

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 650
3270781

BETWEEN MARK MCKENZIE
Applicant

AND FONTERRA CO-
OPERATIVE GROUP
LIMITED
Respondent

Member of Authority: Alex Leulu

Representatives: Applicant in person
Rebecca Rendle and Rachel Nightingale, counsel for
the Respondent

Investigation Meeting: On the papers

Submissions and further information received: 4 June, 2 July, 19 July, 26 July, and 20 August 2024,
from the Applicant
25 June, 26 June, 19 July, and 13 August 2024, from
the Respondent

Determination: 01 November 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 20 October 2023 Mark McKenzie was dismissed for serious misconduct by Fonterra Co-Operative Group Limited (Fonterra). Mr McKenzie claimed his dismissal was unfair and lodged an application against Fonterra at the Authority for unjustified dismissal and unjustified disadvantage.

[2] As part of his claims, Mr McKenzie also sought an order from the Authority to exercise its discretion to reinstate him to his previous role for Fonterra on an interim basis (interim reinstatement application).¹

¹ Employment Relations Act 2000, s 125.

[3] Fonterra opposed Mr McKenzie's interim reinstatement application. It also opposed several of Mr McKenzie's grievance claims because it said they were not raised within the statutory 90-day time frame.²

The Authority's investigation

[4] The Authority convened a case management conference (CMC) with the parties on 21 May 2024. During the CMC it was agreed for both Mr McKenzie's interim reinstatement application and Fonterra's 90-day dispute to be dealt with on the papers. This determination is in respect of those matters.

[5] For the Authority's investigation, written affidavit evidence was lodged by Mr McKenzie and Fonterra environmental manager, Kevin Wood. This evidence was accepted on an untested basis but assessment of unanswered or disputed assertions in those sworn or affirmed statements may be made on a common-sense basis when considering whether to order interim reinstatement.³

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

[7] Prior to issuing this determination, the Authority resolved an issue between the parties relating to the inclusion of privileged information provided to the Authority. For completeness, another Member of the Authority determined that issue.

Context

Mr McKenzie's initial employment and toe injury

[8] Mr McKenzie first started his full-time employment for Fonterra in 2015 as an environmental operator based in Edgecombe. Mr McKenzie's role required him to work on various types of terrain associated with the dairy industry. From 2017, Mr McKenzie reported to Fonterra irrigation officer, Joe Richards. Mr Richards reported to Mr Wood.

[9] On 22 December 2018 Mr McKenzie suffered a toe injury while at work. As a result, he spent a significant amount of time off work due to ongoing complications

² Employment Relations Act 2000, s 114.

³ *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17]-[18].

relating to his recovery. He eventually returned to work on full duties in August 2022. Around this time, Mr McKenzie was assigned special gumboots which were to provide him with adequate support while he performed his work duties.

Mr McKenzie's ankle injury

[10] On 9 November 2022 Mr McKenzie suffered an ankle injury while at home. Up until June 2023, Mr McKenzie took time off work as part of his recovery. After that time, he also returned to work on restricted hours and on limited duties.

[11] This employment relationship problem relates to disagreements between the parties from the time of Mr McKenzie's ankle injury up until the end of his employment. The parties generally disagree on aspects of the following actions by each party:

- (a) Mr McKenzie's disclosures to Fonterra, ACC, and his physiotherapist about his ankle injury;
- (b) Fonterra requiring Mr McKenzie to be assessed by an independent medical assessor (IME) in February 2023; and
- (c) Mr McKenzie obtaining full clearance to return to work on 8 March 2023 and Fonterra not allowing his return until around May or June 2023.

[12] On 8 March 2023 the IME reported to Fonterra confirming Mr McKenzie had fully recovered from his ankle injury. The IME advised for Mr McKenzie to wear new suitable boots which were not gumboots (new boots).

[13] In an email from Mr Richards to him on 8 March 2023, Mr McKenzie said he was told not to attend work until Fonterra was able to confirm a plan for his return to work. As a result, Mr McKenzie said he did not return to work until around May 2023. Mr McKenzie claimed he was suspended by Fonterra during this time.

Dishonesty allegation

[14] Mr McKenzie was invited to meet with Mr Richards and Mr Wood on 24 July 2023 (24 July meeting). Upon attending the meeting, he was given a disciplinary meeting invitation letter. The purpose of the disciplinary meeting was to discuss a dishonesty allegation against Mr McKenzie for discrepancies in his disclosures about his ankle injury to Fonterra, ACC, and his physiotherapist. The discrepancies included

Mr McKenzie disclosing his ankle injury to ACC as a work-related injury (as opposed to the injury sustained at home).

[15] During the 24 July meeting, Mr McKenzie explained the discrepancy as a document error by ACC. Fonterra considered and appeared to agree with Mr McKenzie's explanation when it then decided to take no further action.

25 July 2023 meeting

[16] On 25 July 2023 Mr McKenzie was called by Mr Wood to confirm Fonterra's decision not to proceed with a disciplinary meeting. During the phone call Mr McKenzie told Mr Wood he still wanted to meet with Fonterra. The meeting took place on the same day and was attended by Mr Wood, Mr McKenzie, and his support person (25 July meeting). Mr McKenzie specifically asked for Mr Richards not to attend the meeting.

[17] During this meeting, Mr McKenzie raised a number of issues including his concerns about how Fonterra treated his ankle injury and the requirement to wear his new boots. In raising these concerns, Mr McKenzie claimed he had made a protected disclosure for the purposes of the Protected Disclosures Act 2014.

First disciplinary matter

[18] On 2 August 2023 Fonterra invited Mr McKenzie to a further disciplinary meeting. The purpose of the meeting was to address an allegation against Mr McKenzie for failing to wear his new boots while conducting his work.

[19] The disciplinary meeting took place on 7 August 2023 and on 14 August 2023, Fonterra confirmed to Mr McKenzie a proposed sanction of a final warning.

[20] On 14 August 2023 Fonterra invited Mr McKenzie to attend a further meeting to discuss its proposed sanction of a final warning in respect of the first disciplinary matter. On 24 August 2023 Mr McKenzie attended the meeting with a support person where Fonterra's grounds for its proposed actions were discussed. It appears from the evidence that no decision was reached on the day.

[21] At the end of the meeting, Mr Richards made a further allegation against both Mr McKenzie and his support person. The allegations were in respect of a separate

matter which resulted in Mr Richards issuing Mr McKenzie (and his support person) with a verbal warning. The warning was confirmed later in an email from Mr Richards to Mr McKenzie and his support person on 29 August 2024.

[22] Later on the same day, Mr Richards contacted McKenzie and asked him to attend to a work shift for the next day. Mr McKenzie did not attend the shift.

[23] After considering Mr McKenzie's response to its allegations and its proposed sanction for the second disciplinary matter, Fonterra formally issued Mr McKenzie with a final warning on 30 August 2023.

[24] On 31 August 2023 Fonterra invited Mr McKenzie to attend a second disciplinary meeting for failing to attend his assigned shift on 24 August 2024. After receiving the invitation Mr McKenzie went on sick leave. This led to a delay as to when the disciplinary meeting was due to take place. During this delay, Mr McKenzie provided Fonterra with a written response to the allegations against him on 21 September 2023. In his response, Mr McKenzie disputed whether Fonterra's request for him to attend the assigned shift was a reasonable instruction.

[25] On 4 October 2023 Fonterra said it had considered Mr McKenzie's written response and confirmed its decision to issue Mr McKenzie with a preliminary decision to summarily dismiss him from his employment.

[26] Fonterra confirmed its decision to summarily dismiss Mr McKenzie on 20 October 2023. On 27 November 2023 Mr McKenzie raised personal grievances with Fonterra for unjustified dismissal and unjustified disadvantage. Mr McKenzie lodged his claims with the Authority on 20 December 2023. This also included his application for interim reinstatement.

Did Mr McKenzie raise his personal grievances within 90 days?

Fonterra's position

[27] Fonterra argued several of Mr McKenzie's grievance claims were raised outside the statutory 90-day period. In a memorandum to the Authority on 21 May 2024, Fonterra said the following unjustified disadvantage claims by Mr McKenzie were raised outside the 90-day period:

- (a) he was unjustifiably suspended from 9 March 2023;

- (b) he was bullied by his manager, Mr Richards in 2017 and 2018;
- (c) Fonterra initiated a disciplinary process against him on 24 July 2023; and
- (d) he was allegedly discriminated against in his employment, due to a perceived disability.

The statutory requirements

[28] An employee must raise its personal grievances with their employer within 90 days from when the alleged personal grievance action occurred or came to the notice of the employee, whichever is the latter.⁴ Alternatively, an employer can consent to the raising of a personal grievance outside of the 90-day period. In this case, Fonterra had not consented to Mr McKenzie’s grievances being raised outside the 90-day period.

[29] A personal grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This process provides an employer with sufficient notice to be able to appropriately respond to the grievance.⁵

[30] The Employment Court has identified several principles relevant to whether a personal grievance has been raised in accordance with the Act. These principles are summarised as follows:⁶

- (a) The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing, and there is no particular formulation of words that must be used.
- (b) Whether a grievance has been raised for the purposes of s 114(2) of the Act is to be objectively determined having regard to the facts of each case. The test is, “whether to an objective observer the communication was sufficient to elicit a response from the employer.”
- (c) There is no requirement that the grievance be raised in writing, and it may be established by a “totality of communications.”

⁴ Employment Relations Act 2000, s 114.

⁵ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

⁶ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2009] NZEmpC 35, at [36] to [38]; *Idea Services Ltd (in statutory management) v Barker* (2013) 10 NZELR 262, at [39] and [41]; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 30; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] 1 ERNZ 139; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517.

- (d) The level of detail required is not such as would be required in, for example, a statement of problem.
- (e) The substance of the grievance must be made clear, but an employee is not required to specify the type of relief sought.
- (f) Merely advising an employer that the employee has a personal grievance or specifying the statutory type of grievance without more detail, will be insufficient.

Unjustified suspension allegation

[31] Mr McKenzie said he had received full clearance from the IME and Fonterra's occupational nurse to return to work from his ankle injury on 8 March 2023. As previously stated, Mr McKenzie said he was suspended by Fonterra when Mr Richards told him not to return to work.

[32] Mr McKenzie claimed he raised a personal grievance with Fonterra on 24 May 2024 (24 May email) when he copied Mr Richards and Mr Wood into his email to his union representative which included the following:

I note that I was officially suspended from my employment on this date without proper process or reasoning. This action was implemented after being given a medical clearance from the practitioner Fonterra elected to send me to when they cast aspersions on the integrity of my own Doctors clearance. That clearance was given with advice from Fonterra Edgecumbe's preferred physiotherapist provider to which Fonterra was made aware of.

There have been numerous clear inconsistencies of information utilised by Fonterra to warrant its actions in suspending me from my employment ...

[33] Fonterra denied Mr McKenzie's claims of being suspended and said Mr McKenzie did not directly raise a personal grievance with it (as it was copied into an email for someone else). As a result, Fonterra said the suspension allegation was first raised directly with Fonterra when Mr McKenzie raised his personal grievance on 27 November 2023.

[34] Mr McKenzie should have directly raised his suspension grievance claim with Fonterra. However, the detail of Mr McKenzie's views as expressed in his 24 May email clearly set out his view he was suspended and why he believed he was suspended.

[35] The detail of the 24 May email should have sufficiently alerted Fonterra of Mr McKenzie's suspension allegations against the company. The email was sent 77 days

from when he said he was unlawfully suspended. Accordingly, Mr McKenzie's claim for unjustified suspension was raised with the statutory 90-day time frame.

Bullying allegations

[36] Mr McKenzie claimed he was bullied by Mr Richards in 2017 and 2018. He said he had raised a grievance about being bullied during the 25 July phone call between him and Mr Wood. During the phone call he told Mr Wood he did not want Mr Richards present at the 25 July meeting. He also said the 'totality of communications' between him and Fonterra around this time gave rise to him raising his grievance for bullying.

[37] There was insufficient evidence to show Mr McKenzie had appropriately raised his bullying allegations against Mr Richards for his actions in 2017 and 2018. Although the evidence indicated a strained relationship between them, the evidence does not show a bullying claim was made by Mr McKenzie to Fonterra. For these reasons Mr McKenzie's bullying claims fall outside of the statutory time frame.

[38] It should be noted also Mr McKenzie appeared to acknowledge his bully claims were not intended as a formal claim against Fonterra. In his evidence he described his bullying allegations as "background" to his claims.

Discrimination claim

[39] As a result of his ankle injury, Mr McKenzie claimed Fonterra's actions amounted to discrimination for a perceived disability as set out under the Act.⁷ The detail of Mr McKenzie's claim was set out in his personal grievance letter where he referred to a number of examples relating to the IME process.

[40] Fonterra said Mr McKenzie's claim was out of time because the IME process ended when the assessment was issued in March 2023. This was well before Mr McKenzie raised his personal grievance (on 27 November 2023). In response, Mr McKenzie argued the IME process had not formally ended and Fonterra failed to properly discuss the result of the IME report with him.

⁷ Employment Relations Act 2000, s 131(1)(c).

[41] Based on the available evidence, the IME process ended around the time the IME issued its report on 8 March 2023. However, the IME contained a recommendation for Mr McKenzie to wear his new boots. His failure to wear his new boots was a key reason for this disciplinary process leading to his final warning.

[42] When referring to his allegation of discrimination in his personal grievance letter, Mr McKenzie stated the following:

Despite a PPE recommendation by the IME ... that pertained to all workers, it has only been enforced on me. The enforcing of this condition on my employment without the PPE meeting the requirements as listed by the IME was unfair treatment.

[43] The 'enforcement' referred to by Mr McKenzie should be interpreted to include Fonterra's disciplinary action against him for not wearing his new boots. This led to Fonterra issuing Mr McKenzie with a final warning on 30 August 2023. Mr McKenzie's personal grievance letter (of 27 November 2023) was within the 90-day statutory time frame by one day. Accordingly, the Authority has jurisdiction to investigate Mr McKenzie's discrimination claim.

Disciplinary process 24 July 2023

[44] In his statement of problem Mr McKenzie claimed he was unjustifiably disadvantaged when Fonterra initiated a disciplinary process on 24 July 2023. He also said Fonterra's actions were not fair and were unreasonable.

[45] Mr McKenzie referred to his transcript of the 25 July meeting where he asked Mr Wood why the issues which led to the dishonesty allegation were not addressed earlier. In terms of the dishonesty allegations the transcript also recorded a statement from Mr McKenzie saying the following:

there was an official letter from Fonterra starting the IME process stated that they were aware I had a home injury, an injury that happened at home, so you have these two varying versions, you have a, oh we've found out that you're lying to us and this was a work injury and then you have an official letter from Fonterra saying we know it's a home injury and we really want you to carry on working for us, you know, these things, they don't align.

[46] Fonterra opposed Mr McKenzie's claim saying these comments did not amount to the raising of a personal grievance because there was insufficient information for it to address Mr McKenzie's alleged personal grievance.

[47] There was an onus on Mr McKenzie to articulate what issue he wanted Fonterra to address.⁸ In this case, the transcript showed he had questioned why there was a delay in Fonterra acting on the information (leading to dishonesty allegation) and the conflict between the two communications he received from Fonterra (one acknowledging a home injury while the other making an allegation for dishonesty).

[48] However, it was unclear from Mr McKenzie's statements about what alleged disadvantage he suffered because of Fonterra initiating a disciplinary process on 24 July 2023. As a result, it was also unclear what actions Fonterra needed to consider to address his alleged grievance. For these reasons Mr McKenzie's grievance claims in respect of the 24 July 2023 disciplinary process fell outside the statutory time frame.

Mr McKenzie's interim reinstatement application

Interim reinstatement principles

[49] The Authority has jurisdiction to grant interim reinstatement.⁹ When determining whether to order interim reinstatement, the Authority must have regard to the object of the Act to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and employment relationship.¹⁰

[50] When considering interim reinstatement, the following three step process applies:

- (a) Does Mr McKenzie have an arguable case for unjustified disadvantage, unjustified dismissal, and permanent reinstatement?
- (b) Where does the balance of convenience lie? This includes looking at the relative detriment or injury each party would incur because of an interim reinstatement decision.
- (c) To ascertain where the overall justice of the case lies until the substantive matter can be determined.

⁸ *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 at [420].

⁹ Employment Relations Act 2000, s 127.

¹⁰ Employment Relations Act 2000, s 3.

Arguable case of unjustified disadvantage and unjustified dismissal

Mr McKenzie's argument for an arguable case

[51] For an application for interim reinstatement, establishing an arguable case for unjustified dismissal (or a disadvantage) has a low threshold. The threshold being whether there is a serious question or arguable case to be considered and the claim is not frivolous or vexatious.¹¹

[52] As confirmed earlier in this determination, Mr McKenzie's alleged suspension and discrimination claims were determined to have been made within the statutory time frame. Mr McKenzie's other grievance claims against Fonterra were:

- a) Whether Fonterra's disciplinary actions (leading to his dismissal) were in retaliation to Mr McKenzie's alleged protected disclosure to Mr Wood during the 25 July meeting;
- b) An unjustified disadvantage claim relating to Fonterra's decision and actions in respect of its disciplinary warnings issued against him in the form of a verbal warning on 24 August 2024 and a final warning on 30 August 2024; and
- c) An unjustified dismissal claim in respect of Fonterra's decision to dismiss him from his employment.

[53] Mr McKenzie referred to several grounds as to why he had an arguable case for both unjustified disadvantage and unjustified dismissal. In summary, his arguments fell into the following categories:

- (a) claims against Fonterra for various alleged procedural deficiencies associated with both its disciplinary processes leading to Mr McKenzie's dismissal;
- (b) claims related to Fonterra's actions in relation to the IME assessment and the requirements imposed on Mr McKenzie to wear his new boots; and
- (c) Fonterra's reliance on factors associated with Mr McKenzie's 2018 toe injury.

Fonterra's arguments opposing Mr McKenzie's claims of an arguable case

[54] In response to Mr McKenzie's claim Fonterra said its decision to dismiss Mr McKenzie was justified and appropriately considered Mr McKenzie's final warning for similar conduct, his alleged lack of remorse and lack of insight into his conduct.

¹¹ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

[55] Fonterra also said its process in dismissing Mr McKenzie was procedurally fair including its decision to designate Mr Wood as its decision maker during Mr McKenzie's disciplinary matters.

[56] Fonterra also disputed Mr McKenzie's claim for making a protected disclosure claims because it said it was not made in accordance with Fonterra's internal processes. It also opposed Mr McKenzie's retaliation claims because it said Mr Wood was not aware of Mr McKenzie's protected disclosure until after Mr McKenzie was dismissed.

Does Mr McKenzie's have an arguable case for unjustified disadvantage and unjustified dismissal?

[57] To some degree, Mr McKenzie's various grievance claims relate to Fonterra's processes and actions taken in relation to Mr McKenzie's ankle injury. Given the nature of the dispute between the parties in relation to Fonterra's actions (and the alleged reasons for these actions), further examination is required to ascertain the reasonableness of these actions. The Authority is satisfied Mr McKenzie's claims meet the low threshold of an arguable case for his personal grievances against Fonterra.

Arguable case for permanent reinstatement

[58] Mr McKenzie must not only establish an arguable case for unjustifiable dismissal and unjustified disadvantage, but he must also establish that he would be reinstated if successful in his claims. This is also a low threshold and requires the Authority to consider whether re-imposing Mr McKenzie into the employment relationship is practicable and reasonable.¹²

[59] Mr McKenzie said his reinstatement to his previous role for Fonterra would be practicable because his skills and experience were valuable to Fonterra and his return would not cause any undue hardship to the company. He also said he was fully fit to return to his work duties and relied on the IME report to confirm his ability to return.

[60] Fonterra claimed it had a strong case against Mr McKenzie's claims for permanent reinstatement because:

¹² Employment Relations Act 2000, s 125(2).

- (a) Mr McKenzie had not been employed by Fonterra since 20 October 2023 and prior to his dismissal he was unable to perform his full duties for approximately three and a half years. During his last period of work, he had over a year's worth of contracted hours off work.
- (b) As a result of his alleged actions leading to Mr McKenzie's dismissal (and the seriousness of the allegations), Fonterra claimed it had lost all trust and confidence in him and relied on its allegations against Mr McKenzie for failing to follow reasonable instruction leading to his final warning and his dismissal. Fonterra said there was a risk of this behaviour continuing upon his return to the workplace.
- (c) Mr McKenzie's delay in filing his claim for reinstatement contributed to the practical difficulties in reinstating him at this stage.

[61] The onus of proof of practicability also rests with the employer.¹³ In this case Fonterra submitted Mr McKenzie did not have an arguable case for permanent reinstatement because there were no current roles or vacancies available for him to return to.

[62] Due to health and safety requirements such as training and provision of safety equipment, Fonterra also said it would be expending considerable time and resource to allow Mr McKenzie to properly return to the workplace in accordance with its internal policies.

Does Mr McKenzie have an arguable case for permanent reinstatement?

[63] Although Mr McKenzie attained considerable experience through his previous work tenure for Fonterra, he had not carried out any consistent work for Fonterra for a significant period of time. There was also some doubt as to whether Mr McKenzie could physically return to the workplace and carry out his role safely.

[64] However, as a well-established organisation, Fonterra should be able to work with Mr McKenzie to potentially accommodate his return to the workplace. For this reason I accept Mr McKenzie has a weakly arguable case for permanent reinstatement.

¹³ *Lewis v Howick College of Board of Trustees* [2010] NZCA 320 at [7].

The balance of convenience

The parties' views on balance of convenience

[65] Mr McKenzie said the balance of convenience favoured him because as a result of his dismissal, he had suffered financial hardship. He said he had been without income since his dismissal and as a result, he relied on his superannuation to support him and his son which he said was affecting his mental health. As a result of his dismissal, he also said he had been unable to obtain further employment.

[66] Fonterra disagreed with Mr McKenzie and said the balance of convenience was in its favour and submitted Mr McKenzie had contributed to his current circumstances by his actions leading to his dismissal and his delay in applying for interim reinstatement.

[67] Fonterra also disagreed with Mr McKenzie's view about its need of his experience. In referring to Mr McKenzie's previous role, it said his role was not one which required specialists' skills or any skills certification.

Conclusions on balance of convenience

[68] As previously stated, Mr McKenzie had not carried out work for Fonterra for a significant period of time and without current work, he would be experiencing some form of financial strain. Apart from his affidavit, there was no supporting documentation to support his expressed views about his finances and the impacts of that on him (or any other steps he had taken to mitigate his current circumstances).

[69] Again, as stated in respect of Fonterra, it is an organisation which should be able to accommodate Mr McKenzie's return. Although there will likely be further steps required to facilitate Mr McKenzie's return to the workplace, Mr McKenzie continuing his employment and receiving an income moves the balance of convenience in his favour.

The overall justice of the case

[70] Taking a step back from the detail associated with Mr McKenzie's claim, the Authority must consider where the overall justice lies? The Court of Appeal have described this as:

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.

[71] Mr McKenzie claimed the overall justice of the case favoured his interim reinstatement to his previous role because he was unjustifiably dismissed. He claimed his return to the workplace on an interim basis would deter other employers from breaching their obligations of natural justice and would promote compliance with ethical standards.

[72] Mr McKenzie acknowledged there was a delay from his dismissal to when he had had made his application for interim reinstatement. However, he said between his dismissal and his interim reinstatement application:

- (a) he was in ongoing communications directly with Fonterra about his alleged protected disclosure allegations; and
- (b) the delay reflected his difficulties in trying to navigate the complexities of an interim reinstatement application without legal assistance.

[73] In summary, Fonterra relied on its previous arguments to support its views as to why Mr McKenzie should not be reinstated to his role on a temporary basis. Further to its previous arguments, Fonterra also said Mr McKenzie had not provided sufficient evidence to show he could not support himself financially on an interim basis while the substantive matters are being investigated by the Authority.

Conclusions on overall justice

[74] Considering all views from the parties in respect of Mr McKenzie's claims, Fonterra's concerns relating to how long Mr McKenzie had been out of the workforce are reasonable concerns. I acknowledge Mr McKenzie's efforts to address matters with Fonterra after his dismissal up until his application for interim reinstatement. However there was a considerable delay of about 60 days from when Mr McKenzie was dismissed up until he made his application for interim reinstatement.

[75] Also, a key aspect in the parties' dispute is about how Mr McKenzie should carry out his work in a safe way. The main disagreement being, whether Mr McKenzie's new boots were suitable for him to carry out his work safely. This is important because it relates to both Mr McKenzie's safety in the workplace, and

Fonterra's health and safety obligations for his safety. These concerns (if realised) may present further complications on Fonterra's ongoing work operations and potentially resolution of Mr McKenzie's substantive claims.

[76] Based on these concerns and Fonterra's allegations relating to failure to following instruction, the overall justice of this case favours Fonterra. As a result, I decline Mr McKenzie's application for interim reinstatement.

Next Steps

[77] Given the period that has passed since Mr McKenzie had initially made his claims with the Authority and considering the clarification of a number of Mr McKenzie's claims, the parties are directed to attend mediation. Mediation is to occur within 28 days of today's date to ensure appropriate arrangements are made to attend. Mr McKenzie is to advise following the mediation if he wishes to proceed with his substantive application. Timetabling orders can then be made.

Costs

[78] Costs are reserved.

Alex Leulu
Member of the Employment Relations Authority