

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 171
5313709

BETWEEN	RICHARD ARTHUR MOANA WATTS Applicant
AND	FONTERRA COOPERATIVE GROUP LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	N Perry and M Lajeunesse, Counsel for Applicant J Rooney, Counsel for Respondent
Investigation Meeting:	8 December 2010 at Whangarei
Submissions Received:	22 December 2010 and 9 February 2011 for Respondent 21 January 2011 for Applicant
Determination:	28 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Watts, claims that he was unjustifiably dismissed on 18th December 2009. He asks the Authority to find that he has a personal grievance and award him various remedies including reinstatement to his previous position. Mr Watts also claims that the respondent breached certain provisions of his employment agreement, albeit this claim appears to be collateral to the claim of unjustified dismissal. The respondent, Fonterra Cooperative Group Limited (Fonterra), says that the dismissal of Mr Watts was justified due to the loss of trust and confidence in him related his possession of drug paraphernalia in the workplace and his response pertaining to that possession, when the matter was under investigation.

[2] In addition to the evidence of Mr Watts, the Authority has received evidence for him from Mr Taupaki Cassidy and Ms Moana Clark. For Fonterra there is

evidence from Mr Ernie Gent, Driver Performance Assessor, Mr Paul Somers, Acting Shift Team Leader/Tanker Driver, Ms Deborah Hastie, Human Resources Manager, and Mr Alistair Finlayson, Tanker Driver. Both parties have presented comprehensive closing submissions. All of the material provided and the oral evidence of the respective witnesses has been closely considered, albeit it may not be specifically referred to.

Background Facts and Evidence

[3] Mr Watts was employed as a milk tanker truck driver. His terms and conditions of employment were provided within the *Fonterra Dairy Workers Collective Agreement* (the CEA).

[4] The evidence of Mr Alistair Finlayson is that on Friday, 4th December 2009, he discovered, on the seat of the milk tanker truck (the tanker) that he was to drive that day, an item that he recognised as a piece of marijuana smoking apparatus. Mr Finlayson described this item as “a red coke bottle top with a hole drilled through it and a 3-4 mil socket through the hole.” He says that he “immediately recognised” the item, as he has seen something “exactly” like this during his training at Police College.¹ Mr Finlayson explained that the cap and the socket are usually screwed onto a plastic coke bottle which has the bottom cut off. A plastic bag is taped to the bottom of the bottle and when the marijuana in the socket is lit, it can be inhaled through the plastic bag.² Mr Finlayson says that the inside of the socket was burnt and it had “definitely” been used to smoke marijuana and it was “reasonably fresh.”

[5] Mr Finlayson attests that at approximately 5:45p.m. that day, he handed the smoking apparatus (the apparatus) to the Acting Team Leader, Mr Paul Somers. The evidence of Mr Somers is that having had it confirmed by Mr Finlayson (and others), that the apparatus was used for smoking cannabis; he then checked the records and found that Mr Watts had been driving the tanker immediately before Mr Finlayson. Upon being summoned to Mr Somers’s office, Mr Watts acknowledged that the apparatus was his. The evidence of Mr Somers is that Mr Watts told him that the item was for home use and that what he did at home “doesn’t concern us.” Mr Somers says

¹ Mr Finlayson attended Police College in 2006-2007.

² While the Authority has not been able to view the apparatus found in the tanker, a photo of an example of a similar item has been made available - for the edification of the Authority.

that his response to Mr Watts was that, while it may not be the employer's business what Mr Watts does at home, it does concern Fonterra "once it is in a company tanker." Mr Somers says that he informed Mr Watts that he would be emailing Ernie Gent about the matter and in the meantime, Mr Watts should go home. Mr Somers says that Mr Watts then "took the object off the table" and left the office. The evidence of Mr Watts is that he admitted to Mr Somers that he had smoked marijuana while "going through a rough patch a couple of months ago" but "never" during working hours. Mr Watts says Mr Somers handed the apparatus back to him and that Mr Somers said: "... nothing further will become of it." But Mr Somers denies that he told Mr Watts that nothing further would become of it, nor did he hand the apparatus back to Mr Watts. Rather, Mr Watts simply picked it up and took it with him when he left.

[6] I find the evidence of Mr Somers to be more probable. It is most unlikely that he would have told Mr Watts that nothing further would come of the discovery of a drug related item in a company vehicle. Mr Somer's version of events is confirmed and collaborated by the content of an email he sent to Mr Gent at 7:07a.m. on Monday, 7th December 2009:

Good morning Ernie,

On Friday night a driver from Kikorangi shift handed me a bit from a substance taking equipment [P or weed] i [sic] had a word with Richard Watts who confirmed it was his. Richard says it was for home use and what he does at home does'nt [sic] concern us. I'm a bit concerned that maybe some of this is being done at work which may explain some of his driving habits, what would you suggest i do about this matter.

[7] The evidence of Mr Gent, the Transport Depot Manager (as he was then), is that following a discussion with Mr Somers on the morning of 7th December 2009, he contacted Mr Len Hill, the Dairy Workers Union Delegate. Mr Gent says that he informed Mr Hill of the information he had received regarding Mr Watts and that a preliminary investigation meeting would be necessary. Mr Hill's notes record that:

Ernie [Mr Gent] further commented that he was angry about what had happened because Ritchie [Mr Watts] had been the subject of investigation recently regarding his driving habits, and had been defended quite strongly by the DWU and by Ernie himself, and Ernie felt that maybe drug use was the reason for Ritchie's perceived bad driving. I replied that maybe it was, but we would find out what the true story was.³

³ Mr Hill mistakenly records that this conversation took place on 8th December when the overall evidence confirms that it must have been 7th December 2009.

It was agreed that a meeting would take place the next day. Mr Watts was “stood down” from driving duties pending the outcome of the investigation but it appears that he was driving on the morning of 7th December. Mr Gent says that this was due to Mr Somers being inexperienced as a team leader dealing with employment related issues. Mr Gent attests that there were “serious health and safety concerns” and that Mr Watts should have been stood down immediately.

Meeting on 8th December 2009

[8] The meeting with Mr Gent was attended by Mr Watts accompanied by Mr Hill as his representative. Notes are available - prepared by Mr Gent. The matter of the drug apparatus found in the tanker was put to Mr Watts and an explanation was sought. The evidence of Mr Gent is that Mr Watts acknowledged that it belonged to him and he explained that he had left it in his bag following a move back to his home, due to the reconciliation of a relationship, about two months ago. Mr Watts explained that the apparatus must have fallen out of his bag and was left in the tanker. The further evidence of Mr Gent is that Mr Watts “readily admitted” that he was a user of cannabis but had not “had a smoke” for about two months. Mr Watts also said that he had never used cannabis at work but he did use it sometimes when he got home at the end of a work day; to relax. Mr Watts also said he was prepared to undergo a drug test to prove that he wasn’t currently using cannabis. Mr Gent says that he didn’t think it was necessary for Mr Watts to have a drug test at that time as the investigation had only started and no conclusions had been reached. Mr Gent adds that: “And in any case, Richard had admitted to using cannabis for about a month and a half, two months previously, during the period of his employment with Fonterra.” The meeting concluded on the understanding that Mr Watts would be suspended from his employment while a formal investigation was conducted. Mr Gent says that Mr Hill told him “in private” that he thought that dismissal was warranted in the circumstances and that the Union would not be supporting Mr Watts any further.

[9] However, Mr Hill had a change of mind. In an email to a Fonterra human resources officer later on 8th December, Mr Hill confirms most of what had been discussed at the meeting earlier that day, and that he had also spoken to Mr Watts privately. Mr Hill informs, among other things that:

- The item found in the truck cab was his [Mr Hill’s] which he admits. It was a plastic bottle top with a metal piece screwed into it. It was accidentally left in his bag from when he moved house over 2 months ago, and he had forgotten it was there.

- He fully realises the position he has put everyone in and is extremely upset and remorseful.

In view of the above, can I suggest that Richie is given any drug tests the Co wishes him to undergo, and action is taken on the results. If the result is clear, there would be no need for any disciplinary action.

[10] Via a letter dated 9th December 2009, Mr Watts was invited by Mr Gent to attend another meeting. Mr Gent records (among other things) that:

You have admitted that you own this piece of drug paraphernalia and that you have been a recreational drug user in the past.

Mr Watts was informed that:

At this meeting you will be given the opportunity to provide an explanation to the incident that occurred on 4th December 2009. This incident is regarded as serious and falls short of the level of acceptable behaviour expected of you as a Fonterra Tanker Operator. If your explanation is not acceptable, this meeting may result in [sic] disciplinary action, up to and including dismissal.

Mr Watts was informed that he should bring a representative/support person to the meeting and that interview notes would be made available to him after the interview is conducted.

Meeting of 10th December 2009

[11] Mr Watts was represented by Mr Hill and Mr Richard Everson, the Union's Northern Organiser. Mr Gent was accompanied by Mr Wayne Sivern, Regional Transport Manager for Fonterra. Mr Watts was given the opportunity to give an explanation regarding the existence of the apparatus. The evidence of Mr Gent is that Mr Watts explained that he had separated from his wife on 1st March 2009 but was now back with his family. He had used cannabis for about a month and a half while he was apart from his wife and family, but his lifestyle had changed since returning home. Mr Gent says that Mr Watts confirmed that the apparatus was his, but he now said it had not been used for smoking cannabis.

[12] The evidence of Mr Gent is that he reminded Mr Watts that at the earlier meeting he had said that the apparatus was his and that he had admitted to smoking cannabis. Mr Gent says that Mr Watts responded that: "the apparatus hadn't been used for anything at all, it was in "new condition" and that it could be used for a fishing float. Mr Gent attests that he then asked Mr Watts why he had changed his story, but no explanation was forthcoming. The meeting concluded on the understanding there

would be a further meeting on Monday 14th December 2009, to discuss the outcome to be proposed by Fonterra. This was confirmed in a letter to Mr Watts of the same date.

Meeting on 14th December 2009

[13] The general proceedings of the meeting are recorded in the notes taken by Ms Deborah Hastie, the Fonterra Human Resources Manager, and are also summarised succinctly in the evidence of Mr Gent, Mr Watts does not take issue with. Mr Gent testifies that:

I ran through the main points of the investigation to date. I explained that the apparatus had been found in the tanker after Richard had been driving it. At the 8 December meeting Richard admitted that the apparatus was his and admitted to taking drugs in the past (during the period of his employment with Fonterra). Then at the 10 December meeting Richard claimed that the apparatus could be used as fishing lure or float, as an example. Richard confirmed that this was an accurate summary. I then asked Richard if he had anything else to say or add at this stage. He said that it had been a hectic year and he had made some bad decisions. He also said that he had let the other drivers down on the shift, and let himself and his family down.

[14] The further, and material, evidence of Mr Gent is that:

“I thought, once again, that it didn’t make sense that Richard would say he was remorseful and had let the other drivers down on the shift if the apparatus was genuinely just a fishing lure or float.”

The evidence of Ms Hastie is of a similar vein in regard Mr Watts’ remorse.

[15] A decision was made that Mr Watts would be dismissed. The reasons for the dismissal are encased clearly in the further evidence of Mr Gent:

I explained that we had considered what Richard has said, and had taken into account his past history and service. However, on this occasion we believed that summary dismissal was appropriate. I outlined our reasons for this conclusion, namely that there had been a breach of trust in that Richard’s story had changed between the first meeting and the second meeting and that cast doubt on his honesty and integrity. I explained that we were concerned that he has admitted to using cannabis during the period of his employment with Fonterra. Richard operated a 45 tonne tanker and there were very serious health and safety consequences if he was in any way under the influence of drugs while at work. We were concerned that Richard had drug paraphernalia with him at work in a company vehicle.

[16] Pursuant to clause 8.5.5 of the CEA, where an “instant” or summary dismissal is intended, and the Union wishes to “contest the dismissal” the employee concerned is “stood down” on full pay to the end of the following day “or until negotiations are concluded, whichever is the sooner.” The evidence of Mr Gent is that Mr Watts and Mr Hill were informed that, if they wished to challenge the decision to dismiss Mr

Watts, they would need to submit the objection, in writing, within 24 hours. It subsequently transpired that this time frame was extended and via an email dated 17th December 2009, Mr Hill submitted a challenge to the decision of Fonterra to dismiss Mr Watts. Mr Hill informed that the Union believed that the decision to dismiss was based “on suspicion rather than concrete evidence” and was in contravention of clause 7.7 of the CEA, and was therefore unjustifiable. Mr Hill suggested that Mr Watts should be placed on a random drug testing program for a defined period, while he continued in his employment. It appears that it was intended by Mr Hill that his email should be read in conjunction with another sent (to Mr Hill) by Mr Everson, the Northern Organiser for the Union. This placed an emphasis on allowing Mr Watts to undertake an initial drug test and then, subject to a negative outcome, placing him on a random drug testing regime for a defined period.

[17] Clause 7.7 of the CEA provides for a cooperative approach between the Union and Fonterra in regard to employees that may be impaired through alcohol and drug/substance abuse. Relevant to the argument advanced for Mr Watts, by the Union, is the following extract:

Subject to legislative requirements, the Company does not advocate punitive action for alcohol and/or drug/substance abuse and does not believe in an invasive testing approach in the workplace. Consequently the parties encourage and support employees to self identify if they have a problem.

The submission by the Union was that while under the above provision, the company “does not advocate punitive action for alcohol and/or drug/substance abuse,” in regard to Mr Watts, Fonterra had “gone down a purely punitive path.” However, Mr Gent disagreed that there was any breach of clause 7.7 of the CEA, as it is expected that under the policy, employees are to self identify that they have a problem and seek treatment/rehabilitation. Mr Gent also points to the Fonterra *Drug and Alcohol Impairment at Work* policy. In particular clause 3.2:

Consumption or possession of drugs and/or alcohol at the workplace or in any company vehicles, or whilst carrying out work on behalf of the company, is prohibited.

And at 4.3 of the policy it is provided that:

Fonterra Operations recognises that continuity of employment can be an essential factor in the rehabilitation process and will not put that employment of a participating employee in jeopardy providing that:

4.3.1 The employee seeks treatment and the rehabilitation process proceeds satisfactorily.

- 4.3.2 Job performance becomes satisfactory within a reasonable time after treatment begins.
- 4.3.3 The employee is not in violation of any relevant law or other Company rules and regulations.
- 4.3.4 An employee temporarily reassigned to other duties while undergoing rehabilitation shall not incur any loss of base pay and conditions, where continuation in their assigned position could affect people, plant, safety or risk of environmental exposure. Should reassignment be of a permanent nature, then wages/salary and employment conditions will be subject to review.

[18] At clause 6 of the policy, there is a procedure:

6.1 EMPLOYEES WHO IDENTIFY AS HAVING A PROBLEM WITH ALCOHOL AND/OR SUBSTANCE ABUSE

If an employee identifies themselves as having a problem with alcohol and/or substance abuse or an employee is identified by others as having a problem with alcohol and or substance abuse or is unable to attend work due to impairment of drugs or alcohol the following procedure will apply:

The clause then continues to outline certain steps that will apply. But it is clear that this procedure and the overall policies, rely upon an employee self identifying they have a problem, or another party identifying there is a problem. As Mr Gent has attested, in Mr Watts' case, he had not self identified or sought treatment or rehabilitation. It was not until the drug apparatus was discovered in the tanker, and the company instigated an investigation, that Mr Watts admitted that he had been a user of marijuana.

[19] After considering the submissions made by the Union on behalf of Mr Watts, Mr Gent contacted Mr Hill to arrange a meeting for Friday, 18th December 2009, for the purpose of informing Mr Watts that, following the consideration of the submissions pertaining to the challenge to the decision to dismiss, Fonterra remained of the view that dismissal was the appropriate action. But Mr Hill informed Mr Gent that Mr Watts was not able to come to the workplace for a meeting on that date, as he was at home with his children; albeit it the evidence of Mr Gent and Ms Hastie is that Mr Watts was aware that he would be required to attend a meeting on that date. The evidence of Mr Gent is that Fonterra was concerned that if they did not meet with Mr Watts on Friday 18th December, then: "the [disciplinary] process would drag on" for a further three days until the following Monday. Mr Gent expressed the view that the process had already been "drawn out" due to the Union's delay in making the written challenge to the dismissal.

[20] It was decided that the confirmation of Mr Watts' dismissal would be conveyed to him by telephone on 18th December. Mr Hill was present with Mr Gent and Ms Hastie with the call being transmitted via a speaker phone. Mr Watts was informed by Mr Gent that his dismissal was confirmed effective from that day. The dismissal was subsequently confirmed in writing via a letter from Mr Gent dated 21st December 2009. The evidence of Mr Watts is that he did not receive the letter and that he first sighted it at the mediation meeting held on 24th February 2010. The letter produced to the Authority is unsigned and Fonterra have not produced a signed copy. Also the letter is not addressed to Mr Watts' home address. Rather, it is simply addressed to Mr Watts, *Tanker Operator, Kauri, Fonterra Milk Supply*. However, notes prepared by Mr Everson, the Union Organiser, and produced to the Authority by Mr Watts; indicate that a copy of the dismissal letter was given to Mr Hill. But there is no evidence regarding when (or if) Mr Hill received it or whether he gave the letter to Mr Watts. But in any event, in my view, the onus was on Fonterra to ensure Mr Watts received the letter, preferably by courier.

[21] Mr Watts also says that the manner in which the dismissal was carried out (via oral notification by telephone) was in breach of clause 8.5.4 of the CEA. This provides that:

Prior to any employee being dismissed the site delegate (or in their absence, deputy site delegate) must be informed and must be present together with the worker concerned (unless the worker objects to the delegate's presence in which case the delegate shall not be present). If the dismissal is to be carried out, the time, date and reason for the dismissal shall be recorded by the manager carrying out the dismissal.

[22] The further evidence of Mr Watts is that on 16th December 2009, at his own initiative, he underwent a drug test. A urine sample was taken by his doctor on that day and forwarded to a laboratory for testing. The *Laboratory Services Report* dated 18th December 2009, records that: *Cannabis metabolites Not detected*. This was confirmed to Mr Watts in a note from his doctor dated 23rd December 2009; obviously subsequent to his dismissal. Mr Watts did not inform Fonterra, or the Union, that he had undergone a drug test on 16th December and was awaiting the result. Nor it seems did Mr Watts attempt to obtain the result of the test, prior to having his dismissal confirmed, shortly after 3:00p.m, on 18th December 2009.

Legal Analysis and Conclusions

[23] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied when determining whether or not the dismissal of Mr Watts was unjustified. The Authority is required to consider on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[24] But as was held by the Employment Court in *Air New Zealand v Hudson* [2006] ERNZ 425:

However, the s103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer's actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer's actions by that objective standard. It may mean that the Court [Authority] reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

And then further, in regard to the application of s103A:

The section does not differentiate between aspects of the dismissal process but, because it refers in general to the employer's actions, the test for justification applies at all stages including the employer's decision that misconduct has occurred and the employer's decision to dismiss. Each of these stages are open to scrutiny although this is not to be done in a mechanical way as it is recognised that the lines between each stage are often blurred.

[25] The meaning of s103A was again clarified more recently by a full bench of the Employment Court in *Air New Zealand Ltd v V* [2009] ERNZ 185:

The meaning of the text of s103A is clear on its face and in the light of its common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.

The actions of Fonterra up to and including the decision to dismiss Mr Watts

A false sense of security?

[26] It is submitted for Mr Watts that at the beginning of its investigation, Fonterra did not adequately express to Mr Watts the seriousness of the company's concerns. The submission is that when Mr Watts was required to attend the first meeting on 8th

December 2009, he was just “informed verbally” by his representative, Mr Hill, and that Mr Watts was not advised by Fonterra that he could seek independent advice. It is submitted that Mr Watts thought that the meeting would be “an informal discussion.” It is also submitted that Fonterra did not believe that there was a serious issue to address because it allowed Mr Watts to drive two more tanker runs after the apparatus was discovered. It is also alleged that Mr Somers made a remark to the effect that the matter of the discovery of the drug apparatus would not go any further. And then it is argued that Mr Watts offered to undergo a drug test but this was declined by Fonterra on the basis that it was “unnecessary.” In summary, the argument is that the combination of all of the above factors caused Mr Watts to “labour under a false sense of security.”

[27] Firstly, I do not accept that Mr Watts was unaware of how seriously Fonterra viewed his possession of the drug apparatus. Perhaps it is a fair criticism that Fonterra arranged the first meeting with Mr Watts via his union representative, Mr Hill, rather than conveying the concerns in writing directly to Mr Watts. I would suggest that it would be better practice for Fonterra not to simply rely on the Union to convey its concerns when an investigation and possible disciplinary action is contemplated. There should be direct communication, in writing, with the employee concerned. Nonetheless, I accept that it has most probably been common (and appropriate) practice for Fonterra management to involve the Union closely in such matters and I have little doubt that when Mr Watts attended the meeting on 8th December, he would have been aware that Fonterra was concerned about his possession of the drug apparatus and that there was going to be more than just an informal discussion. Also, this meeting was the first step in the investigation process and there is no evidence that Mr Watts felt compromised in any manner, or that he would have preferred alternative representation. Indeed, he continued to be satisfied with the advice and assistance of the Union throughout the overall process. Furthermore, I accept the evidence of Mr Gent that he made it clear to Mr Watts at the meeting on 8th December that Fonterra viewed matters seriously. This was reinforced by the suspension of Mr Watts from his employment, without protest, while the investigation continued. Indeed, the evidence of Mr Watts is that: “I was informed by Mr Gent that the company was taking this incident very seriously” Further, following the initial meeting on 8th December, Mr Watts received a letter the following day; the content of

which made it transparently clear that matters were serious and that there was a possibility of disciplinary action “up to and including dismissal.”

[28] Further, I do not accept that anything can be made of the fact that Mr Watts continued to drive the tanker for a period after the discovery of the apparatus. I accept that Mr Gent acted promptly and removed Mr Watts from driving duties when he became conversant with the situation after speaking to Mr Somers. And as indicated earlier, I prefer the collaborated evidence⁴ of Mr Somers to that of Mr Watts in that I find it is most improbable that Mr Somers would have given any indication to Mr Watts that matters would not go any further, given that a drug related apparatus had been found in a company vehicle. Finally, it is commonly accepted that Mr Watts offered to undergo a drug test and that Mr Gent felt that was not necessary at the first stage of the investigation. I will return to this matter. But it is enough to say here, that I do not accept that the early rejection of the offer made by Mr Watts could be taken as an indicator that Fonterra did not view matters seriously. In summary, I find that there is nothing to suggest that any action or inaction by Fonterra during the investigation process could have remotely left Mr Watts with a false sense of security as alleged. On the contrary, I have no doubts that Mr Watts was fully aware of how seriously Fonterra viewed his situation and that he was represented to a degree that he accepted and was satisfied with, at that time.

The extent of the investigation

[29] It is submitted for Mr Watts that because he denied that the apparatus had been used for drug taking activity, it was incumbent upon Fonterra to make further enquiries. It is argued this was also required, as there was no evidence that Mr Watts had recently used, or had been affected by cannabis. Criticism has been levelled at Fonterra for accepting the opinion of Mr Finlayson as to the apparatus being recently used. It is also denied that Mr Watts changed his story in regard to what the apparatus actually was and that Fonterra adopted an “antagonistic attitude” towards Mr Watts following the allegation that he had changed his story. In summary, the submission for Mr Watts is that further investigation by Fonterra was required.

⁴ The email to Mr Gent dated 7th December 2009 sent at 7:07a.m.

[30] But I find that Mr Watts did change his position in regard to the identification of the apparatus. The evidence is that at the meeting on 8th December, Mr Watts was commendably candid in regard to his ownership of the drug apparatus and he did not dispute what it was or what it was used for; notwithstanding that he also said that he had not partaken in the use of cannabis for about two months. Had Mr Watts maintained that position, perhaps the outcome of the disciplinary investigation may have been different. However, at the meeting on 10th December, while Mr Watts did not resile from his ownership of the apparatus, the evidence of Mr Gent (which I accept as being entirely credible), is that Mr Watts said that the apparatus had not been used, but that it could be used for a fishing float. I also accept the evidence of Mr Finlayson and Mr Somers that the apparatus had been used for smoking marijuana, albeit I conclude that how recent that use was, remains unproven. The evidence of Mr Watts to the Authority is that: “I was trying out a new prospect for a fishing lure.” While it is clear that Mr Watts did suggest at the meeting on 10th December 2009 that the apparatus could be used as a “fishing float” there is some ambiguity in the overall evidence as to whether Mr Watts suggested that the apparatus might also be used as a “fishing lure,” before presenting his evidence to the Authority. However, the notes taken at the meeting on 14th December record that:

Discussed the device again you [Mr Watts] claimed it could be used for a fishing lure or a float for example.

Richard – Yes

The notes record that when Mr Watts was asked if he had anything else to say or add, he responded:

Just I am remorseful effected [sic] my family, just stressed and wanted to put this behind me. Pretty hectic year, still coming to terms with things, made some bad decisions for me and my family, let the others down on the shift, and want to get past it and try and move on. Let myself and my family down.

Was Fonterra entitled to treat the actions of Mr Watts as serious misconduct warranting dismissal?

[31] It seems to me that the change of position by Mr Watts at the meeting on 10th December 2009, regarding the use of the apparatus, goes to the heart of why Mr Watts was dismissed. The evidence of Mr Gent about this change of position is persuasive:

Richard had himself admitted to us that the drug paraphernalia found in the tanker belonged to him. He was also dishonest with us during the investigation when he changed his story between the first and the second meetings. I considered that Richard’s actions and his dishonesty constituted serious misconduct and that I had lost all trust and confidence in him.

[32] Mr Watts had admitted being user of cannabis in his private life, albeit he said he had not done so for approximately two months. It has to be accepted that what Mr Watts did in his own time was his business, unless it affected his work. But when the drug apparatus was found in the tanker he had been driving, it was then entirely appropriate that Mr Watts' possible cannabis use should become the business and legitimate concern of Fonterra. Mr Watts readily acknowledged that the apparatus belonged to him. He also said that it must have fallen out of his bag after having been in there for some time. The question then arises as to why Mr Watts would be in possession of drug smoking apparatus while engaged in his employment. The response of Mr Watts at the meeting on 10th December 2009 was that the apparatus could be used as a fishing float (or possibly a fishing lure). That explanation was found not to be credible by Fonterra. I do not find it to be credible either, as earlier, Mr Watts acknowledged that had used cannabis (up to about two months before) and that he had the apparatus with him for some time.

[33] A submission for Fonterra is that given the seriousness of Mr Watts' actions, in a safety sensitive environment, where the company have to have complete trust in every driver as they are responsible for driving 45 tonne tankers, the decision to dismiss him for serious misconduct was the action of a fair and reasonable employer in the circumstances. I accept that this is so. Had Mr Watts not changed his position in regard to what the apparatus could be used for, I think that Fonterra may have had reduced grounds to find that serious misconduct warranting dismissal existed. However, given the change of stance by Mr Watts, I conclude that it was fair and reasonable for Fonterra to view that as dishonesty, and in all the circumstances, this led to a loss of trust and confidence going to the heart of the relationship. This is particularly so given the responsibilities inherent in Mr Watts' employment as a tanker driver and the overall trust and integrity that are essential to the role.

Was there anything of a procedural nature that made the dismissal unfair or unreasonable?

[34] Mr Watts says that Fonterra breached clauses 7.7 and 8.5.4 of the CEA. These clauses and their operation have been set out above. In regard to the alleged breach of clause 7.7, the general thrust of the argument for Mr Watts appears to be that the company took "punitive action" in that it did not offer Mr Watts assistance and/or rehabilitation relating to his involvement with cannabis. But I accept the position of

Fonterra that the operation of clause 7.7 and the overall policies relating to drug or alcohol impairment, largely rely upon self identification and Mr Watts did not identify that he was impaired and/or required assistance. It follows that I find that Fonterra did not breach clause 7.7 of the CEA.

[35] It is alleged that Fonterra breached clause 8.5.4 because the site delegate (Mr Hill) was not “together” with Mr Watts when his dismissal was confirmed. It is accepted that the contents of, and adherence by an employer to, the policies and procedures in a handbook or employment agreement, are relevant to an enquiry into the employer’s conduct under s103A of the Act.⁵ There are two matters here that need to be considered. Firstly, the evidence is that Mr Watts was informed that Fonterra intended to dismiss him at the conclusion of the meeting on 14th December 2009. Then, pursuant to clause 8.5.5 of the CEA, the Union was given the opportunity to challenge the dismissal which it was required to do by the end of the following day (15th December). However, for various reasons, it was not until 17th December that the Union presented its reasons for challenging the dismissal. The submissions of the Union were considered but not accepted by Fonterra and the dismissal of Mr Watts was confirmed on 18th December 2009.

[36] Secondly, it seems to me that there was really no good reason why Mr Gent could not have waited until Monday 21st December to meet with Mr Watts, with Mr Hill present. However, if there was a technical breach of clause 8.5.5, and that is arguable, given that Mr Watts was informed of his dismissal on 14th December with Mr Hill present; then I conclude that if there was a breach, it did not lead to Mr Watts being treated unfairly or unreasonably.

[37] There is one other matter that I feel should be addressed. This is the result of the drug test that Mr Watts undertook. Rather oddly, Mr Watts did not inform Fonterra, prior to his dismissal that he had partaken in this test and that he was awaiting a result. But in any event, given that the matters under consideration moved from the possession of drug smoking apparatus and possible associated drug use on the job, to a breakdown in trust and confidence because of his dishonesty about the use of the apparatus, then the outcome of the drug test assumed less relevance in any event. Perhaps if Mr Watts had not changed his position, the outcome of a drug test

⁵ *Butcher v OCS Limited* [2008] ERNZ 367.

and possible future random tests, may have been an option that could have been considered. But unfortunately for Mr Watts, his dishonesty eliminated that possibility, even if Fonterra had been of a mind to consider it.

[38] Finally there is the matter of whether Mr Gent breached any confidentiality provisions that might have applied to the dismissal of Mr Watts, and the subsequent mediation, when Mr Gent addressed a meeting of other employees shortly thereafter. This is a matter that may have required closer consideration had Mr Watts become entitled to remedies, but since that is not the situation I do not consider the matter requires any further attention.

[39] While there were some matters relating to Fonterra's communications with Mr Watts, particularly the delivery of the letter of dismissal and possibly a more strict adherence to clause 8.5.4 of the CEA, that could have been managed better by Fonterra, I find that there was nothing pertaining to the overall procedural aspects of the management of the investigation, and subsequent dismissal of Mr Watts, that resulted in any unfairness being imposed upon him

Determination

[40] For the reasons set out above, I find that the dismissal of Mr Watts was justified and was a fair and reasonable action by Fonterra (the employer) in all the circumstances. Mr Watts is unsuccessful with his claims.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the tariff based approach of the Authority and that the investigation meeting was completed within one day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority