

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 4  
5415550

BETWEEN                      HENRY TAUFUA  
   Applicant  
  
A N D                              FONTERRA BRANDS (NEW  
   ZEALAND) LIMITED  
   Respondent

Member of Authority:      T G Tetitaha  
  
Representatives:              H White, Counsel for Applicant  
   S J Turner/S J Clark, Counsel for Respondent  
  
Investigation Meeting:      19-20 September 2013 and 7 October 2013 at Auckland  
  
Submissions Received:      19 September and 7 October 2013 from Applicant  
   7 October 2013 from Respondent  
  
Date of Determination:      9 January 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.      Henry Taufua was unjustifiably dismissed by Fonterra Brands (New Zealand) Limited;**
- B.      There is an order Henry Taufua is to be permanently reinstated to his job at Fonterra Brands (New Zealand) Limited;**
- C.      The Authority declines to award any remedy under s123(b) because Mr Taufua has not proven to the required standard he has lost remuneration.**
- D.      The Authority declines to award any remedy under s123(c)(i) because Mr Taufua's behaviour was causative of the outcome and blameworthy.**

- E. Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.**

### **Employment relationship problem**

[1] This is the substantive determination following Henry Taufua's successful application for interim reinstatement on 7 June 2013<sup>1</sup>. Mr Taufua had been dismissed following the production of a video involving seven Fonterra employees. The employees, including the Mr Taufua re-enacted their own version of the "Harlem Shake" internet memo<sup>2</sup>. Mr Taufua and two others were dismissed. Four other employees were retained.

[2] Mr Taufua seeks permanent reinstatement. He submits the dismissal was substantively and procedurally flawed.

[3] Fonterra Brands (New Zealand) Limited (Fonterra) disagrees. The decision to dismiss Mr Taufua was justified, procedurally and substantively. It was a decision a fair and reasonable employer could have made. It opposes the remedies sought by Mr Taufua including reinstatement.

### **Facts leading to dismissal**

[4] On 11 March 2013, an employee, Aaron Uiese, organised the "Harlem Shake" video to be shot during the 1 am smoko break. Five other employees, including Mr Taufua agreed to participate. The video shows Craig Flynn hosing water into a chemical footbath which is pooling around Mr Uiese's feet. Mr Uiese is standing in one place wriggling and clapping his hands. Jose Lago, Metua Porea and Ryan Ruawhare are seen pretending to work. Mr Taufua walks across the screen pulling a pallet jack. Nick Jeffries walks in unaware the video is being made and starts working. He realises they are filming, leaves and does not return.

[5] The video moves to a scene where six employees are dancing. Messrs Flynn and Lago wearing visors and gloves are dancing at the rear of the chemical footbath. Mr Uiese is hanging from pipework on the roof. Messrs Porea and Ruawhare are dancing around the chemical footbath with buckets on their heads. Mr Taufua is seen

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<sup>1</sup> Taufua & Anor v. Fonterra Brands (New Zealand) Limited [2013] ERNZ Auckland 230

<sup>2</sup> An internet memo is a short video where people perform a comedy sketch accompanied by a short excerpt from the song "Harlem Shake" by Bower

travelling towards the camera standing on a pallet jack. Someone off screen throws an object towards him causing him to lean to the side. The pallet jack wobbles and tips side to side.<sup>3</sup>

[6] Mr Uiese filmed the video using his Ipad. All of the employees watched the video. The videos were uploaded to Youtube. None of the employees reported their actions to management at Fonterra.

[7] Mr Craig Rooks, UHT Plant Manager, saw the video. He sent a letter to all of the employees involved setting out the company's concerns and asked them to attend a meeting. Mr Taufua with his Union representative was interviewed on 13 and 14 March 2013.

[8] Mr Taufua was found to have breached Fonterra's Health and Safety policies and procedures by participating in the making of the film clip and subsequently failing to report such unsafe behaviour in the workplace. The misconduct was set out in the letter of dismissal dated 20 March 2013:<sup>4</sup>

1. *Engaging in an unsafe act in the workplace namely riding a pallet jack in an unsafe manner, endangering your own safety and that of others around you*
2. *Inappropriate use of work equipment, namely a pallet jack*
3. *Failing to report unsafe acts witnessed in the workplace, including hanging from pipes over 2 metres above a concrete floor, inappropriate use of work equipment including riding a pallet jack, pouring water on the floor and in a chemical bath with the specific intention of dancing around it, mis-use of PPE including visors and gloves, jumping around with a shovel, wearing a bucket on a head limiting visibility*

[9] The above was considered serious misconduct and a breach of the following Fonterra policies:

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<sup>3</sup> Attachment SIR-E SIR

<sup>4</sup> Agreed Bundle of Documents (ABD) Document 30 Letter Fonterra to H Taufua dated 20 March 2013

- Endangering health, safety and/or wellbeing of Employees
- Wilful and deliberate acts affecting quality and safety
- Failure to comply with safety procedures, policies, standards or rules, or working or acting in an unsafe manner, including failure to report accidents, personal injury or damage

[10] Other alleged misconduct was “*participating in the filming of serious horseplay in the workplace using Fonterra property without permission*” considered a breach of the Fonterra policy “*mis-use or unauthorised use of Fonterra property or time.*”

[11] Mr Taufua was summarily dismissed effective 20 March 2013. The remaining employees received a range of outcomes from dismissal to warnings to no further action.

[12] Mr Taufua applied and was granted interim reinstatement on 7 June 2013. This matter is now before the Authority for the purposes of determining the substantive application.

### **Issues**

[13] The issues for determination are:

- (a) Could a fair and reasonable employer have concluded Mr Taufua’s conduct was misconduct justifying dismissal?
- (b) Was the process leading to dismissal of Mr Taufua what a fair and reasonable employer could have done in all the circumstances?
- (c) If the Authority finds that the dismissal was unjustified, then what remedies should be awarded?
  - Is permanent reinstatement practicable and reasonable in the circumstances?
  - Has Mr Taufua lost remuneration (s123(1)(b))?

- What award (if any) should be made under s123(c)(i)
- Were his actions leading to dismissal causative and blameworthy requiring a reduction in compensation due to contributory conduct?

### **Legal framework**

[14] The fact Mr Taufua's employment was terminated is accepted. The onus falls upon Fonterra to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A.

[15] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.<sup>5</sup>

[16] The employment relationship is governed by the Collective Employment Agreement between the New Zealand Dairy Workers Union and Fonterra. Clause 9.1.1(d) under the heading "General Health and Safety Rules" states "*horseplay, or unauthorised use, or unauthorised removal of fire protection or safety equipment may lead to dismissal.*"<sup>6</sup>

[17] Fonterra's discipline and dismissal policy<sup>7</sup> defines serious misconduct resulting in summary dismissal as including the following:

- Endangering the health, safety and/or wellbeing of Employees and members of the public;
- Wilful and deliberate acts affecting quality and safety;
- Failure to comply with safety procedures, policies or rules, or working or acting in an unsafe manner, including failure to report accidents, personal injury or damage.

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<sup>5</sup> *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

<sup>6</sup> ABD Document 1

<sup>7</sup> ABD Document 4

[18] The second category of less serious misconduct sets out behaviour resulting in dismissal following repeated infringements and application of the disciplinary procedure including:

- Failure to comply with Fonterra policies (including less serious breaches of those policies referred to above where abuse of the standard is considered serious misconduct)
- Failure to comply with product safety procedures
- Misuse or unauthorised use of Fonterra property or time.

[19] Serious misconduct “... will generally involve deliberate action inimitable to the employer’s interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.”<sup>8</sup> It is conduct which “deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.”<sup>9</sup>

[20] There is a prima facie case of disparity of treatment on these facts. If there is an adequate explanation for the disparity, it becomes irrelevant. Even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered.<sup>10</sup>

**Could a fair and reasonable employer have concluded Mr Taufua’s conduct was misconduct justifying dismissal?**

[21] Mr Taufua submits the Authority must not determine whether his conduct was serious enough to warrant dismissal. Rather it should be confined to whether the dismissal was fair and reasonable in the circumstances. He submits this involves considering if the process was fair and if there was adequate justification for dismissal in the circumstances including the fact other employees involved were not dismissed.

[22] Fonterra submits Mr Taufua accepts his conduct was horseplay and amounts to misconduct. The issue is whether the dismissal was justified. It submits Mr Taufua

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<sup>8</sup> *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

<sup>9</sup> *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

<sup>10</sup> *Samu v Air New Zealand Ltd* (1995) 4 NZELC 98,334; [1995] 1 ERNZ 636 at 639

breached his terms of contract and employer rules and code of conduct. These were health and safety breaches justifying dismissal. Actual harm or injury is not required.

[23] The parties accepted Mr Taufua's behaviour was misconduct. The issue is whether this misconduct justified dismissal.

[24] The decision maker was Craig Rooks, Manager UHT Plant in Takinini. He believed Mr Taufua's conduct of riding the pallet jack endangered himself, others and was inappropriate use of equipment. He also failed to report the unsafe actions of others.

[25] Mr Rooks identified two issues which led to the conclusion Mr Taufua had committed serious misconduct. Firstly the failure to report, allowing it to happen and active participation. Secondly, riding the pallet jack in breach of safety rules, risking falling onto metal prongs and broken bones if the jack tipped and damage to the filler machine.<sup>11</sup>

[26] Photographs were produced of a pallet jack.<sup>12</sup> The pallet jack had a central wheel at the front with an upright handle in the middle of a flat steel bar with two perpendicular flat bars at each end. The ends of the two perpendicular bars rested upon two small wheels. The jack was close to the floor. Two bars in the middle of the jack had steel prongs which adjusted to a 90 degree angle to hold large rolls of packaging. In the video the bars with the steel prongs are at a 45 degree angle in front of Mr Taufua's thighs.

[27] Lance Flynn, Team Leader, gave evidence at hearing about the operation of the pallet jack. A handle with brakes was used to guide the jack around. It was meant to be pushed not ridden on. If the jack tipped to the side, the flat steel bar and perpendicular bars would hit the floor preventing the jack from tipping right over. The likelihood of tipping causing injury was minimal.

[28] Mr Taufua gave evidence about riding on the pallet jack. He travelled 3.5 meters, slower than walking speed and had a clear view of where he was going. When he wobbled from side to side, the steel bars on each side of the jack hit the floor, preventing tipping.

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<sup>11</sup> Witness Statement (WS) CR Rooks 21 June 2013 para 103

<sup>12</sup> Agreed Bundle of Documents (ABD) Document 11.

[29] The risk of tipping causing injury is equivocal having regard to the operation of the jack and speed it was travelling. The jack is low to the ground. The flat steel bar and perpendicular bars appear likely to hit the ground in the event of side to side wobbling. This would prevent it from tipping, unless pushed from the opposite side. From the video no person can be seen beside Mr Taufua. For a brief moment Mr Flynn can be seen dancing behind him, and unidentified persons are throwing objects towards him from the front. Even if the jack tipped on its side, it was unlikely to endanger people behind and in front of it. The filler machine from the photographs and diagram produced appears to be in front of Mr Taufua.<sup>13</sup> From the video it cannot be seen at all. Similarly the jack tipping on its side is unlikely to damage the filler machine located in front of it. It is also unlikely Mr Taufua would fall onto the steel prongs located in front of him in the event the jack tipped on its side. There was minimal risk of injury or damage in the circumstances. A submission was advanced about the risk of slipping on the jack while travelling. This was speculative and lacked evidential foundation.

[30] Fonterra's disciplinary policy requires employees to report health and safety breaches where there is accident, injury or damage. There was no accident, injury or damage. The employment agreement and policy do not clearly define an obligation to report in the absence of accident, injury or damage. The parties disputed whether this incident should have been reported or otherwise. The parties disputed whether Mr Taufua was in a position to view all of the alleged acts at the material time he should have reported. None of the employees reported this incident, including one employee against whom Fonterra took no disciplinary action. The Authority is not persuaded there was a legal obligation for Mr Taufua to report this conduct in the circumstances.

[31] There was disparity of treatment between the seven employees. Three employees committed similar misconduct, yet retained their jobs. One employee involved in the first part of the video had no disciplinary action taken against him. The explanation for disparity is Mr Taufua's conduct was more blameworthy than the others. These employees jointly made the decision to participate in the making of this video. It was a common enterprise. Other employees who retained their jobs can be seen dancing with buckets and visors on their heads (limiting their visibility) near other people, a chemical footbath in the floor and machinery. The risk of these individuals causing injury or damage appears more likely than Mr Taufua. It is

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<sup>13</sup> ABD Document 11 and Applicants Exhibit B Diagram of area where filing took place

speculative Mr Taufua's behaviour was at more risky than the employees who were retained. It is artificial to make any such distinction. The reasoning for disparity is the same as the substantive justification for dismissal. The Authority is not persuaded Mr Taufua's conduct justified dismissal in the circumstances.

[32] Given the above, the Authority determines a fair and reasonable employer could not have concluded Mr Taufua's conduct was misconduct justifying dismissal. Henry Taufua was unjustifiably dismissed by Fonterra Brands (New Zealand) Limited.

**Was the process leading to dismissal of Mr Taufua what a fair and reasonable employer could have done in all the circumstances?**

[33] Mr Taufua alleges there was inadequate investigation by the failure to interview anyone about the kind of worker he was and whether this was out of character, failure to question about his understanding of his obligation to report and no investigation of the likelihood of injury. The decision to dismiss was predetermined evidenced by the discussions about outcomes with Union representatives and Mr Rooks erroneous belief they had sanctioned this outcome. There was disparity of outcomes between the employees and lack of consideration of the proportionality of risk in Mr Taufua's conduct, which was unfair and unreasonable.

[34] Fonterra submits it carried out a thorough investigation, provided Mr Taufua with full details of the allegations, advised the purpose of the investigation and meetings in advance, advised disciplinary action including dismissal may result, gave him a full opportunity to respond to the allegations and proposed outcome and genuinely considered his replies. Even if there were flaws, they did not result in Mr Taufua being disadvantaged or treated unfairly.

[35] The issues of disparity and proportionality of risk/likelihood of injury are dealt with above.

[36] The remaining alleged failures in the investigation are Mr Taufua's personal character and understanding. He had Union representation at the meetings, and was capable of putting those concerns without interviewing others.

[37] An assumption the Union may have supported a decision to dismiss rightly or wrongly does not evidence predetermination.

[38] There are concerns about the genuine consideration of Mr Taufua's responses by Mr Rooks. Mr Rooks evidence at hearing was he did not consider Mr Taufua's behaviour less serious misconduct under the policy because of the acknowledged breach of health and safety. It appeared from his evidence once a breach was admitted, the matter became automatically serious misconduct. Fonterra's disciplinary policy makes a distinction between serious and less serious breaches of health and safety. Breaches of health and safety per say are not automatically treated as serious misconduct warranting summary dismissal. Mr Rooks admitted failure to consider whether Mr Taufua's behaviour fell within the less serious breaches of health and safety prior to dismissal was unfair. This was not minor given it is provided for within its own policies.

[39] The Authority determines the process leading to dismissal of Mr Taufua was not what a fair and reasonable employer could have done in all the circumstances. Henry Taufua was unjustifiably dismissed by Fonterra Brands (New Zealand) Limited.

**If the Authority finds that the dismissal was unjustified, then what remedies should be awarded?**

*Permanent Reinstatement*

[40] Mr Taufua seeks permanent reinstatement. He says it is practicable and reasonable to reinstate him to his former role.

[41] Fonterra disagrees. Mr Taufua has irreparably damaged trust and confidence by his conduct. It has serious doubts about the viability of any ongoing relationship given his comments he was "*just having a bit of fun*". Mr Rooks is his direct report and he will have to work unsupervised. Reinstatement would send a message to other employees that it was okay to ignore the rules on your own initiative and come back to work.

[42] Fonterra retained four workers for the same or similar conduct. It repaired any breach of trust and confidence it had with those workers. These workers would also report to Mr Rooks. Mediation could also assist in repairing any breakdown in

relationship between Mr Rooks and Mr Taufua. There are resources available to repair any breakdown in relationships and ensure this conduct is not repeated.

[43] Mr Taufua should be well aware his conduct was extremely unwise. Training on health and safety, codes of conduct, rules and any other relevant safety matters should be a priority.

[44] Mr Taufua's reinstatement sends a similar message Fonterra gave in retaining the other employees. It is speculative whether employees would view Mr Taufua's reinstatement as being worse than the other employee's retention.

[45] Reinstatement is both reasonable and practicable in the circumstances. There is an order Henry Taufua is to be permanently reinstated to his job at Fonterra Brands (New Zealand) Limited.

#### *Lost wages/Damages*

[46] Given the finding Mr Taufua has a personal grievance, he may be entitled to recover lost remuneration. Mr Taufua alleged lost income from the date he was dismissed 23 March 2013 until reinstated on 7 June 2013. However he does not show how this accounts for the final pay out received which may include notice, and there is no proof he attempted to mitigate his losses. Accordingly the Authority declines to award any remedy under s123(b) because Mr Taufua has not proven to the required standard he has lost remuneration.

[47] There is no other particularisation of claims for damages or losses arising from Fonterra's action. Other than possible shock at the loss of the job, no other evidence justifying more than a minimal award for damages under s123(c)(i) is evidenced.

[48] If Mr Taufua's actions contributed towards the situation that gave rise to the personal grievance, this can reduce the remedies that would otherwise have been awarded (s.124). Contributing behaviour is causative of the outcome and blameworthy.<sup>14</sup>

[49] Mr Taufua's decision to participate in the making of this video was causative of the personal grievance. The conduct was not "*a bit of fun*" – it was in breach of the health and safety rules and therefore blameworthy. A reduction in compensation

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<sup>14</sup> *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82

of 100% is appropriate. Accordingly the Authority declines to award any remedy under s123(c)(i) because Mr Taufua's behaviour was causative of the outcome and blameworthy.

[50] Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.

**T G Tetitaha**  
**Member of the Employment Relations Authority**