

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 167/09
5108395

BETWEEN

WAYNE HART
Applicant

AND

FONTERRA COOPERATIVE
GROUP LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Helen White for the Applicant
John Rooney for the Respondent

Investigation Meeting: 1 and 2 September 2009 at New Plymouth

Submissions Received: By 22 September 2009

Determination: 3 November 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent (Fonterra) considers that the applicant, Mr Wayne Hart, was justifiably dismissed following a full and fair investigation into a number of incidents of serious misconduct in the course of one shift, relating to his failure to follow directions from and obstruction and abuse of his supervisor, Mr Andy Waite.

[2] Mr Hart claims that his dismissal was unjustified because he did not commit the instances of serious misconduct alleged. He seeks reinstatement, loss of remuneration and other financial remedies.

The Issues

[3] The issues for determination are:

- Whether there was bias against Mr Hart by the decision maker;
- Whether Fonterra treated Mr Hart equally with Mr Waite where both men had made allegations against each other of a serious nature;
- Whether it was fair for Fonterra to add a large number of allegations part way through the disciplinary investigation;
- Whether the inquiry should have investigated the wider context of the dispute between Mr Hart and his supervisor, including interviewing another person who was present on the night;
- Whether many of the issues Fonterra had with Mr Hart arose merely as a result of miscommunication;
- Whether it was fair for Fonterra to rely on warnings which had expired;
- Whether, if dismissal is unjustified, Mr Hart should be reinstated; and
- What other remedies should be applied?

Findings of Fact

[4] There can be no certainty about events which occurred many months ago. The Authority is, however, required to make findings on disputed events and can only do so on the balance of probabilities, i.e. what is more likely to have occurred than not. In doing so, the Authority relies in particular on any contemporaneous documents and what is intuitively more likely to have occurred in a certain set of circumstances than not, in order to determine witnesses' credibility, if that proves necessary.

[5] From the investigation meeting the following facts are germane. On 18 January 2009, the Acting Manager of Fonterra's Cream Products plant at Hawera received a telephone call from the night shift supervisor, Mr Waite, about serious

concerns he had about one of his Level 5B operators, Mr Hart. Those allegations were that he had been disruptive, failed to follow certain directions (particularly refusing to read a training manual) and then abused Mr Waite. The Acting Manager saw the allegations made by Mr Waite as serious enough to pursue a disciplinary investigation. Statements were taken from all staff on shift that night that had seen any of the events in question. In general, they supported Mr Waite's allegations.

[6] The Acting Manager contacted Mr Hart on 21 January to advise him that he would be required to attend an investigation meeting later that week concerning an alleged *refusal to follow direct instructions from a supervisor*. The investigation process was said to be for the purposes of determining whether or not Fonterra's code of conduct and/or Cream Products plant policies and procedures had been breached. It was made clear that Mr Hart's employment was at risk. The next day Mr Hart provided a four page email explaining what had occurred from his perspective.

[7] The meeting was held on 23 January, at which Mr Hart was represented by his union's site delegate. Mr Hart gave a full explanation at the meeting of his version of events. At that meeting, Mr Hart wanted to know what the charges were and was told that there were two issues relating to his refusal to follow directions.

[8] Mr Hart denied that he had refused to follow any instructions, either to do logistics or to work on machines known as *the Benhills*. I note that there is likely to have been some confusion amongst staff about what constitutes *the Benhills*, because although several machines are in fact *Benhill* machines, only one is colloquially so named.

[9] Mr Hart said that Mr Waite became angry with him for refusing to sign off health and safety sheets on *the Benhills* and refused to allow him to go away somewhere quiet to read the manual. Mr Hart stated that he was going to make a stand on the health and safety issue of needing to fully understand how a machine operated before working on it, as a worker had recently been killed at the plant and safety was uppermost in his mind. When denied an opportunity to read the manual somewhere else, he said he started to do so in the office. When Mr Waite returned some five or ten minutes later, the two got into an argument because Mr Hart would not sign the records to show it was safe for him to operate the machine. He then accused Mr Waite of losing his temper, ripping out a sheet from the manual and throwing a folder at him, hitting him on the arm. The argument continued until

Mr Hart left. He then rang another manager and was later directed by a supervising operator to work elsewhere for the shift.

[10] The Acting Manager considered that matters were serious enough to justify suspension and discussed that with Mr Hart's union delegate. They agreed that it would be best for all parties if Mr Hart was suspended, as this would remove him from the potential for further issues to arise while the investigation was continuing.

[11] After he was told that he would be suspended Mr Hart wanted to know what would happen about the assault allegation that he had raised. He was told by his union delegate that he had ninety days within which to bring a personal grievance, but Mr Hart wanted to know whether Mr Waite would be suspended, because he wanted to lodge an assault claim with the Police. The union delegate suggested that Mr Hart should think very carefully about doing that, a comment supported by Fonterra's human resources adviser. Mr Hart was asked if he had any more questions about things and he said that he did not. No complaint was laid with the Police and Fonterra did not pursue the issue with Mr Waite, other than in the context of its disciplinary investigations into Mr Hart's conduct.

[12] A number of interviews were then held with Cream Products staff. Those staff who were able to comment on Mr Waite's demeanour were all consistent that he did not get agitated or swear, as alleged by Mr Hart. By contrast, Mr Hart's conduct was, in their view, agitated and did involve swearing during the course of the argument with Mr Waite. None witnessed Mr Waite throwing a folder at Mr Hart or any other form of assault.

[13] At this point, Mr Conrad Heron, the Plant Manager, returned to work and took over the investigation. In his view there were a number of potential breaches of Fonterra's code of conduct that had been committed by Mr Hart. He gave a copy of these complaints to Mr Hart in advance of the disciplinary meeting on 30 January. The nine items were as follows:

1. *Refusal to follow an instruction from Andy Waite to assist on Logistics on Sunday 18th January 2009.*
2. *Refusal to read and sign the SOP checklist when asked to by Andy Waite on 18 January 2009.*
3. *Refusal to operate the Benhills when asked to do so, knowing that there were training records in place showing that he had already been fully signed on 6 of 13 tasks, and partially*

signed off on the remaining 7 tasks, appropriate to operate this machine.

4. *Refusal to perform logistics work allocated to him by Paul Mackle on 18th January 2009.*
5. *By acting in a manner, whether knowingly or otherwise, that was designed to provoke Supervisory staff to respond in a negative manner towards you thereby enabling you to claim that you had been harassed or unfairly treated by those Supervisors. By making a statement to Andy – “you are just like that other fuckin arsehole” and further statements to Andy that he “will be in the shit and forced out like the last Supervisor” “You are just like him”*
6. *Abuse of Fonterra authority by the following actions or behaviours.*
 - *By responding “I am not interested in that bullshit” when asked to do the 5S audit.*
 - *By alleging that Supervisors had repeatedly sworn and thrown a manual at you.*
7. *By failing to comply with the expectations of the Fonterra Values:*

In particular the Fonterra Value - With Complete Integrity

 - *communicate with openness and honesty*
 - *be accountable for our actions and their impact*
 - *treat all people fairly and with dignity*
8. *It is further claimed that your behaviours are contrary to the guidelines and expectations of the Fonterra publication “The Way We Work” which details the expected behaviours of staff in the workplace.*
9. *That behaviours demonstrated by you on 18 January 2009 are in breach of the Cream Products Code of Conduct, particularly clause 2 and 3 of that Code.*

[14] That code provides that workers will respect each others as individuals and team mates and will communicate openly and honestly.

At the meeting on 30 January, Mr Hart answered the allegations in the following way:

- That he had moved from logistics at someone else’s request;
- That he had started work on the checklist as directed;
- That he was unaware that he had been trained in all aspects of the *Benhills*, being only trained in aspects of some of those machines (as referred to above);
- That he had been given no work to do on logistics;

- That he had not intended to be derogatory of Mr Waite;
- That his comments were meant in a positive way because of the previous supervisor's focus on health and safety, something that Mr Hart also took very seriously;
- That he was working through the appropriate *corrective actions* where there was a dispute on site;
- That he thought Mr Waite provided an open door policy, which he was taking advantage of;
- That he had not breached the rules over integrity and that if a supervisor talked to him like that he could only expect to get it back; and
- That Mr Hart was aware of the seriousness of the situation, that he kept a copy of the code of conduct with him at all times and that he wondered if Mr Waite in fact had a copy of it.

[15] A further investigation meeting was held on 2 February. Mr Hart was given the notes of the first meeting. The first part of that meeting involved discussion over the accuracy of Fonterra's minutes.

[16] Later Mr Hart was given an opportunity to read all the statements collected by Fonterra. After an adjournment Mr Hart was asked about the differences between his recollection and those of other employees on shift on 18 January. He stated that he was amazed that they reflected *the same tone and the same version of events*. He also asked that if Mr Waite was so calm why had he, Mr Hart, felt obliged to ring a higher manager that night, particularly if he was the one so het up, as alleged.

[17] In relation to assisting with logistics, Mr Hart reiterated that he had started doing so and that he had simply asked Mr Waite to be paid at the higher rate because that was standard practice.

[18] With regard to allegation 2, Mr Hart made it clear that he was being forced to read a large manual within five minutes.

[19] Over allegation 3, Mr Hart accepted that he was never forced to work on the *Benhills* until he was signed off, but said that he was not signed off on the machine that they wanted him to work on.

[20] Concerning allegation 4, Mr Hart denied refusing to check *the bungs* but rather that he had refused to go for a smoko with the other person responsible for logistics. He said he went to do the audit and denied ever saying he was not interested in logistics work.

[21] With regard to No 5, Mr Hart denied using swear words or making a derogatory comparison to a previous supervisor. He denied being difficult over his training on the *Benhill* and said that he could only work on machines on which he had been trained properly. He referred to a previous problem with Mr Waite whereby Mr Waite later apologised. In regard to him swearing and Mr Waite being calm, Mr Hart commented that the witnesses to that could have all been *well coached*.

[22] Mr Hart stated that the previous supervisor was *the most cooperative level 8 you could ever have* and that *everyone was sad to see him leave*, but accepted that he had received a warning for abusing him. Mr Hart denied pushing Mr Waite to snap and believed this had happened in the reverse, and that he had a personal vendetta against him because of concerns he had previously raised.

[23] Following the meeting, Mr Heron decided, on instruction from his boss, to interview each of the other witnesses to see whether or not there had been any collaboration between them. Mr Heron started the discussions with three of the witnesses by stating *Wayne has been pushing the line that he believes you guys got together and made the same statement*. Each denied there was any collaboration and noted that the statements were all made on the night in question.

[24] Mr Hart was called to another meeting on 4 February. At the commencement, Fonterra agreed to the union's suggestion that the claim of refusal to assist on logistics could not be sustained. Mr Hart was then asked if there was anything more he wanted to add. He commented about the strain on him and how this had all followed from an incident with his supervisor, which he thought had blown over until the argument on the night. Copies of the notes on collaboration were given to Mr Hart. The union delegate then asked if Fonterra had considered the possible impact on Mr Hart and his partner.

[25] After an adjournment, Mr Heron returned to state that all but the first allegation had been proven to have some basis; that Mr Hart's behaviour on 18 January breached Fonterra's code of conduct; that trust and confidence in him had been lost and that the result would be summary dismissal.

[26] A letter was sent the next day confirming that decision and repeating the nine allegations, albeit that the first was discounted. Mr Heron stated:

Your behaviour and blatant disregard of our instructions and your general conduct over this matter, amounts to serious misconduct and are breaches of Fonterra's code of conduct.

We accept your explanation of breach number one from the above list. Your explanations for the remaining breaches have been completely unacceptable and we have absolutely no trust and confidence whatsoever, that you will not continue with your long history of disharmony with colleagues.

[27] Mr Heron decided to dismiss Mr Hart because he believed the version of events given by witnesses other than Mr Hart. He believed Mr Hart had been difficult throughout the evening and that he had responded in an abusive way to Mr Waite, rather than the other way around.

[28] In coming to his conclusion, Mr Heron did take into account Mr Hart's work history, which included a stale warning for acting in an unprofessional manner and challenging authority. He also took into account an incident the year before over him abusing the previous supervisor over the telephone. He did not accept that Mr Hart's complaint about Mr Waite had any relevance to his dismissal, except that it was a complaint without substance and therefore should not have been made in the first place.

[29] Mr Hart immediately sought interim reinstatement. However, on application to the Authority the parties accepted an early substantive investigation meeting instead. In the meantime they attended mediation, but were unable to resolve their differences. It therefore falls to the Authority to make a determination.

The Law

[30] Failure to follow a lawful and reasonable instruction from a supervisor can be serious misconduct capable of justifying dismissal. Similarly, behaving in an

offensive or abusive manner towards a supervisor or fellow worker is equally capable of constituting serious misconduct justifying dismissal.

[31] The standard requirements of procedural fairness are set out in *NZ (with exceptions) Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35 at 46 where it was held:

The minimum requirement can be said to be:

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or explain or mitigate his or her conduct; and*
3. *An unbiased consideration of the worker's explanation in the sense that that consideration must be free from predetermination and uninfluenced by irrelevant considerations*

Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair minded but not over indulgent person.

[32] The standard of evidence required was explained by the Court of Appeal in *Airline Stewards and Hostesses of NZ IUOW v. Air New Zealand Ltd* [1990] 3 NZLR 549. The Court of Appeal held at 553:

Put briefly, an employer in the conduct and management of its business, is not called upon to sit in judgement on an employee and require proof beyond reasonable doubt on alleged misconduct. When an incident occurs which raises the question of misconduct by an employee, the employer is required to act fairly in considering the interests of the employer's business and of the employee's employment in that business. In some situations the facts are so clear that instant dismissal is justified. In other situations, an explanation by the employee may not be fully satisfactory but sufficient to require further consideration and possibly some investigation.

[33] The Authority is required to judge, on an objective basis, whether a dismissal is justifiable, by considering whether the employer's actions and how the employer

acted, in all the circumstances at the time, were what a fair and reasonable employer would have done.

Bias

[34] I do not accept there was any bias against Mr Hart by Mr Heron. There is evidence of Mr Heron not conducting the interviews on potential collaboration in a fair way. I conclude that this was more likely to have been as a result of a lack of understanding of the techniques of fair questioning rather than any bias.

[35] Mr Hart believes that Mr Heron held a grudge against him because Mr Hart took health and safety extremely seriously, yet Mr Heron held opposite views, although he never expressed them openly. This contention was disproved by the evidence of Mr Hart's union delegate, who described Mr Heron as extremely supportive of health and safety initiatives at Fonterra. While Mr Heron did believe, particularly as the result of investigations, that Mr Hart was a disruptive employee, that is not the same thing as bias. The limited evidence of bias is therefore insufficient for such a finding.

Equality of Treatment

[36] I conclude that there was no unfair inequality of treatment between Mr Hart and Mr Waite that would impact on the justification for Mr Hart's dismissal. First, Mr Hart failed to pursue a formal complaint about Mr Waite's conduct. As noted above, the matter was left in Mr Hart's court at the end of the meeting on 23 January and he never took the matter further, except as a defence for his actions (which he was quite entitled to do). Given this situation, there was no need for Fonterra to consider Mr Waite's suspension, particularly in the light of the information that it had already gathered, which was generally consistent with Mr Waite's version of events.

[37] In any event, Fonterra had gathered all the information germane to Mr Hart's allegations from relevant people on site. It could have chosen to prefer his version to Mr Waite's, which would have given some weight to Mr Hart's allegations and could have led to a later disciplinary investigation against Mr Waite. However, Fonterra did not need to do so because of its decision to dismiss Mr Hart, having found him to be the instigator of events.

Number of Allegations

[38] I conclude that the way that the allegations were put to Mr Hart, gaining number and specificity over time, was fairly done. While the nature of the allegations changed in their specificity and certainly became more numerous and detailed, the overall thrust of them remained the same, in that they related to Mr Hart's alleged refusal to do what he was told and alleged obstructive and abusive behaviour during the January 18 shift. Fonterra could have been criticised if it had failed to provide the specifics of its allegations. Thus while the allegations are somewhat repetitive and some are very general in nature, they all relate to the events on 18 January, which Mr Hart had several opportunities to explain.

[39] While Fonterra might also have given more specificity when first advising Mr Hart of its concerns, Mr Hart well knew what issues arose on 18 January and was able to provide a full account of them right from the outset. He was able throughout the process to answer all of the allegations put by Fonterra. It is not fatal for Fonterra management to have failed to categorise them in a coherent and structured manner as a seasoned employment relations professional might.

Wider Context of Relationship with Supervisor

[40] I conclude that Fonterra's inquiry was sufficiently broad-based. All the witnesses present at the time who observed relevant events were questioned at least once. All that material was provided to Mr Hart. I accept that Fonterra took sufficient note of those matters raised by Mr Hart. In particular, it discussed over the course of several meetings the whole context of the relationship between Mr Hart and Mr Waite. Fonterra was not required, however, to question all those who Mr Hart believed, now or then, could have assisted in establishing some animus between him and Mr Waite on Mr Waite's part. Those people were not present at the time of the incident. In any event, the Authority heard from one witness that Mr Hart claimed would show animus by Mr Waite towards him on an earlier occasion. That evidence disclosed that Mr Waite's upset at that time was not directed at Mr Hart personally.

[41] In any event, as noted below, Fonterra had plenty of evidence from eye witnesses on which it could rely, that Mr Hart's behaviour on the night was unacceptable, whatever the previous background between Mr Hart and Mr Waite. Furthermore, it also had evidence that Mr Hart was, during the disciplinary meetings,

trying to fundamentally distort the tenor of the comments he made about his supervisor on the night.

[42] I accept that for completeness the duty manager to whom Mr Hart spoke on the night could have been contacted during the investigation. However, his evidence would simply be of what Mr Hart told him at the time and could never override that of eye witnesses, provided they were found to be reliable.

[43] Fonterra was entitled to conclude that the witnesses had not colluded, having asked them of this and having had their statements taken in the first instance very close to the time, when their memories would be freshest. I accept that some of the statements show animus towards Mr Hart, but that could just as easily have been because of his behaviour on the night, to which they objected. As in any ongoing situation in any workplace, an employer can never be sure whether certain employees hold grudges against others. However, in this situation, given the fact that these were union members who were concerned about making statements against another union member, and given the consistency of the statements, with at least five staff having recollections different to those of Mr Hart, Fonterra was entitled to treat such factors as important.

Miscommunication

[44] I accept that Fonterra did not fully appreciate the difference between what training on the *Benhills* meant for different staff members. On the other hand, the statements from Fonterra's eye witnesses, if believed, demonstrated unacceptable behaviours by Mr Hart whether or not there was some misunderstanding about training requirements.

Summary on Procedure

[45] Fonterra's investigation could have been slightly broader. It failed to investigate the question of collaboration by the eye witnesses in an even handed and professional manner, its allegations were unnecessarily long and overlapped significantly, and Fonterra appeared not to understand Mr Hart's explanation about training on *the Benhills* as opposed to the *Benhill* he was asked to work on. In summary, this was not a perfect investigation. However, I conclude that none of these factors, individually or in concert, are fatal to the issue of whether a full and fair investigation was held. Rather they are slight deviations from the ideal.

[46] On the whole, I conclude that Fonterra conducted a full and fair investigation, without bias by the decision-maker, involving giving him all the statements from other staff members, investigating some matters raised by him further and holding several meetings with him.

Serious Misconduct

[47] On the evidence before it, a fair and reasonable employer would have concluded that Mr Hart had committed the misconduct alleged, apart from refusal to assist on logistics and the implication that Mr Hart had refused to operate *the Benhills* when trained on them, which he was not. It had evidence from two staff members that he had refused to perform logistics work allocated to him that night. It was therefore entitled to not accept Mr Hart's denial of that. A number of staff members heard Mr Hart say that he was not interested in *that bullshit*. It was agreed that Mr Hart did go to see Mr Waite about whether or not he would be paid an extra allowance for the work, which is consistent with him not wanting to do it before then (not that any negative implication could be drawn from Mr Hart's questioning of whether he should receive additional payment for a different type of work).

[48] Not only were there witnesses to Mr Hart acting in a way to provoke supervisory staff, there were also evidence of him making derogatory statements to Mr Waite. While Mr Hart denied some of the comments he did accept that he said that he was just like the last supervisor. Mr Hart's attempts to explain that he really liked the previous supervisor despite his history of difficulties with him, did not convince Fonterra. I accept Fonterra's conclusion in this regard as his explanation to me over that point was completely unsatisfactory. I do not accept that such a reference was made in the way that Mr Hart now asserts, because it was inconsistent with his real attitude towards Mr Waite and the previous supervisor. In particular, it is quite incongruous for Mr Hart to claim that, in the midst of what he said was a heated argument, he would make such complimentary statements about Mr Waite.

[49] Similarly, there was plenty of evidence from other staff members that Mr Waite had not repeatedly sworn at Mr Hart nor thrown a manual at him, thereby assaulting him. Given the relative independence of the other witnesses in the context of a workplace, I conclude that Fonterra was entitled to rely on those statements and conclude that Mr Hart was misrepresenting the situation in the supervisor's office to defend the allegations against him by means of a counter-attack against Mr Waite.

[50] All of these findings were consistent with failures to comply with Fonterra's local and overarching policies and guidelines as dealt with in allegations 7 and 8.

[51] There was also plenty of evidence of Mr Hart failing to follow Mr Waite's instructions about reading the manual and checking off sections to show that he had read them, as opposed to refusing to work on *the Benhills per se*. Mr Hart accepted that he had never been required to operate *the Benhills* without more training. That was the point of him reading the manual. It was open to Fonterra to conclude that the portion of the health and safety sheet given to Mr Hart was not for the purposes of health and safety checks, but rather for Mr Hart to mark off that he had read certain parts of the manual. While Mr Hart may not have understood that at the time, it was still open to Fonterra to conclude, given all the evidence it had gathered, that his reaction was unreasonable, abusive and obstructive.

[52] In essence, Fonterra concluded, as was open to it, that on the evening of 18 January Mr Hart had conducted himself in a way such that he was refusing to follow directions from his supervisors and was being obstructive and abusive of them. It therefore follows that Fonterra has fairly concluded that Mr Hart had committed serious misconduct in his employment.

Expired Warnings

[53] Fonterra then went on to look at whether dismissal was justifiable. It took account of Mr Hart's work record. If he had had a clean work record then that would have stood in his favour and shows why someone's work record is relevant in these circumstances. Unfortunately, Mr Hart had had a number of warnings. Although the warnings had expired, it was open to Fonterra to take them into account to determine whether or not issues of misconduct might arise again, as opposed to whether the misconduct had occurred at all. They demonstrated that from its perspective, Fonterra's problems with Mr Hart were ongoing.

[54] There appeared to be no other factors that were considered to militate against dismissal from Fonterra's perspective, and thus it decided to dismiss Mr Hart.

Conclusion

[55] In all the circumstances it was open to Fonterra to conclude that summary dismissal was what a fair and reasonable employer would decide at the end of its investigation. Mr Hart's personal grievance claim is therefore dismissed.

Costs

[56] Costs are reserved.

G J Wood
Member of the Employment Relations Authority