



[6] Soon after that final written warning, on 28 January 2009, there was another incident of lateness to which Fonterra says it took a lenient approach, but on 11 March 2009 another significant issue of lateness occurred wherein, according to Fonterra, Ms Penney was 91 minutes late for work. Fonterra initiated a disciplinary meeting which took place on 18 March 2009, as a result of which Ms Penney's employment was terminated on notice. The termination was confirmed by a letter dated 19 March 2009. Four weeks' pay in lieu of notice was provided.

[7] Ms Penney brings this application to the Authority seeking interim reinstatement to her employment pending an investigation of the substantive matters which I had indicated to the parties I could hear in mid-July 2009. At the hearing of this application for interim reinstatement, I confirmed dates for the substantive investigation meeting as 14 and 15 July 2009.

[8] Ms Penney has provided the required undertaking as to damages. Fonterra opposes the application for interim reinstatement, denying that Ms Penney was unjustifiably dismissed and contending that, in particular, reinstatement is not practicable in the particular circumstances.

### **Issues**

[9] It is a truism that, in order to succeed in an application for interim reinstatement, the Authority must apply the law relating to interim injunctions but also have regard to the objects of the Employment Relations Act 2000: s.127(4) of the Employment Relations Act 2000 (the Act).

[10] The law concerning interim injunctions requires the consideration of three issues, and it is the examination of those three issues that forms the basis of this determination. Those three issues are:

- (a) Whether the applicant has an arguable case;
- (b) Where does the balance of convenience lie;
- (c) What is the overall justice of the case.

[11] Section 127(4) of the Act requires the Authority to have ... *regard to the object of this Act* as well as applying the law relating to interim injunctions. For the sake of completeness, I note that the object of the statute is set out in s.3 which lists a

number of important matters which underpin the statutory framework, including the building of productive employment relationships and the promoting of good faith behaviour.

**Does the applicant have an arguable case?**

[12] Mr Meyer urged on me the proposition that Ms Penney had an arguable case, a position which Fonterra would not concede.

[13] In making his case for Ms Penney, Mr Meyer argued that:

- (a) There were deficiencies in Fonterra's procedure, especially in respect of the contention that it was improper of Fonterra to *skip* the second warning;
- (b) Lateness was not a serious disciplinary issue as it did not go to trust and confidence;
- (c) The applicant (Ms Penney) had explanations for much of her lateness; and
- (d) Ms Penney was treated differently from other Fonterra employees who were also late.

[14] For its part, Fonterra says:

- (a) The decision to *skip* the second warning was a decision that was able to be made by Fonterra having regard to the specific provision to that effect in the CEA and that Fonterra's view of that matter was supported by Ms Penney's union, the Dairy Workers' Union;
- (b) That lateness of the magnitude achieved by Ms Penney was indeed a serious matter going to the root of the employment relationship and that Ms Penney's failure to acknowledge her persistent and chronic lateness as a real problem was symptomatic of her whole attitude;
- (c) That contrary to the views advanced on Ms Penney's behalf, there was never a proper explanation for the continuing chronic lateness which, notwithstanding Ms Penney's various excuses, constituted a serious

problem as it represented lateness by Ms Penney on 56% of her work periods;

- (d) That while it was acknowledged that there were Fonterra employees who were late from time to time, the sheer magnitude of Ms Penney's chronic and persistent lateness, required a determined response from Fonterra which, in all the circumstances, it was entitled to make.

[15] I have carefully considered the submissions of counsel and reflected on the affidavit evidence I have before me. As I noted above, this is not a case where the respondent employer has conceded that there is an arguable case and I think that is for good reason.

[16] The threshold for an arguable case is a low one, and I have to say that Ms Penney has only just managed to sustain that low threshold. I note the caution which the Authority must always exercise in matters of this kind where the only evidence available at this early stage is untested affidavit evidence.

[17] I am satisfied that Ms Penney fails to acknowledge the significance of her lateness problem. The factual matrix available to the Authority, even in this relatively truncated environment, produces the incontrovertible facts that Ms Penney was late for her work on more occasions than she was on time during a short 6½ month employment. Indeed, as if to underline that very point, Ms Penney was late for the Authority's hearing on this application.

[18] I am satisfied that it must have been abundantly clear to Ms Penney from the two comprehensive warnings that she received before dismissal and the lenient approach taken by Fonterra on other occasions where it chose to overlook further examples of lateness, that her chronic and persistent lateness was causing Fonterra real and genuine concern and was impacting on Fonterra's ability to contemplate a continuation of the employment relationship.

[19] Further, I am not persuaded on the affidavit evidence before me that Ms Penney's contention that there were procedural flaws in the way that Fonterra dealt with her can be made out. The CEA seems to allow precisely the process which Fonterra adopted, and Ms Penney's own union accepted that the process was fair and that there was an ability for Fonterra to *skip* a stage in some circumstances.

[20] Furthermore, I am satisfied that Ms Penney offered no proper explanation for her persistent and unreasonable lateness and that, eventually, the good offices of her managers at Fonterra who I considered did everything they could to try to meet her needs, was simply taken advantage of by Ms Penney's unreasonable behaviour. Had the lateness been just a persistent failure to arrive exactly on time for work (that is to be a few minutes late), perhaps that could have been tolerated if it was only occasional. But this was a situation where, as I mentioned previously, the lateness was on more than half of Ms Penney's work periods and on some occasions was for a significant period of time, the longest being 90 minutes late.

[21] Finally, I am unmoved by the disparity argument which is simply advanced without any evidence at all to support it. Fonterra says that while other employees are late from time to time, this particular example of lateness is so chronic and so thorough going as to require a definitive response. I accept that submission.

**Does the balance of convenience favour Ms Penney's application?**

[22] The essence of the Authority's obligation in this regard is to consider the relative inconvenience to each party of the other succeeding. In a practical sense, the Authority must weigh the relative hardship to Fonterra of having Ms Penney returned to the employment against the hardship potentially suffered by Ms Penney in remaining away from the employment for a further period until the substantive hearing determines the matter one way or the other.

[23] Ms Penney submits that she needs to retain the employment because of her precarious financial position and the negative consequences of having been dismissed from her employment. Ms Penney emphasises the fact that, in the present economic environment, her ability to find alternative employment is strictly limited. Furthermore, Ms Penney points out that the Authority will presumably not issue a decision on the substantive investigation until some time in August 2009 at the earliest, by which time she will be in an even more precarious financial position than she is at present.

[24] It is also suggested on Ms Penney's behalf that there is no reason in practice why Ms Penney's return to the workplace would not be able to be contemplated in terms of her ongoing relationship with other staff.

[25] Conversely, Fonterra says that the substantive investigation meeting will take place reasonably soon and that damages will meet the case if Ms Penney is successful in her substantive hearing. Furthermore, Fonterra notes that Ms Penney was dismissed on notice and, as a consequence, is effectively paid through to June 2009. Further, Fonterra contends that the evidence suggests that Ms Penney's financial difficulties pre-dated her dismissal and so cannot be exclusively sheeted home to the termination of her employment.

[26] Fonterra accepts that the present economic environment is rather negative, but notes the oral advice provided during this hearing that Ms Penney had obtained some interim employment. On the possible damage to Ms Penney's reputation of the dismissal, Fonterra notes that Ms Penney may truthfully say to prospective employers that she is challenging the dismissal. Fonterra denies Ms Penney's assertion that her reinstatement would not impact negatively on the employer. The nature of Ms Penney's wrongdoing would, in Fonterra's view, have a significant effect on Ms Penney's former work colleagues if she were to be reinstated, given the sheer magnitude of the continued and persistent lateness. Furthermore, Fonterra contends that Ms Penney's lateness issues impacted on its customers and its suppliers and thus reflected on Fonterra's ability to provide a proper professional service to the various parties that it deals with.

[27] Finally, Fonterra refers to a reference in the affidavit provided by the union official who supported Ms Penney in which he refers to an intemperate and unpleasant message that he had received from Ms Penney alleging, in effect, that he had not properly looked after her interests during the disciplinary process. It is suggested that that episode in itself might be evidence that Ms Penney would not fit back in to the workplace as she contends that she would.

[28] I think the balance of convenience favours Fonterra. This is not a situation where Ms Penney will have to wait an inordinate time for her substantive hearing. As I noted above, the parties and I have now agreed on dates in mid-July and I will give the consequential determination urgency thereafter. I am not satisfied that Ms Penney's financial problems are exclusively a result of the dismissal and I think the intemperate message that she left for the union official suggests that she would not just fit back in if she were to be reinstated.

[29] In the main though my decision in relation to this particular aspect of the matter is based on my conviction that damages are an adequate remedy for any interim losses that Ms Penney might suffer, assuming, of course, that she is successful in her substantive application to be dealt with in July 2009.

### **Overall justice of the case**

[30] Standing back and evaluating the case on the currently untested evidence before the Authority and the helpful submissions of both counsel, the Authority must look at the overall justice of the case as between the parties.

[31] The untested affidavit evidence and the submissions before me do not suggest a dysfunctional relationship between Ms Penney and other workers at Fonterra, but I am mindful of Fonterra's submissions that Ms Penney's wrongdoing would not make it easy for her to come back to the workplace. Furthermore, I am not attracted by Ms Penney's contention that lateness is somehow not a real problem and in particular that it does not go to trust and confidence. A reinstatement of Ms Penney to Fonterra in the present circumstances would, of necessity, call into question Fonterra's disciplinary response in dealing with Ms Penney's perpetual lateness.

[32] Of particular concern is Ms Penney's apparent conviction that her lateness problem is not a real one and it seems to me entirely proper for Fonterra to be concerned that if Ms Penney were to be reinstated to the workplace, she would continue to minimise what is plainly a problem of significant magnitude.

[33] It is clear that reinstatement must be practicable and if the consequences of the reinstatement are so negative on the employer, then the Authority must exercise great caution in contemplating the reinstatement option. This is such a situation. At the most obvious end of the practicality continuum is the fact that Fonterra is currently in its off season and the affidavit evidence before the Authority indicates that there is no job for Ms Penney to return to. When Ms Penney was dismissed, she was not replaced. That will remain the position until the beginning of the new season.

[34] Furthermore, it is clear from Fonterra's evidence that Ms Penney's relationship with staff might not be as straightforward as she imagines, given the extent to which she was habitually late and the fact that the affidavit evidence from Fonterra suggests co-workers felt let down by her inability to attend work on time. In

addition, Fonterra not unreasonably refers to the precedent that this sort of continuing lateness and potential acceptance of it would have on other employees.

[35] On balance then, I consider that Ms Penney's overall application for interim reinstatement is a weak one, that she minimises the negative consequences of her own behaviour, and fails absolutely to take responsibility for her present predicament. It could not be said that she has a strong case for permanent reinstatement, given the circumstances described in this interim determination.

[36] For these reasons then, I am satisfied that the overall justice of the case favours the status quo. It follows that Ms Penney's application fails.

### **Determination**

[37] The application is declined for the reasons enunciated in the foregoing sections of this determination.

### **Costs**

[38] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority