



# Employment Court of New Zealand

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## Christieson v Fonterra Co-Operative Group Limited [2021] NZEmpC 142 (26 August 2021)

Last Updated: 3 September 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 142](#)

EMPC 177/2021

IN THE MATTER OF      a challenge to a determination of the  
                                 Employment Relations Authority  
BETWEEN                 DEREK JOHN CHRISTIESON  
                                 Plaintiff  
AND                         FONTERRA CO-OPERATIVE GROUP  
                                 LIMITED  
                                 Defendant

Hearing:                 28 July 2021 (Heard at Auckland)  
Appearances:          A Hope and A Greaves, counsel for plaintiff  
                                 G Service and D Dahanayake, counsel for  
                                 defendant  
Judgment:               26 August 2021

### JUDGMENT OF JUDGE KATHRYN BECK

[1] The plaintiff, Mr Christieson, challenges a preliminary determination of the Employment Relations Authority in which the Authority granted his application for interim reinstatement to the extent that it returned him to the payroll but not to the workplace.<sup>1</sup> Mr Christieson says it is not just about the money; he wants to return to work while he waits for his claim to be fully heard.

[2] The defendant, Fonterra Co-operative Group Ltd, says that to return Mr Christieson to work would cause significant damage to the culture of the site and the health and wellbeing of other employees. It says that it is difficult to put a monetary

<sup>1</sup> *Christieson v Fonterra Co-operative Group Ltd* [\[2021\] NZERA 172 \(Member Craig\)](#).

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figure on such damage but that it outweighs any right to work Mr Christieson may have.

[3] While no date has been set, it seems that an investigation meeting will not take place until February 2022, more than six months from now, and more than a year after Mr Christieson's dismissal.

[4] The company says Mr Christieson's rights are sufficiently preserved on an interim basis by maintaining the status quo and keeping him on the payroll.

[5] The key issue in this case is where does the balance of those competing rights and interests lie?

## The applicable principles

[6] The approach to be taken by the Court on a challenge is as set out in [s 127\(4\)](#) of the [Employment Relations Act 2000](#) (the Act). It must apply the law relating to interim injunctions, having regard to the object of the Act. The object of the Act can be found in [s 3](#) and includes building productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. The object recognises that employment relationships must be built on mutual obligations of trust and confidence.<sup>2</sup>

[7] The principles applicable to interim injunctions are well settled:<sup>3</sup>

- (a) Does the applicant have an arguable case?<sup>4</sup>
- (b) Where does the balance of convenience lie?
- (c) What is required by the overall interests of justice?

<sup>2</sup> [Employment Relations Act 2000, s 3\(a\)\(i\)](#).

<sup>3</sup> *NZ Tax Refunds Ltd v Brooks Homes Ltd* [\[2013\] NZCA 90](#); *Western Bay of Plenty District Council v McInnes* [\[2016\] NZEmpC 36](#).

<sup>4</sup> This question is often interchangeably phrased as “Is there a serious question to be tried?”

[8] For applications for interim reinstatement, the first question can be broken down into two parts:<sup>5</sup>

- (a) whether there is an arguable case for unjustifiable dismissal; and
- (b) if so, whether there is an arguable case for permanent reinstatement.

[9] As is usual in challenges of this sort, evidence was produced by way of affidavits. That means that the Court proceeds on the basis of untested evidence. The evidence will be tested at the substantive hearing.

## Does the plaintiff have an arguable case?

*Is there an arguable case for unjustifiable dismissal?*

[10] Mr Christieson was dismissed on the grounds of incompatibility. The Court of Appeal has noted that a dismissal on such grounds will only be available in very rare circumstances.<sup>6</sup>

[11] Ms Service, counsel for the defendant, properly conceded that for the purposes of an interim reinstatement application, it is arguable that Mr Christieson was unjustifiably dismissed. I agree.

[12] However, that is not the end of the matter. On an application for interim reinstatement, the Court must also determine whether there is an arguable case for permanent reinstatement.

*Arguable case for permanent reinstatement*

[13] Fonterra says there is no arguable case for permanent reinstatement. It says that to reinstate Mr Christieson is neither practicable nor reasonable.<sup>7</sup>

<sup>5</sup> *Cliff v Air New Zealand Ltd* [\[2005\] NZEmpC 14](#); [\[2005\] ERNZ 1 \(EmpC\)](#) at [\[12\]](#).

<sup>6</sup> *Reid v New Zealand Fire Service Commission* [\[1998\] NZEmpC 57](#); [\[1998\] 2 ERNZ 250](#) at 280 (EmpC); *Reid v New Zealand Fire Service Commission* [\[1999\] NZCA 348](#); [\[1999\] 1 ERNZ 104 \(CA\)](#).

<sup>7</sup> [Section 125\(2\)](#).

[14] It is necessary to consider the background to this situation.

[15] Mr Christieson worked for Fonterra for approximately eight and a half years. He was first employed in 2012 as a shift electrician in the maintenance department at the Waitoa plant. Things went well and in 2017 he was invited to apply for a team leader role within that department. He applied and was appointed to the role, making him responsible for a team of two electricians, three fitters and one instrument technician.

[16] It was after shifting into this leadership position that issues began to arise.

[17] Both parties provided me with substantial detail of Mr Christieson's interactions with his colleagues and managers. From early on in his new role, there were issues between him and various others. On 1 August 2018 a facilitated meeting was held with the relevant people.

[18] There is no suggestion that there were issues between Mr Christieson and the people who reported to him. On the contrary, five provided letters in support of him and were complimentary of how he supported them.

[19] In December 2018 Mr Christieson's manager had a discussion with him about putting a performance improvement plan (PIP) in place to assist him to improve his relationships. On 25 March 2019 the PIP was issued and subsequently completed. While further issues arose in September 2019, they were discussed and a facilitated meeting held. Things were seemingly dealt with at the time.

[20] Unfortunately, in November 2019 an incident occurred between Mr Christieson and a lead planner. The situation became heated and resulted in a complaint against Mr Christieson. The matter was investigated and ultimately a 12-month warning was issued to him for aggressive behaviour and refusal to move away from someone when asked to do so.

[21] Mr Christieson raised a personal grievance. This was of concern to Fonterra as Mr Christieson had earlier indicated that he would accept a warning. However, his perspective was that a 12-month warning was longer than was justified.

[22] In March 2020, just before the commencement of the Alert Level 4 lockdown, there was a heated discussion between Mr Christieson and a fellow team leader about the new roster when Mr Christieson accused him of telling lies. The team leader then complained about him.

[23] A further conflict arose with Mr Christieson accusing the same team leader of requiring one of Mr Christieson's team members to come to work when he had told him to stay home due to his immunocompromised position.

[24] It was agreed that Mr Christieson would work from home. While at home, he prepared a detailed bullying complaint which went back for a period of about two years and ended up being against five individuals – two former managers, his current one-up manager, his current direct manager at the time of the complaint, and a fellow team leader. He also made a COVID-19 complaint as he considered Fonterra had not followed proper protocols. The complaints, relating to 122 incidents, covered a period of two years and three months. During the investigation Mr Christieson added a sixth person who was his former manager. A senior employee relations member was appointed to investigate the bullying complaint. The COVID-19 breach complaint was investigated by a member of Fonterra's health and safety team.

[25] When the company moved to Alert Level 2 in May 2020, Mr Christieson attempted to return to work but was told not to do so. The investigation of his bullying complaint had not been completed and Fonterra formed the view that requiring him to work with some of the employees against whom he had made complaints (in particular, his managers and peers) would create significant operational difficulties while the investigation was ongoing. Fonterra's view is that the stand-down was not a disciplinary sanction but simply some temporary measures put in place to ensure the investigation could be completed in a safe, effective and timely way.

[26] The investigation report was finalised in early September 2020. It made four findings of unreasonable behaviour against Mr Christieson's current or former work colleagues. However, it concluded that the incidents were separate and unrelated, and therefore did not amount to bullying. It held that the overall allegation of systemic, persistent and abusive bullying was unsubstantiated.

[27] Mr Christieson did not accept the outcome of the report. He considered that not all of the allegations had been investigated and took issue with the investigator not accepting his version of events, applying the wrong legal test, adopting the wrong methodology for the investigation, and failing to consider the COVID-19 allegations as part of the overall complaint. He raised disadvantage grievances in relation to these concerns and sought mediation.

[28] With the investigation completed, albeit not to his satisfaction, Mr Christieson sought to return to work.

[29] Fonterra noted in correspondence that in the ordinary course of events, the next step would be to organise a discussion about a return to work. Instead, it wrote to Mr Christieson's lawyer, setting out its concerns about those next steps. It cited concerns with his continuing to challenge the outcome of the bullying investigation while it considered it was carried out in a fair and reasonable manner, his request for information relating to a PIP, and his allegations against a number of individuals. It considered it may be unrealistic for him to have a constructive working relationship with those individuals with whom he needed to work closely while he continued to have concerns about the process.

[30] Further, Fonterra considered the revelation to several of his colleagues that he had been making written records and audio recordings about them contributed to the tension and caused significant distrust of him.

[31] Two mediations held in October 2020 did not resolve the issues. Through his lawyer, Mr Christieson proposed a return to work plan which included agreements around how individuals would deal with each other in the workplace and, in particular, around disagreement, communication guidelines, facilitated meetings, resolution of

workload issues, team leader management training, not recording any further meetings, and an apology from him to those whom he had upset. Mr Christieson also advised that he would consent to a transfer to another site and would consider relinquishing his team leader role and returning to work on the tools.

[32] Despite these efforts and the return to work proposal, Fonterra's concerns remained and various communications were exchanged between Mr Christieson's lawyer and the company.

[33] On 27 October 2020 Fonterra wrote to Mr Christieson, formally raising its concerns about the ongoing employment relationship between Mr Christieson and it. It confirmed that it had concerns regarding the working relationships between Mr Christieson and a number of his immediate peers, managers and colleagues. While it acknowledged that Mr Christieson's position was that these breakdowns were due to workplace bullying, its view was that it was due to him construing nearly all routine interactions with peers and managers as designed to either attack or undermine him. It noted that its report into those allegations had found them to be unsubstantiated. In addition, it noted that Mr Christieson's peers had raised concerns about him making audio recordings of the conversations between them. It stated that in its view, the return to work plan proposed by Mr Christieson did not have the ability to repair the broken relationships and ensure a constructive working relationship going forward, although they did not suggest amendments to it or put forward any suggestions of their own.

[34] Ultimately, correspondence between the parties did not resolve the issues and on 11 December 2020 Fonterra wrote to Mr Christieson (via his lawyer) advising that it was considering whether a situation of incompatibility existed such that it might be justified in terminating his employment.

[35] Mr Christieson met with Fonterra. He noted that he had shown a willingness to discuss and resolve any of the concerns and had provided what he considered to be a workable return to work plan. He was willing to meet with any people who said they would not work with him but pointed out he had never been given a chance to speak

to them. Instead, he said Fonterra was choosing to find problems with proposals but not offering constructive input into the process.

[36] Despite his submissions, on 12 January 2021 Fonterra wrote to Mr Christieson, confirming his dismissal because of "irretrievable incompatibility" after determining that he was substantially responsible for that situation. The dismissal was effective immediately and Mr Christieson was paid one month's salary in lieu of notice.

*Is it arguable that reinstatement is practicable and reasonable?*

[37] As I have already stated, it is accepted that Mr Christieson has an arguable case for unjustified dismissal. The question is whether he has an arguable case for reinstatement.

[38] Where an employee who succeeds in their claim of unjustifiable dismissal seeks reinstatement, that must be provided for wherever practicable and reasonable.<sup>8</sup> It likely will be the most significant remedy claimed because of its importance to the grievant; it is often not enough for a monetary judgment to be substituted for the job.

[39] Practicability and reasonableness are two separate considerations.<sup>9</sup> For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question.<sup>10</sup> In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.<sup>11</sup>

[40] Issues have been raised by Fonterra that will be relevant to practicability and reasonableness of permanent reinstatement. In particular, Ms Service has raised issues

<sup>8</sup> [Section 152\(2\)](#).

<sup>9</sup> *Hong v Auckland Transport* [2019] NZEmpC 54 at [65].

<sup>10</sup> At [66].

<sup>11</sup> *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466, at [68].

around workplace culture and the relationships between Mr Christieson and his immediate managers and at least one peer that could go to both practicability and reasonableness. She also notes that the expert called by Mr Christieson, Mr Brosnan,<sup>12</sup> has also pointed out how difficult and resource-intensive it would be to bring Mr Christieson back into the workplace and re-establish relationships.

[41] As with unjustified dismissal, however, Mr Christieson only needs to establish that he has an arguable case for reinstatement.

[42] He has been employed by Fonterra since 2012. He is 52 years old and it was his intention to work there until the age of 65. He enjoys working at Fonterra and has a number of close friends there. From a professional perspective, he says he enjoys the challenges that working for Fonterra offers which can be both stressful and exciting. He says he is unlikely to find those in another workplace in the Waikato. There is no suggestion that he is not competent to perform his role and it is apparent that he has a good relationship with the people for whom he is responsible.

[43] It is difficult, on affidavit evidence and in the face of Mr Christieson having been kept out of the workplace for 293 days and having not had the opportunity to attempt to mend relationships with the individuals concerned, to say that it is neither practicable nor reasonable for him to be reinstated. While no-one is of the view that this would be easy, neither is it possible to say at this stage that it is not practicable or reasonable.

[44] Mr Christieson has an arguable case for reinstatement.

### **Does the balance of convenience favour interim reinstatement?**

[45] Mr Christieson has given evidence of the effect on him of the dismissal and his absence from the workplace.

12 A human resources consultant.

[46] This is a challenge regarding an interim reinstatement application and it is necessary to balance the extent to which the effect of his continuing absence from the workplace cannot be rectified if he succeeds in his substantive proceeding.

[47] In most circumstances such as this, the dismissal will have a significant financial impact on the employee. However, in this case Fonterra reinstated Mr Christieson to the payroll on 30 April 2021. It continues to pay him and proposes that it continue to do so until the substantive proceedings are concluded.

[48] The site operations manager at Fonterra, has provided a list of possible alternative roles that Mr Christieson would be qualified for within the Waikato. There is no suggestion by Mr Christieson that he could not find alternative employment. His point is that there is no alternative employment that is comparable to working for Fonterra. In that regard, he has given evidence in relation to both the nature and challenges of the role as well as the positive terms offered by Fonterra – in particular six weeks' leave and a superannuation plan.

[49] Mr Christieson is also concerned that the longer he is out of the workplace, the harder it will be to rebuild relationships on his return.

[50] If he succeeds in his substantive claim, any loss in terms of income or superannuation would be considered when determining compensation for lost earnings, including for future lost earnings, if he is ultimately not reinstated.

[51] Accordingly, while Mr Christieson's concerns in relation to the terms of employment offered by Fonterra are valid ones, they could be rectified in time should he succeed in his substantive claim.

[52] The more problematic issue is Mr Christieson's concern that further time away from the workplace will only exacerbate concerns around broken relationships and make it harder to mend them on his return.

[53] Fonterra has given evidence that it does not have trust and confidence in Mr Christieson's ability to build trusting and constructive relationships with his peers and

those who are responsible for directly managing him. It points to the evidence of fellow employees about the impact of his return on their wellbeing and their ongoing employment with Fonterra. Fonterra says that at least two employees were struggling with anxiety and stress as a result of the allegations Mr Christieson had made against them and that one was medicating to assist him with coping. Both employees said they felt they could not remain with Fonterra if they had to continue to work with Mr Christieson. The company considers that Mr Christieson has displayed no real insight into, or remorse for, his actions.

[54] The site operations manager has given evidence that since Mr Christieson's departure, he has observed a sense of relief and ability for the team to move forward. He says that Mr Christieson's managers are concerned that should he return, they would be fearful of engaging with him for risk of making mistakes in their leadership, exposing them to allegations of bullying and harassment. He says that Mr Christieson's return would have an immediate and direct negative impact on morale within the maintenance team, that they would risk losing two team members, and that it would create disruption for the new maintenance team leader. He is of the view that shifting Mr Christieson to a different site would

simply be shifting the problem.

[55] The Court must be cautious of statements about loss of trust and confidence in employees as a reason for not reinstating an employee where, at an interim stage, the basis for that claim of loss of trust and confidence has not yet been tested.

[56] Likewise, claimed differences between employees, including suggestions that employees will leave if another staff member returns to work, must be treated with care. If a dismissal is found to be unjustifiable, it is often reasonable for employers, particularly employers with the resource and depth of experience in its human resource and employee relations functions such as Fonterra, to arrange for a reintegration process to facilitate an employee's return to the workplace. However, at an interim stage, where the justification for the dismissal has not been properly tested, the practicability and reasonableness of such a reintegration process is considerably less.

[57] This position appears to be supported by Mr Brosnan. His advice is that the ability for any interventions to restore the relationship during the litigation process is

minimal and should not take place until the legal process is concluded. He says that any interventions attempted during the process may have a detrimental effect.

[58] That distinguishes this case from *Humphrey v Canterbury District Health Board Te Poari Hauora o Waitaha*,<sup>13</sup> where the Court did not have such evidence before it.

[59] The majority of these matters point away from an order for interim reinstatement.

[60] The detriment suffered by Mr Christieson by not being reinstated pending the hearing of his claim can be substantively rectified if he succeeds. The concerns of Fonterra, if it succeeds, may not be able to be reversed.

[61] For these reasons, the balance of convenience does not support an order for interim reinstatement.

### **Where does the overall justice lie?**

[62] Mr Christieson has an arguable case. There are concerns with Fonterra's actions in this case or, more specifically, its alleged inaction. While there were mediations between it and Mr Christieson in relation to the current issues, it did not take any steps to facilitate the rebuilding of relationships between him and his colleagues. It is arguable that it did not constructively engage on the development of a return to work plan, choosing instead to critique the one put forward by Mr Christieson. This is despite it being an organisation with significant internal resources and well placed to deal with such issues.

[63] There is an aspect of these circumstances, however, whereby Mr Christieson is arguably a contributor to his own misfortune.<sup>14</sup> He does appear to have problematic relationships with a number of people (although not his reports) and it has taken some considerable time for him to get to the point where he accepts his role in this situation.

<sup>13</sup> *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59.

<sup>14</sup> Which would be relevant to the issue of remedies including reinstatement – [s 124](#).

Fonterra says it is still not apparent that he understands it. Of course, a properly constructed and implemented restorative justice process<sup>15</sup> may have assisted with this occurring earlier.

[64] Mr Hope, counsel for Mr Christieson, has referred me to *Humphrey* and suggested that like the Court in that case, I could impose conditions on an interim reinstatement such as ordering reinstatement to the payroll and directing the parties to mediation to identify and implement steps to ensure a managed transition that safeguards the interests of colleagues.<sup>16</sup>

[65] Unlike that case, however, Mr Christieson is already reinstated to the payroll and Fonterra proposes that the status quo remain. Further, a managed transition while litigation is unresolved is inconsistent with the advice of the plaintiff's own expert. Additionally, while his role at Fonterra is important to Mr Christieson, he does not face the same professional consequences and limited options that Dr Humphrey experienced if he was not returned to it on an interim basis.

[66] I am concerned that reinstatement to the payroll not be seen to create a system of licensing unjustified dismissals, in particular those for incompatibility. However, the expert opinion of Mr Brosnan that an attempt to reconcile relationships while this process is unresolved could have a detrimental effect, Mr Christieson's own contribution, and the fact that his

concerns about the comparatively favourable employment terms of Fonterra compared to other Waikato employers can be addressed by way of damages, outweigh that concern.

[67] Standing back from the matter, and considering the overall justice of the case, I am satisfied that full interim reinstatement to the workplace ought not be ordered. The status quo as ordered by the Authority should remain and Mr Christieson should remain on the payroll.

[68] Leave is reserved for the parties to seek further orders, if necessary, in relation to issues arising from reinstatement to the payroll.

15. The development of which would be expected to be within the expertise of Fonterra's Human Resource or Employment Relations Team.

16 *Humphrey*, above n 13, at [53].

[69] Having been successful in defending this challenge, Fonterra is entitled to costs. The matter has been assigned Category 2B under the Court's Costs Guideline scale.<sup>17</sup> If there is any disagreement as to the calculation of costs to be paid by Mr Christieson in respect of the challenge, the matter can be referred back to the Court by appropriate memoranda for a decision.

Kathryn Beck Judge

Judgment signed at 2.30 pm on 26 August 2021

17. "Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 16.

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