

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

5147850
CA 29/10

BETWEEN

JAMES CAVANAGH
Applicant

AND

FONTERRA CO-OPERATIVE
GROUP LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Craig Smith, Counsel for Applicant
John Rooney, Counsel for Respondent

Investigation Meeting: 20 and 21 October 2009 at Invercargill

Submissions Received: 5 and 30 November 2009 for Applicant
23 November 2009 for Respondent

Determination: 10 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] James Cavanagh has driven professionally for 25 years. He commenced his employment with Fonterra in August 2001 as a tanker operator at the Edendale plant and was a member of the Dairy Workers' Union. His work was covered at the material time by the Fonterra Limited Dairy Workers' Collective Agreement 2007-2008.

[2] Mr Cavanagh says that he was unjustifiably dismissed from his employment as a milk tanker operator with Fonterra following an incident at 3am on Saturday, 19 April 2008 when the trailer of the tanker he was driving rolled on McCall Road, Edendale emptying its contents of milk into the Maitai River in Southland. Mr Cavanagh was dismissed on 15 July 2008 after investigation into the accident and attendance at two disciplinary meetings.

[3] Mr Cavanagh wants to be reinstated to his position with Fonterra, reimbursed for lost wages between dismissal and the date of the investigation meeting on 20 October 2009, compensated in the sum of \$20,000 and recovery of costs.

[4] Fonterra agrees that Mr Cavanagh was dismissed on 15 July 2008 but does not accept that his dismissal was unjustified. Fonterra says that Mr Cavanagh was justifiably dismissed because, after investigation, it concluded he drove his milk tanker in an incorrect and unsafe manner by failing to negotiate a corner safely which resulted in the trailer rolling, causing significant damage to company property. Fonterra concluded, it says justifiably, that Mr Cavanagh's actions amounted to serious misconduct and that the decision to dismiss him was what a fair and reasonable employer would have done in all the circumstances. Fonterra does not accept that Mr Cavanagh is entitled, therefore, to the remedies he is seeking.

Section 103A of the Employment Relations Act 2000

[5] The test in s.103A of the Employment Relations Act 2000 for justification in personal grievances requires the Authority to objectively review all the actions of the employer against the objective standard of what a fair and reasonable employer would have decided and how the decisions would have been made in all the circumstances – *Air New Zealand Ltd v. V* (2009) 9 NZELC 93, 209.

The issues

- Was there a full and fair investigation undertaken by Fonterra that disclosed conduct that was capable of being considered serious misconduct?
- Was the decision to dismiss justifiable in all the circumstances, including consideration as to whether there was disparity in the treatment of Mr Cavanagh and another driver?
- If it is found that the decision to dismiss was not justifiable then what remedies should be provided, is reinstatement practicable and are there issues of mitigation and contribution?

Was there a full and fair investigation undertaken by Fonterra that disclosed conduct that was capable of being considered serious misconduct?

Who made the decision to dismiss?

[6] The decision to dismiss Mr Cavanagh was made by the Depot Manager at Fonterra Edendale and Stirling Depots, Dean Morrison. As part of the process, Mr Morrison was supervised and supported by Michael Graveson, the South Island Regional Transport Manager at Fonterra. Mr Graveson said in his written statement of evidence that management was unhappy with the way the previous incident five weeks previous to Edendale had been handled and therefore it was agreed that Mr Graveson would stay closely involved with the investigation into Mr Cavanagh's conduct.

The reason for the dismissal

[7] I find that the reason for Mr Cavanagh's dismissal was as set out in the letter written to him after his dismissal that provided:

This is to advise that your action on 19th April 2008 in which you failed to negotiate a corner safely resulting in the trailer you were towing at the time rolling causing significant damage to company property. This has been investigated by the company and discussed with you on the 11th June and 15th July 2008. Having considered all matters including your explanation, the company considers that your recent action constitutes serious misconduct justifying summary termination as a tanker operator.

[8] The damage caused to the trailer was \$55,000 and the milk and potential revenue loss was \$21,000. In his evidence, Mr Morrison said there was a further \$2,000 cost for a helicopter from Environment Southland to monitor the milk spill and potential damage to the environment. That is a total of \$85,000 damage.

Similar accident involving the roll-over of a trailer on Sunday, 9 March 2008

[9] On 9 March 2008, approximately five weeks before Mr Cavanagh's accident, another employee of Fonterra, who will be referred to as Driver X, was involved in a very similar accident whilst driving the same model truck and trailer set up to the one Mr Cavanagh was driving at the time of his accident. The truck in both accidents was a Scania. Driver X rolled the trailer unit but, as in Mr Cavanagh's accident, the truck remained upright and sustained no damage. The trailer in the Driver X's accident was also extensively damaged and there was spilt milk. I was provided with a copy of

Driver X's accident investigation report. Neither driver could really explain why the accidents occurred when they were both navigating a corner.

[10] Mr Morrison was the decision-maker with respect to disciplinary action for both accidents. Driver X received an informal warning on his file.

The collective employment agreement and other policies and procedures

[11] I was provided with a copy of the current collective employment agreement and advised that the disciplinary procedures contained in it were unchanged from when Mr Cavanagh was employed. The disciplinary process set out in the collective agreement consists of a warning process for the first, second and final warning and there is provision for dismissal for serious misconduct. The disciplinary procedures do not set out the types of conduct that may amount to misconduct and serious misconduct.

[12] Fonterra also produced as part of its bundle of documents a Fonterra policy standard and dismissal document which included incidents which could constitute serious misconduct. This policy was a human resource type document and Mr Rooney did not address in his submissions whether this policy formed part of the terms and conditions of Mr Cavanagh's employment and I am not enlightened from my reading of the collective agreement. I shall however set out the two incidents that Mr Rooney refers to in the policy which could constitute serious misconduct. They are endangering the health, safety and/or well being of employees and failure to comply with safety procedures, policies standards and rules or working or acting in an unsafe manner, including failure to report accidents, personal injury or damage. In the circumstances I place more weight on the driver procedure manual and memoranda provided to drivers by Fonterra.

[13] Fonterra has a driver procedure manual and Mr Cavanagh, although saying he had not recently referred to the document, accepted in his evidence that he was bound to follow the procedures therein. The manual recognised amongst other matters that one of the challenges of the driving position is to work safely in all conditions during all seasons and that drivers are ultimately responsible for their driving manner with respect to legality, safety and avoidance of danger. Extra caution is specifically referred to as to be taken in bad weather.

[14] Fonterra also produced as part of its bundle four memoranda that had been sent to drivers and/or discussed in team sessions involving the approach that would be taken in the event of a driving accident by Fonterra management. The earliest memorandum was dated 23 March 2007. Read together these would inform drivers that Fonterra takes all accidents seriously. I have then considered whether a driver would conclude from this that Fonterra would view every accident where the main contributing factor was driver behaviour as serious misconduct. The earliest memorandum dated 23 March 2007 may suggest that. The memoranda dated 17 January and 14 March 2008 refer to specific accidents, one fatal and both it appears where Fonterra concluded the drivers did not obey road signs. They do not go so far as to suggest any accident involving driver behaviour is serious misconduct. The fourth memorandum is dated 7 February 2008 and confirms the unacceptability of driver failure to adhere to road signs, safety policies, procedures and work instructions and that continual and/or consistent failure to remedy illegal or unsafe behaviour or habit may result in a disciplinary process being initiated which may result in termination of employment. From the communication and policy and procedures it is clear that Fonterra take accidents very seriously but they do not go so far as to provide that every accident involving driver behaviour is serious misconduct. I shall go on now to look at Fonterra's investigation and disciplinary process with respect to Mr Cavanagh's accident.

Following Mr Cavanagh's accident on 19 April 2008

[15] Mr Cavanagh advised Fonterra immediately following the accident that the trailer had rolled and again when he realised that milk was flowing from the trailer into the river. Mr Morrison was also alerted to the accident and the following steps were taken shortly thereafter:

- The workshop mechanic was despatched to the scene to rescue the trailer;
- The Police were notified of the accident and promptly attended at the scene of the accident;
- Fonterra team shift leaders, Graham Harris and Mark Brady, also attended at the scene at or about 4am. Mr Harris spoke to Mr Cavanagh and took a brief statement from him and later, with Police agreement to

leave the road closed until daylight, returned at 0700 hours to take photographs and measurements and drew a scene of the area. Mr Harris had asked the crane operator to wait until daylight and after the photos and measurements had been taken before the trailer was recovered;

- Environment Southland was advised of the milk spill into the river and a representative also attended at the site shortly after the accident.

[16] Mr Harris advised Mr Cavanagh that he was stood down from driving duties until there had been an investigation in accordance with Fonterra's policy. Mr Cavanagh does not take issue with that matter. There is an issue as to whether Mr Cavanagh undertook some limited driving duties after this within the yard or close to the depot. I accept that if this did happen Mr Morrison was unaware of it.

[17] After 19 April, Mr Cavanagh was on rostered days off and then on his return undertook work in the depot. He then had a period of annual leave which had been pre-booked before the accident until 6 May 2008 and he then continued to be based at the depot until 19 May 2008 when he went on sick leave. After Mr Cavanagh went on sick leave, he did not return and perform any further work before his dismissal on 15 July 2008.

The investigation of Darrin Rhodes from the Fonterra Specialist Crash Investigation Team and his report

[18] Fonterra has a specialist crash investigation team which was set up in 2005 to carry out quality investigations into serious accidents. The team member assigned to Mr Cavanagh's accident was Darrin Rhodes. Mr Rhodes attended the scene of the accident on 21 April 2008 and interviewed Mr Cavanagh as part of his investigation in the presence of Union delegate, Grant Ellis, on 22 April 2008. Mr Cavanagh was also interviewed by the Police about the accident on 21 April 2008.

[19] The tanker and trailer unit driven by Mr Cavanagh at the time of the accident was inspected by Robert Legget, an experienced mechanic at Fonterra. Mr Leggat cleared the tanker and trailer of any mechanical defects.

[20] On 6 May 2008, there was a root cause analysis meeting held to discuss the accident in an attempt to identify any possible causes of the accident. This analysis is standard practice at Fonterra after every accident and there are five steps undertaken as part of the analysis. The first step is to identify the problem which, in this case, a

trailer carting 11,000 litres of milk rolling on McCall Road causing substantial damage to the trailer. The second step is to set out the steps taken immediately after the accident.

[21] The third step is to attempt to identify the root cause or causes of the accident and this was the purpose of the 6 May 2008 meeting. Mr Cavanagh attended this meeting along with Mr Ellis as his representative. Several others attended as well including Mr Rhodes and Mr Morrison. Mr Morrison said in his evidence that he could not recall Mr Cavanagh contributing a lot at the meeting and I accept that is more likely than not. A fishbone diagram was prepared at the meeting that was attached as part of Mr Rhodes' investigation report. Agreement could not be reached at the meeting as to the cause of the accident but the possible causes set out in the fishbone diagram included the driving technique, the tyres, the road surface which was gravel, narrow and not long graded, the bad weather at the time which was windy with hail, the auto gearbox and possible fatigue.

[22] The step after the root cause analysis meeting was to try and identify any corrective action and the final step is ongoing learning for others from any accident.

[23] The investigation report from Mr Rhodes was available to Mr Morrison on or about 26 June 2008. Mr Cavanagh was concerned about the delay of the provision of that report and also the references in the report to the date of 6 May. On my reading of the report, that date could relate more when the root cause analysis meeting was held rather than when the report was completed. One of the reasons for the delay of the release of the report I find was that Fonterra was waiting to see if there would be a Police prosecution as a result of the accident.

[24] Before the issue of the report on or about 26 June 2008, Mr Rhodes became aware that the Police had decided to charge Mr Cavanagh with careless driving and he included that in his report together with advice that Mr Cavanagh was intending to defend that charge.

[25] The investigation conclusions from Mr Rhodes were as follows. Mr Rhodes concluded that both the truck and trailer had been checked and cleared of any defects and that planned maintenance was up-to-date. He concluded, in terms of driver behaviour:

The driver was the sole person in control of his work area at the time. Irrespective of the poor weather conditions and the partially loaded trailer it is incumbent on the driver to operate to the conditions that prevail at any one time. Therefore on the information I have available to date the drivers lack of concentration for whatever reason was the main contributing factor in this accident.

[26] Before the release of that report, Mr Cavanagh was asked to attend the first disciplinary meeting that took place on 11 June 2008. He was invited to the meeting by letter dated 9 June 2008 which set out the allegations that he was facing. The allegations were set out as follows:

... you drove a tanker in an unsafe manner and caused significant damage to company property. Specifically it is alleged that when driving your tanker on April 20th, you failed to negotiate a corner on McCall Road and as a result, caused the tanker and its trailer to leave the road and roll over, resulting in considerable damage to both the tanker and the trailer.

[27] Mr Cavanagh was advised that he was entitled to bring a representative to the meeting and that the allegations he was facing were serious and may result in disciplinary action up to and including summary dismissal. Mr Cavanagh was also advised of the Fonterra employee assistance programme run through SEED. Whilst nothing was made of the matter I do want to record the allegation as it concerns the tanker is incorrect. The tanker was not damaged as it remained upright. It was the trailer that rolled and was damaged.

11 June 2008

[28] Mr Ellis attended the meeting on 11 June 2008 as Mr Cavanagh's representative. Mr Morrison attended with Kate Ryan who is Fonterra's Human Resources Adviser. During the Authority investigation meeting, there was a suggestion that Mr Cavanagh took issue with the only notes available for the meeting on 11 June 2008 that were prepared for Fonterra. I am satisfied that these notes taken by Fonterra form the most accurate record of what was discussed during that meeting. One part of the notes was changed during the Authority's investigation meeting when Mr Morrison gave his evidence. I am satisfied that Mr Ellis and/or Mr Cavanagh were provided, prior to the final disciplinary meeting, with a copy of the notes and although there was some discussion about them at the meeting on 15 July 2008, there were no changes made to them at that time.

[29] At the 11 June 2008 meeting, Mr Morrison confirmed with Mr Cavanagh whether he was well enough to attend the meeting because he was, at that time, on stress leave. Mr Cavanagh responded that he was well enough to be present at the meeting and made it clear that what would help him was for Fonterra to complete the investigation and give him an outcome because it was the *not knowing* that was causing his poor health.

[30] There was some discussion about the seriousness of the allegation and that it may result in disciplinary action including summary dismissal. Mr Cavanagh advised that he did not know what summary dismissal was and that he did not agree with the allegations against him at all and felt he had done nothing wrong on the day of the roll-over and that he had done nothing to cause the vehicle to lose control.

[31] Mr Cavanagh explained that leading up to the roll over he was feeling good and was not tired. His runs on that shift had been changed around but that did not bother him and the Dispatcher knew about this. This change resulted in him using McCall Road to get to his last pick up. At the time of turning into McCall Road it was some of the worst weather conditions he had ever driven in, the hail was so heavy he couldn't see the white line. He had driven the road several times in the past and was very aware that the corner where the roll over occurred was a difficult one and so he drove into it at what he felt was a safe speed.

[32] Mr Cavanagh could not give Ms Ryan, when asked, the speed that he was doing at the time but explained that after negotiating the corner he felt a jolt and saw that the trailer was out to the side of him and he pushed in the clutch and took the truck out of gear but the trailer continued to leave the road and roll. Mr Ellis advised that Mr Cavanagh had been observed by other drivers before the accident who were driving home at the time and they had advised how cautiously he was driving prior to McCall Road. Mr Cavanagh was asked if he ever considered pulling over at the time and waiting until the weather eased up if it was that bad, and he responded that he had not. He also, when asked, said that he would not do anything different if it was not for *the crap that you have to go through* but knowing that he would not pull over and let the weather clear.

[33] Mr Cavanagh said he was not distracted by anything at the time of the accident and towards the end of the meeting Mr Cavanagh advised that he was angry that he had not received a decision and it appeared, although it is not reflected in the meeting

notes provided by Fonterra which suggest that the meeting was adjourned, that he may have walked out of the meeting early.

[34] A fair and reasonable employer would be concerned about Mr Cavanagh's comments and attitude at that meeting, and would weigh those against the fact that Mr Cavanagh is an uncomplicated man who attended the meeting whilst on stress leave. When the meeting notes are considered, it is clear he was expected to have been provided before this meeting with a copy of the accident report and have a decision. It seems, in the absence of the provision of the accident report, he had been unable to see the point of the meeting. In that respect, whilst accepting Mr Morrison felt there was enough information for a case for Mr Cavanagh to answer, it is a little unusual to hold such a meeting before an accident report is available particularly when one is expected in the not so distant future.

[35] Following the 11 June 2008 meeting, Mr Morrison then received Mr Rhodes' accident report. He said in his evidence at the Authority's investigation meeting that he conducted investigations himself into any other possible causes of the accident and was satisfied that they were capable of being eliminated as causes.

[36] On 1 July 2008, Mr Cavanagh was written to about a disciplinary meeting on 3 July 2008 but that meeting did not take place and a further letter was written on 7 July 2008 to invite Mr Cavanagh to the second and final disciplinary meeting which was held on 15 July 2008.

15 July 2008 meeting

[37] Mr Cavanagh attended the second disciplinary meeting with Mr Ellis and with another support person, Gordon Smith. Mr Morrison attended again with Ms Ryan. Mr Ellis covertly taped the meeting and at the Authority's investigation meeting this was disclosed to the Authority for the first time. A recording was then made available to the Authority and Mr Rooney which I have listened to carefully.

[38] At this meeting, the parties had before them a copy of the accident investigation report and the notes of the earlier meeting. Unfortunately, the recording of the disciplinary meeting is far from clear, but I am satisfied there was an opportunity for some discussion to have taken place about the notes if they were not clear or were inaccurate but no such discussion took place. On that basis I reached my earlier findings about the notes.

[39] There was a discussion during that meeting as to whether speed was an issue in the accident. Mr Morrison said that although speed had been indicated as not being a causative factor if Mr Cavanagh was going slower, say 10km an hour slower, he may not have rolled. Ms Ryan did confirm there was no indication that speed was a contributing issue within the accident report.

[40] Mr Morrison advised Mr Cavanagh that Fonterra expected professional drivers to take responsibility and accountability for the tanker they are driving and that they are required to drive within the law and follow company procedures including driving to the conditions at all times. Mr Morrison advised Mr Cavanagh that the equipment was expensive and that a potential environmental hazard is carried and that a tanker could endanger the safety of the driver and anyone else on the road through its misuse. Mr Cavanagh did not disagree with Mr Morrison about the expectations on him as a driver.

[41] Mr Morrison advised that, after considering all the information collected through the investigation, including Mr Cavanagh's version of events, that Fonterra considered the allegation that Mr Cavanagh drove the tanker in an unsafe and incorrect manner had been proven and was deemed to be serious misconduct.

[42] Mr Morrison gave the following reasons to Mr Cavanagh as to why he concluded the conduct was serious:

- The investigation had not revealed any systems or mechanical failure and there was no third party interference. Mr Cavanagh therefore had the sole responsibility for control of the vehicle at the time and did not maintain that control. Mr Morrison acknowledged that the weather was bad at the time of the accident, but that there had been clear messages sent to Fonterra in recent times about driving safely including always driving to the conditions and that Fonterra believed these conditions should have made him even more vigilant.
- That Mr Cavanagh had no idea of what speed he was doing at the time and that if he was concentrating on carefully rounding the corner that he knew was dangerous in good driving conditions then he should have been carefully monitoring his speed.

- That if he truly felt conditions were unsafe to drive in, he could have stopped but did not, as discussed at the last meeting.
- That the Police had charged Mr Cavanagh with careless driving although Mr Morrison said that the decision was not based on the Police's decision but it reinforced Fonterra's decision as the Police have a higher burden of proof and therefore it suggested there was evidence to support Fonterra's decision.

[43] Mr Ellis said that it had never been mentioned to drivers that they could pull over and that no one had done that in 13 years. Mr Morrison advised that he did not accept that and that drivers had been told on a regular basis that it was their responsibility to drive to the conditions.

[44] Mr Morrison then asked Mr Cavanagh on what basis did Fonterra have going forward that would allow it to have trust and be confident that the accident would not happen again. All Mr Cavanagh seemed to say, from what I could ascertain from the tape at that point, was *I am disappointed*. Mr Ellis and Mr Smith did provide several reasons as to why Mr Cavanagh should not be dismissed and these are set out below:

- Mr Smith said that Mr Cavanagh would be the safest driver for the next five years and Mr Ellis said that Mr Cavanagh had given seven years sterling service with no previous accidents and that the weather was atrocious and speed was not an issue.
- Mr Ellis also said that Mr Cavanagh did not lose control of the vehicle but that the trailer lost control and went through factors that may have contributed to the accident including the automatic transmission, the wide tyres, the slosh movement and the fact there was no side baffling on the trailer.

[45] There was some discussion about the earlier roll-over involving Driver X some five weeks earlier and Mr Smith asked whether there was any comparison between that accident and Mr Cavanagh's accident. Mr Morrison responded that there was not as every case was on its own merits. Mr Morrison said he had made a mistake with Driver X and Driver X was lucky because of it.

[46] Mr Ellis also suggested at the meeting that Mr Morrison should talk to the drivers who observed Mr Cavanagh driving to the conditions shortly before the accident. Mr Morrison did not talk to these drivers because when they saw Mr Cavanagh he was driving about 1km from the accident and so they would not be in a position to provide useful information as to whether he was driving safely around the corner in question.

[47] Mr Morrison and Ms Ryan then adjourned and upon their return to the meeting advised that Mr Cavanagh's employment was terminated effective immediately.

[48] For the first time at the Authority investigation meeting, Mr Cavanagh in his evidence said that he took the corner around the bend higher than would normally be the case to avoid pooling of water on the side of the road. He accepted that had there not been pooling of the water at the side of the road then he may have driven more into the corner. Mr Cavanagh said that he had not mentioned this during the disciplinary investigation but he said he did mention it to Mr Rhodes. In any event, Mr Cavanagh and Mr Ellis were both clear that this was not a factor that caused the accident when they gave their evidence at the Authority investigation meeting.

Conclusions as to whether there was a fair and full investigation at the end of which a fair and reasonable employer would conclude Mr Cavanagh's conduct was serious misconduct

[49] I agree with Mr Rooney's submissions that Fonterra's process should not be subject to pedantic scrutiny and that what is important is the overall fairness and reasonableness of the process.

[50] In line with what a fair and reasonable employer would do, Fonterra advised Mr Cavanagh clearly of the nature of the allegation he was facing and that he could be dismissed following the disciplinary investigation. Mr Cavanagh was encouraged to obtain representation and he was able to give an explanation of the allegations he was facing at that the meeting on 11 June 2008 although I am conscious at that time that he did not have in front of him the accident report.

[51] Mr Cavanagh was then provided with a copy of the accident report and minutes from the 11 June 2008 meeting before the 15 July 2008 meeting. Mr Cavanagh was given an opportunity to make submissions in the main about his future with the company. Mr Ellis did refer to other possible causes for the accident

and again made it clear that Mr Cavanagh did not accept any responsibility for the accident.

[52] Mr Smith submits that the process was not that of a fair and reasonable employer in that there are two main procedural deficiencies. The first complaint that Mr Smith makes about the process is the failure by Mr Morrison to talk to the other two drivers who had seen Mr Cavanagh driving about 1km from where the accident took place. The second complaint is about the nature and extent of the investigation into the accident.

[53] The drivers who saw Mr Cavanagh were David Poyntz-Roberts and Graham Harvey. They were travelling home from work at approximately 3am on Saturday, 19 April 2008. Mr Poyntz-Roberts and Mr Harvey both saw Mr Cavanagh turn into McCall Road in front of them although Mr Cavanagh said that he was unaware that they were behind him. Mr Poyntz-Roberts described in his written evidence Mr Cavanagh driving in a safe and slow manner and that he saw the tracks of the trailer in the road which was white with hail and slush. Both men said that the weather was very bad and Mr Poyntz-Roberts said that he could remember clearly commenting to Mr Harvey who was driving that *Cav drives like I do in these sorts of conditions at night, using the middle of the road, as you can see no road markings*. Mr Poyntz-Roberts and Mr Harvey do not dispute that, when they observed Mr Cavanagh, they were approximately 1km from the scene of the accident.

[54] I find that a fair and reasonable employer would have talked to these drivers as part of its investigation. One of the matters raised as part of the conclusion that the conduct of Mr Cavanagh was serious was that Mr Cavanagh did not or could have stopped if he considered the weather was so bad. A fair and reasonable employer would have asked Mr Poyntz-Roberts and Mr Harvey who were driving at the same time in the same conditions about that matter. Mr Poyntz-Roberts, for example, said at the Authority investigation meeting that he would not have pulled over in the weather but would have kept going.

[55] Mr Morrison considered it implicit in the frequent employer instructions to drivers to drive to the conditions that a driver stop when the weather is too bad to continue to drive. That is not unreasonable and I accept, objectively assessed, a professional driver should not need to be told when to stop. I am not satisfied, though, that a fair and reasonable employer would have had enough information to

assess whether Mr Cavanagh should have stopped in these circumstances and/or that it was common practice for Fonterra drivers to pull over if the weather was bad.

[56] A fair and reasonable employer would also have wanted to know from Mr Poyntz-Roberts and Mr Harvey how Mr Cavanagh was driving in the weather conditions shortly before the accident. If he was, for example, driving to conditions shortly before the accident, then that would be a matter in his favour as it was quite close to the scene of the accident. Mr Poyntz-Roberts and Mr Harvey did not consider he was going too fast for the conditions and was driving clean tracks down the middle of the road. A fair and reasonable employer would consider the likelihood of Mr Cavanagh then continuing to drive safely down McCall Road.

[57] The other issue that Mr Smith alleged in his submissions was the failure by Mr Morrison to adequately and properly consider all the possible causes into the accident, especially in light of a nearly identical accident five weeks earlier when neither driver could properly explain why the trailer had rolled.

[58] Having had the advantage of the accident report from Driver X's accident and having been able to compare that with Mr Rhodes' accident report it is clear that the accident report for Mr Cavanagh's accident does not show any analysis of the other possible causes of the accident. Whilst I have no reason not to accept that Mr Morrison made further investigations after he received Mr Rhodes' report into the other possible causes raised at the root cause analysis meeting, I am not satisfied that it would have been clear to Mr Ellis and Mr Cavanagh why they had been eliminated. Mr Morrison presented a conclusion that the allegation was proven and that Mr Cavanagh's conduct was serious misconduct without giving Mr Cavanagh or his representative an opportunity to comment on the contents of the accident report.

[59] Mr Ellis did have an opportunity to put forward other possible causes such as tyres, transmission and weather, before a decision was made as to any disciplinary action and Mr Morrison did not completely exclude other factors such as weather but found that, if they played any role at all, it was much less than the driver behaviour. There was an opportunity for Mr Cavanagh to provide an explanation at the 11 June 2008 meeting.

[60] As to whether the investigation into the accident was thorough I was provided with expert reports prepared for the purposes of the Authority investigation that were

not available as part of the disciplinary process. I find that the level of detail in both of these reports is not what a fair and reasonable employer would be required to have before it reached conclusions about the cause of the accident, particularly in circumstances where Fonterra had a specialist crash investigation team.

[61] For completeness and as an illustration of the difficulties in establishing the exact cause or causes of an accident, the expert report obtained by the Union concluded that the overriding factor in the trailer sliding out of the bend is the fact that there is discernibly less friction available at the road/tyre interface of the maxi single tyres as fitted to the trailer when compared with the dual configured tyres fitted to the truck. The expert report obtained by Fonterra concluded that the overriding causative factor in the accident was not the incompatible tyre performance between truck and trailer but that incorrect driving tracking combined with a late corner entry caused the trailer to experience a higher lateral acceleration than it would have under normal steady state cornering conditions inducing the subsequent roll-over.

[62] I found it was unusual that Mr Cavanagh was not given an opportunity to comment on the accident report before Mr Morrison moved to present his conclusion that the allegation was proven and that the conduct of Mr Cavanagh was serious. As to whether it was unfair, I have taken into account that Mr Cavanagh was provided with an opportunity to provide an explanation at the meeting on 11 June 2008 and Mr Ellis made further submissions both as to the cause of the accident and penalty after the conclusion about serious misconduct were provided. Looking at the process as a whole I am not satisfied that it made the process unfair. I do find, however, that the failure to talk to the two witnesses about Mr Cavanagh's driving shortly before the accident, and whether, given the weather conditions he should have pulled over so as to form a view as to the reasonableness or not of Mr Cavanagh continuing to drive, was unfair.

[63] Having considered that the process was fair except in that one respect I now turn to the conduct itself, the substance of the dismissal. An accident involving a truck can involve serious risk to the driver, third parties and the environment and Fonterra was justified in taking a serious approach to investigating Mr Cavanagh's accident which is consistent with its approach to health and safety generally.

[64] I am satisfied that a fair and reasonable employer would conclude, on the basis of the accident report and on the balance of probabilities after elimination of any

mechanical/design defect, the way in which Mr Cavanagh took the corner was the major contributing factor to the accident occurring. A fair and reasonable employer would not have discounted other factor such as the tyres and the unusually bad weather entirely. I do not consider the outcome would have been any different had Mr Cavanagh advised about taking the corner slightly higher to avoid pooling of water because Fonterra without that information had already concluded he took an incorrect cornering line. Fonterra would then have had to reach a conclusion on the reasonableness of avoiding pools of water in potholes.

[65] I do not find a fair and reasonable employer would have placed weight in reaching a conclusion about the seriousness of the conduct on the Police's decision to charge Mr Cavanagh with careless use. I am satisfied that Mr Morrison made it clear that factor took into account as a sort of reassurance that Mr Cavanagh's driving was at fault, but in doing so I accept that he did not base his decision on that. I was advised at the Authority investigation meeting that Mr Cavanagh subsequently defended the charge of careless use and, after a three day hearing, was found not guilty.

[66] Fonterra did take into account the weather which is what a fair and reasonable employer would have done, although concluded that regardless Mr Cavanagh should have driven to the conditions. A fair and reasonable employer would have wanted to talk to the other two drivers to form a conclusion about whether Mr Cavanagh should reasonably have parked up on the morning in question or whether it was common practice to do so. That failure to undertake further investigation in that regard was unfair.

[67] Mr Cavanagh was not able to give his speed as he went around the corner. There is a black box in the truck but a reading from that was unable to be obtained to indicate the speed at which Mr Cavanagh took the corner. I do not find that a fair and reasonable employer would consider not being able to recall the exact speed at which Mr Cavanagh approached the corner increased the seriousness of the conduct in these circumstances where speed was not considered to be a contributing factor. Driver X was also unable to provide, when asked by the accident investigator in his accident, the speed at which he was travelling when the accident occurred, although he advised that he did not consider he was going too fast. When Driver X had his accident the weather was fine but he was inexperienced in driving the Scania. Mr Cavanagh was

on the other hand experienced in driving the Scania but the accident occurred in bad weather.

[68] There were serious consequences for Fonterra as a result of Mr Cavanagh's accident and there was also some environmental impact in terms of the milk spill into the river. The fact though that consequences are very serious does not mean the act that produced or contributed to those consequences necessarily amount to serious misconduct – *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 at 319.

[69] Taking all these factors into account a fair and reasonable employer would conclude that the actions of Mr Cavanagh in entering the corner and failing to take the corner safely were careless, inadvertent or at worst negligent as opposed to wilful, reckless or deliberate.

[70] Serious misconduct was described in *Angel & Hutton v. Fonterra Cooperative Group* [2006] ERNZ 1080 by Judge Shaw as:

... the most serious breach of the employment relationship and often results in the most serious outcome of dismissal because if the employment relationship is deeply impaired or destroyed it is untenable. The trust and confidence which is at the heart of a relationship has gone.

[71] In *Angel* it was also recognised that the consequences are significant for both employer and employee in the event of a finding of serious misconduct because the employer is required to replace the employee with all the costs of that and the employee loses his job and bears the stigma of having committed serious misconduct which may impact on future employment prospects. Mr Morrison, when asked, said that he still retained trust and confidence in Driver X to drive for Fonterra. No doubt that is because Driver X is a good driver who had an accident but that accident did not result in destruction of the trust and confidence Fonterra had in him as a driver.

[72] Mr Rooney provided several cases in which the Authority had found a dismissal for health and safety to be justified. I will not refer to them here but consider them distinguishable on their facts. Perhaps the closest case because it also involved another driving matter is *Pairama v. Firth Industries Ltd* (unreported, AA188/04, 28 May 2004, Member Monaghan). In that case, the conduct considered to be serious misconduct consisted of two incidents alleged of unsafe overtaking manoeuvres against a background where there had been a fairly recent warning.

[73] Mr Cavanagh's conduct consisted of a single act in taking an incorrect cornering line of carelessness or at worst negligence. A decision made in a second in bad weather. It was not concluded that speed was a contributing factor. Mr Cavanagh was an experienced driver and Fonterra is entitled to have trust and confidence in its drivers that they will drive safely and to the conditions and make the right decisions. In *W & H Newspapers v. Oram* [200] 2 ERNZ 448 the Court of Appeal expressly approved a finding in *Click Clack International Ltd v. James* [1994] 1 ERNZ 15 that a single act of negligence which is sufficiently serious could be viewed as misconduct. Although in *Click Clack* the actions of the employee could be regarded as involving a reckless element. Before Oram it was noted in *Trotter v Telecom Corp of NZ Ltd* [1992] 2 ERNZ 659 that generally no employee can be dismissed for a single act of negligence.

[74] Section 103A of the Employment Relations Act 2000 now requires the Authority to evaluate whether a fair and reasonable employer would have concluded that Mr Cavanagh's conduct in incorrectly taking the corner in bad weather was serious misconduct. An accident some five weeks earlier did not result in Fonterra losing all trust and confidence in the driver which would support that the accident then although in many ways strikingly similar to Mr Cavanagh's was not seen as a most serious breach so as to be considered serious misconduct.

[75] Disparity of treatment is usually considered in terms of penalty or outcome of a disciplinary process as supported by the three issues set out by the Court of Appeal in *Chief Executive of Department of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 765 that require consideration for the legal test of disparity. A fair and reasonable employer would want consistency of outcomes in similar cases about whether conduct is viewed as serious or not. Mr Morrison did not agree when it was put to him that he undertake a comparison between the two accidents. That was because he felt he had made a mistake with the first outcome. Given that he retained trust in Driver X that may not be so. I find a fair and reasonable employer would have considered the two accidents and conclusions made in both.

[76] Mr Cavanagh had driven for Fonterra without an accident for seven years and he had not previously been the subject of warnings or disciplinary action. Mr Morrison gave some examples of where he had had to talk to Mr Cavanagh about some matters that had arisen, however, I am satisfied from his answers that they were

not matters that could properly be considered in the same light as the accident and in any event Mr Morrison did not escalate them in any sort of disciplinary sense.

[77] I find objectively assessed in all the circumstances of this case Mr Cavanagh's conduct was not what a fair and reasonable employer would conclude was serious misconduct.

Was the decision to dismiss Mr Cavanagh what a fair and reasonable employer would have done?

[78] I have found that the conduct on the part of Mr Cavanagh was not conduct that a fair and reasonable employer would regard as serious misconduct and therefore trust and confidence was not undermined to such a degree that Mr Cavanagh could not be trusted to carry on further work at Fonterra.

[79] Mr Morrison said that in making his decision to dismiss Mr Cavanagh he took into account that Mr Cavanagh showed no remorse and did not accept any responsibility for his actions in which case he concluded that he could have no trust and confidence in Mr Cavanagh that such an accident would not occur again. That was a matter Mr Morrison I find took into account in assessing the penalty rather than the seriousness of the conduct.

[80] I accept that Mr Cavanagh did not accept responsibility for the accident. His contribution at the second meeting in particular was minimal and he left the talking in essence to Mr Ellis and to his support person, Mr Smith. However frustrating that may be a fair and reasonable employer would not disregard statements from an employee's representative. When these statements are analysed, it is clear that it was put forward on his behalf that he had had seven years incident-free driving leading up to that point and that in the future, I have taken that to be because of the accident he could be considered to be the safest driver in Fonterra. On that basis, it was not a situation where there was nothing said at all to satisfy Fonterra they could have trust and confidence that Mr Cavanagh could continue to drive in a safe way without an accident in the future. This was after all his first accident and he had no other disciplinary matters.

[81] Even if Mr Morrison had concluded that the conduct of Mr Cavanagh was serious misconduct, within the disciplinary procedures in the collective employment agreement a final warning is available in cases of serious misconduct where instant

dismissal is not warranted. I am not satisfied that there was any real consideration given by Mr Morrison to a penalty short of dismissal. Mr Morrison did not accept he was under any pressure because of some management dissatisfaction about the outcome in Driver X's case to reach findings of serious misconduct and then dismiss Mr Cavanagh. I cannot conclude to a firm degree whether he was or not although often if advice is received that there is dissatisfaction about an outcome it can perhaps subconsciously impact on other decisions.

[82] Given my conclusions about what a fair and reasonable employer would conclude about Mr Cavanagh's conduct I am not required to make a determination as to whether there was disparity in terms of the disciplinary outcome of Driver X and Mr Cavanagh.

[83] For reasons given above, I find that, objectively assessed, Mr Cavanagh's dismissal was not justified as it was not a decision a fair and reasonable employer would reach in all the circumstances. Mr Cavanagh has a personal grievance that he was unjustifiably dismissed and is entitled to remedies.

Remedies

Contribution

[84] I am required to consider the extent to which the actions of Mr Cavanagh contributed toward the situation that gave rise to the personal grievance, and, if required, reduce the remedies that would otherwise have been awarded.

[85] Mr Cavanagh did not advise Mr Morrison that he took the corner higher than would usually be the case to avoid the pooling at the side of the road. It was only at the Authority investigation meeting for the first time that Mr Cavanagh said he had taken the corner higher than usual for this reason. That explanation seemed to be more consistent with Mr Rhodes' accident report and the conclusion reached by the employer in this case.

[86] Whilst Mr Cavanagh wanted clearly to leave much of the talking to his representative at the disciplinary meeting, not mentioning this is surprising. I do not necessarily consider, on my analysis of this matter, that a fair and reasonable employer would have considered the accident more serious because of Mr Cavanagh

driving higher on the road than would normally be the case but it was a matter that should I find have been put forward as part of the explanation.

[87] I do not consider that this simply occurred to Mr Cavanagh after the event or his dismissal or indeed the District Court case which he attended in respect of the careless use charge. That is because Mr Cavanagh said at the Authority investigation meeting that he advised Mr Rhodes about this when he talked to him which was before the disciplinary meeting. I find that unlikely because there is no mention of Mr Cavanagh taking the corner higher than would normally have been the case in the root cause analysis diagram or in Mr Rhodes' accident investigation report as one would expect.

[88] I find that Mr Cavanagh contributed in this case in a blameworthy way to his dismissal by not advising Mr Rhodes or Mr Morrison or anyone about his driving in this manner and I find that, on the balance of probabilities, to be more consistent with Mr Rhodes' accident report than matters put forward by Mr Cavanagh and Mr Ellis as to what contributed mainly to the accident. I find, on the balance of probabilities, that it is more likely than not that Mr Cavanagh did take an incorrect cornering line as he went around the corner on McCall Road possibly to avoid pooling.

[89] On that basis, I do not accept, as submitted by Mr Smith, that there should be no contribution but I also do not accept, as submitted by Mr Rooney, that remedies should be reduced by 100%. Even without this information, Fonterra was able to reach the conclusion that it did. In light of the fact that I do consider Mr Cavanagh contributed to his personal grievance I shall consider the appropriateness of remedies in all the circumstances including reinstatement as to whether they should be awarded and/or reduced.

Reinstatement

[90] Section 125 of the Employment Relations Act 2000 provides that reinstatement is to be the primary remedy and that the Authority must, whether or not it provides for any other remedies, where practicable provide for reinstatement.

[91] In *NZEI v. Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243, the Court described the test of practicability as follows:

Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[92] After Mr Cavanagh was dismissed, 70 employees of Fonterra being fellow drivers signed a petition for his reinstatement. It is clear that he is held in high regard by his driving colleagues. Reinstatement, however, is strongly opposed by Fonterra on the basis that it cannot have trust and confidence in Mr Cavanagh to drive in a safe and correct manner and prevent a further accident. I heard evidence from Mr Morrison and Mr Graveson about this and it was also confirmed that Mr Cavanagh's team leader Mr Harris would not support his return to work. There was a concern that Mr Cavanagh did not express remorse or regret or accept any responsibility for the accident and his attitude throughout the disciplinary process was not constructive.

[93] One of the other grounds put forward for opposing reinstatement was that there were no current full time driver positions at the Edendale depot. Fonterra was notified very shortly after the dismissal that Mr Cavanagh was seeking reinstatement and I do not find that to be a strong ground of opposition.

[94] I accept that Mr Cavanagh had a good driving record and he certainly seems to have the support of other drivers.

[95] In terms of Mr Cavanagh's attitude and failure to acknowledge any responsibility for the accident, this is a matter that goes to practicability of reinstatement. I have no reason not to accept Mr Cavanagh is a good driver and held in high regard by fellow drivers. I do not conclude that there is a greater risk that he would be more likely to have an accident than another driver. I need to consider though whether he would change his behaviour in the future in light of this accident and whether he would assist Fonterra if there was ever another incident by advising of everything he could recall.

[96] I cannot conclude that Mr Cavanagh engaged in the whole process with respect to the accident in a particularly constructive way even taking his stress into account. Fonterra has an obligation to investigate any accident and Mr Cavanagh needs to assist them in that.

[97] Mr Cavanagh did not disclose during the accident investigation or the disciplinary process driving higher around the corner to avoid pooling of water and that is concerning. If such a failure to disclose was not intentional then it would be concerning that a professional driver would not have thought to have mentioned this. In the event that Mr Cavanagh did have another accident, and this could not be ruled out completely for any driver, then Fonterra would need to know that he would assist in the investigation of that accident in a constructive manner so that the cause of the accident could be assessed as accurately as possible and that ongoing learning could be achieved by all drivers. In all the circumstances I cannot be satisfied of that in this case and I do not find that reinstatement is therefore practicable.

[98] I do not make an order reinstating Mr Cavanagh to his position.

Lost wages

[99] After Mr Cavanagh was dismissed he gave evidence that he was very upset and very low. He attended the doctor and it was suggested to him that he take some anti-depressant medication. Mr Cavanagh felt unable to, as he put it, pull himself together and went onto a sickness benefit until he was able to secure a driving position with Herbert Transport Limited on 8 October 2008 driving a milk tanker. I am satisfied that his sickness related to his dismissal for that initial period. Two matters then took place which, in my view, clearly led to the end of that employment.

[100] Mr Rooney was instructed by Fonterra and did write to Herbert Transport Limited on 24 October 2008 advising that Mr Cavanagh's employment was recently terminated in relation to a road traffic accident and that Fonterra had serious concerns about Mr Cavanagh's ability to drive in a safe manner. The letter advised that Fonterra was not prepared to allow Mr Cavanagh access to Fonterra sites in his capacity as a driver with immediate effect. Mr Graveson also had a telephone discussion with Herbert Transport's manager Mr Holland about Fonterra's view of Mr Cavanagh's driving. Herbert Transport Limited then had to terminate Mr Cavanagh's job as it involved the transportation of products in and out of Fonterra's plant and the only other position at that time involved the cartage of product from Fonterra sites.

[101] Mr Cavanagh was then able to obtain other employment fairly shortly thereafter performing driving unrelated to Fonterra but he was then made redundant from that position in December.

[102] When I stand back and consider the contribution I am not satisfied that, as claimed, Mr Cavanagh should be entitled to reimbursement of his lost earnings for the period from 15 July 2008 to 20 October 2009 which is a period of 67 weeks. On the other hand, the circumstances as outlined where Mr Cavanagh's first job was completely frustrated by the actions of Fonterra limiting it as suggested by Mr Rooney to three months would in my view be insufficient.

[103] I find taking contribution into account that Mr Cavanagh is entitled to reimbursement of loss of earnings for a period of 9 months from 15 July 2008 to 15 April 2009 less his earning during that period. I have been provided with his income from that period which has been confirmed by IRD records. During the twelve months Mr Cavanagh received \$3640 from Herberts Transport, \$7322 from Dynes Transport limited (although one the IRD statement suggests there was income in January 2009 of \$3999 from Dynes which may need to be clarified). There was also income from Kelso Kontracting Limited in April 2009 (\$4100 gross) to take into account. The difficulty I have in calculating a final figure is that Mr Smith in final submissions said that Mr Cavanagh was in receipt of a gross salary of \$68,301.45 and with a 9% company contribution superannuation brings his total annual earnings to \$74,448.58. Mr Rooney on the other hand in his submissions say that Mr Cavanagh's base salary was \$61,278 plus 4% on top for allowances and superannuation contributions. I suggest that counsel confer and I reserve leave for either to return to the Authority if required to set a final figure for lost wages.

Compensation for stress, humiliation and upset

[104] I accept that Mr Cavanagh was very upset and distressed by his dismissal. He had a period of sick leave and then having picked himself up and obtained another role was dismissed from that because of Fonterra would not allow him to drive onto their sites. Mr Cavanagh's partner of 23 years Yvonne Smith gave the most compelling evidence of the effect on Mr Cavanagh of his accident. Mr Cavanagh is not from my observations of him the sort of person who would say too much about his feelings. Ms Smith said that the accident was very traumatic for Mr Cavanagh and then when he was dismissed he was *gutted* and then went to pieces and would not socialise or talk to anyone. She said that although not a man to cry he did on several occasions following his dismissal and she described him as a broken man. Ms Smith said that after he lost his job for the second time he was really angry.

[105] I find that a fair and reasonable award in all the circumstances would be the sum of \$12,000.

[106] I order Fonterra Co-operative Group Limited to pay to James Cavanagh the sum of \$12,000 being compensation under section 123 (1)(c)(i) of the Employment Relations Act 2000.

Costs

[107] I reserve the issue of costs. Mr Smith has until 3 March 2010 to lodge and serve submissions as to costs and Mr Rooney has until 17 March to lodge and serve submission in reply.

Summary of findings and orders made

- I have found that Mr Cavanagh was unjustifiably dismissed from his employment with Fonterra.
- I have not ordered Mr Cavanagh to be reinstated to his position with Fonterra as I have not concluded reinstatement is practicable.
- I have ordered Fonterra to pay to Mr Cavanagh 9 months lost wages and reserved leave for either party to return to the Authority if there is difficulty with calculating that amount in circumstances where Mr Smith and Mr Rooney have provided two different base salary amounts and benefits on that.
- I have ordered Fonterra to pay to Mr Cavanagh the sum of \$12,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.
- I have reserved the issue of costs and timetabled for submissions.

Helen Doyle
Member of the Employment Relations Authority