

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 294/08  
5092101

BETWEEN                      NATASHA KOVACEVIC  
   Applicant  
  
AND                                FONTERRA BRANDS  
   LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              S Gallagher, Advocate for Applicant  
   L Jenkins, Counsel for Respondent  
  
Investigation Meeting:        28 April and 8 May 2008  
  
Submissions received:        27 May 2008 and 20 June 2008 from Applicant  
   12 June 2008 from Respondent  
  
Determination:                15 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Fonterra Brands Limited (“Fonterra”) employs Natasha Kovacevic as a laboratory technician at its Takanini site. Ms Kovacevic’s employment began on 17 May 2004. The laboratory manager at the site, Zakir Shaikh, determined her starting grade and remains her overall manager.

[2] Ms Kovacevic says that throughout her employment she has not been given the correct grade in terms of the applicable collective employment agreement and associated documents. In turn she has been underpaid. It was agreed during the investigation meeting that this determination would address Ms Kovacevic’s grading, with the quantification of any underpayment to be addressed by the parties later if necessary.

[3] Ms Kovacevic says further that she has a number of personal grievances on the ground that she was disadvantaged in her employment by unjustified actions of her employer. Some of the dissatisfaction expressed in her grievance claims concerns her view of the way in which her concerns about her grading were addressed. The remaining areas of dissatisfaction involve actions which had an element of alleged unjustified treatment in themselves, but took on more significance to Ms Kovacevic because she believed the actions were connected with the fact that she was raising concerns about her grading.

[4] Fonterra denies that Ms Kovacevic's grading was wrongly set, and denies that it has affected her employment to her disadvantage by any unjustified action.

## **Grading**

### 1. Provisions in contractual and other documents

#### A. The setting of grades

[5] The position of laboratory technician was covered by a collective employment agreement ("cea") negotiated between New Zealand Dairy Foods Limited ("NZDF")<sup>1</sup> and the New Zealand Dairy Workers' union ("the union"). The cea in force when Ms Kovacevic's employment began had a term of 1 November 2003 – 31 October 2006. Unless otherwise specified, subsequent ceas did not contain any material amendments to the provisions discussed in this determination.

[6] The cea contained the following provision for grading:

#### "4.6.1 Gradings

The grading classification of individual workers will be made by the company based on the grade definition clause 4.6.3

#### 4.6.1.1 Commencement rates for new workers

(a) the commencement rate for all new workers shall be as follows:

New workers role

Minimum starting grade

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<sup>1</sup> The relevant employer party at the time.

All workers	Grade 1
Coolroom workers	Grade 3
Drivers	Grade 4

- (b) New workers who have previous experience shall commence at the rate appropriate to their level of skill and knowledge under this wages and grading system, clause 4.6.

...

#### 4.6.3 Grade definition clause

“Grade 1	A new worker without previous relevant experience in the dairy industry or less than 1 month’s experience
Grade 2	A worker who has demonstrated competence in routine duties or who has had previous relevant experience in the dairy industry
Grade 3	A worker who has demonstrated competence in all duties allocated to him/her and has performed such duties to a satisfactory level  This grade is the minimum starting grade for those workers employed in the coolroom, chiller or transport
Grades 4 – 7	A worker who can competently perform those tasks classified at this grade in the department
Grades 8 – 10	A worker who is appointed with formal responsibility for staff ...”

- (a) The tasks in each department are identified in the Job Evaluation Manual as per clause 4.6.7 and any subsequently agreed grades.

...

#### 4.6.7 Job Evaluation Manual

(a) The Job Evaluation Manual (JEM) contains copies of all Job Descriptions and Job Evaluations pertaining to each department and will be kept and made available to all workers within that department.

(b) The JEM as signed by both parties on 10 November 2003 is incorporated into this cea. The job evaluation factors currently applied are set out in Schedule D hereof.”

[7] The parties to the cea had agreed to a job evaluation scheme several years earlier. The result was the JEM incorporated into the cea under clause 4.6.7.

[8] The scheme in the JEM incorporated a system for allocating points to particular positions, with primary reference to the job evaluation factors, and included a table allocating a particular grade to a particular range of points.

[9] Accordingly a ‘grading matrix’ in the JEM, and applicable at 28 June 2004, provided that payment would be made at particular grades based on the points awarded through a job evaluation. A table listed pay grades from 1 - 10, together with the range of points attaching to each grade. The grading scheme was further described as follows:

- “1. Grades 1 – 2 are introductory gradings for new workers unless specified elsewhere in the collective employment agreement.
- 2. Grades 1 – 7 are for roles without any leadership or supervisory content, ...
- 3. Grades 8 – 10 require a level of leadership or supervisory duties.”

[10] No points were attached to grades 1 and 2. Ranges of points were attached to the remainder of the grades. Most particularly for present purposes the matrix applicable at 28 June 2004 attributed a grade of 7 to positions with more than 650 points (excluding the leadership or supervisory positions which had a higher grade). A grade of 6 was attributed to positions having 501 – 650 points. These provisions remained the same in a new matrix dated 27 November 2007.

[11] In early 2005 the union and NZDF agreed the grading structure was focussed on a manufacturing environment and was not relevant to a laboratory environment. That is a reference to the fact that the cea (and the JEM) covered workers employed in: the operation of the factories on the Takanini site; certain milk depots; the operation of other specified milk stations and factories; driving; and work incidental to and necessary for the processing and distribution of milk and its products in the specified sites. Accordingly on 21 April 2005 the parties agreed on a variation in the grading structure to be applied to the laboratory (“the 2005 variation”).

[12] The new structure was:

“Position	Grade
Laboratory team leader	9

Senior technician	6
Intermediate technician	5
Junior technician	4
New to lab	3

[13] Mr Shaikh's position was the equivalent of a laboratory team leader.

[14] In support of her overall argument regarding her grading Ms Kovacevic has relied on parts of Fonterra's Quality Assurance Manual ("QAM") which apply to the laboratory. The QAM contains job descriptions for junior, intermediate and senior laboratory technicians, and sets out some qualifications for those positions. It is not part of the cea or the JEM.

[15] A version of the QAM in effect from 31 October 2005 required in summary that: senior technicians have competence in at least 5 routine work areas and at least 3 years' dairy laboratory experience; intermediate technicians have competence in at least 4 routine work areas and at least 2 years' dairy laboratory experience; and junior technicians have at least 6 months' dairy laboratory experience and competence in at least 2 routine work areas, as well as NZCS or a BSc or equivalent in a relevant field. A revised version in effect from 11 June 2007 increased to 4 the years of experience required in a senior technician, while the service qualification for an intermediate technician was increased to 3 years.

[16] Ms Kovacevic placed considerable reliance on these provisions. She says she had acquired the experience and competence set out above, and this was not correctly reflected in her grade.

[17] Finally, Ms Kovacevic invoked a benchmarking exercise conducted for the purposes of the JEM in or about August 2000. The only laboratory position benchmarked was that of senior laboratory technician. Its grading at the time was grade 6. The score for the position was 791.5 points. Ms Kovacevic has assessed her position as attracting a comparable number of points to the benchmarked position, supporting her reasoning regarding her entitlement to a grade of 6.

[18] However the position with which the benchmark is concerned was a supervisory position. Ms Kovacevic's position is not. Secondly, the benchmarked

position was not a grade 6 'senior technician' position of the kind referred to in the 2005 variation, the JEM and the QAM. The benchmarking exercise was by then out of date and inapplicable. In particular, restructuring carried out after the completion of the benchmarking exercise established positions that were not directly comparable with benchmarked positions.

[19] For these reasons I do not accept that the benchmarking exercise is a suitable reference point for Ms Kovacevic's analysis. Her analysis is flawed in that respect.

#### B. Grade attainment

[20] Returning to the cea, clause 4.6.5 provided for grade attainment as follows:

- “(a) Workers will be trained to meet the agreed operation/business need.
- (b) Subsequent to demonstrating competency on their role/position/grade the worker will advance one grade.
- (c) Competency is defined as:
  - i. The ability to operate unsupervised, at least three jobs in the appropriate grade in their department/operation.
  - ii. Where there are less than three jobs in the grade in their department/operation they must be able to operate unsupervised, all jobs within that grade in their department/operation.
- (d) Upon meeting the competency criteria in clause 4.6.5(c) i or ii above, the worker will be paid the grade commensurate with their competency.
- (e) With the exception of grades 1 to 3 workers will be paid at the grade immediately below the grade they are being trained into.
- (f) A worker must be selected for training ...
- (g) Workers in training will be assessed on not more than 12 monthly intervals.”

[21] Ms Kovacevic based only a very small part of her argument on these provisions. They were relied on principally in association with her view of her entitlement to annual increases in grade.

#### C. Qualification payment

[22] The cea provided at cl 4.9 for qualification payments. Ms Kovacevic's tertiary qualification was recognised by such a payment.

## 2. Comparison of the parties' positions on Ms Kovacevic's grade

[23] The following table compares the parties' positions on the appropriate grade for Ms Kovacevic.

Date	Actual grade (Fonterra's view)	Correct grade (Ms Kovacevic's view)
17.5.04	2	3
17.11.04	3	4
18.11.05 <sup>2</sup>	4	5
18.11.06	5	6
18.11.07	6	7

## 3. The development of the dispute about grading

[24] Fonterra says Ms Kovacevic was appointed to a grade appropriate to her at the commencement of her employment and, with some adjustments to be discussed shortly, she progressed through the grades one at a time on an annual basis. Accordingly Mr Shaikh engaged Ms Kovacevic on grade 2, recognising that she was a new worker who had a tertiary qualification in science as well as laboratory experience but that she had no experience in the dairy industry. While her background was strong although specialised in a different area, it remained necessary to apply the definitions in the cea. After 6 months, in November 2004, Mr Shaikh promoted Ms Kovacevic to grade 3 because he believed she was picking up relevant concepts well.

[25] Annual wage reviews were usually conducted in November each year. Mr Shaikh acknowledged that slippage occurred, so that the next annual wage review took place in February 2006 rather than November 2005. He promoted Ms Kovacevic to grade 4 in February 2006.

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<sup>2</sup> Ms Kovacevic says the movements in grading should take effect from the date of the wage reviews which were to occur in November in any year. Fonterra would substitute February of the following year for the November dates set out here and following. I was not asked to determine any issue arising.

[26] Ms Kovacevic approached the union's site delegate, Barry Millett, in August 2006 because she believed she was entitled to a higher pay grade. By letter dated 25 September 2006 and addressed 'To Whom it May Concern' she:

- (a) queried whether she could have been started at grade 3, with reference to her extensive laboratory experience in an alternative field, or whether she could have been moved to grade 3 after an initial period in which she demonstrated her competency;
- (b) queried whether she should have been promoted to 'intermediate technician' (grade 5) in May 2006 given her period of service and because she had achieved competence in 5 work areas;
- (c) queried whether she was eligible for promotion to 'senior technician' (grade 6) in May 2007 given her period of service and because she had achieved competence in 5 work areas.

[27] These queries arose out of Ms Kovacevic's assessment of her position principally in terms of the QAM. The query assumed grading would be determined as a result of the period of service and the competence provisions in the QAM.

[28] Mr Millett approached Mr Shaikh about Ms Kovacevic's concerns. A meeting was held on 12 December 2006 to discuss them. Mr Millett suggested to Mr Shaikh that Ms Kovacevic should have been appointed to grade 3 when her employment commenced. Mr Shaikh agreed to backpay Ms Kovacevic at the grade 3 rate for the six month period May – November 2004 during which she had been on grade 2. He said this was because he was persuaded Ms Kovacevic's previous experience could have been given more weight. He also agreed to a further payment to address the 'slippage' between the next nominal review date of November 2005 and the actual review date of the following February. Payment was calculated as the difference between the grade 3 and grade 4 rates.

[29] According to a note she made the next day, Ms Kovacevic queried during the meeting whether that outcome meant she should now be on grade 5. There was a discussion about the criteria for appointment to grade 5, and Ms Kovacevic presented an argument that she qualified for grade 5.

[30] Ms Kovacevic understood from the meeting that her original starting grade had been assessed in error and her starting grade was to be treated as grade 3 for all purposes. Accordingly, since she was promoted in November 2004, the promotion should have been to grade 4. She should have moved to grade 5 in November 2005, and grade 6 in November 2006. She was dissatisfied with the outcome of the December meeting because she was still on grade 4 (although she was at least due to move to grade 5), when she now believed she should have just attained grade 6.

[31] A second outstanding concern was with apparent discrepancies between her grading and that of some of her colleagues.

[32] Finally, there was a job evaluation review pending. Ms Kovacevic was told that new criteria would be set in association with that review, and if her grading was wrongly assessed she would be backpaid. She found this unsatisfactory as she believed the criteria applicable at the time should be used to ensure she was correctly graded at the time.

[33] The job evaluation review was to be conducted because the JEM was out of date. Natalie Manning, the senior human resources advisor, was to re-evaluate the laboratory positions in association with management representatives including Mr Shaikh, and union representatives including Mr Millett and the laboratory delegate Freddie Herbert. The approach was to analyse the positions with reference to 'bench' (or the places within the laboratory where different roles and tests were conducted) rather than 'role', and with reference to the evaluation factors. Analysis sessions were conducted in discussion with some of the job holders from each position under review, union and management representatives, and Ms Manning.

[34] Using the information obtained points were given for the evaluation factors associated with each bench, and a grade allocated to the bench. There was a correlation between the bench, the grade allocated to it, and the seniority and experience of the technician working at that level.

[35] The result of the review was announced on or about 18 May 2007. Ms Kovacevic was promoted to grade 5. The promotion was backdated to February 2007.

[36] The JEM contained a procedure for appealing against 'a job grading'. Ms Kovacevic exercised the right of appeal available to a job holder by letter dated 25 May 2007.

[37] The appeal was extremely comprehensive. It challenged not just Ms Kovacevic's own job grading, but called into question the constitution and procedure of the group which conducted the evaluation as well as the validity of its overall conclusions.

[38] Ms Manning was to handle the appeal. Despite the comprehensive nature of the appeal, Ms Kovacevic sought a reply on 1 June 2007 and was dissatisfied when she did not receive one. At or about the same time a number of matters came to a head, and Ms Kovacevic's employment relationship problem was filed in the Authority on 29 June 2007.

[39] Ms Kovacevic's appeal has not been determined, pending the determination of this employment relationship problem.

[40] From Fonterra's point of view Ms Kovacevic was eligible for promotion to grade 6 in February 2008.

### **Determination of whether grading was correct**

[41] The 'executive summary' of the submissions on behalf of Ms Kovacevic identified the following key arguments in support of her position on her grading, so I will address the dispute with reference to those arguments. They were:

- (a) since Ms Kovacevic's initial grading had been 'corrected' from grade 2 to grade 3, she should have been promoted to grade 4 in November 2004 and by a further grade in each subsequent year;
- (b) with reference to the terms of the JEM prior to 2007, the correct grade for an intermediate technician is grade 6 and for a senior technician it is grade 7; and

- (c) irrespective of the conclusion in (b) above, grade increases should have occurred at 12-monthly intervals after achieving grade 4 in accordance with the QAM.

[42] I begin by observing that Mr Shaikh said he used the cea to set Ms Kovacevic's grade. I accept his evidence. Moreover it is a fundamental principle that the cea is the guiding contractual document in any circumstances where there is an applicable cea, with the JEM being a secondary contractual document here. If Ms Kovacevic's commencing grade or any other grade was wrongly set, it is necessary to consider this in the first instance with reference to the cea.

#### 1. The 'correction' to Ms Kovacevic's initial grading

[43] In terms of the definitions in clause 4.6.3, without more Ms Kovacevic would have been a Grade 1 worker. She did not have relevant experience in the dairy industry. However since her qualifications and employment history meant she could reasonably be expected to demonstrate competence in routine duties, Mr Shaikh considered grade 2 was appropriate. Grade 3 was not available to Ms Kovacevic from the standpoint of the application of the cea at the time of commencement of her employment.

[44] I do not accept the arrangement reached in December 2006 was an acknowledgement of error. Rather it was an acknowledgement that in practice Ms Kovacevic was able to demonstrate the necessary competence once she started her employment. Although the nature of the arrangement reached in December was discussed and explained during the investigation meeting, Ms Kovacevic has not seen it as a fair and industrially pragmatic resolution where a strict application of the cea was not to her advantage. She has persisted in misconstruing the nature of the arrangement.

[45] In terms of the first of the queries she had raised in her September 2006 letter, she was moved to grade 3 six months after she commenced her employment, because she had demonstrated that competence. The back pay agreed to in December 2006 was recognition that she had demonstrated her competence from the outset, but not a

concession that there was an error in her grade in terms of clause 4.6.3. It was not an adjustment to her grading. It was a payment made in an effort to resolve a problem.

[46] Included in the submissions made under this heading were extensive submissions seeking to compare the starting grades, and movement through the grades, of certain other individuals in the laboratory. Ms Kovacevic is highly qualified and experienced, albeit in an area other than the dairy industry, and believes that some individuals with lower qualifications or less work experience have progressed faster through the grades than she has. She feels this is unfair. While she believes her supporting analysis is objective, I do not agree. It has centred on an interpretation of the papers as Ms Kovacevic sees them, and suffered from refusals to accept certain arguments are misconceived or to accept explanations that cast her analysis in a different light.

[47] The primary focus in determining the appropriateness of Ms Kovacevic's own grading is on the application to her of the cea and the JEM, being the documents with contractual effect. The mere fact that someone else may appear to have been treated differently is not a reason in itself to say the contractual provisions were not correctly applied to Ms Kovacevic.

[48] I add that Ms Kovacevic included in her list of personal grievances a number of concerns about the availability to her of documents she sought. Regarding access to colleagues' assessments and grading, those matters involve personal information. The individuals concerned are entitled to require their privacy to be observed. Because Ms Kovacevic made the matter an issue in this proceeding, the information was produced with accompanying requests that privacy be observed. Ms Kovacevic's complaints about the availability of the associated detail any earlier indicate she has not taken proper account of the reasons why such information might be disclosed in the course of legal proceedings but not otherwise.

[49] Some differences in grade attainment were explained by the effect of the 2005 variation, making grade 3 the starting grade for laboratory workers. It is understandable that someone in Ms Kovacevic's position, having been employed before that change came into effect, might feel aggrieved or disadvantaged as a result.

Unfortunately the result was a function of the changed contractual arrangements and does not involve a breach of obligation by Fonterra.

[50] Other differences were accounted for in that Ms Kovacevic had made her own analysis in respect of particular individuals. I do not accept an analysis of that kind is good reason for saying Ms Kovacevic should have been on a higher grade.

[51] Further differences are accounted for because certain employees whose employment began before Ms Kovacevic's were the subject of 'grandfathering' arrangements. The reasons for arrangements of that kind were discussed at the investigation meeting. The discussion was overlooked entirely in submissions and recourse was again had to detailed argument to the effect that Ms Kovacevic was disadvantaged in comparison with these people. The discussion should not have been overlooked.

[52] Finally there was one named individual, X, whose comparative grading was of particular concern to Ms Kovacevic. X commenced her employment shortly before Ms Kovacevic, but commenced at grade 3 and remained one grade ahead of Ms Kovacevic. X had prior experience in a dairy laboratory. At the same time she was young, and was studying for and eventually obtained a qualification at certificate level. Ms Kovacevic compared this with the level of her own qualification.

[53] The cea does not provide for an assessment of qualifications in setting a grade. The difference in the way the grading of these two women was assessed lies in the relevance of their prior experience. X had direct experience in a dairy laboratory, and was assessed as having demonstrated competence in the duties allocated to her. The difference was adequately explained.

[54] Overall I do not accept that Ms Kovacevic should have been treated as being on grade 3 from the commencement of her employment, and that her promotion in November 2004 should therefore have been to grade 4. To the extent that it rests on this point I do not accept her argument that, assuming she was entitled to annual increases in grade thereafter, she should have been graded as set out in the table at paragraph [23] of this determination. Nor do I accept her argument that, in

comparison with the grade attainment of certain colleagues, she should have attained grade 4 in November 2004 and the failure to recognise this was unfair.

## 2. Correct grades for intermediate and senior technicians

[55] With reference to the structure of the QAM, the view Ms Kovacevic expressed in her September 2006 letter was that she had at least 2 years' experience as at May 2006, was able to carry out and had achieved competence in more than the 4 routine work areas identified in the 'qualifications' provision, so in turn should have had the position of intermediate technician and a grade of 5. The view expressed in submissions was that she should have had that job title with a grade of 6.

[56] The argument is flawed in that the QAM was not a contractual document determining grading criteria and the setting of grades. The documents of contractual application are the cea, the 2005 variation and the JEM. While there is a practical link between the latter two documents on the one hand, and the QAM on the other, it is not necessary to refer to the QAM in order to give meaning to the contractual documents in a contractual context.

[57] The cea, the 2005 variation and the JEM are the documents used to evaluate positions and attribute grades in the context of applicable terms and conditions of employment. The QAM is a quality assurance document required for regulatory and export purposes, not for employment purposes. It is part of a system for confirming to regulators and purchasers of product that certain standards have been met in association with the product. It is not part of a system for setting employees' pay grades. In particular, it does not make years of service a factor in attributing a grade.

[58] The argument as expressed in submissions attracts the further difficulty that the grading structure agreed in April 2005 sets a grading of 5 for an intermediate technician. The 2005 variation has contractual effect and cannot be ignored. Ms Kovacevic sought to address the issue by questioning the validity of the variation, although the employment relationship problem as framed had not raised that issue.

[59] The variation was signed by representatives of the parties to the cea. Mr Millett signed on behalf of the union. During the investigation meeting Ms

Kovacevic sought to challenge Mr Millett's authority to sign the variation. Mr Millett's evidence was that he had such authority. I am not prepared to go behind that evidence.

[60] There was a further submission based on access to grade 7 for a senior laboratory technician. It was said that Ms Kovacevic qualifies as a senior laboratory technician by virtue of her competence and years of experience, and with reference to the grading matrix in the JEM as well as the provisions of the QAM.

[61] Nothing in any of the contractual documents provides for a position of 'senior laboratory technician' with a grading of 7, or for a period of service which would qualify the employee concerned for a grading of 7. Again, Ms Kovacevic's argument is based on the QAM and is flawed in that respect.

[62] The applicable provision is the 2005 variation. It specifies that the position of senior technician has a grading of 6. I do not accept that Ms Kovacevic has any entitlement to a grading of 7.

### 3. Grade increases should have occurred at 12-monthly intervals under the QAM

[63] For the reasons indicated, I do not accept that the QAM makes it a term of Ms Kovacevic's employment that she obtain grade increases at 12-monthly intervals.

[64] Even if the document had contractual application, I would not accept it can be construed in such a way. It sets out the minimum number of years' experience expected in certain positions for quality assurance purposes. It does not include any provision for annual movements in grading.

[65] I do not accept there are reasonable grounds for Ms Kovacevic's concern that the June 2007 amendments to the QAM were made in response to her concerns about grading and were intended to target her. Again I urge Ms Kovacevic to reconsider her way of thinking because it is not well-founded and is causing her unnecessary distress. Aside from the lack of any evidence to that effect, Fonterra did not and does not accept Ms Kovacevic's view of the relevance of years of experience regardless of which version of the QAM is relied on.

[66] Passing reference was made in submissions to clause 4.6.5. Subparagraphs (f) and (g) are not directly applicable to the laboratory and are of more practical relevance to positions in manufacturing. Essentially, informal on-the-job training was provided in the laboratory. Although there was evidence that training needs were monitored, this problem has not been framed with reference to any concern about the nature and availability of training.

[67] In any event, subparagraph (g) provides that workers in training be assessed on not more than 12-monthly intervals, but not that they will move up a grade at those intervals.

#### 4. The outcome of the job evaluation review

[68] Because it has a bearing on Ms Kovacevic's grading from February 2007 I turn now to the outcome of the job evaluation review. As I have said it confirmed that Ms Kovacevic was to move to grade 5 as from February 2007. Ms Kovacevic has appealed.

[69] I consider it arguable that Ms Kovacevic's right of appeal does not extend as far as some of the matters she raised. Even if I am wrong in this, embarking on an appeal of the scope set out in her letter of 25 May 2007 would inevitably cause further delay and distress to Ms Kovacevic and would not assist her state of mind.

[70] Much of Ms Kovacevic's disagreement is with the new assessment framework created as a result of the review. Many of the points of disagreement amount to a disagreement about the fundamental nature of the new framework. I doubt it is open to Ms Kovacevic to challenge that outcome, as distinct from the result of her own assessment, through the appeal process.

[71] The letter in support of the appeal went as far as to say that the position of senior laboratory technician - as benchmarked in 2000 - should have been used as a comparator when determining the grade point scores for intermediate and junior laboratory technicians. For reasons already discussed that argument is misconceived and should be abandoned. In addition Ms Kovacevic said the grade scores for

laboratory technicians did not correlate to the jobs performed; and there was an increased qualifying period for the positions of intermediate and senior technician, when the periods were well established in the Quality Assurance Manual (“QAM”). I have also commented on the application of the QAM.

[72] Overall I consider it likely the challenges to the wider framework and scoring system are more appropriate issues for the union and the employer to address.

[73] Finally, following an assessment she performed using the approach she believed should have been used, Ms Kovacevic identified grade 6 as an achievable grade both for junior and intermediate laboratory technicians. While again it is probably not appropriate for Ms Kovacevic to use her right of appeal in the JEM to seek to review the scoring system in relation to grade 6 positions, or to the general grading for junior and intermediate positions, it is open to her to argue that she qualifies for a grade 6 position.

## 5. Conclusion

[74] I am not persuaded that Ms Kovacevic’s grade up to and including grade 4 was set in error.

[75] The question of whether a grade of 5 or 6 was correct as from February 2007 should be dealt with as part of Ms Kovacevic’s appeal against the result of the job evaluation review. Accordingly I adjourn that matter to be resolved as part of the appeal process.

[76] In that respect I suggest that Ms Kovacevic take into account that her arguments should centre on her own competency, with reference to the JEM and the cea. Most of the arguments she has raised have distracted from what should have been her core argument, as well as delayed the resolution of this problem and caused unnecessary distress.

[77] Finally, even if grade 6 was the correct grade for Ms Kovacevic as at February 2007, I do not accept that grade 7 is open to her under her terms and conditions of employment.

## The personal grievances

[78] To establish a personal grievance in the legal sense, Ms Kovacevic must establish that the concerns she has raised fall within the statutory definition of a personal grievance. The relevant provision is s 103(1)(b) of the Employment Relations Act 2000, which reads:

“(1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee’s employer ... because of a claim –

- (a) ...
- (b) that the employee’s employment, or 1 or more conditions of the employee’s employment .... is or are or was ... affected to the employee’s disadvantage by some unjustifiable action by the employer; or
- (c) ..”

[79] Fonterra says Ms Kovacevic did not raise her grievances within the 90 day period contained in s 114(1) of the Act, and it does not consent to their being raised. The number of concerns Ms Kovacevic raised, and the way in which they were raised, made it difficult to identify which of them fell within s 103(1)(b) and how. It was in turn difficult to identify what, if any, issues arose under s 114(1) although attempts were made to clarify these matters. Since the attempts were not successful, in order to advance the investigation and gain a better appreciation of the nature of the grievances in their proper legal context I proceeded to hear evidence about them.

[80] The result means it is not necessary to address matters arising under s 114.

[81] The concerns underlying the personal grievances started with Ms Kovacevic’s dissatisfaction with the result of the December 2006 meeting. Thereafter there was a compounding effect, with increasing numbers of minor incidents adding to her dissatisfaction and being perceived as an attempt to punish her or create a reason to dismiss her. It is in Ms Kovacevic’s interests to abandon that way of thinking. It is destructive of her peace of mind, and is preventing her from bringing a realistic perspective to ordinary incidents.

[82] I record, too, that the approach to the raising of the grievances led me to ask at the investigation meeting for express confirmation of what was being said to amount to a grievance under s 103(1)(b). I have addressed the grievances with reference to that discussion.

#### 1. Provision of thermal protection for chiller checks

[83] The laboratory technician's duties included carrying out 'chiller checks'. The 'chiller' in question was a freezer unit used in the laboratory for laboratory purposes. Although technicians would visit it from time to time, whether to check it or for other reasons, only minutes at a time were spent in it. It was not the 'coolroom' which is the subject of the requirements in clause 9.6 of the cea.

[84] Because general health and safety obligations applied in any event, protective equipment including a polar fleece jersey, gloves and a cap were provided for use in the chiller. However Ms Kovacevic is physically small, and the jersey was too big for her. She did not raise the problem for over a year. Being unaware of the problem at the time, Fonterra's management cannot be held to account for it.

[85] The resulting inadequate thermal protection exacerbated a medical condition to the point that Ms Kovacevic was unable to conduct the chiller checks. In March 2006 she presented a medical certificate which referred to her medical condition and recommended that she avoid the 'freezer'. In June 2006 she presented a further medical certificate in respect of a second medical condition, saying the condition was exacerbated by cold conditions. Following a meeting of those involved, by agreement the other technicians on Ms Kovacevic's shift would carry out her chiller duties and she would perform certain of their duties in return.

[86] In January 2007 a new employee, who had not participated in the agreement reached the previous year, was one of two laboratory technicians who approached Mr Shaikh to express dissatisfaction that not all technicians were conducting chiller checks.

[87] Only in the aftermath to that approach did Ms Kovacevic raise the adequacy of the thermal protection available to her. In a letter dated 2 May 2007, to which I refer

again below, she acknowledged the general availability of thermal protection but asserted that she had been issued with an over-sized polar fleece jersey. She suggested that the chiller check issue could be resolved by providing her with protective clothing which fitted her. That was a sensible suggestion on which Mr Shaikh acted.

[88] Within only a few months, a restructuring meant that the laboratory technicians no longer carried out chiller checks at all.

[89] Ms Kovacevic's failure to raise the problem when she could have, and the attention it was given when it was eventually raised, mean I do not accept there was any unjustified action on the part of the employer in respect of this matter.

## 2. Review of arrangements for chiller checks - the letter of 12 April 2007

[90] In response to the approach from the two technicians, by letter to Ms Kovacevic dated 12 April 2007 Mr Shaikh referred to the fact that her colleagues were taking her share of the chiller work, and requested an update of the medical certificate. Mr Shaikh also asked that Ms Kovacevic attend the company's occupational health specialist.

[91] Ms Kovacevic responded in a letter dated 2 May 2007. She believed the matter of the chiller checks had been resolved, and said in her letter that: "... the intention of the [12 April] letter can have no other objective but to unfairly and without justification start a formal process of either restricting my advancement as a laboratory technician, or to initiate the first stage of a process to dismiss me."

[92] That perception was not the reality. As was explained to Ms Kovacevic at the time, the intention of the letter was to review the ongoing suitability of the arrangement regarding the chiller checks. Ms Kovacevic had made her performance of chiller checks a medical issue. Mr Shaikh was entitled to continue to treat it as such and seek updated information. Ms Kovacevic was also told of the approach from her colleagues, although they were not named. She sought to argue the point but I find that Mr Shaikh was entitled to seek the review he did, and was not obliged to enter into further debate of the kind Ms Kovacevic sought to commence.

[93] I do not accept there was any unjustified action on the part of the employer in respect of this matter.

### 3. Failure to offer call backs

[94] 'Call backs' are provided for at clause 3.7 of the cea. The provision applies when an employee is required to work on a rostered day off, and provides for payment at higher than ordinary rates of pay. The person usually responsible for arranging callbacks for the shift on which Ms Kovacevic worked was Mr Herbert. While Ms Kovacevic made the generalised assertion that she received fewer call backs than her colleagues, she was unable to establish any unfairness in the general allocation of call backs. Although there was some imbalance, this was explained by the nature of the shift on which she worked.

[95] Ms Kovacevic's key concern was that, on 29 March 2007 she asked Mr Shaikh for a call back she knew was available on 3 April. Mr Shaikh told her he did not have a roster in front of him, but would get back to her. It came to her attention on 31 March that she had not been assigned to any of the four call backs available on the relevant roster. When she questioned Mr Shaikh about this, he advised that two of her colleagues did not wish to work with someone who was not conducting chiller checks. The two people involved were the two who had expressed dissatisfaction earlier that year with the allocation of chiller check duties.

[96] Ms Kovacevic did not accept Mr Shaikh's response. She understood that her colleagues were happy with the resolution of the previous year. She perceived that either someone else was receiving favourable treatment, or the chiller check issue was being used to apply pressure on her because she was questioning her grade advancement.

[97] Again the perception was not well-founded. The reason for not offering Ms Kovacevic that callback was the one given by Mr Shaikh. I do not accept this was an unjustified action on his part.

### 4. Delays and failures to respond to Ms Kovacevic's concerns

[98] Ms Kovacevic's concerns about delays and failures to respond arise in respect of the aftermath to the December 2006 meeting. The delays referred to in submissions were:

- (a) being told in December 2006 that she would be informed of her 'resolution' in February 2007;
- (b) being 'forced' into waiting until May 2007 for the completion of the job evaluation review before Fonterra would talk to her about her issues;
- (c) having the request to meet in June 2007 refused, with Fonterra 'insisting' that Ms Kovacevic go on holiday first; and
- (d) the use of delaying tactics when an investigation meeting scheduled for 17 and 18 December was adjourned.

[99] In December 2006 Ms Kovacevic was asked to await the result of the job evaluation review before the correctness of her grading was finalised. It is unfortunate that it was several months before the result was available, but I do not consider Fonterra's actions in that respect were unfair or unjustified.

[100] Secondly, the result was that Ms Kovacevic was graded at 5 and received back pay. In that respect at least she was not disadvantaged as a result of the delay. Any disadvantage lay in her increasing impatience and the stress associated with that. I do not accept the impatience was caused by an unjustified action of Fonterra's.

[101] Regarding the allegation in (b) above, I do not accept that Ms Kovacevic was 'forced' to wait until May 2007 before the company would discuss her issues with her. To the extent that her issues concerned grading, it was appropriate to await the outcome of the job evaluation review. She sought to debate some of her issues again in the course of Mr Shaikh's attempts to address the chiller check issue. As I have found, she was not entitled to insist on expanding the matters to be addressed in the way she did.

[102] Regarding the allegation in (c) above, in a letter dated 18 April 2007 Ms Kovacevic sought to postpone a period of some 5 weeks' leave scheduled to commence in June 2007. She referred to her letter of September 2006, and the

meeting of December 2006. Although she acknowledged that the job evaluation process was continuing, she remained concerned that her queries about grading had not been resolved. She believed it would be inappropriate to take leave with these matters remaining unresolved. The request was declined with reference to the applicable provisions in the cea, and on the ground that Ms Kovacevic had accrued a significant amount of untaken annual leave.

[103] In a letter dated 14 May 2007 Ms Kovacevic raised the matter again. She considered it necessary to remain at work in order to pre-empt the possibility of further delays in the resolution of her grading issue. She said it would help reduce her stress if she did not take the leave. However by then Ms Kovacevic had become so sensitised to even minor incidents that I consider the assertion to be unrealistic.

[104] The reply, by message dated 21 May 2007, was that Mr Shaikh declined to reconsider his decision. The response accorded with the leave provisions in the cea and was justified. Ms Kovacevic found it unsatisfactory. She incorporated it in her overall fears and concerns about the way in which her issues were being addressed.

[105] By letter dated 5 June 2007 Ms Kovacevic raised her concerns with Fonterra's employee relations manager. The letter was very long and detailed, and Ms Kovacevic required a response before she took her leave, 5 days later.

[106] Fonterra's response was forwarded in a letter dated 7 June 2007. It reconfirmed that Ms Kovacevic should take her leave, and gave undertakings: to meet with Ms Kovacevic at a convenient time on her return from leave; and that Ms Kovacevic would not be prejudiced as a result of any lapse in time from the receipt of her 5 June letter and the provision of a reply.

[107] I do not accept that the response was unjustified, or amounted to an unjustified action delaying the resolution of Ms Kovacevic's concerns. Ms Kovacevic's opinion was that the requirement that she take leave would delay the process to a point where a fair opportunity to have her case heard and determined in good faith was exhausted. I do not accept that opinion was well-founded.

[108] By letter dated 8 June 2007 Ms Kovacevic requested mediation. Although there have been ongoing attempts at obtaining a mediated resolution since then, the employment relationship problem has remained unresolved.

[109] Overall, the delay in resolution of Ms Kovacevic's concern about grading is most closely associated with the time taken to complete the job evaluation review. While any employee would wish the process to be completed as soon as possible, the process was thorough and time consuming and there was nothing about the time it took which was not reasonably explained. Ms Kovacevic was deeply frustrated by the wait, but I do not accept the circumstances overall involved unjustified actions amounting to a personal grievance.

[110] I do not accept, either, that Fonterra failed to respond to Ms Kovacevic's concerns. It did respond, but not in a way Ms Kovacevic found satisfactory. Its actions were not unjustified.

[111] Finally, with reference to the allegation in (d) above, the decision on the adjournment was the Authority's. I do not accept that the request for the adjournment was a delaying tactic. As for the reasons for granting the adjournment, there remained the unresolved difficulty with the framing of the personal grievances and matters arising out of s 114. More importantly, further mediation was suggested at the time and the associated discussion was generally positive. That itself is good reason for granting an adjournment particularly in the light of the Authority's statutory obligations regarding the possibility of mediation. Further mediation was subsequently attempted but the employment relationship problem remained unresolved.

##### 5. Additional matters raised in submissions

[112] There was a discussion during the investigation meeting of Ms Kovacevic's view that Fonterra was taking steps with a view to dismissing her. I found at the time that evidence on which Ms Kovacevic was relying in support of her perception did not support the conclusion from an objective point of view. This was particularly so with reference to an emailed message produced as BOD 15.

[113] The matter was raised again in submissions. I repeat the finding that I do not accept that email, or other material relied on, supports a conclusion that Fonterra was taking a first or any step towards dismissing Ms Kovacevic. If Ms Kovacevic has fears or perceptions to different effect, then again I urge her to put them aside.

[114] There were also submissions regarding Fonterra's failure to respond to Ms Kovacevic's concerns about stress. I accept that, in the course of the correspondence in which she raised her issues, Ms Kovacevic referred variously to the fact that these issues were causing her to be distressed, and to feel anxious and stressed.

[115] Put that way, the feeling of stress was associated with the attempts to deal with the issues in question, rather than being the issue itself. It was not raised as a matter requiring attention in itself. Satisfactory resolution of the issues being raised would address the feelings of stress.

[116] Finally, there were several complaints about the availability of documents. I have already referred to information about colleagues' assessments and grading. I accept that, for various reasons, other documents were not available to Ms Kovacevic when she required them. I do not accept that anything in these matters is capable of amounting to a personal grievance.

## 6. Conclusion

[117] For the reasons discussed above, even aside from the issues arising under s 114 I would not accept Ms Kovacevic has established a personal grievance in respect of the matters she has raised.

## **Costs**

[118] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking an order from the Authority shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority