

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 2
5415553

BETWEEN CRAIG FLYNN
 Applicant

A N D FONTERRA BRANDS (NEW
 ZEALAND) LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: H White, Counsel for Applicant
 S J Turner and S J Clark, Counsel for Respondent

Investigation Meeting: 22 and 25 July 2013 at Auckland

Submissions Received: 29 and 30 August, 2 and 6 September 2013 from
 Applicant
 19 July and 6 September 2013 from Respondent

Date of Determination: 9 January 2014

DETERMINATION OF THE AUTHORITY

- A. Craig Flynn was unjustifiably dismissed by Fonterra.**
- B. An order for Craig Flynn to be permanently reinstated to his job at Fonterra.**
- C. The Authority declines to award any remedy under s123(b) because Mr Flynn has not proven to the required standard he has lost remuneration.**
- D. The Authority declines to award any remedy under s123(c)(i) because Mr Flynn's behaviour was causative of the outcome and blameworthy.**

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

Employment relationship problem

[1] Craig Flynn was dismissed following the production of two videos at the Takanini plant of Fonterra Brands (New Zealand) Limited (Fonterra). The videos showed seven Fonterra employees, including the applicant, re-enacting their own version of the “Harlem Shake” internet memo¹. Four of the seven employees kept their jobs. Mr Flynn and two others were dismissed.

[2] The Authority ordered the interim reinstatement of Mr Flynn to his job.² Mr Flynn now seeks permanent reinstatement. He submits his behaviour did not justify dismissal and there were procedural flaws in the process leading to the dismissal.

[3] Fonterra disagrees. It says the decision to dismiss was open to a fair and reasonable employer given the importance of health and safety and the applicant’s knowledge, actions and conduct amounted to failures to comply with these requirements.

Facts leading to dismissal

[4] On 10 March 2013, Mr Flynn was discussing the Harlem Shake internet memo with another employee, Aaron Uiese. Mr Flynn agreed to participate in making their own version during the 9 pm smoko break. The video shows Mr Uiese wearing a hairnet and earmuffs dancing alone in front of a pallet. The video then cuts to Mr Uiese dancing in front of the pallet with Mr Flynn dancing around the pallet with a plastic shovel between his legs. Both wear protective clothing, hairnets and visors.³

[5] The following day, Mr Uiese organised another video to be shot during the 1 am smoko break. Five other employees, including Mr Flynn agreed to participate. The video shows Mr Flynn is wearing protective clothing and hosing water into a chemical footbath. The water is overflowing onto the floor and pooling around Mr Uiese’s feet. Mr Uiese is standing in one place wriggling and clapping his hands. Mr

¹ An internet memo is a short video where people perform a comedy sketch accompanied by a short excerpt from the song “Harlem Shake” by Baauer, an American DJ and producer.

² *Taufua & Anor v. Fonterra Brands (New Zealand) Ltd* [2013] NZERA Auckland 230.

³ Attachment SIR–F Statement in Reply (SIR)

Flynn flicks the hose to his left side near a pallet of plastic packaging. Jose Lago, Metua Porea and Ryan Ruawhare are seen pretending to work behind Mr Flynn. Henry Taufua walks across the screen pulling a pallet jack. Nick Jeffries walks in unaware the video is being made and starts working. He realises they are filming, leaves and does not return.

[6] The video cuts to a scene where the remaining six employees are dancing. The water has drained away but the surface appears wet. Mr Flynn is now wearing a visor and gloves and dancing on the left side of the chemical bath. Mr Lago is wearing a visor and gloves and dancing in the same area. Mr Uiese is hanging from pipework on the roof. Messrs Porea and Ruawhare are dancing to the right side and in front of the chemical footbath, with buckets on their heads. One of them can be seen crouching over the chemical footbath. Mr Taufua is seen travelling towards the camera standing on a pallet jack.⁴

[7] Mr Uiese filmed both videos using his Ipad. He uploaded the videos to Youtube. Mr Flynn told him to take them down. None of the employees reported their actions to management at Fonterra.

[8] Mr Craig Rooks, UHT Plant Manager, saw the videos. He sent a letter to all of the employees involved setting out the company's concerns and asked them to attend a meeting. Mr Flynn was interviewed twice.

[9] Mr Flynn was found to have breached Fonterra's Health and Safety policies and procedures by participating in the making of the film clip and subsequently failing to report such unsafe behaviour in the workplace. The misconduct was set out in the letter of dismissal dated 20 March 2013:⁵

1. *Engaging in an unsafe act in the workplace namely purposely pouring water on the floor and chemical bath to engage in an unsafe act of dancing in the UHT Plant, and dancing with a shovel between your legs, endangering your own safety and that of others around you*
2. *Inappropriate use of work equipment, namely a hose, PPE visor and gloves, and a shovel*

⁴ Attachment SIR-E SIR

⁵ Agreed Bundle of Documents (ABD) Document 32 Letter Fonterra to C Flynn dated 20 March 2013

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

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

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

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

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

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

Issues

[14] The following issues arise:

- (a) Could a fair and reasonable employer have concluded Mr Flynn’s conduct was misconduct justifying dismissal?

- (b) Was the process leading to dismissal of Mr Flynn what a fair and reasonable employer could have done in all the circumstances?
- (c) If the Authority finds that the dismissal was unjustified, then what remedies should be awarded?
- Is permanent reinstatement practicable and reasonable in the circumstances?
 - Has Mr Flynn lost remuneration (s123(1)(b))?
 - What award (if any) should be made under s123(c)(i)
 - Were his actions leading to dismissal causative and blameworthy requiring a reduction in compensation due to contributory conduct?

Legal Framework

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

[16] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.⁶

[17] The employment relationship is governed by the Collective Employment Agreement between the New Zealand Dairy Workers Union and Fonterra. Clause 9.1.1(d) under the heading "General Health and Safety Rules" states "*horseplay, or unauthorised use, or unauthorised removal of fire protection or safety equipment may lead to dismissal.*"⁷

⁶ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

⁷ ABD Document 1

[18] Fonterra's discipline and dismissal policy⁸ defines serious misconduct resulting in summary dismissal as including the following:

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

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

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

[20] Serious misconduct “... will generally involve deliberate action inimitable to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.”⁹ It is conduct which “deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.”¹⁰

[21] There is a prima facie case of disparity of treatment on these facts. If there is an adequate explanation for the disparity, it becomes irrelevant. Even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered.¹¹

⁸ ABD Document 4

⁹ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

¹⁰ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

¹¹ *Samu v Air New Zealand Ltd* (1995) 4 NZELC 98,334; [1995] 1 ERNZ 636 at 639

Could a fair and reasonable employer have concluded Mr Flynn's conduct was misconduct justifying dismissal?

[22] Mr Flynn submits he did not deliberately and knowingly breach Fonterra's Health and Safety policies and procedures. His conduct did not justify dismissal because a wet floor was common in this area. His actions were reasonable for washing out the chemical footbath given the flooring was designed to be wet and there was no standard operating procedure for the footbath. It was illogical for Fonterra to find misconduct for misuse of protective clothing by wearing it while dancing when it is a requirement to be worn in the workplace irrespective of what he was doing. Dancing with a shovel between his legs was not serious misconduct. The alleged risks of his actions were remote. He did not fail to report the actions of others because there was no obligation to report in absence of accident or injury. He accepts the incidents were horseplay but disputes he should have been dismissed as a consequence.

[23] Fonterra submits it is well established law that breaching employer codes of conduct and/or health and safety policies and procedures may amount to serious misconduct warranting dismissal. Mr Flynn was aware of the codes and policies, was an experienced employee and failed to comply. The employer's management prerogative prevails where there are questions of safety. No actual harm or injury is required to justify dismissal on health and safety grounds.

[24] The parties acknowledged Mr Flynn's participation in the videos was misconduct. The issue is whether this was misconduct justifying dismissal. The fact conduct was not wilful or deliberate does not prevent it from being misconduct justifying dismissal. The test requires an overall evaluation as to whether the decision to dismiss was one "*a reasonable and fair employer could have taken.*"¹²

[25] The decision maker was Craig Rooks, Manager UHT Plant in Takinini. He believed Mr Flynn's conduct of dancing with the shovel between his legs and hosing the chemical footbath so water overflowed onto the floor for dancing and dancing in the water was serious enough to warrant dismissal. He created the risk of tripping and slipping himself and other employees.

¹² *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448; [2001] 3 NZLR 293 (CA), at para 31;

[26] The risk of Mr Flynn tripping due to dancing with a shovel between his legs was minimal. This was acknowledged by Mr Rooks' evidence that "[on] its own though, I don't think that I would have dismissed him for this one-off incident."¹³ This evidence does not support the conclusion Mr Flynn's conduct endangered the health, safety and/or wellbeing of employees in terms of Fonterra's disciplinary policy.

[27] Despite this view, Mr Rooks' actual concern about the first video was Mr Flynn's subsequent participation in the second video. This concern was not clearly raised with Mr Flynn at the time of the dismissal. It may have been referred to obliquely in the dismissal letter, but the interviewing and the reasons for dismissal focused upon his conduct within the video and participation in filming generally. Other retained employees who appeared in one video had the same or similar reasons of participating in filming and misuse of Fonterra property or time.¹⁴ It can be reasonably inferred Mr Rooks made no clear distinction between Mr Flynn's participation in two videos and the other employees' participation in one video at the time of dismissal.

[28] Even if he had raised this concern, the misconduct fell within the second category of less serious misconduct namely misuse or unauthorised use of Fonterra property or time. At hearing he conceded he did not look at the category of less serious misconduct for Mr Flynn.¹⁵

[29] The evidence of the risk of slipping was equivocal in the second video. Lance Flynn, Team Leader and the Applicant's father, gave uncontested evidence at hearing the area where the water overflowed was normally wet. This is because people walked through the chemical footbath to sanitise their footwear prior to entering the plant. The floor surface was specifically treated to allow extra grip in wet conditions and surface water to drain away. All of the employees were wearing appropriate footwear for wet conditions. It is difficult from viewing the video alone to determine with any degree of certainty the likelihood of slipping. There was no other evidence Mr Flynn's actions increased the likelihood of slipping in this area, other than marginally, from what would normally be present. The Authority is not persuaded Mr

¹³ Witness statement (WS) CR Rooks 21 June 2013 para 119

¹⁴ Respondent Exhibit 1 produced C Rooks 25/07/13 Letter Fonterra to M Porea 21 March 2013; Letter Fonterra to J Lago 21 March 2013; Letter Fonterra to R Ruawhare 25 March 2013.

¹⁵ C Rooks oral evidence 25/07/13

Flynn's conduct endangered the health, safety and/or wellbeing of employees in the terms contemplated by Fonterra's disciplinary policy.

[30] There is no evidence overfilling the footbath was to engage in an unsafe act of dancing, other than what can be seen in the video. Mr Flynn gave evidence at hearing he was filling the footbath 'pretending' to work, not for the purposes of overflowing it to dance in a slippery or wet area. He denied intending to create any risk. This concern was not supported by the evidence.

[31] Mr Flynn's activities following the hosing of the footbath were similar to the other participants. He wore similar protective clothing as Jose Lago, namely a PPE visor and gloves. This clothing was required to be worn within this workplace irrespective. The fact he was wearing the clothing cannot logically be serious misconduct as defined in Fonterra's disciplinary policy. It does not endangering others, compromise health and safety or fail to comply with health and safety policies. It may fall within less serious misconduct (misuse of Fonterra property) but Mr Rooks did not turn his mind to this.

[32] Mr Flynn's dancing was in a similar position to Mr Lago. Messrs Porea and Ruawhare danced in close proximity to the chemical footbath wearing buckets on their heads. Their conduct appears more risky than Mr Flynn's given their limited visibility. There was little in the video to suggest Mr Flynn's dancing was more risky than anyone else's.

[33] Fonterra's disciplinary policy imposes an obligation to report health and safety breaches where there is accident, injury or damage. There was no accident, injury or damage shown in the video. The obligation to report other matters is unclear. Fonterra submitted the incident was a 'near miss' which required reporting. There was no clear definition of 'near miss' in the Fonterra policies. It appeared to cover everything from leaving a door ajar to working at heights without proper permits. The necessity to report a 'near miss' was left to the discretion of the employee. None of the employees reported the incident, including Mr Jefferies who was not subject to any disciplinary action. The Authority is not persuaded there was an obligation for Mr Flynn to report this conduct under Fonterra's policies. It may have been wise to report this incident, but the evidence is insufficient to give rise to a legal obligation in the circumstances.

[34] There was inexplicable disparity of treatment between these employees. Three employees (Jose Lago, Metua Porea and Ryan Ruawhare) were found to have committed similar misconduct, yet retained their jobs. There was an inadequate explanation for the disparity. The Authority is not persuaded Mr Flynn's conduct justified dismissal in the circumstances.

[35] Given the above, the Authority determines a fair and reasonable employer could not have concluded Mr Flynn's conduct was misconduct justifying dismissal. Craig Flynn was unjustifiably dismissed by Fonterra.

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

[36] Mr Flynn submits the investigation was unfair because there was no separate enquiry into his actions. He submits the company failed to raise and/or investigate the risks they allege created health and safety concerns for example, risks of slipping due to cream or milk product on floor, splashing of chemicals, contamination of packaging, burns from pipes and hearing loss. Other matters were not put to Mr Flynn for comment such as his opportunity to see others dangerous actions and his role as an instigator. The company asked composite questions which they never 'unpacked'.

[37] The company submits the investigation and process leading to the decision justified dismissal.

[38] Mr Flynn should have been aware of the concerns about general risks of slipping and tripping. He was not asked about his viewpoint in the video but knew the concern was his failure to report the allegedly unsafe acts of others.

[39] He was interviewed twice. He had access to competent legal advice through his Union. He gave an explanation and made oral submissions through his Union prior to the dismissal decision. At no stage did he raise complaints about the questioning.

[40] Concerns were raised in evidence which were not put to Mr Flynn for comment. The concern he *actively sourced other people and recruited them to be*

*involved in this activity*¹⁶ was specifically denied at hearing. There was evidence others actively recruited the employees to make the video, but not Mr Flynn.¹⁷

[41] Fonterra raised concerns at hearing about his compromising the sterility of the chemical footbath which were not raised with Mr Flynn at the time of dismissal. There was no direct evidence Mr Flynn's actions compromised the sterility of the footbath other than speculation from viewing the video. It was accepted Mr Flynn used a general water hose to fill the chemical footbath as opposed to a hose using water treated with chemical sanitiser. Lance Flynn gave uncontested evidence at hearing the footbath could be filled with the general water hose if sanitiser was added directly to footbath. There was no standard operating procedure for filling the chemical footbath which prevented use of the general water hose.

[42] Concerns were raised about increased risks of slipping due to cream or milk product on the floor, misuse of the hose creating risk employees may be splashed with chemicals from the footbath, contamination of packaging and not wearing earmuffs risking hearing loss. None of these concerns were raised with Mr Flynn for comment prior to dismissal. The video did not evidence milk or cream product on the floor, splashing of chemicals and contamination of packaging. No other evidence was produced to justify these concerns. There was a dispute regarding the necessity for earmuffs in the area.

[43] The Authority was left with the impression the above concerns did influence Mr Rooks decision to dismiss. They should have been raised with Mr Flynn prior to dismissal. There was evidence available from Mr Flynn and other sources disputing the concerns. The failure to raise the concerns prior to dismissal was unfair.

[44] Mr Rooks admitted at hearing he did not consider any alternatives to dismissal for Mr Flynn.¹⁸ The requirement that an employer treat its employees fairly and reasonably, may arguably give rise to a duty to consider other alternatives before dismissing a worker.¹⁹ A failure to consider alternatives to dismissal may give rise to unfairness, especially in situations where other employees are involved and alternatives have been considered and applied.

¹⁶ WS CR Rooks 21 June 2013 para.66

¹⁷ Respondent Exhibit 1 Interview notes J Lago referred to Ryan Ruawhare inviting him to come along and have some fun.

¹⁸ CR Rooks oral evidence 25/07/13

¹⁹ Brookers ER103.04 Dismissal — procedural fairness para (6)

[45] These defects in the process were not minor and did result in Mr Flynn being treated unfairly (s.103A(5)).

[46] The Authority determines the process leading to dismissal of Mr Flynn was not what a fair and reasonable employer could have done in all the circumstances. Craig Flynn was unjustifiably dismissed by Fonterra.

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

Permanent Reinstatement

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

[48] Fonterra disagrees. It says it has lost trust and confidence in Mr Flynn because his actions undermined Fonterra's health and safety policies. Reinstatement would send a message to other employees that it was okay to ignore the rules twice, on your own initiative and come back to work.

[49] Fonterra retained four workers for the same or similar conduct. It repaired any breach of trust and confidence it had with those workers. It should be able to do the same for Mr Flynn. Mr Flynn's reinstatement sends a similar message Fonterra gave in retaining the other employees. It is speculative whether employees would view Mr Flynn's reinstatement as being worse than the other employee's retention.

[50] Reinstatement is both reasonable and practicable in the circumstances. There is an order Craig Flynn is to be permanently reinstated to his job at Fonterra.

Lost wages/Damages

[51] Mr Flynn seeks compensation for all losses suffered as a result of the dismissal. As a consequence of this order and the interim reinstatement order, Mr Flynn should not have lost remuneration. He deposes to losses of 10 weeks and 4 days' pay totalling \$13,534.00 gross. He does not explain how this is calculated taking into account his final pay and the interim reinstatement order. There is no evidence of mitigation of this lost remuneration. Accordingly the Authority declines to award any remedy under s123(b) because Mr Flynn has not proven to the required standard he has lost remuneration.

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

[53] The Authority must consider the extent to which Mr Flynn's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124). Contributing behaviour is behaviour which is causative of the outcome and blameworthy.²⁰ Mr Flynn's behaviour was causative and blameworthy. A reduction in compensation of 100% is appropriate. Accordingly the Authority declines to award any remedy under s123(c)(i) because Mr Flynn's behaviour was causative of the outcome and blameworthy.

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

T G Tetitaha
Member of the Employment Relations Authority

²⁰ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82