

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Sharon Pilcher (Applicant)
AND Fonterra New Zealand Ltd (Respondent)
REPRESENTATIVES Mark Ryan, Counsel for Applicant
John Rooney, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 15, 16 August 2005
11 October 2005
SUBMISSIONS RECEIVED 4 November 2005
29 November 2005
DATE OF DETERMINATION 24 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Pilcher commenced employment with Fonterra New Zealand Limited (“Fonterra”) on 9 December 2002 as a Business Analyst (“BA”). In her role Ms Pilcher provided support fixing defects, bugs and developing enhancements for the computer system used by the share registry staff. Ms Pilcher was required to draw up scripts outlining test scenarios to test the fixes and enhancements made to the system and also drew up functional specifications for new system functions.

[2] In 2004 Ms Pilcher says she was bullied by her manager, Ms Kathy Rooke, that the company failed to rectify the situation and that this has led to a disadvantage in her employment by an unjustified action of Fonterra in that it did not provide a healthy and safe working place for Ms Pilcher. Ms Pilcher seeks remedies of lost wages, compensation and costs.

[3] Also in 2004 Ms Pilcher was subjected to a performance management plan which ultimately resulted in her dismissal for poor performance. Ms Pilcher claims the dismissal was unjustified and seeks remedies.

[4] Fonterra denies all claims and says that the issues between Ms Pilcher and Ms Rooke was investigated and resolved. Further, Fonterra says it worked through a fair and reasonable process with Ms Pilcher in an effort to help her improve her performance but she failed to make any substantial improvements and the dismissal is therefore justified.

Unjustified disadvantage claim

[5] Ms Pilcher claims she suffered a disadvantage in her employment with Fonterra as a result of Fonterra failing to provide a healthy and safe work environment. Ms Pilcher says her Manager, Ms Rooke, subjected her to bullying in the workplace.

[6] Matters must be determined on the balance of probabilities. In making my findings of fact I am conscious that the allegations Ms Pilcher makes against Fonterra and Ms Rooke in particular are very serious i.e. bullying. Accordingly, the evidence in support of it needs to be as convincing in its nature as the charges are grave (*Honda NZ Ltd v. NZ (with exceptions) Shipwrights etc Union*, [1990] 3 NZILR 23 (CA) applied). The Authority therefore has the unenviable task of determining the facts on the basis of what it believes more likely than not occurred, i.e. on the balance of probabilities.

[7] Before any determination can be made about whether or not Ms Pilcher was bullied, it is necessary to define “bullying”. This is a topic Authority Member King researched for her determination in *Evans v Gen-I Limited*, unreported, AA 333/05, 29 August 2005. Ms King stated:

As with many concepts, this is not easy as even a quick examination of the literature shows. Dan Olweus Bullying at School, Cambridge, MA : Blackwell, 1993, defined it as “negative behaviour” intended to inflict “injury or discomfort” and that it was likely to occur in situations where there was an imbalance of power. The English criminologist, David Farrington, “Understanding and preventing bullying” in Crime and Justice, Vol 17, Chicago : University of Chicago Press, 1993 said it was “repeated oppression, psychological or physical, of a less powerful person by a more powerful person”. All behaviour needs to be looked at in the social context in which it occurs and the motivation for the behaviour is also relevant. A vulnerable person may perceive criticism of his or her work as bullying, regardless of how the criticism is couched. Bullying may be seen as something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action, such as threats, intended to cause fear and distress. The behaviour has to be repeated on more than one occasion and there must be evidence that those involved intended or felt fear.

[8] Ms Rooke commenced employment as Ms Pilcher’s supervisor in December 2003.

[9] On 26 February 2005 Ms Rooke and Ms Pilcher attended a team meeting in Hamilton. Ms Pilcher says that after the meeting, as they were not stopping for lunch, Ms Pilcher went to get a coffee before driving back to Auckland. Ms Pilcher told the Authority that while she was getting

her coffee Ms Rooke was pacing backwards and forwards and had told her [Ms Rooke's] partner that she [Ms Pilcher] was dawdling. Ms Pilcher had parked the car in a side street in Hamilton. After she and Ms Rooke returned to the car, there was a parking ticket on the windscreen. Ms Pilcher told the Authority that Ms Rooke was angry, told her off, insisted on driving and took the parking ticket off her.

[10] Ms Rooke told the authority that she took the parking ticket to see if her manager would agree to the company picking up the cost of it. Ms Rooke had to get back to Auckland to attend another meeting. In answer to questions at the Authority Ms Pilcher told me that she knew Ms Rooke had to get back for a meeting starting at about 3.30pm. The incident at the car occurred at about 12.30pm. The return trip to Auckland was undertaken in silence.

[11] Ms Pilcher told the Authority that at a meeting on 2 March 2004 with other team members, Ms Rooke was rude to her in that she shouted at her. Ms Rooke says she didn't shout, but she possibly did talk over the top of Ms Pilcher.

[12] It was common ground that after the meeting Ms Rooke apologised for and acknowledged the uncomfortable silence in the trip from Hamilton to Auckland on 26 February. Other matters were discussed between the two including issues about Ms Pilcher's lateness. Ms Pilcher says she told Ms Rooke that she thought she was a bully. Ms Rooke says Ms Pilcher didn't use the word "bully" but told her she thought she was intimidating. I have concluded that Ms Rooke also told Ms Pilcher that she liked her and she [Ms Pilcher] ought not to take criticisms of her personally.

[13] The next day on 3 March 2004 Ms Pilcher says she was forced to take a taxi to a pick up point at the Autobarn at Bombay to meet Ms Rooke in order to attend another meeting in Hamilton. Ms Pilcher says Ms Rooke refused to pick her up at her home and she did not want to leave her car on the motorway. I find that Ms Pilcher has put a spin on this incident to create an unfavourable picture of her relationship with Ms Rooke to support her claim of bullying. I have concluded that in fact, it was not uncommon for Ms Pilcher to drive to the Autobarn and park there, before being picked up by other staff members when travelling out of Auckland.

[14] In the notes made by Ms Pilcher and provided to the Authority, Ms Pilcher remarks that on 28 July 2004 she was dropped off by two of her team mates as she had parked her car at the Autobarn at the Bombay's and decided to go straight home from there. At the investigation meeting Ms Pilcher conceded that being picked up at the Autobarn was a common practice.

[15] A further incident occurred on 24 March 2004. On that day Mr Jeremy Norton was appointed as Ms Rooke's 2IC. When Ms Rooke advised the team of the appointment she explained that Mr Norton would not be rostered to take support calls. Ms Pilcher told the Authority the team were curious as to why another member of the team, also a senior BA, had to do the rostered support calls and Mr Norton did not. She was asked by two team members to talk to Mr Norton about the issue, which she did. Ms Pilcher told me she asked Mr Norton why he would not be involved in on-call support, and that the team had been told that whatever position you held, you had to do the on-call support. Mr Norton reported the conversation to Ms Rooke.

[16] Later that day, as Ms Pilcher was driving home when Ms Rooke contacted her on her cell phone. Ms Pilcher's cell phone battery was low and agreed to call Ms Rooke once she got home. During the subsequent telephone conversation Ms Rooke advised Ms Pilcher that she had been told about her conversation with Mr Norton and asked for Ms Pilcher to apologise to Mr Norton, as he had just joined the company and should not be expected to put up with inappropriate behaviour. Ms Pilcher says she was "...utterly insulted and could not believe anyone could be so inadequate and bloody chunky." At the investigation meeting Ms Pilcher accepted that if she had any questions about why decisions were made regarding a new employee that Ms Rooke was the appropriate person to discuss them with.

[17] Ms Pilcher says that from that time on she was subjected to "bullying" behaviour by her supervisor and gave many examples of the behaviour she has attributed to the term "bullying". I have concluded that in general the majority of the examples provided by Ms Pilcher related to criticisms of her work. Also, Ms Pilcher included in her examples a requirement set by Ms Rooke that the whole team were to check the outlook system if they wanted to know Ms Rooke's whereabouts. I don't accept that this obligation, something required of all team members, was directed specifically at Ms Pilcher. Nor do I accept that Ms Pilcher could be offended by the request.

[18] Another incident occurred on 27 July 2004. The team was to meet at 9.30am to review a presentation for the Hamilton Team Meeting. Ms Pilcher says that on that morning she knew Ms Rooke was not happy when she [Ms Pilcher] asked Ms Rooke if they were ready to go. Ms Rooke loudly told Ms Pilcher there was no meeting room booked and no data show. Ms Pilcher says Ms Rooke then threw her hands in the air. Ms Rooke then went to Reception to book the data show and a meeting room.

[19] As Ms Pilcher came down stairs she was told by Ms Rooke to go to the training room. As events transpired the computerised room booking system was experiencing a problem with synchronisation and the training and other rooms were all booked. Ms Pilcher says that at that point Ms Rooke swore loudly at her. Ms Rooke told the Authority that she was upset about there being no training room or data show booked and that she did swear, but not at Ms Pilcher directly. Ms Rooke says it was simply a general statement made to no-one in particular to vent her frustrations.

[20] Ms Pilcher advised Mr Mark Adams, Business Solutions Manager, Shareholder Services about the incident. Ms Pilcher says that after she returned to her work station she ended up in another argument with Ms Rooke which she says resulted in Ms Rooke telling her that if she was not going to listen and co-operate there would be consequences. Ms Pilcher says she asked if she was being threatened and the response from Ms Rooke was to point her finger in her face and say “I am your manager and as your manager I have the right to write you up ... As your manager I have the right to discipline you and take disciplinary action and I will write you up.” Ms Rooke says of the incident that Ms Pilcher’s tone was loud and getting louder. That Ms Rooke told her to keep your voice down but that she continued. Ms Rooke says she told Ms Pilcher that she was “not doing herself any favours” and Ms Pilcher responded to this by asking in a loud voice “are you threatening me? Are you threatening me?”

[21] Ms Pilcher then approached Mr Adams and asked him if Ms Rooke had spoken to him and was she being written up. Mr Adams told Ms Pilcher she was not being written up and asked Ms Pilcher to document what had happened.

[22] That same day Ms Pilcher outlined in an email the events of that day as requested by Mr Adams. Ms Pilcher also mentioned in her email that other members of staff had issues and that they should be spoken to and that the “climate in [the] team was one of fear and job insecurity”. Mr Adams investigated Ms Pilcher’s claims with the other team members. Mr Adams concluded that there were no apparent issues for the other staff and he did not gain the view, portrayed by Ms Pilcher, that the staff were feeling threatened by Ms Rooke.

[23] Mr Adams discussed the complaint with Ms Rooke. Ms Rooke apologised to her Manager for her unprofessional and inappropriate behaviour in the reception area on 27 July 2004. Ms Rooke was told that the behaviour was not to occur again. Mr Adams advised Ms Pilcher of the outcome of her complaint.

[24] On 19 August 2004 (two days earlier issues had been raised with Ms Pilcher, in a formal setting, relating to her performance) Mr Adams received a letter from Mr Mark Ryan (on behalf of Ms Pilcher) alleging that Ms Pilcher had been bullied by Ms Rooke. In his letter Mr Ryan refers only to the 27 July 2004 incident. Mr Adams asked Mr Russell Malone, HR Manager, Information Services, to investigate the allegation raised by Mr Ryan.

[25] Mr Malone then proceeded to interview members of the team including the receptionist who was present at the time of the swearing incident. Mr Malone presented a full written report of his investigation, a copy of which he provided to Ms Pilcher. Mr Malone concluded that the expletives used by Ms Rooke on 27 July 2004 were not directed at any one person and that Ms Rooke's reaction was inappropriate. Ms Pilcher was advised that remedial action had been taken and was assured that the behaviour would not be repeated. The final conclusion reached by Mr Malone was that no bullying had occurred.

[26] Ms Pilcher does not accept that Fonterra took her complaint about Ms Rooke seriously. Nor does she accept the findings of Mr Malone following his investigation. Contrary to Ms Pilcher's perceptions, I find that Fonterra did take Ms Pilcher's complaint seriously. Firstly, Mr Adams investigated Ms Pilcher's complaint within a day or two of receiving her email setting out her view of events, secondly Mr Malone undertook an entirely separate investigation and came to his own independent conclusions which I find, are supported by the facts.

[27] Mr Ryan has relied on other incidents referred to earlier in this determination to support his submission that Ms Pilcher was bullied by Ms Rooke. At no stage were these issues raised with the respondent by either Ms Pilcher or Mr Ryan during the period of Ms Pilcher's employment.

[28] The Employment Court has held that an employer is bound to investigate allegations of work place bullying and take steps to prevent it, if necessary (*McGowan v Nutype Accessories Limited* [2003] 1 ERNZ 120). However, before an employer can undertake such necessary investigations, the employee is obligated to bring her concerns to the employer's attention (*McGowan*).

[29] Ms Pilcher raised specific concerns about the 27 July 2004 incident but did not provide any further information to her employer, in relation to any other incidents. Fonterra, through its managers, Mr Adams and subsequently Mr Malone, were satisfied that this was a one off incident.

[30] Ms Pilcher did raise other concerns from time to time with Mr Adams regarding her relationship with Ms Rooke; specifically she mentioned to him the incident on 3 March in Hamilton, for which Ms Rooke had previously apologised. Mr Adams says Ms Pilcher came to him a number of times about work issues and criticisms she had received. He says that each time she was very emotional, sometimes crying. He says she seemed unable to accept that there may be problems with her performance. Mr Adams says Ms Pilcher saw any criticism as her being picked on or unfair. Mr Adams says these matters pre-dated Ms Rooke's appointment.

[31] Mr Adams referred the Authority to an email written by Ms Pilcher on 5 September 2003 where she advises Mr David Parker, Service Delivery Manager that ...it is being made very obvious that I am not fitting into the environment. I think it would be a good idea if I talked to someone about my future here.

[32] Mr Adams attended a meeting with Ms Pilcher and Mr Parker on 8 September 2003 where Ms Pilcher raised issues about her work including her sense that she was being excluded from meetings. Being excluded from meetings was an issue raised at the investigation meeting by Ms Pilcher in support of her allegations against Ms Rooke in regard to the bullying.

[33] Ms Rooke was employed in December 2003 and came into an area of the business which was not performing to the standards expected of its internal customers. Having considered all the evidence I have concluded that at times Ms Rooke became frustrated with Ms Pilcher's responses to situations and criticisms of her, but that Ms Rooke's responses to those frustrations could not be classed as bullying.

[34] Ms Rooke's behaviour, while undoubtedly upsetting to Ms Pilcher, was not intimidating, malicious or insulting behaviour, nor was it an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure her. Neither was there was any attempt to deliberately undermine Ms Pilcher or to induce fear in her. I am satisfied that Ms Pilcher's health and safety were never at risk during her employment with Fonterra.

[35] In order to find in favour of Ms Pilcher, I have to find that her employment was affected to her disadvantage by some unjustifiable action by Fonterra. I have determined that there have been no unjustifiable actions by Fonterra. I therefore dismiss her claim for unjustified disadvantage.

Unjustified dismissal for Poor Performance

[36] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of a *fair and reasonable employer ...in all the circumstances ...at the time...* (Section 103A Employment Relations Act 2000).

[37] In relation to issues of poor performance it is necessary to determine whether the respondent has met the requirements set out in *Trotter and Telecom Corp of NZ Ltd [1993]2 ERNZ 659*. These are:

- Did the employer in fact become dissatisfied with the employee's performance of his or her duties?
- If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?
- Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?
- Was a reasonable time allowed for the attaining of those standards?
- Following the expiry of such a reasonable time, and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected?

[38] As already set out in this determination, Ms Pilcher raised issues in September 2003 about fitting into the environment at Fonterra.. Before Ms Pilcher met with Mr Adams and Mr Parker on 8 September 2003 she met with Ms Phillipa Newlove, manager of the Share Registry, a major internal client of the team in which Ms Pilcher worked. During her meeting with Ms Newlove, Ms Pilcher discussed problems Ms Newlove had with her performance. The meeting was initiated by Ms Pilcher. At that meeting Ms Newlove told Ms Pilcher that she was concerned that a couple of times Ms Pilcher had dived into a solution without thinking about it first.

[39] Six months later on 9 March 2004 Ms Pilcher spoke with Mr Gary Philip, Contract Project Manager. Ms Pilcher says she told Mr Philip that Ms Rooke had mentioned he was disappointed in her performance on the Matrix job. Ms Pilcher asked for his assessment. At the investigation meeting Ms Pilcher told me Mr Philip's explained that she didn't do a good job on the Matrix job and that she had not provided the information he had required. Ms Pilcher did not view these criticisms as negative, due to Mr Philips also telling her that she had "potential".

[40] On 23 April 2004 Ms Rooke met with Ms Pilcher. Ms Pilcher was counselled about her performance and was told that she needed to make improvements in specific areas. Ms Rooke says some of the specific areas she covered off included:

- the business would not go to [Ms Pilcher] for alternative solutions because they did not have confidence in her;
- people did not want to deal with [Ms Pilcher] because they felt she was not understanding or taking too long to understand;
- [Ms Pilcher] did not take opportunities to get involved (i.e. a lack of initiative)
- [Ms Pilcher] was too dependent on others and not able to work out problems for herself; and
- not looking at the whole picture and asking relevant questions.

[41] Ms Pilcher refutes that Ms Rooke raised performance issues with her at the 23 April meeting, however, I do not accept that as being correct. The notes made by Ms Rooke and which she used for the meeting show that the items listed above, and other matters, were raised during the meeting. Also, it was Ms Pilcher's own evidence that she was a bit "gob smacked" at the meeting and that Ms Rooke "continued to criticise me and said I needed to be more proactive". Ms Pilcher also told the Authority that Ms Rooke had told her, she could not produce alternative solutions or that she didn't understand.

[42] In June Ms Rooke carried out an Annual Performance Review of Ms Pilcher's performance. Ms Pilcher received an overall rating of "needs improvement". Out of eight areas for assessment three areas were rated as being "needs development" while two areas of assessment rated Ms Pilcher as being "substantially achieved" or "competent". During the performance review meeting Ms Rooke discussed with Ms Pilcher the need for Ms Pilcher to increase her knowledge, work more autonomously, reduce reliance on contractors, be proactive in suggesting viable improvements for the business and to be more precise and work in improving her BA skills. Ms Pilcher debated with Ms Rooke one area of the assessment where she believed she should have received an "achieved" rating but had only received "substantially achieved". Ms Rooke considered what Ms Pilcher had to say and, following the meeting changed the rating to "achieved". Ms Pilcher's overall rating, however, did not change.

[43] Following the performance reviews Ms Rooke requested feedback from the business unit managers on the performance of the whole team, including Ms Pilcher. In late July/early August 2004 three business unit managers provided negative feedback of the work undertaken by the team as a whole and specifically Ms Pilcher.

[44] Following the performance review and the feedback from the business unit Managers, on 13 August 2004 Ms Pilcher was invited to attend a meeting on 17 August to discuss her performance. Ms Pilcher was advised that a possible consequence of the meeting was that the company's 3 month performance plan may be put in place with respect of her individual performance.

[45] Ms Pilcher's chosen representative for her 17 August meeting was Ms Sandra Williams, who was another Fonterra employee, based in Hamilton. Initially, Fonterra managers were unhappy about Ms Williams attending from Hamilton, however, I am satisfied that this matter was resolved.

[46] At the meeting on 17 August 2004 Ms Rooke outlined her concerns relating to Ms Pilcher's performance. Issues included:

- The business did not have the confidence that Ms Pilcher was able to come up with alternative solutions;
- People did not want to deal with Ms Pilcher because they felt she was not understanding or was taking too long to understand;
- Contractors were not willing to spend time with Ms Pilcher (Fonterra employed employees and contractors to provide services to its business units. Business units were being encouraged to decrease their reliance on contractors and use internal BAs instead – this required the internal staff to work with contractors to enable them to take over their work);
- Not taking opportunities to get involved;
- Too much dependency on others (not able to work out problems alone)
- Not looking at the whole picture.

[47] These issues were the same issues raised with Ms Pilcher during the meeting held on 23 April 2003. In addition Ms Rooke described to Ms Pilcher feedback she had received from the business unit managers regarding her performance. In particular:

- Ms Pilcher did not have a grasp of the Share Registry process and the business rules that applied to them, not did she have a sound understanding of the system that managed the Share Registry's processes and transactions;
- Ms Pilcher had a "bull at a gate" approach to her work and a lack of attention to detail.
- costs associated with using contractors instead of Ms Pilcher for support; and
- Ms Pilcher's lack of understanding of issues in the Shareholder services business.

[48] After outlining these issues Ms Rooke and Ms Pilcher agreed on some specific actions which included:

- Ms Rooke would investigate Ms Pilcher attending systems training ;
- Ms Pilcher was to work on gaining the confidence of the business, improving her support activity and getting involved in some BA activity which would be assigned by Ms Rooke;
- Ms Rooke was to be the main reference point for communications;

- Ms Pilcher was to provide Ms Rooke with more information on her activities through fortnightly team meetings;
- Ms Rooke would discuss with Ms Pilcher opportunities for her to be involved in BA activities (e.g. requirements gathering exercise in the field);
- Improvement required in some core BA areas e.g. taking initiative, attention to detail.

[49] During the meeting Ms Pilcher asked for clarification on some points which Fonterra agreed to provide. A further meeting was arranged for 20 August 2004 at which time Ms Pilcher was to raise points of clarification and to provide some feedback on the performance issues raised.

[50] As events transpired that meeting did not go ahead, Ms Pilcher was not prepared for the meeting and advised that she wished to seek advice from her lawyer. Mr Malone advised Ms Pilcher that Fonterra may have to make a decision on whether to put her on a 3 month performance plan without her feedback if she could not provide it.

[51] The next meeting took place on 26 August 2004. Ms Pilcher was represented by Mr Ryan during this meeting and throughout the rest of the performance management process. Notwithstanding that this meeting was for the specific purpose of allowing Ms Pilcher to respond to the issues raised on 17 August 2004, Ms Pilcher did not contribute to the meeting in any significant way. Following a request by Mr Ryan and during the meeting it was agreed that Ms Pilcher, could take until 1 September 2004 to provide feedback to Fonterra in relation to the performance issues raised. Again Ms Pilcher was advised that if no written response was provided a decision as to whether or not she would be put onto a three month performance management plan may be made without the benefit of her response to the issues.

[52] By 6 September 2004 no response had been forthcoming from Ms Pilcher regarding the issues raised by Fonterra at the meetings of 17 and 26 August 2004. Mr Malone wrote to Ms Pilcher on 6 September 2004 and set out a summary of the discussions held to date. Mr Malone states:

The performance issues raised in the meeting and stated above need urgent attention. [Ms Rooke] and I will meet with you on a fortnightly basis to talk about progress against the key actions and your respective performance improvement. At the end of the three month period, if there has not been sufficient improvement we will have no choice but to end your employment for continued poor performance.

[53] Mr Malone then set out for Ms Pilcher the key areas on which her performance would be measured. The stated measures were:

- [Ms Rooke's assessment of your contribution to the team and at team meetings;
- Feedback from key customers re: confidence/willingness to engage with you;
- Assessment of progress towards Perform! Objectives;

- Functional requirements – change requests. You independently complete change requests as required within two reviews and subsequently reviewed and passed by [Ms Rooke] and the technical team leader;
- Contributions to the team – taking the initiative to come up with business process changes that will increase the team’s reputation in the eyes of the business;
- Expert knowledge and guidance to the business and problem resolution – Monitoring the businesses use of contractors. You convince the business to come to you for support and answers. Dependency on contractors should be reduced. You should have the knowledge to support the business, and, if not, then show initiative finding the answers in appropriate documentation and systems;
- Maintain and enhance system documentation – This will be measured by the number of times a change request or defect needs to be reviewed or the clarity of her documentation;
- Testing – No or low defects are found in deployed functionality in the areas that are tested by you.

[54] Mr Malone left it open for Ms Pilcher to comment on the contents of the letter and advised that meetings would be held fortnightly to review her progress. Mr Malone also expressed his desire for future meetings to be constructive

[55] Mr Ryan responded to this letter on 7 September 2004. It is surprising to see Mr Ryan criticising Fonterra for pursuing the three month performance plan in the absence of a written response from Ms Pilcher. Ms Pilcher had been given two opportunities to respond to the performance issues raised on 17 August. The first opportunity was on 27 August 2004, a meeting specifically requested by Ms Pilcher, but during which Ms Pilcher contributed very little, and secondly Mr Ryan was provided with a further week at his request to provide a written response by 1 September. Mr Ryan’s complaint in his letter on 7 September 2004 that the decision to proceed had ...effectively denied our client a right to be heard on this matter... is misconceived.

[56] In his letter Mr Ryan also raised concerns about the measurability of the key measures as set out.

[57] As required, fortnightly meetings were held with Ms Pilcher to discuss her progress. On 16 September 2004 Ms Rooke and Ms Pilcher met to discuss Ms Pilcher’s performance. At that meeting two matters were discussed. One related to a functionality request for the Aspire system made by Ms Newlove, and a defect identified in a batch report. Both matters had previously been raised in email correspondence by Mr Rooke to Ms Pilcher. Fonterra’s concerns, and as explained to her at the meeting, were with her responses to the requests. Specifically Fonterra was concerned that Ms Pilcher’s responses demonstrated a lack of initiative in finding a complete solution; and provision of incorrect information to the business; and a demonstrated lack of attention to detail. All concerns previously raised with Ms Pilcher from 23 April 2004.

[58] A further review meeting was held on 30 September 2004. The key issue for discussion at this meeting was feedback received from Mr Adrian Clark, a senior BA regarding a “notes” document Ms Pilcher had prepared. Mr Clark criticised the document as being not well structured and too wordy with poor spelling and formatting. Mr Clark had advised Ms Rooke that in his view Ms Pilcher did not pay enough attention to the detail. He told Ms Rooke that he had tried to guide Ms Pilcher to think about what she was trying to get across to the reader and provided suggestions to avoid repetition in the document.

[59] At the review meeting on 14 October 2004 related to her poor communication skills. The major area of discussion concerned a situation in which Ms Pilcher had taken a day’s sick leave and had chosen to leave a message on the answer phone, instead of talking to Ms Rooke directly. Ms Rooke provided Ms Pilcher with positive feedback about the completed “notes” document and that there had been an improvement in her work.

[60] The next review meeting occurred on 5 November 2004. The issues discussed at this meeting were about Ms Pilcher’s poor communication, lack of attention to detail and lack of rigour in the testing and analysis of system fixes. Ms Rooke and Mr Malone say that at this meeting Mr Ryan continually interrupted, was disruptive and would not allow Mr Malone to finish sentences and was generally unhelpful to the process. After warning Mr Ryan that if his behaviour continued the meeting would be discontinued, Mr Malone made good his threat and ended the meeting. Ms Pilcher says of that meeting, that Mr Malone got angry and raised his voice to Mr Ryan and told her she would get a final warning that if her performance did not improve her position would be terminated at the end of November. I am satisfied that Mr Malone did indicate that a final warning was in contemplation at that point in time, but that no warning was actually issued. I am supported in that view by the correspondence dated 9 November 2004 (but which wasn’t faxed until 15 November) where Mr Malone reiterated the steps taken throughout the process including confirmed that at the 5 November meeting Mr Malone had commented that a final warning was being considered.

[61] In his letter dated 9 November but not delivered until 15 November, Mr Malone provides Mr Ryan with two days to provide a response to the proposed final warning and reiterates that if her improvement does not improve she will be dismissed 11 days later on 26 November.

[62] No response had been received from Mr Ryan by Friday 19 November 2004 and so Mr Malone wrote to Ms Pilcher advising her that a decision had been made to issue her with a final

warning. Mr Malone advised Mr Ryan that the next performance review meeting would occur on 24 November 2004 at which time a decision would be made to either extend the performance review or terminate Ms Pilcher's employment.

[63] Ms Pilcher was not receiving copies of all the correspondence between Mr Ryan and Fonterra. This came to the attention of Fonterra when Ms Rooke mentioned the meeting on 24 November and Ms Pilcher appeared to know nothing about it. To remedy that situation, and on that same day Mr Malone copied Ms Pilcher with the letters sent on 15 November (dated 9 November) and 19 November.

[64] In any event, the meeting did not eventuate as Mr Ryan advised Mr Malone that he was unavailable and could not attend. On 26 November 2004 Mr Malone wrote to Mr Ryan expressing his concern regarding the cancellation of the meeting at such short notice. In that letter Mr Malone took the time to set out two further issues with Ms Pilcher's performance regarding work carried out on Capital Notes, ATS Report Requirements. In concluding his letter Mr Malone says:

These two examples are further evidence that [Ms Pilcher] does not appear to be performing at the level required for a BA.

- Communication continues to be an issue. Keeping [Ms Rooke] up-to-date may have avoided some of the confusion in the above examples. There are still on-going issues with [Ms Pilcher's] ability to communicate concisely with [Ms Rooke] and client groups alike.
- Understanding of the business and [Ms Pilcher's] ability to record business requirements concisely is a recurring theme in many of the examples.
- Written documentation and recommendations/conclusions have not captured the business requirements adequately.
- The business is hesitant to engage [Ms Pilcher] because of her lack of understanding. This was evident in the Capital Notes example, which resulted in [Ms Rooke] having to investigate the situation in more detail.

[65] The meeting was postponed until Monday 29 November.

[66] Ms Pilcher prepared a written document outlining her explanations for performance issues raised in November 2004 and which she presented at the meeting on 29 November 2004. It was agreed that Ms Rooke and Mr Malone would take the document and review it and a further meeting would be held on 2 December 2004 to discuss Fonterra's response to Ms Pilcher's explanations.

[67] The Authority has had the benefit of receiving a copy of Ms Pilcher's explanations with notes against each explanation from Ms Rooke, Mr Malone and Ms Felicia Cree-Brown (an IT specialist working for Fonterra under contract). The commentary from Ms Rooke and Ms Cree-

Brown indicate Ms Pilcher was still not performing to the expected level in areas of communication/clarity, initiative and attention to detail.

[68] A further meeting was held on 2 December 2004. At this meeting Fonterra went through each of the letters sent to Mr Ryan and dated 9 November and 26 November. Ms Rooke also took Ms Pilcher through her responses to the prepared statement provided by Ms Pilcher on 29 November 2004. Ms Pilcher produced another prepared statement for consideration.

[69] The meeting ended with a promise to review Ms Pilcher's further response. Ms Rooke reviewed the prepared document and concluded that Ms Pilcher's assessment of her own work was inaccurate and not supported by the feedback she had received.

[70] On 8 December 2004, Ms Pilcher was dismissed for poor performance. This followed a discussion and response to Ms Pilcher's document presented at the 2 December 2004 meeting. Ms Pilcher was provided with one month's notice in writing and advised that she would not be required to work her notice period out.

Conclusions

[71] I am satisfied that by 23 April 2004 Ms Rooke had genuine and serious concerns about Ms Pilcher's performance. The issues were raised with Ms Pilcher during a meeting on 23 April 2004, during the performance appraisal process and again on 17 August 2004. Ms Pilcher was given full opportunity to discuss and respond to the concerns raised. Ms Pilcher was informed that if she was put on a three month performance program that termination was a possibility if she failed to demonstrate a significant improvement.

[72] Fonterra embarked on a process of setting measurements and standards to be achieved by Ms Pilcher. When setting these measurements Ms Pilcher was provided with the opportunity to have input and offer alternative measurements. I am satisfied that during the performance plan Ms Pilcher was provided with additional on-the-job training by Ms Cree-Brown and she attended a Technical Writing Course.

[73] Ms Rooke and Mr Malone met with Ms Pilcher on a fortnightly basis to discuss and review her performance for the immediately preceding two week period. Ms Pilcher was represented at every step of the process and had a full opportunity to provide input into the process. Ms Pilcher

was provided with more than three months in order to demonstrate an acceptable improvement in her performance. Fonterra appropriately acknowledged any improvements made, unfortunately Ms Pilcher was unable to reach the standard of performance required from her.

[74] Mr Ryan submitted that the use of Ms Rooke in providing assessments of Ms Pilcher's performance seriously prejudiced Ms Pilcher's prospects of continued employment. I am satisfied that the feedback provided by Ms Rooke came from other business unit managers and was substantiated by documentation. At least three managers provided feedback to Ms Rooke. They were Mr Clark, Ms Newlove and Mr Drumm.

[75] Mr Ryan also cites the personality conflicts between Ms Rooke and Ms Pilcher as contributing to the prejudice. I have already found that Ms Rooke's conduct did not amount to bullying. I am satisfied that the personality differences did not factor into the decision to dismiss Ms Pilcher. I am also satisfied that Mr Malone and Mr Adams both provided an independent management overview throughout entire process.

Given my findings above, I have concluded that in all the circumstances Ms Pilcher's dismissal is justifiable. I find that the actions of the respondent and the way in which the respondent acted were what a fair and reasonable employer would have done. Ms Pilcher does not have a personal grievance and I can be of no further assistance to her.

Costs

[76] .The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority