

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 172
3132339

BETWEEN DEREK CHRISTIESON
Applicant

AND FONTERRA CO-OPERATIVE
GROUP LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Alex Hope, counsel for the applicant
Gillian Service and Dilshen Dahanayake, counsel for
the respondent

Investigation Meeting: 24 March 2021

Submissions received: At the investigation meeting and 8 April 2021 for the
applicant
At the investigation meeting and 14 April 2021 for the
respondent

Date of determination: 27 April 2021

DETERMINATION OF THE AUTHORITY

- A. Derek Christieson’s application for interim reinstatement is granted to the extent that Fonterra Co-operative Group Limited is required to reinstate him to the payroll within 3 working days after the date of this determination.**
- B. Costs are reserved.**

What is the employment relationship problem?

[1] Derek Christieson worked at the Waitoa Plant operated by Fonterra Co-operative Group Limited (Fonterra). He was dismissed on 12 January 2021 for incompatibility.

[2] Mr Christieson claims he was unjustifiably dismissed. He seeks reinstatement to his role on an interim basis until his grievance claims can be fully considered. He also claims that he was disadvantaged by several Fonterra actions; being given a 12-month warning, suspended and not allowed to return to work and failure to properly investigate his bullying and Covid protocol complaints.

[3] Affidavits were provided from Mr Christieson, Andrew Johns (Waitoa operations manager), Abdul Rahman Pakir Maideen (referred to as Mr Rahman) (Waitoa engineering manager) and the two other maintenance team leaders at Waitoa (whom I refer to as leaders A and B).

[4] An investigation meeting was held on 24 March 2021 to hear submissions. Mr Christieson's representative later wished to file additional submissions regarding the right to work. Submissions in reply to those submissions were then filed by Fonterra.

[5] As is usual, I have dealt with this application for interim reinstatement on the basis of untested evidence and submissions. Disputed matters cannot be decided on the basis of such evidence.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[7] The issues for determination in this interim reinstatement matter are:

- (a) Is there a serious question to be tried, so does Mr Christieson have an arguable case for unjustified dismissal and for permanent reinstatement?
- (b) Where does the balance of convenience lie?
- (c) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

[8] Although some factors are relevant under more than one head, I have focused my discussion in one area of the determination.

¹ For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863 and *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36.

What was Mr Christieson's work history?

[9] Mr Christieson is a registered electrical inspector with a level 4 Hazardous Areas Electrical endorsement. He was initially employed by Fonterra in 2012 as a maintenance shift electrician at Waitoa. Mr Christieson's first six years appear to have been largely uneventful.

[10] In August 2017, after relieving in a team leader role, Mr Christieson was asked by Fonterra to apply for the permanent role. He was interviewed twice and appointed. He became responsible for a team of six staff. He worked with a small group of team leaders.

[11] Mr Christieson sees himself as having a good working relationship with the team he managed. The conflicts which have arisen do not focus on them. However, in December 2018 Mr Christieson was placed on a performance improvement plan (PIP) regarding his style of communication. He completed the PIP.

[12] At a 20 November 2019 meeting a lead planner asked team leaders to carry out a task which would normally have been undertaken by an absent team member. Mr Christieson objected on the basis that he did not know how to perform the task, it was not part of his job description and he did not have time due to work pressure. He asked the planner how many hours of overtime he did each week. The planner found that offensive. Mr Christieson repeated the question. The situation became heated with both men later saying the other had moved towards him. Mr Rahman felt the need to put himself physically between them. Mr Christieson apologised to the planner, who accepted the apology.

[13] Mr Rahman sought a meeting with Mr Christieson to discuss his conduct. Mr Christieson then informed Mr Rahman that he would not be able to complete all his work as he normally would nor attend management team meetings due to prolonged bullying.

[14] Later Mr Christieson talked to the plant manager Mr Johns about his view that there was a culture of bullying in the department, including against him. At some point Mr Johns told Mr Christieson that he could make a written bullying complaint.

[15] Mr Johns took over the disciplinary process and met with Mr Christieson and his representatives. A 12-month warning was issued about Mr Christieson's aggressive

behaviour towards colleagues and refusal to move away from someone when they asked. Mr Christieson raised a personal grievance.

[16] Fonterra points out that Mr Christieson had earlier indicated that he would accept a warning. However, he responds that it was a longer warning than was justified.

What happened around the time of the 2020 Covid Level 4 lockdown?

[17] A group discussed maintenance work rostering. Mr Christieson felt he was left out of discussions and wanted to ensure that any roster complied with the collective agreement. On 25 March 2020, the first day of the level 4 lockdown, during a group discussion Mr Christieson asked leader B about the new roster and then told him to stop telling lies. B complained about Mr Christieson.

[18] Later another conflict arose with Mr Christieson accusing leader B of contacting one of Mr Christieson's team members about coming into work. Mr Christieson had told that worker not to come into work as he was immune compromised.

[19] During the lockdown Mr Christieson worked from home at his request, at least partly to ensure better social distancing. Others covered his job's on-site components.

[20] Whilst at home Mr Christieson prepared a detailed bullying complaint covering around two years of employment. This included conversations with colleagues and managers which he had both overtly and covertly recorded.

[21] The complaint initially alleged bullying by the operations manager Mr Johns although this part was promptly withdrawn. Remaining were allegations against four direct or more senior managers, past and present and a peer. Mr Christieson identified an extra person during the investigation. A senior employment relations advisor was appointed to investigate.

[22] Mr Christieson also prepared a Covid-19 complaint as he considered Fonterra had not followed proper protocols. The complaint identified six people, partly overlapping with those identified in the bullying complaint. The Covid complaint went through Fonterra's complaints process.

[23] In late March 2020 Mr Rahman received complaints about Mr Christieson's conduct from the other two team leaders. They covered similar allegations including

Mr Christieson raising his voice, refusing to listen and arguing. One referred to him following when a colleague tried to walk away.

[24] When the country moved to Covid Alert level 2 on 11 May 2020 Mr Christieson was to return to work but was told not to. He proposed a return to work programme but on 4 June Fonterra stood Mr Christieson down on pay, pending completion of the bullying investigation. Mr Christieson's representative raised a personal grievance claim about that action.

[25] The investigator provided a draft report on the bullying claim to Mr Christieson and gave him the opportunity to comment. He and his lawyer responded.

[26] The report was finalised in early September 2020. It made four findings of unreasonable behaviour against Mr Christieson's current or former work colleagues over a two year period, concluding the incidents were separate and unrelated. Otherwise the overall allegation of systemic, persistent and abusive bullying was unsubstantiated. The report commented that Mr Christieson had recorded interactions with colleagues for half his time at Fonterra, including by diary notes and audio recording. To be fair it appears that other than regarding one early incident, most of the recordings are from a later period.

[27] Mr Christieson believed that the investigator had not addressed a substantial number of the 133 bullying complaints he made. He provided her with more information and sought to have the investigation re-opened. When the investigation into the Covid complaint was completed in late September, Mr Christieson had the same concern. Further personal grievances were raised.

What process lead to Mr Christieson's dismissal?

[28] When a return to work was sought, Fonterra raised concerns about broken relationships. In a 28 September 2020 letter Fonterra identified its concern about whether a constructive working relationship with managers and colleagues was realistic when Mr Christieson continued to hold serious concerns about those people. Fonterra concluded that the common denominator was not that all of his managers and peers were bullies but that Mr Christieson now construed nearly all routine interactions with peers and managers as being designed to attack or undermine him.

[29] Two mediations were held in October 2020 but did not resolve the claims.

[30] Through his representative, Mr Christieson proposed a return to work plan which included some behavioural restrictions on himself and others, facilitated meetings and no recordings by him. Later he also offered, as part of the plan, to apologise to those he had upset and expressed willingness to transfer to another Waikato Fonterra site. He also indicated he would consider relinquishing his team leader role and returning “on the tools”.

[31] Fonterra had concerns about Mr Christieson’s ability to comply with the behavioural restrictions, as well as the feasibility of re-establishing working relationships.

[32] By 11 December 2020 letter Fonterra set out in detail its incompatibility concerns, including that:

- (i) Serious allegations had been made against many colleagues;
- (ii) Mr Christieson did not accept the overall findings of the bullying investigation, submitting more material and calling for more investigation. This reflected other occasions when Mr Christieson is said to be unable to accept negative comments, instead seeing them as bullying; and
- (iii) Recording of others had caused a significant loss of trust.

[33] Failure to live up to Fonterra’s values was also mentioned. Dismissal was proposed due to a fundamental breakdown of Fonterra’s trust and confidence in Mr Christieson, meaning there was irretrievable incompatibility.

[34] A meeting was held on 11 January 2021. Mr Christieson’s response included a statement that he had done nothing wrong. The following day Fonterra dismissed Mr Christieson for incompatibility.

What happened in the lead up to the Authority’s investigation meeting?

[35] Mr Christieson filed for interim reinstatement. Before the parties attended urgent mediation Fonterra made an open offer of a holding pattern whereby it would reinstate Mr Christieson to the payroll to avoid the need for an interim hearing. Mr Christieson rejected that offer.

Is there an arguable case regarding unjustified dismissal?

[36] In order to justify dismissals in incompatibility cases, there have been irreconcilable incompatibility with the relationship breakdown being wholly or substantially attributable to the applicant and a procedurally fair process.²

[37] Submissions for Mr Christieson emphasise that he was not provided with details of information about incompatibility Fonterra held and thus did not have the opportunity to respond about the matters or behaviour complained of by others. Mr Christieson's affidavit in reply emphasises that reading Fonterra's affidavits was the first time he had learned of some of these matters.

[38] An additional question is whether adequate consideration given to the fact that some of the incidents of conflict with other employees occurred in the lead up to or shortly after the Level 4 lockdown; a time of high stress for many.

[39] Mr Christieson is also critical of Fonterra's failure to try to repair relationships. He sees the employer's approach as being negative and destructive.

[40] The Authority would need to be satisfied that the incompatibility was really irreconcilable. Should Fonterra as a large and well-resourced organisation, have been more open to the possibility of attempting reconciliation?

[41] There may also be a question about whether Mr Johns should have made the decision-maker as he was one of those Mr Christieson secretly recorded and was affected by that revelation.

[42] I am satisfied that there is an arguable case that Mr Christieson was unjustifiably dismissed.

Is there an arguable case for permanent reinstatement?

[43] I now look at whether it is reasonable and practicable to reinstate Mr Christieson. Reinstatement has returned as a primary remedy.³ What is the feasibility

² *Walker v Procare Health Ltd* [2012] ERNZ 303.

³ Section 125 of the Act.

or practical workability of re-imposing this employment relationship, noting that it is not sufficient to show resistance and strained circumstances to avoid reinstatement?⁴

[44] The evidence from those who worked with and managed Mr Christieson goes beyond mere resistance or an indication of uncomfortableness if he returns. Details of this are set out below under the balance of convenience.

[45] Fonterra argues strongly against reinstatement being reasonable and practicable given Mr Christieson's past behaviour, seeming inability to interact positively with others and accept management guidance, along with the difficulties caused to his working relationships with several of those closely connected to his Waitoa role.

[46] Given the objection to working with Mr Christieson from the team leaders and managers, the prospect of other work or workplaces was raised for Mr Christieson. This included him giving up his team leader role to return to work as an electrician. Although the Authority is able to order interim reinstatement subject to any conditions it thinks fit, reinstatement must be to the applicant's former position or one "no less advantageous to the employee".⁵ It is hard to see reinstatement to a role without leadership responsibilities and associated remuneration as being no less advantageous.

[47] The other prospect was redeployment to another site. Mr Christieson indicated that he was agreeable to being redeployed to a site a similar distance from his home. There was little evidence regarding vacancies at other plants. Fonterra emphasised that its concerns about Mr Christieson's ability to work harmoniously with others and accept management would be equally problematic at another plant. On an interim basis I accept that. This is not a case involving one or two alleged bullies. The bullying complaint related to a wide group of former and current direct and more senior managers, as well as both of the other maintenance team leaders.

[48] My assessment at this interim stage is that Mr Christieson's case for permanent reinstatement is not strong.

⁴ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at p 8.

⁵ The Act, s 127(5) and s 123(1)(a).

What is the balance of convenience?

[49] I now move on to weigh the interests of Mr Christieson against those of Fonterra, including a consideration of the adequacy of damages.

Mr Christieson

[50] Mr Christieson says his job was very important to him; he enjoyed the work and wanted to keep working. He saw himself as working for Fonterra until retirement. Mr Christieson describes himself as more than happy to return to work with his former colleagues and work under the managers at Waitoa.

[51] Mr Christieson appears to be in a relatively sound financial position. He and his wife own a mortgage-free home. He also refers to having an unspecified amount of savings. His wife works full time.

[52] Although few specifics were provided, it seems likely that Mr Christieson has a reasonable prospect of finding other work. He is skilled and was not dismissed for misconduct.

[53] However, according to Mr Christieson, Fonterra pays above market rates and has excellent staff benefits, including a superannuation scheme. He has been unable to identify other work that matches the salary and benefits at Fonterra.

[54] Mr Christieson's losses can largely be recompensed by damages but as is pointed out on his behalf, he is unlikely to receive compensation for wages which he will have lost all the way to his retirement.

Fonterra

[55] I now look at any detriment which Fonterra would or could suffer if Mr Christieson is reinstated. I take into account that Fonterra is a large organisation, operating over multiple sites with many employees.

[56] Fonterra's primary argument is the potential difficulties which could occur between its staff and Mr Christieson if he was reinstated. It describes a constant history of disagreement with Mr Christieson not being able to accept the company's process or the outcomes of those processes.

[57] The importance of the plant is emphasised. Waitoa is the only New Zealand Fonterra site producing paediatric milk powder. Mr Johns describes its maintenance as requiring a highly engaged team.

[58] Mr Johns' concerns about Mr Christieson's return are morale declining, staff leaving and team engagement declining. He sees Mr Christieson's conduct as not being in line with Fonterra's core values and concludes that any manager would struggle to manage him.

[59] Mr Johns describes conversations with several unidentified employees who were very negative towards Mr Christieson and fearful for their careers and decisions they would make if he returned to work.

[60] It was indicated on Mr Christieson's behalf that he held no ill feeling towards management or colleagues. Perhaps not surprisingly, Mr Johns could not reconcile that assurance towards individuals with Mr Christieson's seemingly firm belief that he did not accept the finding that no systematic bullying was established.

[61] Mr Rahman speaks to significant dysfunction between Mr Christieson and the only other maintenance team leaders at the site. He has observed the team now working more coherently. He describes a sense of relief being expressed amongst the staff when he announced that Mr Christieson would not be returning to the site.

[62] Mr Rahman does not consider that if Mr Christieson returned to work, Mr Rahman, as manager would be able to effectively discharge his duties. If Mr Christenson perceives routine, and otherwise non-controversial, work interactions as bullying, Mr Rahman does not feel like he could have the required conversations without putting himself at risk of being subject to further bullying accusations.

[63] Mr Christieson had secretly recorded his first conversations with both Mr Johns and Mr Rahman. Mr Johns describes feeling betrayed and sickened and getting a sense that Mr Christieson had no insight or remorse.

[64] The two other maintenance team leaders express strong concerns about Mr Christieson returning to work. Leader A attributes a significant part of his depression being due to Mr Christieson's conduct. He cannot trust Mr Christieson after discovering about the recording of conversations. He also feels some physical insecurity, after having witnessed what he describes as Mr Christieson chasing after a

manager, shoving his phone in the man's face and saying "I'm recording you, say it again, and say what you said again". Mr Christieson disputes this description.

[65] Leader A describes the culture and team work as being much better now. He would take sick leave or extended annual leave if Mr Christieson came back to the office. He says he is not going to work at the same site as Mr Christieson.

[66] Leader B found Mr Christieson's approach intimidating, aggressive and argumentative. As part of the bullying complaint Mr Christieson alleged that leader B had been spying on others on behalf of management.

[67] Leader B was shocked to learn that Mr Christieson had recorded discussions and remains distressed and disappointed about this. He seriously considered leaving work. He says if Mr Christieson came back he would have to seriously consider his options again. Leader B's sense of having each other's back and working towards a common goal has been shattered.

[68] Mr Christieson's evidence that he did not sense that fellow workmates would be offended by covert recordings of their conversations was surprising. His affidavit in reply apologises for any offence. He speaks of his willingness to try to work out any problems in the relationship between himself and other staff.

Conclusion on the balance

[69] The balance, if considered with Mr Christieson returning to the Waitoa site, favours Fonterra. It is hard for the ill effects Mr Johns and others envisage to be adequately compensated by money whereas Mr Christieson's financial loss could be more readily.

Where is the overall justice of the case?

[70] In terms of the merits, my focus is on the dismissal rather than the unjustified disadvantage claims. Mr Christieson has an arguable case for unjustified dismissal although my assessment at this early stage is that it would not be seen as very strong.

[71] It is likely that this matter would not be heard until around the end of the year at the earliest, particularly in light of the fact several days is likely to be needed for the investigation meeting.

[72] Mr Christieson filed his application reasonably promptly after his dismissal. However, the status quo prior to his dismissal was him being stood down on pay. He has not worked at the plant itself for over a year.

[73] This is where I examine the prospect of Mr Christieson being returned to the payroll but not being required to work. This largely avoids, at least until a substantive determination makes a decision about permanent reinstatement, the potential negative effects on other Waitoa employees. I accept that this does leave some prospect of Mr Christieson's return hanging over them.

[74] I have no difficulty in recognising that for Mr Christieson, there is value in actual work in the workplace as distinct from just being paid his salary. This includes not only the enjoyment of undertaking tasks. It also means that his undertaking can be seen as less likely to be called upon as he has provided his labour and been paid in return. If he is reinstated to the payroll only, Fonterra may seek to have that salary paid back. Fonterra's representative, when asked about this, indicated that the Authority has discretion about whether to require payment pursuant to an undertaking.

Should Mr Christieson be reinstated?

[75] Whilst the balance favours Fonterra, that is largely focused on the potential difficulties of Mr Christieson returning to Waitoa. In its open interim offer, Fonterra acted responsibly in offering payroll reinstatement. I consider that a just solution.

[76] I grant Mr Christieson's application for interim reinstatement to the extent that Fonterra is ordered to reinstate him to the payroll within three working days of the date of this determination, as an interim measure until the Authority is able to determine his substantive claim.

Costs

[77] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority