Attention is drawn to the order prohibiting publication of certain information in this determination for a specified period

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 275/10
5296235

	BETWEEN	DOUGLAS TE STROET Applicant
	AND	FONTERRA COOPERATIVE GROUP Respondent

Member of Authority:	Robin Arthur
Representatives:	Helen White for Applicant John Rooney for Respondent
Investigation Meeting:	24 and 25 March 2010
Determination:	11 June 2010

DETERMINATION OF THE AUTHORITY

Order prohibiting publication of Applicant's name

[1] The name of the Applicant is not to be published for 30 days from the date of this determination, unless this order is varied earlier by the Authority or the Employment Court. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[2] I have decided not to make an order permanently prohibiting publication of his name. However, as both parties have rights to challenge some or all of this determination in the Employment Court within 28 days, and the Court might also be asked and decide to prohibit publication permanently or for a further period, I have made an order for this limited period so as not to render nugatory any further order

regarding publication which might be sought in and made by the Court.

[3] Ms White applied for an order regarding publication at the close of the investigation meeting, having given notice earlier that she would. It was sought to prevent possible detrimental impact on the Applicant's health, whether his case was successful or not. He had suffered a further period of mental ill-health recently and there was a concern about the possible impact on him of any media coverage of the determination, whatever its outcome. Mr Rooney, for Fonterra, took a neutral view, noting that the names of parties were generally public but otherwise content to leave the matter to be dealt with as the Authority saw fit.

[4] In this case I do not consider the public interest in the open administration of justice need yield to the Applicant's privacy. I also doubt a prohibition on publication of his name is of much practical benefit or effect anyway. In the workplace from which he was dismissed word of mouth will inevitably mean a range of people there already know of his circumstances. While it must be acknowledged that there is still some stigma around mental illness, there is a wider public understanding that such views are unfounded. The applicant himself recognised in his evidence that his previous attempts to keep his health issues entirely private had not served him well. Nevertheless the limited order made will preserve his privacy for a short period to allow for the eventuality this whole matter might go to the Court and that a different order is made there.

Employment Relationship Problem

[5] Fonterra Co-operative Group (Fonterra) dismissed Douglas Te Stroet, a laboratory technician at its Waitoa plant, on 22 January 2010.

[6] An investigation by Fonterra concluded Mr Te Stroet wilfully and deliberately submitted falsified results for laboratory tests he had conducted on 22 November 2009 and was in breach of its stringent quality procedures. It also found he had failed to report that he knew the results he had passed on to production staff were incorrect.

[7] Fonterra concluded Mr Te Stroet's actions were serious misconduct and decided to dismiss him after a disciplinary process involving several meetings during

December 2009 and January 2010.

[8] Through his union's lawyer Mr Te Stroet promptly raised a personal grievance seeking reinstatement. He accepted the laboratory test results submitted were incorrect and he had failed to follow procedures to address that situation. However he denied any intention to falsify results. He identified a long standing anxiety disorder and stress as reasons for his difficulty recalling what he had done on 22 November and for not reporting doubts he later had about those results.

[9] The matter was not resolved in mediation and proceeded to investigation by the Authority.

Issues

[10] The issues for resolution by the Authority are:

(i) whether Mr Te Stroet's conduct was capable of being regarded as serious misconduct; and

(ii) whether dismissal was the appropriate outcome in all the circumstances at the time; and

(iii) if not, is reinstatement practicable; and

(iv) what adjustment, if any, should be made to the remedies sought (being reinstatement, lost wages and distress compensation) for factors of mitigation and contribution.

[11] For the purposes of the Authority's investigation, written witness statements were provided by Mr Te Stroet, Dairy Workers Union organiser Mark Hope, union delegate Brett Brown, Fonterra speciality chemistry co-ordinator Jirong Wang, former laboratory manager Melt Bekker, plant manager Andrew Johns, and former human resources advisor Kerry Ann Cornelious. Each witness, under oath or affirmation, confirmed their statement and answered questions from me and the parties' representatives.

[12] I also had a statement from Mr Te Stroet's GP, Dr Andrew Minett of Matamata and an affidavit from Paul Chubb, laboratory manager of Fonterra's Whareroa plant. I accepted both documents as evidence of the facts stated in them.

[13] Mr Chubb's evidence concerned a disciplinary investigation and outcomes for three laboratory technicians accused of falsifying test results at the Whareroa plant in August 2009. Each was issued with a warning. His evidence is relevant to whether Mr Te Stroet was treated differently for a similar offence, and if so, whether there was an adequate explanation of that difference, and, further, whether dismissal was the only option for a fair and reasonable employer in such circumstances.

[14] I declined to accept in evidence an opinion from occupational health specialist Dr Steve Culpan dated 22 March 2010. The opinion, addressed to Fonterra's lawyer, was based on a review of Mr Te Stroet's medical records and reached without meeting or examining him. It was lodged by Fonterra outside an agreed timetable for the Authority's investigation and was not available to Fonterra at the time of making its decision to dismiss Mr Te Stroet. The applicable collective employment agreement allowed for medical examination at the employer's direction. Fonterra could have had Dr Culpan or another suitable practitioner assess Mr Te Stroet prior to making the dismissal decision. It did not.

[15] In preparing this determination I have reviewed the statements of witnesses, their answers to questions in the Authority investigation, relevant background documents provided by the parties (including notes of meetings) and the written and oral submissions given by the representatives at the close of the investigation meeting. As provided for under s174 of the Act I have not recorded here all evidence and submissions received but state findings of facts and issues of law and express conclusions on the issues for determination.

[16] There were some procedural issues raised in the evidence regarding notification and participation in meetings which I have not considered necessary to resolve in determining the substantive merits of the case.

Was there serious misconduct?

[17] In justifying a finding of serious misconduct Fonterra must establish it conducted a full and fair investigation which revealed conduct by Mr Te Stroet which a fair and reasonable employer would have found deeply impaired or destroyed its

basic confidence and essential trust in its relationship with such an employee.

[18] The Court's description, in *Angel v Fonterra Co-operative Group*, of an employer's obligation in investigating breaches of a policy or code, may also be applied to this case where the managers were concerned Mr Te Stroet had knowingly or deliberately provided incorrect results, and, by doing so failed to follow proper procedure or protocols for carrying out his work:[1]

> *Where an employer investigates an employee's failure to adhere to a policy or code of conduct, it has to assess whether the employee's failure to comply was because of inadvertence, oversight, or negligence or whether it was done deliberately in the knowledge that it was wrong. … [ ] … This is not to say that it is necessary for an employer to be satisfied that an employee who breaches policy or a code of conduct has done so deliberately in the sense of having mens rea or criminal intent (an approach firmly rejected in the Hepi case) but it is bound to investigate fully to establish why it occurred.*

[19] In the present case whether Mr Te Stroet had sufficient knowledge of what he was required to do in conducting the tests is an incidental but not central question. How Fonterra reached its conclusions that he deliberately and intentionally provided incorrect results is fundamental to the justification of its decision to dismiss him.

[20] The test of justification under s103A of the Act does not allow the Authority unbridled licence to merely substitute its views for those reached by the manager who made decisions on behalf of Fonterra but the Authority may reach a different conclusion on the proper outcome where that results from objective scrutiny of all the relevant circumstances at the time.[2]

[21] I find Fonterra was justified in reaching a conclusion that certain actions or omissions of Mr Te Stroet amounted to serious misconduct but not to the same extent or for the reasons expressed at the time. Its conclusion and how it was reached was flawed in some important respects. I reached that view on the basis of the findings of fact and reasons given that follow.

[22] Problems with the accuracy of laboratory test results provided by Mr Te Stroet during his shift on 22 November 2009 were first identified as a result of tests done by a different technician on a later shift.

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[1] [2006] ERNZ 1080 at [81] (EC, Shaw J).
[2] *Air New Zealand v Hudson* [2006] 1 ERNZ 415 at [120], [122] and [127] (EC, Shaw J).

[23] The tests – called an RG test – were for fat content of a product batch. The later test showed a wider difference between samples taken from the same batch as the samples for which Mr Te Stroet had provided earlier results. The samples he had tested were then retested by another technician and the results showed a level of difference in fat content which was outside an acceptable range of difference or bias.

[24] This anomaly triggered a review procedure which is part of the laboratory quality control system. Mr Wang investigated the results and examined the documentation which Mr Te Stroet had used and generated for his tests on 22 November. He became concerned about how closely the results reported by Mr Te Stroet's matched results given by automated reading equipment used in the plant. Those automated results – called MPA readings – are not always reliable as the calibration of the equipment may be slightly incorrect. The equipment calibration is regularly checked and adjusted. The RG tests of each product batch conducted by the technicians are an important 'check' on whether the MPA readings can reasonably be relied on at any given time.

[25] From his review of Mr Te Stroet's results and documentation for 22 November Mr Wang was concerned that it appeared Mr Te Stroet had not finished full testing of the samples but had deliberately falsified the reported results so they matched the MPA readings provided with each sample. He reported those concerns to Mr Bekker who began a disciplinary investigation.

[26] At a disciplinary meeting on 7 December Mr Te Stroet accepted the evidence Mr Wang provided about the results. He described remembering "*something was wrong, something screwy*" with the results for the samples tested. He admitted manually changing results to "*what I thought they should be*".

[27] However I do not find this was a situation where the employer was entitled to rely on that admission without further inquiry.

[28] Mr Te Stroet told Mr Bekker that he remembered being "*really stressed*" as he started his shift that day. The team leader for the previous shift had told him that other workers expected at work were away and "*it's your worst nightmare*". He also

advised Mr Bekker that he was having difficulty with his memory and was taking medication for which the dosage had recently changed. He described his experience of work on 22 November in this way:

> *"When I went in everything felt unreal. It felt like a room within a room. I was struggling as I was so stressed. I can't piece it together".*

[29] In a further disciplinary meeting on 8 December Mr Te Stroet insisted his actions were not intentional and apologised for compromising the integrity of the laboratory. He insisted that he did not realise during 22 November that he had done anything wrong but only realised there was a problem on the next day without knowing what it was. He accepted that he had not advised anyone of those concerns.

[30] Mr Bekker advised that dismissal was being seriously considered. Mr Te Stroet explained that he had been "*not well*" for months but felt he could not talk to anyone. Mr Brown referred to the situation as being a mental health issue which Mr Te Stroet wanted help with and which could be resolved.

[31] Mr Brown then invoked clause 8.5.5 of the collective agreement. This clause allowed for a worker to be stood down on full pay where an instant dismissal was being considered. Mr Te Stroet also provided a medial certificate from Dr Minett. The certificate provided for seven days of sick leave as Mr Te Stroet was deeply distressed and showing signs of extreme anxiety.

[32] Mr Bekker then arranged for a report from Dr Minett about Mr Te Stroet's health. The report advised that Mr Te Stroet suffered from a generalised anxiety disorder, had previously experienced severe depression and had a regular prescription for medication used at stressful times.

[33] Mr Te Stroet did not attend the next disciplinary meeting – on 23 December – where he was represented by Mr Brown and Mr Hope. Mr Bekker advised of his conclusion that Mr Te Stroet's actions on 22 November, and not later reporting his concerns once he "*knew something was wrong*", were an unacceptable compromise of the laboratory's integrity and was serious misconduct. A robust discussion followed with Mr Hope insisting that Mr Te Stroet had panicked, and then tried to fix a

mistake. He said the actions were neither deliberate nor malicious. He asked Fonterra to get a further report from a mental health specialist or a psychologist. He also asked for an opportunity to identify other jobs within Fonterra to which Mr Te Stroet could be redeployed with a written warning rather than dismissal.

[34] Mr Bekker concluded that discussion by confirming Fonterra's view that although a "*one-off incident*", Mr Te Stroet's actions were serious misconduct and summary dismissal was the appropriate outcome. However he agreed to a one month period in which Mr Hope could "*explore alternative positions within Fonterra, outside of the laboratory*". Mr Bekker said the findings of his investigation would be disclosed to any potential hiring manager who asked. Alternative proposals would be considered before the investigation was concluded on 22 January 2010.

[35] It is apparent to me from the totality of the evidence of Mr Bekker, Mr Wang and Ms Cornelius that Mr Te Stroet's explanation of panic on 22 November was treated with some cynicism. The symptoms of a generalised anxiety disorder and stress reported by his doctor's letter of 16 December and the distress exhibited by Mr Te Stroet in the disciplinary meetings were regarded as a natural response to the disciplinary inquiry rather than operating earlier in the situation he faced on 22 November and on the following days.

[36] Mr Bekker dismissed Mr Hope's proposal for an examination and opinion from a mental health specialist or psychologist.

[37] He did check the level of staffing on that shift and established that, although short-handed, the supervisor had stepped in and done some of the work leaving Mr Te Stroet to do tests which were within the normal workload. However it was not until weeks after the dismissal that Mr Bekker checked about the conversation which Mr Te Stroet had identified as causing him to panic when he first encountered difficulty with the testing results that day – the anxiety triggered at the start of the shift when the previous shift's team leader referred to his "*worst nightmare*".

[38] Neither did he take account of a recent change in Mr Te Stroet's pattern of work in which he was directed to carry out the RG testing required on each shift rather than focussing on other routine laboratory work which he preferred to do.

While Mr Te Stroet had the necessary training to do the RG testing, the change may have been a factor in heightened anxiety.

[39] Mr Te Stroet said he had tried to talk to his team leader before 22 November about the stress he experienced at work but was told to "*toughen up*". While as part of his investigation Mr Bekker did ask that team leader whether Mr Te Stroet had spoken to him about finding work difficult, he did not check whether the team leader had given Mr Te Stroet that response.

[40] In light of these facts I find Fonterra failed to make sufficient inquiries into why Mr Te Stroet's faulty performance of the testing procedure occurred on 22 November. Its inquiry was less than what a fair and reasonable employer would have conducted. Consequently its conclusion that his actions were deliberate falsification was flawed. It failed to fairly explore and discount a plausible medical explanation for his actions and has not justified – against the standard of the objective employer – its finding that the conduct was truly intentional. However I accept Fonterra was entitled to reach a finding of serious misconduct on the basis that Mr Te Stroet omitted to alert his supervisors when he had real doubts on the following day as to whether he had satisfactorily carried out his duties on 22 November. He could then have initiated the appropriate steps under quality control or corrective action procedures to properly check the situation and his doubts about his work. He did not do so. In that respect he was negligent in attending to obligations of which he was aware and had the time and opportunity to raise, notwithstanding potential embarrassment in having to explain his confused recall of events and his anxiety disorder as a possible cause.

Was dismissal then the appropriate outcome?

[41] Even if a conclusion of some serious misconduct is accepted as justified, the Authority may objectively review the employer's ultimate decision to dismiss in light of that finding.

[42] In doing so in this case I have reached the view that Fonterra's action in deciding to dismiss Mr Te Stroet in these circumstances was not what a fair and reasonable employer would have done. I find the dismissal unjustified for the

following three reasons.

1. Inadequate consideration of service

[43] Mr Te Stroet had served Fonterra and its predecessors for 27 years. It was a factor which deserved some weight in the circumstances of a single incident of what I have found to be incapacity and negligence. My impression of the evidence from Ms Cornelious and Mr Bekker was that little more than lip service was given to it as a factor in making the ultimate decision to dismiss Mr Te Stroet.

[44] There was nothing to suggest Mr Te Stroet's service had been anything other than satisfactory throughout, apart from this incident. There was also no evidence of any inquiry to check even a sample of Mr Te Stroet's earlier work to establish whether the faulty 22 November results were truly a 'one off' event, whether there was any real risk of repetition, and whether some additional measures or checks could adequately protect against that in a way which would enable Mr Te Stroet to remain employed. What the event had shown was that Fonterra procedures were sufficiently robust to identify aberrant activity by a technician.

2. Apparent disparity

[45] Fonterra presented dismissal as its only realistic option in the circumstances of what Mr Bekker described as wilful and deliberate falsification by Mr Te Stroet.

[46] However that is not consistent with a decision by Fonterra in August 2009 about three other technicians who were described by their manager, Mr Chubb, as "*falsifying results*" in a laboratory. In those cases Mr Chubb found the three technicians had modified fibre pads used as filters in 70 tests for foreign matter in milk powder. A disciplinary investigation concluded the technicians were not aware of the consequences for Fonterra and a flawed training process had contributed to their actions. They each received a written warning because their actions were repeated (compromising tests of 70 samples) and had serious consequences for the integrity of Fonterra's testing process.

[47] I accept Fonterra is not bound to treat Mr Te Stroet in the same way as those

other technicians, if the treatment of them was "*mistaken or overgenerous*".[3] However there is nothing to suggest it was. There is a clear difference from how Mr Te Stroet was treated a few months later and I do not accept there is an "*adequate explanation*" for it.[4] This is because I do not accept the distinctions between the two situations were as Fonterra submitted.

[48] The three technicians in the earlier case had deliberately and repeatedly poked holes in a filtering material so liquids flowed better. I have not accepted Mr Te Stroet's actions had that same sense of deliberation and they were not repeated. Those other three technicians 'knew' what they were doing while there is a fair argument – not fully examined by Fonterra before reaching its decision – that Mr Te Stroet's capacity to truly understand or 'know' what he was doing was impaired on 22 November. While Mr Te Stroet did not lack adequate training, unlike what Fonterra identified was the case with the other technicians, he had limited recent experience of the particular RG testing he was required to carry out that day.

[49] Mr Bekker was aware during his disciplinary investigation of Mr Te Stroet that the recent case of the three technicians had not resulted in dismissals. Dismissal was not treated as a virtually automatic outcome in that earlier case but was with Mr Te Stroet, once Mr Bekker had confirmed his finding of serious misconduct on 22 January 2010.

3. Inadequate consideration of alternatives

[50] In the 23 December meeting the union representatives, Mr Brown and Mr Hope, asked Mr Bekker to consider an alternative to dismissing Mr Te Stroet. They sought a transfer for him to another non-laboratory job.

[51] Fonterra's minutes of the meeting record Mr Bekker agreeing to defer the final decision to allow the representatives an opportunity "*to explore alternative positions within Fonterra, outside of the laboratory*". If Mr Te Stroet was successful in securing an alternative job, Fonterra would "*consider accepting his resignation from the lab*". Mr Bekker said that "*if approached*" he would "*disclose all findings of our*

[3] *Samu v Air New Zealand Limited* [1995] 1 ERNZ 636, 639 (CA).
[4] *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767, 778 (CA).

current investigation" to any manager from other Fonterra business units who might consider taking on Mr Te Stroet.

[52] Mr Te Stroet was stood down for one month over the Christmas and New Year period while Mr Hope and Mr Brown canvassed prospects of other jobs for Mr Te Stroet within Fonterra. Mr Bekker adjourned the 23 December meeting until 22 January when, according to the Minutes made by Ms Cornelious, "*we will consider any alternative proposals you may have to conclude this investigation*".

[53] However by the January meeting Mr Bekker had resiled from that position. His oral evidence to the Authority was that he had never really intended to allow for the prospect of Mr Te Stroet continuing to work for Fonterra. Meanwhile Mr Hope and Mr Brown had taken Mr Bekker's words in good faith and canvassed other managers about possible positions to which Mr Te Stroet could be transferred. Mr Johns had agreed to consider Mr Te Stroet for posts at his site but a dispute then arose whether the union representatives had properly appraised him of the circumstances in which the transfer was being sort.

[54] I accept the evidence of Mr Hope and Mr Brown that they were 'up front' about the incident and disciplinary investigation but also expressed their opinion, different from Mr Bekker's conclusions, about whether Mr Te Stroet's actions were deliberate. That is confirmed by notes taken by a human resources advisor of the discussion between the union representatives and Mr Johns.

[55] It is also clear that any prospect of Mr Johns being prepared to consider appointing Mr Te Stroet to a post at his site were firmly extinguished following a telephone conference between a number of managers and human resource advisors on 13 January 2010 during which, as Mr Johns said in his evidence, Ms Cornelious led the conversation. Around this time she also criticised Mr Hope for what she called placing "pressure" on other business unit managers, despite Mr Bekker having earlier authorised approaches being made to seek possible jobs for Mr Te Stroet.

[56] Against that background I do not accept Mr Bekker and Ms Cornelious acted in good faith regarding the exploration of alternatives, and consequently could not be said to have fairly considered options other than dismissal.

Is reinstatement practicable?

[57] Mr Te Stroet seeks reinstatement to his former position at Fonterra.

[58] Fonterra opposes reinstatement as "*completely impracticable*". It identifies four factors in support of this view: (i) its loss of trust in Mr Te Stroet; (ii) the risk of further repetition; (iii) the unsupervised nature of the position; and (iv) the difficulty of providing restricted duties in a laboratory where current procedures require technicians to carry out a full range of tests.

[59] While accepting Fonterra's position was strongly expressed, particularly by Mr Wang who manages the laboratory, I do not accept it has met the onus of establishing the primary remedy is truly impracticable in this case.

[60] For the following reasons I find reinstatement is not sufficiently impracticable to be excluded as a remedy for Mr Te Stroet's unjustified dismissal.

[61] Firstly, Fonterra's position is based on its conclusion about the level of deliberation in Mr Te Stroet's actions on 22 November – a conclusion which I have found was not fairly reached. While I have accepted that Fonterra established there were elements of negligence in how he subsequently dealt with doubts about his work (which could amount to serious misconduct), it had accepted three other technicians who acted in a way that damaged the integrity of laboratory processes could, after being provided with suitable guidance, be trusted to work satisfactorily.

[62] Secondly, the risk of repetition is more likely to be lower than the original risk of occurrence now that Fonterra is aware of Mr Te Stroet's health issue and can take measures to manage and accommodate it.

[63] Thirdly, Mr Te Stroet's position is not unsupervised. While he must on occasion work alone in carrying out certain procedures, each shift has a team leader or senior analyst to provide adequate supervision. A "buddy system" is operated for new staff and could be used while Mr Te Stroet is reintegrated into the laboratory. Fonterra could also have some confidence that the design of its laboratory and testing

systems is sufficiently robust to identify any further aberrations and Mr Te Stroet could be expected to be particularly diligent with the prospect that his work would be subject to closer scrutiny than previously.

[64] Fourthly, while rosters are organised so technicians carry out a full range of testing, the prospect of Mr Te Stroet performing restricted duties for a certain period while rebuilding confidence in himself and of others is a difficulty rather than an inherent impracticality.

Other remedies

Contribution

[65] In addressing remedies the Authority must consider whether a reduction is required for blameworthy conduct by Mr Te Stroet which contributed to the situation giving rise to his personal grievance: s124 of the Act. Such reduction need not apply uniformly across the basket of remedies sought – here being reinstatement, lost wages and benefits, and compensation for hurt and humiliation.

[66] Mr Te Stroet has conceded throughout that he contributed to the situation giving rise to his personal grievance. He was a long serving employee and trained in Fonterra's laboratory procedures regarding quality control and corrective action. From the day following 22 November, when he admits he had doubts about the results reported on the previous day, he should have notified his supervisor. While he would have had to overcome a reticence about revealing his mental health difficulties, the failure to report was blameworthy conduct and requires some reduction of remedies.

[67] If this were a situation where reinstatement was not sought or not being ordered, I would have reduced by one third the remedies of lost wages and compensation under s123(1)(c)(i) of the Act.

[68] In the present matter I have resolved the substantial merits of the case require reinstatement but with contribution recognised by a one-third reduction of the lost wages sought and no order of compensation for hurt and humiliation.

Lost wages

[69] Mr Te Stroet promptly mitigated his financial losses following his dismissal by taking a job with a local security firm. This paid $15 an hour, substantially less than the more than $27 an hour (including service) he earned at Fonterra.

[70] Under s123(1)(b) and s128 of the Act Fonterra is ordered to reimburse Mr Te Stroet for lost wages, and any superannuation or medical insurance benefits he might otherwise have received, for the period from the date of his dismissal to the date of reinstatement. The parties can calculate the value of this award – less a one third reduction on the wages element for contribution – for this period. The elements for superannuation and medical insurance should be calculated from the wages amount without reference to the reduction for contribution. Leave is reserved for either party to apply for further determination if the calculation of payment due cannot be resolved between themselves.

Reinstatement

[71] I make the following orders under s123(1)(a) of the Act for the reinstatement of Mr Te Stroet to his former position or a position no less advantageous to him, on the following conditions:

(i) he is reinstated to the pay roll from the first day after the date of this determination; and

(ii) Fonterra is to discuss with Mr Te Stroet, through his union representative, arrangements for his return to work on a day nominated by the company within 14 days of the date of this determination, but no later than 14 days; and

(iii) Mr Te Stroet is to participate, in good faith and at Fonterra's discretion and direction, in any training or 'refresher' programme required in preparation for his return to work; and

(iv) Fonterra may require Mr Te Stroet to work in any position for which he is trained and adequately experienced if he cannot immediately be placed in his former position and until such a position becomes available; and

(v) Leave is reserved for either party to apply for further directions regarding these conditions (provided that the parties have first attended mediation on

any points on which they cannot reach agreement).

Costs

[72] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, Mr Te Stroet may lodge and serve a memorandum on costs within 28 days of the date of this determination. Fonterra may lodge a reply memorandum within 14 days of service of Mr Te Stroet's memorandum. Any application for costs will not be considered outside this timeframe unless prior leave is sought and granted. Should the Authority be required to determine costs, and subject to any matters of which the Authority is not yet aware, any order for costs is likely to be at the level of the familiar notional daily rate.

Robin Arthur
Member of the Employment Relations Authority