

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 568
3143203

BETWEEN KEREOPA HAKOPA
Applicant

AND FONTERRA CO-
OPERATIVE GROUP
LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Matthew Hague, counsel for the Applicant
Rebecca Rendle and Matthew Austin, counsel for the
Respondent

Investigation Meeting: 22 November 2021 (by audio-visual link)

Submissions received: 22 November 2021 from Applicant
22 November 2021 from Respondent

Determination: 17 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 1 September 2016, Kereopa Hakopa commenced working for Fonterra Co-Operative Group Limited (Fonterra) at its Cream Plant in Edgumbe. On 17 May 2021, he was dismissed from his role as a Level 4 packing operator for serious misconduct.

The issues

- [2] The issues requiring investigation and determination are:
- (a) Did Fonterra unjustifiably disadvantage Mr Hakopa when it suspended him from employment without a contractual or statutory basis and without justification?

- (b) Was Mr Hakopa unjustifiably disadvantaged when he was subjected to a procedurally flawed investigation by his employer?
- (c) Was Mr Hakopa unjustifiably disadvantaged when Fonterra found that his actions amounted to serious misconduct?
- (d) Was Mr Hakopa unjustifiably dismissed from his employment?

The Authority's investigation

[3] For its investigation the Authority received written statements and heard oral evidence under affirmation from Mr Hakopa, Janek Tomaszewski, Fonterra's Edgecumbe Cream Plant manager, and Jarrad West, the Plant's Process Manager. In addition, the Authority received written submissions and heard closing oral submissions from the representatives.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

Background

[5] On 12 April 2021, at approximately 4.20 am, Mr Hakopa was working in the drumming room with a co-worker, a Level 5 packing operator with over 20 years' work experience for Fonterra. The two workers were filling metal bins (goodpacks) which were transported into the drumming room by conveyor belt. An automatic sensor caused a rapid door to open up for the goodpack as it approached. The door then fell behind the goodpack once it was through, stopping any foreign material such as dust and insects from entering the room.

[6] The goodpacks Mr Hakopa and his co-worker were filling were destined for export to Japan and South Korea. The room in which they worked was known as a redline area where staff were expected to be vigilant and alert as Fonterra's last visual check of a product before it left the plant.

[7] The drumming room had a closed circuit television (CCTV) camera which recorded visual images with no audio. Because Mr Hakopa had his back and the side of his body facing the camera, the front of his face could not be seen.

[8] The CCTV had a time stamp which showed that at 4.23.54 am, Mr Hakopa started the infeed conveyor which carried an empty goodpack into the drumming room. He wore his safety glasses over his head and he had his overall sleeves rolled up.

[9] At 4.23.56, an automated rapid door opened up allowing the goodpack entry into the room. The door was fully opened by 4.24.00.

[10] At 4.24.09, the CCTV captures the rapid door dropping down onto the goodpack which is not supposed to happen. This is due to a faulty sensor.

[11] At 4.24.12, Mr Hakopa stands up from his seat and looks at rapid door which is caught on the goodpack. The infeed conveyor continues to push the goodpack further into the room.

[12] At 4.24.16, Mr Hakopa does a “fist pump” with his right hand.

[13] At 4.24.28, Mr Hakopa observes the door break. At 4.24.30, the CCTV records what Mr Tomaszewski says is Mr Hakopa laughing at the broken door. At 4.24.31, Mr Hakopa looks over to his co-worker who is clapping and is giving a thumbs up.

[14] At 04.24.46 am, the CCTV records Mr Hakopa breaking an invisible light curtain with his right hand which brings the goodpack to a stop. He and his co-worker then start to fill the goodpack with product.

[15] After filling the goodpack, Mr Hakopa telephones Jamie Stanton, a process mix operator and informs her that the door is broken. He is asked whether it is stopping him from doing his job to which he replies it is not. He is then instructed to carry on working which he does. At the end of his shift, Mr Hakopa informs the incoming shift about the damaged door, but he does not inform his supervisor.

[16] From 13-16 April 2021, Mr Hakopa observes his rostered days off from work.

Disciplinary action commenced

[17] On 13 April 2021, it is brought to Mr West's, and subsequently Mr Tomaszewski's attention, that the conveyor door has been damaged. In order to determine how the damage occurred, the CCTV footage from the previous night is reviewed following which, Mr Tomaszewski commences disciplinary proceedings against Mr Hakopa and his co-worker.

[18] In accordance with the Fonterra NZ Dairy Workers Union collective employment agreement in force at the time, Mr Tomaszewski emails Chris Jones, a union delegate, a letter (16 April 2021) inviting Mr Hakopa to a meeting to discuss a proposal that he be suspended pending an investigation into his actions. Mr Tomaszewski's letter records the concern that he may have deliberately failed to use the emergency stop (E-Stop) to stop the rapid door from being damaged and causing a potential breach of critical hygiene.

[19] Mr Tomaszewski's letter further records that there was a need to investigate the incident in order to determine what happened and to ascertain whether any additional action was required. Given the nature of the incident, it was necessary to interview potential witnesses to ensure a fair process. Mr Tomaszewski further stated that the issue was serious and that Fonterra needed to ensure that there was no risk of the conduct being repeated while the incident was being investigated.

[20] Mr Hakopa was advised that suspension was not a disciplinary sanction and was no indication as to outcome. It was however a temporary measure to ensure that the investigation proceeded in a safe, effective and timely way. As such, suspension was usually on full pay as stipulated by Mr Hakopa's collective employment agreement. He was further advised that no decision had been made about the proposal and that he was invited to attend a meeting on 17 April 2021 at 8.30 am to discuss it further. He was free to bring a representative or a support person to the meeting.

Proposed suspension meeting

[21] Mr Hakopa returned to work on the morning of 17 April 2021 and received a copy of Mr Tomaszewski's letter of 16 April 2021 approximately 30 minutes before the proposed suspension meeting was to start.

[22] The meeting was recorded and a transcript produced which Mr Hakopa acknowledged was an accurate record of what was discussed. Mr Tomaszewski, Mr West, Mr Hakopa and Mr Jones were all present. The meeting began with Mr Tomaszewski reading his letter as described above.

[23] At 8.38 am, Mr Tomaszewski took a short adjournment to discuss matters with Mr West. The meeting resumed at 8.40 am and Mr Hakopa was advised that he would be suspended on full pay effective immediately. In hearing this, Mr Hakopa's response was "Good as gold."

Formal letter of suspension and invitation to investigation meeting

[24] Mr Hakopa subsequently received a formal letter (19 April 2021) from Mr Tomaszewski confirming his decision to suspend him. The letter set out four concerns he had with Mr Hakopa's actions the first of which was that he may have deliberately failed to use the E-Stop button or overhead E-Stop cable after observing the rapid door come down on the goodpack. As a result of not activating the emergency stop, the door had broken off the side railing damaging the door as a result.

[25] Mr Tomaszewski stated that the use of the E-Stop was required by the Packing Line 5 Drumming SOP (standard operating procedure) in the event of an emergency where people or plant were at risk. The CCTV footage showed that after the rapid door had become stuck on the goodpack, there was sufficient time for Mr Hakopa or his co-worker to have activated any of the five emergency stops that were nearby. However, both workers appeared to have deliberately observed the door break off. Mr Tomaszewski considered that this was a serious safety event that potentially exposed the drumming room to foreign material.

[26] The second concern was that Mr Hakopa may have failed to report the incident as soon as possible because he had left it towards the end of his shift at 4.50 am. It further appeared that he had deliberately misreported the event to his team leader by not disclosing the fact that the damage to the conveyor door was avoidable.

[27] The third concern related to Mr Hakopa's failure to comply with the wearing of personal protective equipment (PPE) as required by the "Filling of Drums" SOP. It appeared that he wore his safety glasses incorrectly (over his head as opposed to over

his eyes) and had his overall sleeves rolled up while working in the drumming room, a redline area.

[28] Mr Tomaszewski's fourth concern was that Mr Hakopa may have deliberately failed to follow Fonterra's expected values and behaviours as he had laughed, clapped and cheered with a thumbs up when the conveyor door got stuck and then broke off. It was reiterated that there was sufficient time and opportunity for him to have prevented the door from breaking off by using the emergency stop to stop the line.

[29] If it was proven that he had deliberately allowed the damage to the door to occur, Mr Tomaszewski stated that this was of serious concern because:

- (a) Mr Hakopa's actions may have breached clause 7.1 of the Dairy Workers Union (DWU) collective employment agreement which required workers to comply with Fonterra's policies, procedures, directions and instructions regarding health and safety and to ensure that in performing their role workers did not undermine their own health and safety or the health and safety of any other person.
- (b) Mr Hakopa's actions may have breached clause 15.12.1 of the collective agreement which required workers to be familiar with and to comply with all aspects of the company's food quality system, including the applicable food safety quality and food regulatory requirements as well as the company's food safety and food quality policies, standards, rules, procedures, directions, and recommendations in force at the time.
- (c) Mr Hakopa's conduct may have been contrary to the Packing Line 5 Drumming SOP manual which required him to perform an E-Stop in the event that people or plant were at risk.
- (d) Mr Hakopa's actions may have been contrary to the site induction learning he undertook on 14 July 2020 in which he had learned that any event or injury needed to be entered into the company's First Priority (FP) system as soon as possible and within 24 hours.

- (e) Mr Hakopa may have breached Fonterra's Conduct and Behaviour Standard including its Code of Business Conduct '*The Way We Work*' and a breach of the company's values – '*Co-operative Spirit*' and '*Do What's Right*'.
- (f) The cost to repair the conveyor door was approximately \$4,000 (ex GST) which could have been avoided if the correct procedure had been followed.

[30] Mr Tomaszewski's letter ended with an invitation to Mr Hakopa to attend an investigation meeting on 27 April 2021. Copies of the relevant SOPs and work practice documents were provided to Mr Hakopa for his information. He was reminded that he could bring a support person or a representative to the investigation meeting.

Statement in response

[31] By letter of 21 April 2021, Mr Hakopa responded to Mr Tomaszewski's concerns. He stated that there had been many issues with the plant that night particularly with the outward door that would stay in the open position but then reset itself after a while.

[32] On the night when the inward conveyor door dropped on top of the goodpack, Mr Hakopa stated that he immediately got up from his chair to observe what had happened. He thought that the rapid door would drop off the back of the goodpack and reset itself like the outward door had done during the shift. He did not think that the door would become damaged.

[33] Mr Hakopa explained that his "fist pump" was out of frustration and exasperation. The incident had come at the end of a trying shift with a number of faults and issues during the night. At no point did he wish or intend to cause any damage to the plant especially as he knew there was a safety camera in the room. He considered it unfortunate that his words were not caught by the CCTV as it would have shown his annoyance.

[34] Mr Hakopa stated that he telephoned the control room after he had filled the goodpack. He spoke to the product mix operator who advised him to continue working

if the damage did not stop him from doing his job which was the case. Mr Hakopa reiterated that he had spoken to an incoming shift worker about the damaged door.

[35] Mr Hakopa acknowledged that he had not worn his PPE correctly however it had been a humid night which caused his glasses to fog up. As for having his sleeves rolled up, Mr Hakopa suggested he would use some tape to keep them secure.

Investigation meeting

[36] The investigation meeting took place on 27 April 2021 and was also recorded and transcribed. Present at the meeting was Mr Tomaszewski, Mr West, Mr Hakopa and Mr Jones. The meeting commenced with Mr Tomaszewski reading parts of his formal letter of 19 April 2021 notably his four concerns with Mr Hakopa's actions (see [24]-[28] above).

[37] Mr Hakopa stated that he was aware of the damage to the conveyor door but that he did not know how bad it would be. He reiterated that there been trouble with the conveyor and the doors being out of sync that night with the outward door staying open and then closing again after it had reset itself.

[38] When asked by Mr Tomaszewski how long he had been a packing operator, Mr Hakopa stated that he had been a Level 4 packing operator for three to four years. When asked why he had not activated the E-Stop within 20 seconds of the door dropping onto the goodpack, Mr Hakopa's response was that he expected the door to reset itself like the outward door had.

[39] Mr Hakopa acknowledged that he had not reported the damage to his supervisor because he believed that speaking to Ms Stanton, the product mix operator, was enough and that she would pass his message on. However, he conceded that he had not told anyone that he could have stopped the door from being damaged.

[40] Mr Tomaszewski asked Mr Hakopa why he had not recorded the incident into First Priority (FP). Mr Hakopa stated that he did not realise that he was supposed to do that. When reminded about his site induction learning regarding FP, Mr Hakopa accepted that not reporting the incident into FP was a failing on his part. When asked

why he had laughed and had given a fist pump, Mr Hakopa denied that he had laughed and explained that his fist pump was made out of frustration.

[41] Mr Tomaszewski advised that he had shown the CCTV footage to members of Fonterra's employment and human relations department and the site manager all of whom, were of the view that Mr Hakopa had laughed and made a fist pump. Mr Hakopa denied that this was so; he had not laughed and his fist pump was built up from the troubles he had that night with the outward door staying open and not closing as it normally did. However, Mr Hakopa accepted that he had not worn his PPE correctly, that he should have reported the incident to his supervisor, and that Fonterra had suffered a financial loss as a result of his actions.

[42] Mr Tomaszewski stated that, based on the CCTV footage he had seen, he was concerned about having trust and confidence in Mr Hakopa "going forward". Mr Hakopa stated that he knew where he had gone wrong and guaranteed that he would not repeat the same mistakes again. At the end of the investigation meeting, Mr Tomaszewski advised that he would be going through the information with which he had been provided and that he would arrange another meeting to discuss his preliminary findings with Mr Hakopa.

Proposed sanction letter

[43] On 11 May 2021, Mr Tomaszewski advised Mr Hakopa in writing that he had, on the balance of probabilities, upheld all of the concerns against him and that Mr Hakopa's actions had breached Fonterra's Conduct and Behaviour Standard to constitute serious misconduct, specifically:

- Endangering the health, safety and/or wellbeing of employees
- Failure to comply with safety procedures, policies, standards or rules, or working or acting in an unsafe manner, including failure to report accidents, personal injury or damage
- Wilful, deliberate and/or negligent non-performance of duties set out in the employee's employment agreement
- Wilful and deliberate acts affecting food safety and quality
- Breach of Fonterra policies, standards, guidelines and other supporting documents, and/or 'The Way We Work' – Code of Business Conduct including content specific to the Fonterra values and associated behaviours.

[44] Individually and collectively considered, Mr Tomaszewski's preliminary finding was that Mr Hakopa's actions constituted serious misconduct. It was essential that staff followed all reasonable work policies, procedures and standards expected of them in their role. The company took seriously any actions that compromised its safe working environment and any failure to operate and work in a safe manner and to report an incident truthfully.

[45] Mr Tomaszewski stated that he was treating the matter as potentially very serious as it appeared that Mr Hakopa may have deliberately failed to follow the correct SOP and safety procedures with respect to the loading of products in the drum line. It was proposed that he be dismissed for serious misconduct because all of Mr Tomaszewski's concerns regarding his actions had been upheld. This brought into question Mr Tomaszewski's ability to have trust and confidence in Mr Hakopa as an employee.

[46] The letter ended with Mr Tomaszewski advising that he had not made a decision because he wanted to hear Mr Hakopa's response to his findings before a final decision was made. To that end, Mr Hakopa was invited to a further meeting on 13 May 2021.

Proposed sanction meeting

[47] On 13 May 2021, Mr Hakopa, Mr Jones and another union delegate, Brett Brown, met with Mr Tomaszewski and Mr West as arranged. As with the previous meetings, this too was recorded and transcribed. Mr Tomaszewski commenced the meeting by reading his letter of 11 May 2021 as noted above.

[48] Mr Brown spoke on Mr Hakopa's behalf and acknowledged that the matter was serious. There had been plant damage for which Mr Hakopa had accepted responsibility but he wished to be given another "crack at making this right" because he wanted to keep his job and believed that he could still make a contribution to the business. While he had done the right thing by reporting the incident, Mr Brown acknowledged that Mr Hakopa had not spoken to the right person.

[49] Mr Brown clarified what Mr Hakopa meant by the door resetting itself after it had come down on the goodpack. He thought that it would act like a garage door and go back up once it touched something. He had not seen a rapid door do this before.

[50] Mr Brown stated that a Level 4 operator would not have been expected to do the FP report themselves as there were other people within the organisation who could do that. In response, Mr Tomaszewski commented that one month prior, a probe had been dropped which cost \$10,000 to replace. After that incident, staff were reminded how essential it was to report all accidents to the team leader straight away.

[51] Mr Brown stated that he agreed that everything should be documented and he endorsed the use of FP as a means to do so. However, it was not Mr Hakopa's personal responsibility to input information into FP. Mr Brown was concerned also that Mr Tomaszewski had shown the CCTV footage to a number of people which was not fair as he had asked Mr Hakopa and his co-worker to keep the matter confidential. Mr Tomaszewski clarified that he had shown the CCTV footage to the HR site manager, the regional manager and those who were expected to be part of the escalation process. He denied showing the footage to other staff outside of that group.

[52] Mr Brown noted that the CCTV had no audio content which meant that Mr Tomaszewski had no idea whether Mr Hakopa and his co-worker had laughed or had clapped. Mr Brown further stated that Mr Hakopa had refuted from the outset the allegations made against him.

[53] Mr Brown acknowledged that there were no excuses for Mr Hakopa's breach of the rules around the wearing of PPE which were "pretty clear". It was reiterated that he wanted to continue working for Fonterra and that he would follow the SOPs around the use of the E-Stop and the reporting of incidents to his team leader in order to rebuild trust and confidence. Mr Brown stated that Mr Hakopa was not completely sure whether activating the E-Stop would have stopped only the door or the entire plant.

[54] Mr Tomaszewski advised that another union delegate had checked the CCTV footage and had found an example of the same situation occurring one week earlier. However, on that occasion, the E-Stop had been activated which stopped the door while the plant continued packing.

[55] Mr Brown stated that one of the things that Mr Hakopa needed to change was documenting all issues. However, if the expectation was that he sit down in front of a computer to do that, he needed further training.

[56] Mr Tomaszewski responded that Mr Hakopa had not previously raised this as an issue with anyone before. There were multiple people whom he could have approached for further assistance such as his team leader and process manager.

[57] Mr Hakopa's process manager, Mr West, noted that Ms Stanton had not entered the broken door into FP because she thought it had broken off and was therefore a breakage issue for which a work order and not an FP report was required. However, she had not been made aware by Mr Hakopa that he could have stopped the door from being damaged. As such, the matter needed to be reported into FP.

[58] Mr Tomaszewski asked Mr Hakopa whether the rapid door was going down on all units during the night in question. That was not the case. Mr Hakopa clarified that the issues with the doors were not the same. The outward door would stay up for several units and then come down after a while and operate as normal. However, the inward conveyor door had come down on a unit which Mr Hakopa stated he had never seen before.

[59] Mr Tomaszewski stated that, if the rapid door was going to do "the garage door thing", he could understand a delay of one to four seconds before activating the E-Stop. However nearly 20 seconds had transpired from the point the rapid door had struck the goodpack to when it came away from the side rail which Mr Tomaszewski stated was a "long time of watching it and seeing it go".

[60] In response, Mr Hakopa stated that he expected the door to reset. When it was put to him that the door had not reset after 20 seconds, Mr Hakopa reiterated his expectation that the door would reset and that he had never seen a rapid door come down on a unit before.

[61] Mr Brown sought a final written warning with no second chances for Mr Hakopa who would undertake to get things right and follow the instructions regarding PPE and the reporting of incidents. He acknowledged that he had got it wrong and that the damage had cost the company. He was prepared to take any warning or sanction short of dismissal.

[62] As the meeting came to an end, Mr Tomaszewski stated that he had a lot to consider before making a decision. He did not want to rush matters because this was important for Mr Hakopa who (at 28 years) was a young man. He would take the weekend to consider things before meeting with him and his union representatives again to give his decision.

The dismissal

[63] On 17 May 2021 at 10 am, Mr Tomaszewski and Mr West met with Mr Hakopa, Mr Jones and Mr Brown. At that meeting, Mr Tomaszewski stated that he had carefully considered the information that had been provided and whether a lesser sanction was appropriate. However, his decision was to terminate Mr Hakopa's employment effective immediately for serious misconduct. Mr Tomaszewski stated that the decision had not been taken lightly and that all of Mr Hakopa's responses and his employment circumstances had been considered.

[64] This was a breach of a serious nature which cut at the heart of the employment relationship. Mr Tomaszewski explained that it was essential that the business operated in a workplace where there was full trust and confidence in staff to comply with the standards that had been set. Mr Tomaszewski stated he could not trust Mr Hakopa to work in compliance with Fonterra's standards and instructions. He found it disappointing that at the last meeting that Mr Hakopa thought the rapid door would simply bounce off the goodpack and reset itself. However, as an experienced operator of nearly five years, he would have known that not to be true.

[65] At that point, Mr Brown requested a break which was given. It is understood that there was a discussion outside of the room between Mr Brown and Mr Tomaszewski as to whether Mr Hakopa should be given the opportunity to resign from his employment rather than be dismissed. When the meeting resumed, Mr Hakopa advised that he did not wish to resign. Consequently, Mr Tomaszewski confirmed his decision that he be summarily dismissed for serious misconduct.

[66] Following the meeting, a formal letter (19 May 2021) was emailed to Mr Hakopa which summarised the four concerns Mr Tomaszewski had with his actions, the findings that were made, the proposed sanction, and confirmation of the decision to dismiss him. Later that same day, Mr Hakopa's newly-appointed counsel, raised a

personal grievance with Fonterra. A more detailed personal grievance letter from counsel was provided on 2 June 2021.

[67] On 12 June 2021, Mr Hakopa commenced proceedings in the Authority by lodging a Statement of Problem which included an application for interim reinstatement and a signed undertaking as to damages. The interim application was not pursued as the Authority was able to offer the parties an earlier substantive date for an investigation meeting. Unfortunately, due to the COVID-19 Delta variant the matter needed to be adjourned and, by agreement, heard not in-person but by audio-visual link.

Did Fonterra unjustifiably disadvantage Mr Hakopa by suspending him?

[68] Mr Hakopa raised three disadvantage grievances against his former employer. Section 103(1)(b) of the Act is applicable to disadvantage grievances and states:

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or

...

[69] Section 103A(1) of the Act requires the Authority and the Employment Court to deal with personal grievances for unjustifiable disadvantage or unjustifiable dismissal on an objective basis by applying the test of justification at s 103A(2) which states:

The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[70] In terms of his unjustified disadvantage claims, Mr Hakopa must therefore establish that there was some unjustifiable action by Fonterra which affected the terms and conditions of his employment to his disadvantage.

Contractual basis to suspend

[71] Mr Hakopa stated he was unjustly disadvantaged by Fonterra's action to suspend him. It was submitted that there was no contractual or statutory basis or justification to do so. While Mr Hakopa's collective employment agreement did allow for suspension, it was submitted that the company could only do so where the worker in question had a first or previous breach or had breached its drug and alcohol policy. Neither scenario applied to Mr Hakopa who was facing his first disciplinary proceeding.

[72] Mr Hakopa's reference to a "further breach" of discipline comes from clause 8.5 of the collective employment agreement which states (emphasis added):

8.5 Dismissal

Any further breach requiring disciplinary action may result in either suspension and/or dismissal.

[73] I am not persuaded that a first or previous breach of discipline is required before the disciplinary procedures of clause 8 are engaged. Clause 8.5 is not a standalone provision but one of 19 other clauses that constitute collectively the disciplinary procedures that Fonterra and the DWU have agreed to be bound.

[74] Clause 8.5 must be read in conjunction with its neighbouring clauses, including 8.1.1 which states:

8 DISCIPLINARY PROCEDURES

8.1 Introduction

8.1.1 It is recognised that in dealing with situations which may result in disciplinary consequences for a worker the process adopted will depend on a number of factors including the nature and seriousness of the allegations and the particular circumstances at the time. Some matters may be dealt with less formally where appropriate, whereas more serious matters may result in dismissal.

...

[75] If a first breach was expressly required before the disciplinary procedures of clause 8 could be engaged, I would have expected Mr Hakopa or his two union delegates to have raised this with Mr Tomaszewski at some point during the three meetings that took place from 17 April – 17 May 2021. They did not. In fact, Mr Brown sought a final warning with "no second chances" for Mr Hakopa which is indicative of the magnitude and seriousness of his actions.

[76] Clause 8 makes clear that it is non-exhaustive in terms of what factors can be considered in determining how a disciplinary matter is to be dealt with. While I accept that a clean work history is a relevant factor for consideration, it is not determinative. If it were, it would mean that Fonterra could not dismiss any employee for a first offence, irrespective of the seriousness of their conduct. For this reason, I find that a first or previous breach was not a pre-requisite for suspension or dismissal.

Decision to suspend substantively justified

[77] It was submitted that Mr Hakopa's suspension was without justification because there was nothing to show that he would have interfered with witnesses or evidence. While I accept that Mr Hakopa would not have interfered with the investigation itself, on an objective basis, it was reasonable for Mr Tomaszewski to be concerned of a further risk to the business in terms of the behaviour being repeated.

[78] *Prima facie* the CCTV footage showed Mr Hakopa deliberately failing to use the emergency stop button which resulted in damage to the rapid door and a potential exposure of foreign material into a redline area where there was a high standard of health and safety and FSQ (food safety quality) expected of staff.

[79] It is noted that it took 19-20 seconds from the moment the rapid door struck the goodpack to the point when it came off the side rail causing damage to the door. Some may say that 19-20 seconds is not a long time, but time is relative and I have had the benefit of watching the CCTV footage. Mr Hakopa was a Level 4 packing operator with approximately five years' work experience working for Fonterra. He had been well trained and inducted with respect to the company's health and safety and FSQ policies, directions and SOPs.

[80] Mr Tomaszewski has held various roles within Fonterra since he started working for the company in 1998. He has a very thorough understanding of all areas of the plant, including the drumming room in which Mr Hakopa worked on the night in question with his co-worker.

[81] In Mr Tomaszewski's view, one to four seconds was more than enough time for Mr Hakopa to have activated any of the five E-Stop buttons and cables that were near him. Doing so would have brought the goodpack to a stop and not the entire plant.

[82] The Packing Line 5 Drumming SOP with which Mr Hakopa was familiar, required him to activate the emergency stop in the event of an emergency (people or plant at risk). There was ample opportunity for a person of Mr Hakopa's level of training and experience to have activated the emergency stop in time. However, he failed to do so and watched the rapid door come off the side rail and damage the door.

[83] At this point, the drumming room was potentially exposed to foreign contaminants such as dust, insects and bugs which is a serious health and safety issue for Fonterra. Its products are exported around the world including high-discerning customers in Japan and South Korea.

[84] It is not in dispute that Mr Hakopa activated a light curtain rail with his hand which did bring the goodpack to an eventual stop. However, that was too little too late as the rapid door had already fallen off by that stage. The activation of the light curtain occurred some 37 seconds after the rapid door had struck the goodpack and approximately 19 seconds after it had broken off.

[85] In explanation for not activating the E-Stop, Mr Hakopa stated that he expected the rapid door to reset itself like the outward door had. The analogy that was given was that of a garage door hitting something and then going back up. That explanation was not accepted by Mr Tomaszewski which I find to be fair and reasonable. When I questioned Mr Hakopa, about the reasonableness of his expectation that the rapid door would reset itself, he acknowledged that this was an assumption on his part.

[86] Mr Hakopa had previously stated that the problems with the two doors that night were not the same. Unlike the inward door which had struck the goodpack, the outward door had not and it was the outward door that Mr Hakopa had observed reset itself. As such, he could not have reasonably assumed that the inward rapid door would respond the same way as the issues were not the same and he had never seen a rapid door hit a goodpack before, let alone one that had reset itself after doing so.

[87] There was a clear risk to plant and it was fair and reasonable of Mr Tomaszewski to have expected Mr Hakopa to have followed the relevant SOP which required an emergency stop to be performed, especially when he was faced with an unprecedented situation for the first time.

[88] It matters not that Mr Hakopa's co-worker had also failed to activate the E-Stop. Both workers were trained to work autonomously of each other. They each had their own individual roles to play to ensure that they complied with Fonterra's health and safety and FSQ requirements.

[89] On its face, the CCTV footage showed Mr Hakopa and his co-worker falling well short of what was required of them in the workplace and this was the risk that Mr Tomaszewski was concerned about, namely that there could be a reoccurrence that would potentially compromise Fonterra's health and safety and FSQ requirements. His desire to minimise that risk while matters were being investigated was what a fair and reasonable employer could have done in all the circumstances.

Decision to suspend procedurally justified

[90] It was submitted that Fonterra had not acted in good faith with Mr Hakopa who had been given a copy of Mr Tomaszewski's letter of 16 April 2021 approximately 30 minutes before the meeting to discuss his proposed suspension started.

[91] It is acknowledged that an employer must deal with an employee in good faith.¹ Furthermore, an employer who is considering a decision that could have an adverse effect on an employee's continued employment must provide the employee with access to relevant information and an opportunity to comment on the information before a decision is made.²

[92] While it is not disputed that Mr Hakopa had only 30 minutes notice of the proposed suspension meeting, it has not been demonstrated that he was unfairly or unduly prejudiced as a result. Mr Tomaszewski's invitation comprised two pages which would not have taken Mr Hakopa long to read fully. The letter made clear that no decision had been made and the proposed suspension would usually be on full pay, which it was.

[93] That meeting was recorded from which an accurate written transcript was made. Mr Hakopa was of sufficient age and maturity to have requested an adjournment if he

¹ Employment Relations Act 2000, s 4(1)(a).

² Section 4(1A)(c).

felt that he needed more time to prepare. However, at no point during the meeting did he or his union delegate make such a request.

[94] When advised of the suspension decision, there were no concerns or objections raised by Mr Hakopa whose response was “Good as gold.” Mr Tomaszewski would have taken from that response that the suspension process had been a fair, which was the case.

Was Mr Hakopa unjustifiably disadvantaged by a flawed investigation?

[95] It was submitted that Fonterra’s investigation of the allegations was flawed in that Mr Hakopa’s explanations and reassurances were not genuinely considered and even downplayed. During the investigation meeting, Mr Hakopa explained that he had not activated the E-Stop because he thought the rapid door would reset itself.

[96] Furthermore, in explanation for not reporting the damage to his supervisor, Mr Hakopa stated that he thought Ms Stanton, the product mix operator to whom he had initially reported the incident, would pass his message on. He advised Mr Tomaszewski that he now understood what he should have done, which was to report the incident to his supervisor. Mr Hakopa accepted that he had not worn his PPE correctly and that his actions had cost his employer financially. He guaranteed that the incident would not happen again.

[97] It is not for the Authority to substitute its view for that of the employer. As previously stated, it is the Authority’s role in accordance with s 103A of the Act to make an assessment of whether Fonterra’s actions were those of a fair and reasonable employer in all the circumstances at the relevant time. The assessment includes examining the reason for the dismissal but also how Fonterra acted in the process leading up to the dismissal.

[98] In s 103A(3) of the Act a range of factors are set out for consideration by the Authority when assessing the employer’s procedural actions at the time of dismissal, these include:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[99] Genuine consideration means that an employer should approach an investigation into alleged wrong-doing by an employee with an open mind rather than a pre-formed view from the outset. Accordingly, the fair and reasonable employer should assess all the evidence before arriving at a decision based on the balance of probabilities.

[100] Mr Hakopa's concern that his explanations and reassurances were not genuinely considered by Mr Tomaszewski is not without merit. In his letter of 11 May 2021, in which he advised Mr Hakopa of his proposed sanction that he be dismissed, Mr Tomaszewski made the following findings:

Findings

I have carefully considered all of the information, and have upheld (on the balance of probabilities) all the concerns raised for the following reasons:

- You (Mr Hakopa) did not deny the concerns, and made admissions that these incidents did indeed happen. You admit that your actions on the night were wrong.
- You did not question/challenge the CCTV footage.
- Although I acknowledge that you provided an explanation to your actions, you were unable to provide me with any explanation for your behaviour that would mitigate your breach of policy or process for the occurrence above.
- You failed to provide us with any reassurances that you would not engage in similar conduct going forward.

[101] At first glance, these findings are difficult to reconcile with the information, responses, explanations and assurances Mr Hakopa had provided to Mr Tomaszewski in his written statement of 21 April 2021 and at the investigation meeting of 27 April 2021. Mr Hakopa had made denials about laughing and clapping, explained why he had not activated the E-Stop button, made limited admissions around the reporting and

not wearing his PPE correctly, and had given a personal guarantee that he would not behave similarly again.

[102] On one reading of Mr Tomaszewski's letter it could be argued that the way he articulated his "findings" suggests *prima facie* that he has not genuinely considered what Mr Hakopa had said to him. However, Mr Tomaszewski's letter includes a list of 10 bullet points which set out in summarised form what Mr Hakopa had said by way of explanation and mitigation:

I met with you on 27 April 2021 to hear your response to the concerns ...
Essentially, you told me:

- You provided us a statement prior to the meeting outlining your response to the concerns from your perspective
- You thought that the door would roll off the goodpack and it would have come off the zipper track and reset itself
- You admitted not reporting this to your team leader at the earliest convenience but that you told an operator running the mix tank after the incident
- You acknowledged that you are an experienced operator of over 4 years
- You did not report any of the previous issues with the machine which you alleged to have happened earlier that night and previously
- You admit not entering the incident into FP as you didn't think you needed to do this
- You told us that you weren't celebrating by pumping your fists and laughing rather it was a reaction to the troubles on the machines that night, which you admitted you failed to report
- You admitted to not wearing your PPE. You told us it was hot on the night that's why you rolled up your sleeves and did not have your glasses over your eyes as required.
- You "guaranteed" that a situation like this will never happen again (but failed to outline the practical steps on how you'd achieve this)
- You acknowledged Fonterra has suffered a financial loss as a result of your actions

[103] The abovementioned list gives me confidence that Mr Tomaszewski was actively listening to Mr Hakopa during the investigation meeting. While he could have articulated his findings with greater precision, I am satisfied that he had given careful consideration to Mr Hakopa's responses. It is important to bear in mind that this was a

preliminary findings letter and while the proposed sanction was dismissal, no final decision had been made until Mr Tomaszewski heard further from Mr Hakopa.

[104] Following the proposed sanction meeting on 13 May 2021 with Mr Hakopa and his two union delegates, Mr Tomaszewski took the weekend to consider matters. The following Monday, Mr Hakopa was dismissed. On 19 May 2021, Mr Tomaszewski wrote a confirmation of dismissal letter to Mr Hakopa in which his preliminary findings were ameliorated.

[105] Where he had previously said that Mr Hakopa had made no denials, Mr Tomaszewski stated that “[e]ssentially” admissions had been made. In his final letter, Mr Hakopa’s explanations were repeated in summarised form.

[106] The Act requires that an employer give genuine consideration to an employee’s explanation. While I accept that Mr Tomaszewski could have drafted his preliminary letter of 11 May 2021 with greater precision, a text-book perfect process is not required.³ After reading both of his letters (11 and 19 May 2021) I am satisfied that Mr Tomaszewski did give genuine consideration to Mr Hakopa’s explanations and reassurances. However, even so, this did not mean that he could not reject them, only that they be genuinely considered.

Was Mr Hakopa unjustifiably disadvantaged by a finding of serious misconduct?

[107] The test of justification is set out section 103A of the Act. It was submitted that each of Mr Tomaszewski’s four concerns were neither individually or collectively serious enough for a finding of serious misconduct. I disagree.

Not activating the E-Stop button

[108] Mr Tomaszewski’s first concern was that Mr Hakopa may have deliberately failed to use the E-stop button or overhead cable E-stop to prevent the door from being damaged. It was submitted that it was unreasonable to expect Mr Hakopa to instantly react especially when he first needed to assess the situation and decide what needed to be done. However, Mr Hakopa had 19-20 seconds to activate the E-Stop before the rapid door fell off. If he genuinely thought that the rapid door would behave like a

³ B v Virgin Australia (NZ) Limited [2013] NZEmpC 40 at [178].

garage door, it would have been apparent to him after four seconds that the rapid door was not going to go back up

[109] It was submitted that even if there was an element of negligence in Mr Hakopa's actions, the negligence needed to be gross or amount to recklessness before an employee could be summarily dismissed.⁴ Mr Hakopa's delay in activating the emergency stop was not an oversight on his part. One to four seconds would have been a reasonable response time with which to have performed an emergency stop. However, 19-20 seconds was a long time for Mr Hakopa to have done nothing but simply watch the rapid door essentially be pulled off its hinges by the conveyor. This was not negligence but a deliberate choice on his part not to do the right thing.

[110] Individually considered, Mr Tomaszewski's first concern with Mr Hakopa's failure to activate the E-Stop was serious. There was a clear risk to plant that necessitated an emergency stop be performed in line with the Packing Line 5 Drumming SOP with which Mr Hakopa was familiar. This was a significant departure from the standard operating procedures that warranted a finding of serious misconduct.

Failure to report

[111] Mr Tomaszewski's second concern was that Mr Hakopa may have failed to report a health and safety incident as soon as possible and that he may have also misreported the event to his team leader by omitting the fact that the damage to the door could have avoided.

[112] The underlying concern here is not that Mr Hakopa failed to report to the right person (he did inform his process operator, Ms Stanton) but that Mr Hakopa was frugal or selective with the truth. This went to trust and confidence in my view and Mr Tomaszewski was correct to be concerned as to whether he could trust Mr Hakopa as an employee. It is concerning that Mr Hakopa felt that he could leave matters to Ms Stanton as that merely transferred the problem to another worker. Further, I note that Mr Hakopa felt that he did not need to report the incident into the First Priority system which does not suggest ownership of the problem at all. He would have known

⁴ *Makatoa v Restaurant Brands (New Zealand) Ltd* 2 ERNZ 311 at 318, line 50.

from his site induction training in July 2020 and from the daily management meetings he attended how critical the FP system was to health and safety and FSQ.

[113] I finally note that staff had recently been reminded of the need to report accidents after a probe was dropped and had to be replaced at significant expense. Because of that incident, a reminder had been given to staff, including Mr Hakopa about the need to report accidents.

[114] While Mr Hakopa may have required further computer training to operate a computer to log an incident into FP, that did not stop him from reporting the damage to his supervisor or to Mr West. Given the training and recent reminders Mr Hakopa had received about reporting workplace accidents, his failure to do so was not an oversight but a deliberate choice on his part that justifiably put him in the cross hairs of a finding of serious misconduct.

PPE

[115] Mr Hakopa acknowledged that he had not worn his personal protective equipment (his glasses and overall sleeves) correctly. However, it was disingenuous of him to suggest that he could use some tape to secure his sleeves when they were elasticised already. The use of tape could have also potentially introduced contaminants into the drumming room where a high level of FSQ was required.

[116] I accept that the breach of PPE may not have been sufficiently serious for a finding of serious misconduct especially as Mr Hakopa had no previous disciplinary matters in his record. However, even so, the reality was that there were multiple concerns regarding his actions and, when cumulatively considered, a finding of serious misconduct was warranted.

The laughing, clapping and cheering

[117] Mr Hakopa has consistently maintained that he did not laugh at any time during the incident. It was submitted that there was no evidence of him laughing. I remain unconvinced. Although the CCTV recorded visual images without sound, Mr Hakopa's body language was more consistent with someone laughing or cheering than someone expressing frustration or exasperation.

[118] There was no pointing of the finger, touching of the forehead, hands on hips, hunched shoulders, beating of the chest, or a shaking of the head. Instead, Mr Hakopa did what he described was a “fist pump” where his right elbow was parallel to the floor, his right forearm pointed towards the ceiling, and his right hand closed into a fist.

[119] At 4.24.30 am, the CCTV footage shows Mr Hakopa’s head tilt back and his shoulders and upper torso shake a little. As an outside independent observer, my impression of Mr Hakopa’s body language is consistent with someone who is not expressing frustration or disappointment but amusement.

[120] There is then the conduct of Mr Hakopa’s co-worker who is sitting on a chair and who is clapping and giving a thumbs up. When the body language of Mr Hakopa and his co-worker are considered together, they both appear to be expressing the same emotion which is not one of exasperation but of enjoyment.

Conclusion on unjustified disadvantage

[121] Mr Hakopa’s suspension was an action by his employer that was substantively and procedurally justified. While it was unlikely that he would have interfered with Mr Tomaszewski’s investigation, suspension was fair and reasonable given the multiple concerns there were with Mr Hakopa’s actions and the need to minimise any risk of a repeat occurrence.

[122] With respect to Mr Hakopa’s remaining claims for unjustified disadvantage, genuine regard was given to his explanations and reassurances. For that reason, he had not been subjected to a flawed investigation. Nor has it been demonstrated that Mr Hakopa was disadvantaged by a finding of serious conduct, which I find was fairly and reasonably made.

Whether Mr Hakopa was unjustifiably dismissed?

[123] The onus is on Fonterra to show that Mr Hakopa’s dismissal was justified. It must be able to show that, as a result of a fairly conducted and complete investigation, it believed that the events or conduct had occurred, and that dismissal was an outcome which a fair and reasonable employer in the same circumstances could have chosen.

Conclusion on unjustified dismissal

[124] At the risk of repeating much of what I have already said, I will keep this part of my assessment relatively short as I would be traversing already well-covered ground. First, it is necessary to observe the primacy of health and safety and FSQ for Fonterra, a business which prides itself on maintaining a high level of work place safety for its staff and its food manufacturing processes.

[125] Second, when the rapid door hit the goodpack, Mr Hakopa failed to perform an emergency stop notwithstanding that he had five nearby stop buttons and an overhead E-Stop cable. He had approximately 19-20 seconds to do so but the CCTV showed that he chose to watch rather than act. Mr Hakopa's failures were multiple:

- (a) He had failed to press any of the E-Stops when he had ample time in order to do so and knew the SOPs that required him to perform an emergency stop in case of an emergency where there was risk to people or plant.
- (b) While Mr Hakopa expected the rapid door to reset itself, there was no reasonable basis for him to believe that it would as he had never seen a rapid door come down on a goodpack before.
- (c) Mr Hakopa had not only failed to report the incident in the correct way as he had been trained and reminded about, he was selective with the facts and chose not to advise his team leader that the damage to the door could have been avoided,
- (d) The CCTV showed body language from Mr Hakopa that did not support his claimed emotional state of being frustrated or exasperated. Instead, the footage showed Mr Hakopa and his co-worker taking delight in the rapid door's demise. This could only have fractured beyond repair, Mr Tomaszewski's trust and confidence in Mr Hakopa as an employee.
- (e) Mr Hakopa's actions occurred in a safety sensitive workplace where health and safety was of utmost importance. His failure to comply with

Fonterra's work safety and FSQ policies and procedures deeply impaired the basic trust and confidence that was essential to the employment relationship.

[126] For these reasons, I find Mr Tomaszewski's decision to dismiss Mr Hakopa for serious misconduct to be substantively and procedurally justified. In terms of process, the standard here was high which is to be expected of a large organisation such as Fonterra. Concerns were put in writing, Mr Hakopa was afforded an opportunity to respond, meetings were recorded and transcribed, preliminary findings were made, and an opportunity for further comment before the final decision was made was afforded.

[127] It follows that Mr Hakopa's claim for unjustified dismissal must also be declined.

[128] The application is dismissed.

Costs

[129] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[130] If they are not able to do so and an Authority determination on costs is needed Fonterra may lodge, and then should serve, a memorandum on costs within 24 days (in light of the Christmas/New Year holidays) of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Hakopa would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[131] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Peter Fuiava
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].