IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 13/06
CRC 9/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BARRY ANGEL First Plaintiff
AND	KEN HUTTON Second Plaintiff
AND	FONTERRA CO-OPERATIVE GROUP Defendant

Hearing: 7 and 8 August and 22 September 2006
(Heard at Christchurch and Wellington)

Appearances: A J McKenzie, Counsel for the first and second Plaintiffs
G Pollak, Counsel for the Defendant

Judgment: 13 December 2006

JUDGMENT OF JUDGE C M SHAW

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[1] Mr Angel and Mr Hutton were senior packing and blending operators at Fonterra's Clandeboye milk plant, Timaru. They were two of four senior operators with responsibility for shifts of employees working on packing machines which packed dried whey protein products.

[2] Following an investigation by Fonterra, they were summarily dismissed on 16 December 2005 for serious misconduct for breaching product safety procedures. They took a personal grievance to the Employment Relations Authority which found they had been justifiably dismissed. The challenge to that determination was by way of a de novo hearing.

Employment Relations Authority determination

[3] The Authority heard similar evidence to that presented to the Court but did not have the benefit of extra evidence from the plaintiffs' witnesses including Mr Switalla, Mr van Valkengoed, and Mr McGrath.

[4] The Authority recognised that at the heart of Fonterra's case was the importance of its product safety procedures and that central to the employees' case was their assertion that they did not know they were in breach of those procedures.

[5] The Authority found that Fonterra had met its obligations in the investigation and disciplinary process. The key question was whether the actions of the plaintiffs were capable of constituting serious misconduct. The Authority held that the matter was one of negligence and relied on *W & H Newspapers Limited v Oram*[1] where the Court of Appeal held that a single act of carelessness when sufficiently serious can impair trust and confidence.

[6] Having found that the employees had breached the integrity of the product safety systems the Authority held that their actions were capable of being seen to constitute serious misconduct and that a fair and reasonable employer in a statutory environment would likely have come to a similar conclusion and the dismissals were therefore justified.

The issues

[7] The issues for determination in this challenge are:

- Whether the investigation was fair and reasonable.
- Whether Fonterra was justified in concluding that each man was guilty of serious misconduct.
- Whether dismissal was the appropriate outcome.

The plaintiffs

[8] Mr Angel is 54 years of age and has worked for Fonterra and its predecessors for about 8 years. He has been a senior packing and blending operator for 3 to 4 years. He was workplace delegate for three seasons and chairman of a site

[1] [2000] 2 ERNZ 448

steering committee on manufacturing excellence. He regarded this job as the best he has had and saw it as his job until retirement.

[9] Mr Hutton is 35 years of age. He has worked for Fonterra and its predecessors for about 9 years and has been a senior packing and blending operator since 2005. He also liked the job which for him was long term.

[10] Neither had been formally trained in the operation of the packing machine but were trained under a buddy system.

The collective employment agreement

[11] The employment relationships of the plaintiffs and Fonterra were governed by the Fonterra Dairy Workers Collective Agreement 2004 to 2006 (the CEA). It has a comprehensive section on disciplinary procedures which is introduced in the following way:

> *It is recognised that in dealing with situations which may result in disciplinary consequences for a worker the process adopted will depend on a number of factors including the nature and seriousness of the allegations and the particular circumstances at the time. Some matters may be dealt with less formally where appropriate whereas more serious matters, may result in dismissal.*

[12] The disciplinary procedures which are then set out include a range of responses to misconduct or breach of company policies and procedures.

[13] Warnings may be used depending on the circumstances and seriousness of the issue at hand. In normal circumstances a warning expires after 6 months but in more serious circumstances a warning may be given a 12-month expiry date.

[14] A first warning or verbal warning is issued in cases of substandard performance or misconduct or breaches of company policy and procedures.

[15] A second warning is issued in cases of persistent poor performance where there has been a previous warning or previous breaches of policy and procedures or misconduct.

[16] A final warning is given in cases of serious misconduct where instant dismissal is not warranted.

[17] The dismissal section which follows says that any further breach requiring disciplinary action may result in either suspension and/or dismissal. Clause 8.6 provides that serious misconduct may result in instant dismissal without notice.

[18] Where instant dismissal is intended, the agreement provides for the worker to be stood down and paid until the following day or until negotiations are concluded.

[19] There is no definition of serious misconduct in the CEA.

The work

[20] Fonterra's operations are regulated by standard operating procedures to ensure food safety issues. Fonterra is concerned with "truth in labelling", that is, ensuring that its products are accurately labelled both as to the product content and its weight.

[21] Whey protein concentrate (WPC) is a powdered product like milk powder. It is packed by shifts of four employees each supervised by a senior operator. The bags are filled from a hopper and drop on to a packing line – a continuous machine that removes air from the bags, adjusts the weight, and seals the bags. Once sealed, the bags are mechanically moved onto a conveyer to pass through a metal detector and check scales.

[22] If the metal detector detects metal in a bag an alarm sounds and, further along the line, the affected bag is automatically kicked off the conveyor onto a reject table by a hydraulically operated reject arm which is triggered by the metal detector so that the defective product does not go on to be loaded onto pallets for distribution. Bags are also rejected if they are under or over weight.

[23] WPC is packed in three forms:

- The bulk of the product is for human consumption and is packed in 25 kilogram bags. The packing machine is calibrated for this weight.

- Reject WPC and any significant spillings which have not touched the floor is packaged and labelled as stock food.

- Waste WPC swept from the floor or stock food which fails the metal detector test is packaged and labelled as sweepings.

[24] It is part of Fonterra's quality control standards that the first two forms of WPC must not contain metal of any sort. Sweepings are on-sold to be further processed and may contain metal.

[25] Stock food and sweepings were packed at the end of the shift into 20 kg bags. This meant the scales had to be recalibrated for this purpose. Also the reject arm, designed to kick 25 kg bags off the line, tended to push the lighter bags right off the reject table. To avoid this, on at least two of the shifts supervised by Mr Angel and Mr Hutton, the reject arm was switched off for the packing of stock food and a staff member was positioned next to the reject table to manually remove any stock food which had activated the metal alarm.

[26] The procedures in the packing and blending department are governed by a hazard analysis critical control point (HACCP). This defines critical control points or CCPs as a step at which control can be applied to prevent and eliminate a food safety hazard or reduce it to an acceptable level. Any control measure which is needed to prevent, eliminate, or reduce a highly likely hazard is deemed to be a CCP.

[27] Control points are additional to CCPs and are to ensure quality rather than food safety.

[28] The HACCP classifies both the metal detector and the reject arm as a CCP. Its check lists also refer to them together. For example, as part of the testing process for the packing machine, test bags must activate both the audible alarm and the reject pusher arm.

[29] Fonterra regards the whole metal detector and reject area as one CCP operation. Mark Leith, a previous plant manager of protein products, described it as two parts of the same process – one part identifies the problem and the other deals with it. Both are part and parcel of the metal detection apparatus. It is Fonterra's policy that the disconnection of the reject arm amounts to a breach of the CCP.

[30] On 20 September 2005 the process manager, Mr Walter, sent out a memo to all packing staff. It said that metal detector requirements are a CCP and must be followed. It referred to the need for operators to record when the metal detector calibration test had been completed. It said:

> *When a metal detector calibration is done each test piece must be passed through the metal detector three times, with a reject for metal each time.*

> *A tick in the log sheet corresponds to a one pass through the metal detector with a positive metal rejection. A log sheet must have 3 ticks for each test piece size.*
>
> *A failure of the Metal detector requirements is a failure of the CCP. Failure to comply with the metal detect requirements will result in disciplinary actions.*

[31] Although the memo confirms that the metal detector requirements are a CCP and must be followed, the emphasis in the memo is on proper documentation for the prestart checks before the packing begins but it does not mention the reject arm. However, Mr Walter is confident that as a result of this both men were well aware of the CCP and production requirements.

[32] Mr Angel has maintained from the beginning of the inquiry that he was not aware that the reject arm was part of the metal detector CCP. He believed that only the metal detector itself with the alarm was the CCP as it was physically separated from the reject arm. He regarded the reject arm as a control point only.

[33] He and Mr Hutton were involved in a HACCP assessment on 21 September 2005 and answered questions to demonstrate their knowledge of the CCP. Mr Hutton said the assessment did not specifically concern the reject arm and the self-assessment check list which he completed confirms this.

[34] Both Mr Angel and Mr Hutton were, I find, quite genuine in their belief that the reject arm was not part of the CCP. While it is difficult for Fonterra to see how they could have avoided knowing this given their years of experience and their positions as senior operators, a process trainer/assessor in the protein products department, Dave Switalla, told management at the time of the dismissals and repeated in evidence that at the end of 2005 the protein product HACCP manuals had not been published and were in draft form. They showed the reject arm as a control point only. He said clearly it is not a CCP.

[35] Along with two others, Mr Switalla had conducted the assessments in September which Mr Hutton and Mr Angel attended. These were rushed through when an audit revealed that there were no training records of assessments of staff who operated CCPs. The operators were not issued with workbooks or formally assessed at that time as this was only required for NZQA. Mr Switalla said that the HACCP plan had not been printed or available at the plant for the operators to be familiar with it but what was available was the blending and packing manual. In the

table of contents of that manual the metal detector was noted as a CCP but not the reject station. However, in the body of the blending packing manual the reject station was designated as a CCP.

[36] A work diary is kept in the packing and blending department to record comments on work practices and other matters. On 13 November 2005 there is an entry by one of the four senior operators, Alan Perrin:

> *Bag kick (Reject) Who keeps on turning the air off at the bag reject station and why?*

[37] On 18 November 2005 he again noted that the reject arm had been turned off when he started his shift. The next entry is by Mr Walter who wrote:

> *On Inspection of the Packing Documentation today I found that the air to the bag reject arm was turned off. This is a failure of the CCP. On looking back in the diary it was found another instance of this practice. Two cyphers will be placed on hold and then rechecked through the metal detector. Under No circumstance can this practice continue. This will be investigated on Monday to check if any other cyphers are effected.*

[38] On the same day Mr Angel wrote after that:

> *The Reject Station was Turned off at 5.30 Because we were going to do stock food and Sweepings but by the time dust extractor was cleaned it was to late I forgot to tell A.P. that I had just turned off for this procedure. There was no failure of CC.P. During Packing.*

[39] The diary entries were a matter of some controversy in the hearing. The entry for 13 November 2005 was on a Sunday. Mr Perrin worked the nightshift. The shift which immediately preceded that was supervised by Darren Fitzgerald. The plaintiffs believe that Mr Perrin's entry about the reject arm being turned off must have referred to Mr Fitzgerald's shift.

[40] In the course of the investigation Fonterra was told that Mr Perrin had not written the 13 November entry on that day but some time later. Another packer, Jan van Valkengoed, told the subsequent investigation that it was common knowledge that all shifts disabled the reject arm during the packing of sweepings. He would not name names to the investigation or the Court but accepted that he only knew what was happening on other shifts from hearsay. It was not the function of the Court to make findings about other shifts. At the time of the investigation, Fonterra only had enough evidence to warrant disciplining Mr Angel and Mr Hutton. This was because both honestly admitted to the practice when asked about it.

[41] When Mr Leith found out about the issue on 18 November 2005 he asked Mr Walter to investigate why the arm was being turned off and how much product was potentially affected. Mr Walter then found the 13 November diary entry and wrote his comments on the 18 November page. That same day Mr Leith met Mr Angel who was on his way to start the night shift covering for Mr Hutton who was on parental leave. Mr Leith asked him about the turning off of the reject arm and told him to read the diary before starting work. Mr Angel added his entry on the 18 November page after that which showed that he had turned the arm off.

The investigation

[42] In conjunction with Fonterra's HR advisor Ms Worner, Mr Leith and Mr Walter commenced an investigation. Until their dismissals Mr Angel and Mr Hutton continued their usual shifts and Mr Hutton was also engaged under the supervision of another in the rechecking of the stock food.

[43] Ms Worner and Mr Leith interviewed Mr Angel on 23 November 2005 and Ms Worner and Mr Walter interviewed Mr Hutton on 2 December 2005. Both admitted they had turned the reject arm off while packing stock food for the season.

[44] At about the same time, all of the WPC/lactose stock food for the season was put on hold on the advice of the product safety coordinator because a significant amount of product had been affected and the problem had to be contained. The New Zealand Food Safety Authority was notified. Between 25 and 27 November all stock food and sweepings were passed through the metal detector and weight scale. Out of 974 bags, 26 stock food bags were found to be contaminated with metal, and 175 bags or about a third were either over or under the target weight of 20 kg. It was not possible to identify which line the defective bags came from.

[45] The investigation team also interviewed the two other senior operators, Alan Perrin and Darren Fitzgerald, and three other operators. Fonterra accepted Mr Perrin's explanation that the diary note on 13 November had been added in after the 13th and had not referred to Mr Fitzgerald's shift. That, plus Mr Fitzgerald's denial of following this practice, meant that he was not disciplined. However, Mr Angel and Mr Hutton did admit to turning off the reject arm and the investigation into their conduct took its full course.

[46] Having reviewed the progress of the investigation, the hub operations manager for Fonterra, Alan Bennett, who did not normally get involved with disciplinary proceedings, decided that the matter was serious enough for him to become involved. He thought it appropriate when it concerned two relatively senior staff and when the issues were of significance for Fonterra.

[47] Mr Angel and Mr Hutton were required to attend disciplinary meetings on 16 December 2005. The notice of this meeting said that turning off the reject arm while packing stock food compromised the CCP which was a breach of the product safety procedures and was considered serious misconduct. They were told that the allegations were serious and could result in summary dismissal.

[48] Mr Angel's meeting was set for 10am on 16 December 2005 but his union representative, Mr Faulkner, had told Ms Worner that he was going to be away on that day. Before the meeting, Mr Angel spoke to Mr Leith and Ms Worner about his representation. Ms Worner told him that as Mr Faulkner had been aware of the date of the meeting for a couple of days it had to go ahead and there were other union representatives available.

[49] Both men were represented at the meetings which were carefully documented. Mr Bennett and Ms Worner were at both meetings. Mr Leith attended Mr Angel's meeting and Mr Walter went to Mr Hutton's.

[50] At Mr Angel's meeting, there was a lot of discussion about the packing line. Mr Angel referred to two incidents where the metal detector had not been working properly and queried what had happened to the product that came off those lines. He said that he didn't realise that by turning off the reject arm he was compromising the CCP, otherwise he would never have turned it off. Mr Bennett told him that even if it were an honest mistake it had major ramifications and they were having to put product on hold for reworking. There was also potential damage to the reputation of the company.

[51] At Mr Hutton's meeting he said he had not received formal training on the CCP or the metal detector apart from buddy training. He thought stock food was a lower grade product. He knew and followed the procedure for doing metal detection checks. He talked of turning off the arm at the end of the day when processing stock food. He said that this was a busy time and the bulk density of the product made it

hard to get through. They also discussed a number of technical matters relating to the packing line. Mr Bennett said that everyone was allowed to make a mistake but this was not a one-off incident but a deliberate action that had happened more than once. He said "*It is about integrity*."

[52] Each meeting was adjourned and reconvened in the afternoon when both men were told that there was no choice but dismissal. Mr Bennett told them he looked to his leaders on site to act with integrity and take ownership for their actions. He expected them to comply with the regulatory requirements which included the operation of CCPs.

[53] The formal dismissal letters prepared by Ms Worner during the adjournment were identical. They referred to the employees' actions in compromising the CCP in protein packing by disabling the reject arm. It said that all matters including their explanations had been investigated and the company considered that their actions constituted serious misconduct justifying termination of their employment.

[54] In evidence, witnesses for Fonterra elaborated on their reasons for dismissal. Mr Bennett said that he could not trust the two men as both had acted with complete disregard for the product safety system and Fonterra. Their explanations were unacceptable.

[55] He emphasised that if Fonterra did not comply with regulations the site could lose its registration. Compromising standards also had the potential to affect customer confidence.

[56] Mr Bennett accepted that Mr Angel was honest in his response to the diary entry on 18 November 2005 and Mr Hutton told the truth when he was asked about turning off the arm. But his concern was that the CCP had been compromised. He said that the breach was deliberate because each man had deliberately rather than accidentally turned off the arm. He could not accept that they could be so incompetent that they did not know they were compromising the CCP. In his view, they were being lazy by deactivating the arm so that the product would go through quickly without having to recheck it. Even if it had been established that deactivating the arm was a regular practice which had gone on for years, Mr Bennett's view was that the plaintiffs would not have been less culpable.

[57] Mr Bennett's uncompromising stance was shared by the other people involved in the investigation. Mr Walter said that once Mr Angel admitted on 18 November 2005 to turning off the arm he was going to be dismissed because there could have been no reason which could have justified the action.

[58] Ms Worner said that, while neither may have deliberately intended to allow contaminated and out of specification product to be processed, that was the likely and foreseeable consequence which would have been obvious to everyone concerned.

[59] Mr Leith said that having spent many hours investigating the matter and considering the explanations he formed a very definite view that both employees had turned off the reject arm and caused the product issues without satisfactory reason and authority. He described it as irresponsible and reckless.

[60] Before the disciplinary meetings on 16 December 2005, Mr Bennett asked Mr Leith to prepare a contingency plan in the event that both men were dismissed. Mr Leith arranged for this with his process managers but denied that this indicated predetermination.

[61] Mr McGrath, a packing operator, who since 2000 had worked with other senior operators but has most recently and exclusively worked with Mr Angel told the Court that since Mr Angel and Mr Hutton were dismissed there have been changes to the procedure. Formerly, the only CCP he was aware of was the metal detector. Since the dismissals Fonterra has changed the way stock food and sweepings were regarded and the standard practice of turning off the reject arm was changed so that no one turns it off now. This was confirmed by Mr Switalla.

[62] There had been an earlier incident at Fonterra's Takaka plant, which had recently re-opened after a fire. The incident involved the turning off of a reject arm by two operators who subsequently were not dismissed. Ms Worner said that that was because they were junior and very new employees. In cross-examination she conceded that they were not new employees but inexperienced on the line which had recently been set up.

[63] Mr Bennett gave the two Takaka employees conditional final written warnings. The condition was that no metal contaminants were found in the product

that was retested. In that case the dairy workers union accepted that serious misconduct had occurred.

The issues

[64] The questions of whether the investigation conducted by Fonterra was fair and reasonable and whether the conclusion about serious misconduct was justified are closely linked.

[65] First, for the plaintiffs, Mr McKenzie submitted that the employer failed to meet minimum standards of fair and reasonable dealings. He pointed to a number of matters including the letters of dismissal which he submitted were pre-prepared before the dismissals and the way the decision-makers conducted themselves. In particular, he referred to the arrangement of replacement labour before the dismissals and alleged that Fonterra had predetermined the outcome.

[66] Second, the plaintiffs also allege that instead of a fair and thorough investigation Fonterra embarked on questioning designed at incriminating them as having committed serious misconduct even though they did not intend to and honestly admitted what they had done believing they had not breached standard operating procedures.

[67] For the employer, Mr Pollak maintained that, in the face of compelling evidence that Fonterra's procedures had been breached, there was no reasonable or justifiable explanation for the plaintiffs' acts which amounted to misconduct of potentially the worst sort.

Discussion

[68] As to the first point, the test for predetermination is whether an objective observer would conclude that the decision-maker had closed his/her mind and was no longer giving genuine consideration to the issues before him/her.[2]

[69] I am satisfied that the plaintiffs had proper notice of the allegations against them in the preliminary letter followed up by the second letter advising of the allegations and the possible outcome of dismissal. I am also satisfied that the dismissal letters were not prepared until a final decision was made to dismiss.

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[2] *New Zealand Educational Institute v Board of Trustees Auckland Normal Intermediate School* [1992] 3 ERNZ 243 at 272 – applied in *Richardson v Board of Governors of Wesley College* [1999] 2 ERNZ 199 at 220

Management's preparations to replace Mr Angel and Mr Hutton before their dismissal was a prudent contingency and not evidence of predetermination in the legal sense.

[70] As to the second point, this case has similarities to the facts in *Chief Executive of the Department of Inland Revenue v Buchanan and Symes*[3] where the employees were dismissed for breaching a code of conduct although they had not wilfully done so.

[71] In *Buchanan*, the Court of Appeal held[4] as it had in *Oram*, that the correct approach is to stand back and in the light of factual findings evaluate whether a fair and reasonable employer would characterise the conduct as deeply impairing, or destructive of, the basic confidence or the trust essential to the employment relationship and which justified dismissal.

[72] *Buchanan* was decided under the legal principles which the Court of Appeal in *Oram* applied under s103 of the Employment Relations Act 2000. The Court's focus at that time was on the subjective views of the employer as to whether the conduct in question had breached the obligations of trust and confidence.

[73] The 2004 statutory definition of justification by s103A has caused these principles to change. These changes were discussed in *Air New Zealand Ltd v Hudson* [5]. In summary they are:

1. Justification for dismissal must be determined on an objective basis from the point of view of a neutral observer. It is not enough that an employer makes a decision which falls within an acceptable range of responses.

2. The standard against which the actions of an employer are objectively judged is that of a fair and reasonable employer.

3. The Court may reach a different conclusion from the employer provided it is the result of an objective inquiry rather than a substitution of the Court's decision.

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[3] [2005] 1 ERNZ 767
[4] At paragraph [36]
[5] (2006) 3 NZELR 155

4. The inquiry into justification must focus on all the circumstances which were relevant at the time of the inquiry and the dismissal.

[74] The effect of the change to the test is that the subjective views of an employer as to what constitutes serious misconduct and whether dismissal is the appropriate outcome are no longer virtually unassailable. Since s103A the Court has an obligation to evaluate the employer's subjective views against an objective standard.

[75] Serious misconduct is the most serious breach of the employment relationship and often results in the most serious outcome of dismissal because if the employment relationship is deeply impaired or destroyed it is untenable. The trust and confidence which is at the heart of the relationship is gone.

[76] The consequences of such a finding are significant for both parties. At short or no notice the employer loses an employee who must be replaced with all of the attendant costs and inconveniences. The employee loses a job and a livelihood. That employee also bears the stigma of having committed serious misconduct which may well influence his or her future employment prospects.

[77] Offences of dishonesty are almost always cast as serious misconduct. If an individual deliberately steals from an employer this will usually destroy the trust and confidence between them and the consequence is almost inevitably as serious as the misconduct.

[78] The classification of serious misconduct becomes more problematic where an employee acts out of ignorance, carelessness, or accident but causes serious or potentially serious consequences for the employer or the employer's business. In evaluating whether an employer is justified in believing that such an act has caused the irreparable breakdown of the employment relationship, the Court has to objectively assess whether it was the consequences of the employee's action which have led the employer to conclude that there was serious misconduct or whether it was the actions or omission of the employee that were so serious.

[79] In *Makatoa v Restaurant Brands (NZ) Ltd*[6] the Court stated:

> *The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily*

[6] [1999] 2 ERNZ 311 at 319

> *amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical 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.*

[80] With respect, the last four words may have overstated the position. If the behaviour has got to the point of dereliction of duty then that must come close to or even amount to serious misconduct. The word dereliction includes an element of shame[7] and impliedly a deliberate failure to fulfil the required duty.

[81] 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. If the employee did not have knowledge of the relevant policy or rule, a fair and reasonable employer should find out whether that was the fault of the employee for ignoring or failing to take proper care to be familiar with the policy, or whether there was genuine room for misunderstanding as to what the policy meant. 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[8]) but it is bound to investigate fully to establish why it occurred.

[82] In the present case the question of training was raised by both plaintiffs during the investigation. In asserting their position that the reject arm was not a CCP, they maintained that they had not received training on this point. Mr Switalla's letter written very shortly after the dismissals and confirmed in sworn evidence shows that the training and assessment given to them about the metal detector CCP did not include specific reference to the reject arm being part of a CCP. Even the trainer/assessor did not regard it as such. Such training as was given was rushed.

[83] Secondly, the documentation available to the employees on this issue was ambiguous. The blending and packing procedures contained inconsistent references to what comprised a CCP.

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[7] Concise Oxford Dictionary 10th edn

[8] *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* [1983] ACJ 656 at 660

[84] In a rules-based organisation such as Fonterra it is understandable that management was reliant on its standard operating procedures as a baseline to measure employees' performance and compliance with instructions. However, if there is a disconnect between the published procedures, training, and a significant amount of actual practice, then it is incumbent on management to look at its own performance and practices to see if it should bear any responsibility for the failure of these standard operating procedures.

[85] In this case, while Fonterra interviewed other senior operators who denied disabling the reject arm, it had evidence from the work diary that the practice was known to other senior operators and, apart from the work diary entry directed at other staff, those senior operators had not formally advised management of this apparently serious breach of procedure.

[86] Fonterra management had also seen Mr Angel's entry in the diary. It is clear evidence that he was not concerned that he had breached any rules but only that he forgot to tell the next shift the reject arm was off. In the disciplinary meeting Mr Hutton also explained his usual practice clearly indicating that he did not regard it as a breach of operating procedure. Both referred to the limited training they had received and both were open in agreeing that this was the procedure he followed.

[87] These matters should have indicated to a fair and open-minded employer that, while it was obvious that the CCP had been breached in terms of the standard operating practices, there was a real chance that this had not been done with the intention or even the knowledge that it was in breach of a CCP. At the very least it warranted an inquiry with the process trainers/assessors to clarify what training on this point had been given. Such an inquiry with Mr Switalla would have revealed that the training did not adequately match the intended policy and there was genuine misunderstanding of the requirement to keep the reject arm on during the packing of stock food.

[88] The facts in the present case, particularly the explanation of the plaintiffs, warranted a more thorough investigation than was given. It was very obvious from the evidence of Mr Walter in particular but the other Fonterra managers as well that their overriding concern was directed at the breach of the CCP rather than how and why it had occurred. Mr Walter said the plaintiffs were dismissed for one reason and

one reason only – they turned off the reject arm and there could be no justified reason for this. Mr Bennett and his managers formed the view that as each man had deliberately turned off the arm and had to bend under the reject table to do so, this indicated deliberate and therefore culpable action.

[89] An objective assessment of the actions of the plaintiffs shows that it was open to the company to find that they may have been careless about the outcome of turning off the reject arm but not deliberately blind to the CCP policy or wilfully engaged in avoiding it. In moving directly to dismissal, Fonterra acted on the assumption that each man had committed serious misconduct without considering the extent to which its training procedures were at fault

Was dismissal an appropriate outcome in this case?

[90] Mr Pollak submitted that clause 8 of the collective agreement concerning dismissals must be read in its totality and if this is done and serious misconduct is found to occur, the warning procedures are by-passed and clause 8.6 applies so that dismissal is the appropriate response.

[91] I do not accept that submission. The collective agreement recognises that warnings are part of a process which can lead to a dismissal. They are issued in areas of either substandard performance, misconduct, or breaches of company policy or procedure. They are not limited in their application. The agreement contemplates a final warning being given for serious misconduct. The consequence of dismissal is not mandatory.

[92] Having reached the conclusion that Mr Angel and Mr Hutton were guilty of serious misconduct, the only available outcome at least for Mr Walter was dismissal and none of the Fonterra witnesses indicated in their evidence-in-chief that they had seriously considered any other alternative although Ms Worner did consult with the managers at Takaka over the warnings given to the two employees there. Mr McKenzie submitted that this is a case of disparity of outcome for similar misconduct but I do not accept that. There were significant differences in that Mr Angel and Mr Hutton were senior and experienced operators and some metal was found in the rechecked bags.

[93] I find that even if the actions of the employees amounted to serious misconduct Fonterra did not follow its own dismissal policy. The policy

contemplates a final warning even where instant dismissal is warranted. This policy should have been given more consideration in circumstances where the allegation was a breach of standard procedures. Both men had deliberately turned off the reject arm but they had not deliberately breached or compromised the CCP which is what they were dismissed for. As Fonterra was bound by a dismissal policy which provides grades of responses to misconduct, it was bound to assess the seriousness of the behaviour as required by clause 8 in the agreement.

[94] I do not underestimate the importance of product safety and therefore the integrity of Fonterra's CCPs as described by Mr Bennett. They are critical to its continuing operation and food safety licenses as well as to Fonterra's carefully nurtured reputation. Fonterra was put to the onerous trouble and expense of rechecking the season's output of stock food and there were potentially serious consequences of the breach of the CCP which were only avoided by the careful management of the problem once discovered.

[95] In spite of this, Fonterra's assertion that the actions of the plaintiffs destroyed the employment relationship of trust and confidence is open to question. Neither man was stood down or suspended after the matter was raised. Throughout the investigation and disciplinary process they continued to work albeit under supervision and on the advice of the human resources department, although Fonterra knew from 18 November 2005 that the CCP had been compromised at least by Mr Angel.

[96] I find that, while the potential consequences of the actions of the plaintiffs were an important part of Fonterra's investigation, the trust and confidence in them was not affected to the extent that they could no longer work on the packing line even when they had both accepted that they had turned off the reject arm. When both employees explained they acted as they did because they believed they were entitled to, Fonterra could not accept that position and found their explanations gave rise to a loss of trust and confidence in them. Inquiry of Mr Switalla or the other assessors would have corroborated the explanations and should have given Fonterra pause to consider whether the employees should bear full responsibility for the breach of the CCP.

Conclusion

[97] The investigation undertaken by Fonterra was procedurally fair in that it gave ample advice of the investigation and matters in issue as well as the likely consequences and likely outcome of the investigation. The meetings were carefully documented and conducted in a procedurally fair way.

[98] Notwithstanding this adherence to formally correct procedures, the investigation process unfairly failed to look beyond the admitted actions of the plaintiffs to properly assess the basis of their explanations that they did not believe they were acting in breach of the procedures.

[99] The plaintiffs were in breach of company policy and certainly had performance issues to address. However, in light of the question about whether the reject arm formed part of the CCP which was raised in the investigation, Fonterra had an obligation to have this clarified before subjecting its employees to the ultimate penalty. The managers' justified shock and disappointment at finding out about the breaches seems to have prevented them from doing this and led them to the single but not inevitable conclusion that the acts of the plaintiffs were serious misconduct which could only be met by summary dismissal. For reasons given, those conclusions objectively assessed were not justified and the dismissals of Mr Angel and Mr Hutton were unjustified.

Remedies

[100] The Court is obliged under s124 of the Employment Relations Act 2000 to consider the extent to which the employees contributed to the situation which led to their personal grievances. In this case it is inarguable that they did contribute to this and to a considerable extent even if not deliberately so. This contribution will be reflected in the remedies.

[101] Both men spoke of the effect of the dismissals on them. They were both dismissed just before Christmas.

[102] Mr Angel's wife also works at Clandeboye. They have placed plans for home alterations on hold and have had to rely on the holiday pay he received in the interim. Mr Angel was gutted by the dismissal and his confidence was badly dented. He has had to explain why he had left Fonterra when applying for other jobs and the only work he has been able to get is 2 nights casual work. He feels the combination

of his age of 54, the reasons for his dismissal, and the dent to his confidence are why he is unable to get a permanent alternative employment.

[103] Mr Hutton's wife was off work on maternity leave at the time of the dismissal. He was the only income earner. He sought alternative work and after ten rejections got some seasonal work at the Smithfield meat works. He was shocked and gutted by the dismissal and the loss of the sole income for his household before Christmas which placed a great deal of strain on the family. He feels humiliated and that his employment prospects are limited by the dismissal. Both men are adamant that if reinstated they would never turn the reject arm off again and recognise the importance of Fonterra's standard operating procedures.

[104] Mr Walter and Mr Bennett expressed the view that neither man can be trusted in a role of responsibility on the packing line because they have lost their credibility as supervisors but Mr Bennett said that a professional organisation like Fonterra would, however, make reinstatement work if that were the Court's decision. I am satisfied that reinstatement would be practicable given Mr Bennett's evidence and the earnest desire by both Mr Angel and Mr Hutton to keep their jobs for the long term.

[105] The quantum loss of income has not been calculated. The parties have agreed to do their own calculations of this issue.

[106] Given all of these factors, the following remedies are granted:

1. Mr Angel and Mr Hutton will be reinstated without delay to positions with Fonterra which are no less advantageous to them than their former positions. In making that order I recognise that Fonterra is concerned about either man holding a position of responsibility at this stage. For this reason this order does not require that they assume positions of senior operators or packers until or unless Fonterra deems them capable of performing this work to a high standard.

2. Mr Angel and Mr Hutton are both entitled to reimbursement of the sum equal to the wages lost by them as a result of the grievance. This should be calculated on the basis of the base earnings (not including overtime or allowances) that they would have earned until reinstatement but for their dismissals. It should take into account any earnings they have made in other

employment. Leave is granted for the parties to apply to the Court if this cannot be calculated by agreement.

3. Although I accept that the dismissals inevitably caused each man distress and had serious impacts on their families, there will be no order for compensation beyond the reimbursement of lost wages. This is to reflect their contribution to the personal grievance.

Costs

[107] Costs are to be dealt with between the parties. If they cannot agree on these, counsel for the plaintiffs is to file a memorandum as to costs by 31 January 2007. The defendant will have 14 days to respond to that.

C M Shaw
JUDGE

Judgment signed at 9.15am on 13 December 2006