of constituting serious misconduct; and
- In dismissing the applicants, did the respondents follow the appropriate procedures as set out in the CEA; and
- Were the applicants treated differently from two workers in another plant who had undertaken the same actions; and
- Were the applicants unjustifiably dismissed, and if so, what remedies are appropriate in the circumstances?

## ***Discussion and analysis***

[26] At the heart of the respondent's view of this matter is the respondent's product safety procedures. Those procedures are established under statute and any breach must be reported to the appropriate authority. Criminal sanctions are a distinct possibility where the breach is deemed to be serious.

[27] Central to the applicants' defence is their assertion that they did not know that the reject arm was an integral component of the CCP. Both accepted the metal detector was such a component and explained that they had not disabled the detector and manually removed bags activating the detector alarm. Both also proffered their view that stock food/sweepings could be handled in a different manner from first quality product.

[28] On the evidence before the Authority, it is clear that the reject arm has two functions: to remove underweight or overweight bags and to remove bags detected as containing metal. The Blending and Packing Reference Manual dated 13 January 2004 clearly states:

*If the check weigher and metal detector has identified the bag as out of specification, the pusher pushes it off the conveyor onto the reject frame.*

[29] The pre-start check section of the 15 August 2005 Manual at point 6 says:

### ***Test Metal Detector CCP***

- *There are two test bags. One contains 2.4mm mild steel and the other contains 3.2mm stainless steel.*
- *Each test bag containing metal is to be tested three times before each new cypher is packed and first thing in the morning if continuing from previous packing run.*
- *Both test bags must activate the audible alarm and reject pusher arm for each test.*
- *Ensure the bags are not being rejected due to them being under or overweight.*
- *Two signatures are required on the packing summary confirming metal detector checks have been completed. One signature from the operator and one from the senior packer or in his/her absence supervisor.*

[30] It is palpably evident that the reject arm is integrally connected to the check weigher and the metal detector. To disable the reject arm is to undermine the certainty the process confirms of the integrity of product leaving the plant. Human nature being what it is, it is highly probable that under and/or overweight bags of product will be missed by staff. In the event of the metal detector alarm sounding, it is possible that the offending bag may be misidentified and as a result pass through to the palleting area.

[31] It is also clear from the evidence before the Authority that both applicants disabled the reject arm in order to facilitate the packaging of stock food. In his evidence, Mr Leith expressed concern that employees appeared to believe that stock food did not need to comply with the high standard of food safety as required of other product. He told the Authority in regard to packing the stock food; *Only the set up of the line would alter. All products are handled in the same way.* Mr Leith also described the need for the company to be sure product was packed to the correct weight as a *truth labelling* issue.

[32] Also in this evidence in front of the Authority, Mr Leith summed up the actions of the applicants by saying; *Disable the reject arm and you disable the CCP.*

[33] In the evidence given by the applicants and the submissions made on their behalf I was urged to consider allegations in respect of the process adopted by the respondent. The applicants say their dismissals were pre-determined and support this contention by directing the Authority to six points for consideration. Those points are:

- The pre-prepared letters of dismissal;
- The conflicting accounts on when the decisions to dismiss were made;
- The brief time given to thoughtfully consider the applicants' explanations;
- The refusal to grant a reasonable adjournment;
- The replacement labour arranged for dismissal;
- The identical wording of the notices of dismissal.

[34] I deal with each one in turn.

[35] The evidence of Ms Worner was *I typed up the two notices of dismissal at approximately 3pm on 16 December*. Further, this witness told the Authority that a discussion on each applicant's actions followed the meetings with each of those interviewed, with the final decisions being made at the end of all three meetings. Ms Worner said that the discussion regarding Darren Fitzgerald did not take much time and that the final decisions were made *at the end of all the meetings*. I think it more likely than not that Ms Worner prepared the dismissal letters using a template which would also explain the identical wording of the letters except for the names of the addressees.

[36] I have considered the evidence of Ms Worner alongside that of Mr Bennett and I am satisfied that their accounts on this point are consistent.

[37] The evidence before the Authority confirms that Mr Angel's interview was held at 10am, Mr Hutton's interview was held at 12 noon and Mr Fitzgerald's interview was held at 2pm and ended at approximately 2.45pm according to Ms Worner's evidence. Given that I accept Ms Worner's evidence on the timing of the discussion of each applicant's actions and on the preparation of the dismissal letters, I have no difficulty in concluding that ample time was available to consider the explanations offered by the applicants before a conclusion was reached. Again the evidence of Mr Bennett and that of Mr Leith reassures the Authority that appropriate consideration was given to all relevant matters.

[38] The allegation that the respondent refused to grant what the applicants considered a reasonable adjournment to enable the arrival of Mr Faulkner needs to be placed in its proper context. The respondent had commenced its investigations on 18 November 2005 when Mr Leith asked Mr Walter to begin an investigation. As mentioned above, the investigation took longer than was anticipated and involved the interviewing of a considerable number of staff. It is clear from the evidence of several witnesses that the delay occasioned Mr Angel in particular considerable anxiety resulting in his taking sick leave. The respondent had completed its investigations by 12 December 2005, the date on which the notices to attend a discipline interview were dispatched to the applicants. The respondent had clearly established a schedule for the conduct of the three disciplinary interviews and clearly decided to adhere to the schedule it had established. While Mr Angel clearly may have preferred the attendance of Mr Faulkner at this meeting, he was nonetheless represented by Mr Wallace who spoke on this applicant's behalf at the meeting. So, in effect, Mr Angel was not deprived of representation as a result of the respondent's declining the adjournment. Had that been the case, the Authority would take a considerably different view.

[39] In his evidence to the Authority, Mr Leith makes it clear; *I had made arrangements for contingency cover to keep the business running if we decided to dismiss in the days before but nothing was arranged until the meeting on 16 December 2005. After that time I arranged for two other staff to cover their absences.* Given the nature of the respondent's business, operational requirements dictated the need to put contingency plans in place in the event that the decision should go against the applicants.

[40] The applicants allege they were unfairly treated. In this regard, they contend that the respondent embarked on a process of *incrimination*. *The questions were more designed in incriminating the applicants as opposed to investigating other relevant facets to the alleged conduct: what were the problems which made stock food/sweepings problematic; how long has this practice endured; who else was involved etc.* In my view, this submission flies in the face of the evidence and particularly the undisputed fact that both Mr Angel and Mr Hutton admitted that they had turned off the reject arm.

[41] Having considered the submissions put to me by Mr McKenzie in relation to the process adopted by the respondent, I am satisfied that the respondent has met its obligations to the applicants in the investigation and disciplinary process.

[42] A key question in resolving this matter is whether the actions of the applicants were capable of constituting serious misconduct.

[43] It is submitted on behalf of the applicants that the CEA does not define serious misconduct. Importantly, in clause 8.2.1, it provides that first warning or verbal warning [is] *issued in cases of substandard performance or misconduct or breaches of company policy and procedures. This is unequivocal and, as such, must be given effect to.* The point is appropriately made. However, the CEA is not silent on serious misconduct. At 8.6 it states: *Serious misconduct may result in instant dismissal without notice, in which case the worker shall be entitled to be paid only up until the time of dismissal.*

[44] The applicants contend that because they were found guilty of a breach of the product safety procedures, the respondent was restricted under clause 8.2.1 to issuing a first warning. They say this clause gives rise to a presumption against or restricts the type of conduct which can constitute serious misconduct. They claim the respondent has failed to demonstrate that the applicants' conduct is serious misconduct. In considering this argument, I have taken into account the precedents quoted by Mr McKenzie in his submissions to the Authority. However, having considered at some length the evidence available to me, I am of the strong view that this matter is one of negligence. As was observed by the Court of Appeal in *W & H Newspapers v. Oram* [2000] 2 ERNZ 448:

[45] *This was a case of negligence. There was never any suggestion of wilful misconduct. But a single incident of carelessness, when sufficiently serious, can impair trust and confidence, as the decision of Palmer J in Clickclack International Ltd v James illustrates.*

[46] *After an investigation to which there can be no objection the employer having regard to the business of publishing newspapers and the need to rely on reporters for the veracity of information published, which is fundamental to the reputation and credibility of the publication, reached the conclusion that Mr Oram's conduct in the circumstances meant that he had lost the confidence of his superiors that he could be relied upon in the future. We have no doubt that a fair and reasonable publisher could form that view. It was a view open to the employer, notwithstanding the appellant's previous employment record with The Herald.*

[45] In his submission, Mr McKenzie on behalf of his clients says: *Both applicants were unaware of a prohibition of turning the reject arm off whilst doing stock food/sweepings (and importantly that this was viewed as comprising the CCP). ... They had never been told not to turn it off. Had they done so after the November 18 diary entry, the position may well have been different.* This submission simply misses the point and is at odds with the evidence placed by the respondent in front of the Authority. That evidence was quite clearly that all product being packed, including stock food/sweepings, was to be treated in the same way as primary product. Secondly, the actions of the applicants were not viewed as compromising the CCP, they actually breached its integrity. (emphasis is mine) This is a matter of fact not one of opinion. The applicants' attempts to take refuge in the fact that they had never been told not to turn the reject arm off does them little credit.

[46] Turning to the test of justification, s.103A of the Employment Relations Act 2000 as amended states: *For the purposes of s 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[47] The respondent company is in the business of processing and manufacturing food products. Many of those products are used in further manufacture in a wide range of items for human consumption. Others are utilised in the raising of livestock. This country's food safety regulations are established by statute and failure to observe those regulations may have dire consequences for the organisations found to be at fault. Indeed the criminal sanctions for such breaches can be applied not only to the organisation but also to its senior managers. In this context, it is not difficult to understand the need for a very high level of trust and confidence to reside in those controlling critical processes. The applicants were such people.

[48] A matter which was raised both in front of the Authority and in the applicants' submissions was the allegation that others apart from the two applicants had at various stages disabled the reject arm. I am satisfied that the company undertook a thorough investigation on this matter, extending the original investigation beyond its intended breadth. I accept its evidence that it found no other instances of breach. As no evidence, other than the applicants' assertions were put before the Authority on this matter, I am unable to make any ruling.

### ***The determination***

[49] I find that the reject arm does comprise an integral element of the CCP and that the applicants did compromise the respondent's process by disabling the reject arm.

[50] I find that the respondent undertook a thorough and fair inquiry into the events and further sought to determine whether others had compromised a critical part of the process. The respondent found none although I have no doubt that had they identified others, such persons would have been afforded the same opportunity to be heard.

[51] I find the respondent's procedures were fair to the applicants.

[52] I find that the dismissals were not premeditated and met the principles of natural justice and complied with the collective employment agreement.

[53] I find that in the particular circumstances of this respondent and the regulatory regime within which it must operate, the actions of the two applicants were capable of being seen to constitute serious misconduct. Further, I find that a fair and reasonable employer in a statutory environment would likely have come to a similar conclusion.

[54] I find that the applicants were treated differently from two workers in the Takaka plant who had undertaken similar actions. However, I find it was reasonable of the respondent to differentiate the two incidents on the basis of experience in packing milk powders and the fact that no contaminants were found in the bags processed while the arm was disengaged at the Takaka plant.

[55] I find that the applicants were justifiably dismissed.

[56] Having made these findings, the Authority is unable to assist the applicants further.

***Costs***

[57] As requested by counsel for each of the parties, I reserve the matter of costs. The parties are urged to attempt to resolve this matter between themselves. However, if that is not possible, Mr Pollak is to file his memorandum no later than 4pm Friday, 12 May 2006. Mr McKenzie is to have his memorandum in reply lodged and served 14 days thereafter.

Paul Montgomery  
Member of Employment Relations Authority