# Employment Court of New Zealand



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Last Updated: 8 September 2010

**IN THE EMPLOYMENT COURT AUCKLAND**

**[2010] NZEMPC 115**

**ARC 76/10**

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN FONTERRA COOPERATIVE GROUP LIMITED

Plaintiff

AND DOUGLAS TE STROET Defendant

Hearing: 13 and 31 August 2010 (Heard at Auckland)

Appearances: John Rooney and Jenna Rennie (on 13 August) and Stephanie Van der Wel (on 31 August), Counsel for Plaintiff

Helen White, Counsel for Defendant

Judgment: 2 September 2010

**INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE GL COLGAN**

[1] This judgment decides whether the Employment Relations Authority's order for reinstatement of Douglas Te Stroet should be stayed and, if so, on conditions pending hearing of Fonterra's challenge which will be in March 2011, about seven months hence with a decision to follow.

[2] By a determination delivered on 11 June 2010[1] the Employment Relations

Authority found Mr Te Stroet to have been dismissed unjustifiably and directed his

reinstatement under s 123(1)(a) of the Employment Relations Act 2000 (the Act) to his former position or one no less advantageous to him on the following conditions:

(i) he is reinstated to the pay roll from the first day after the date of this determination; and

(ii) Fonterra is to discuss with Mr Te Stroet, through his union representative, arrangements for his return to work on a day nominated by the company within 14 days of the date of this determination, but no later than 14 days; and

(iii) Mr Te Stroet is to participate, in good faith and at Fonterra's discretion and direction, in any training or 'refresher' programme required in preparation for his return to work; and

(iv) Fonterra may require Mr Te Stroet to work in any position for which he is trained and adequately experienced if he cannot immediately be placed in his former position and until such a position becomes available; and

(v) Leave is reserved for either party to apply for further directions regarding these conditions (provided that the parties have first attended mediation on any points on which they cannot reach agreement).

[3] In addition, the Authority directed Fonterra to reimburse Mr Te Stroet for lost wages, superannuation and medical benefits for the period from his dismissal to the date of his reinstatement. The award of wage reimbursement was, however, to be reduced by one-third to reflect Mr Te Stroet's culpable contribution to his dismissal.

[4] On 5 August 2010 Fonterra applied for an urgent hearing of its application for stay of the reinstatement order. Since the application for stay was adjourned[2] on

13 August 2010, the Court now has better evidence, especially prognostic medical expert evidence, upon which to determine that issue. Unsurprisingly, some of the expert medical evidence is conflicting and will really only be able to be resolved at the substantive hearing of the challenge at which it will also be relevant to the question of reinstatement. Even in its current partly conflicted state, however, the evidence is helpful and I am grateful to the parties, their counsel, and the expert medical witnesses for its provision at short notice.

[5] Mr Te Stroet was a dairy factory laboratory technician at Waitoa. Fonterra concluded that he "wilfully and deliberately" submitted falsified results of laboratory tests he had conducted on 22 November 2009 and failed to report subsequently that

he knew the results he had passed on to production staff were incorrect. Following investigation in December 2009 and January 2010 Fonterra determined that Mr Te Stroet's actions were serious misconduct and he was dismissed.

[6] After more than 27 years of uneventful employment with Fonterra and its predecessors, a very stressful series of events occurred on 22 November 2009 which led to Mr Te Stroet's dismissal. Although he was one of a number of laboratory technicians scheduled to work together on that day and as he had done habitually, two and then subsequently three of his colleagues were unexpectedly absent from work due to illness. This event, combined with the unfortunate, but not malicious, way in which this news was conveyed to Mr Te Stroet, triggered an acute episode of the anxiety disorder from which he had long suffered causing him to act irrationally and, in some significant respects, unconsciously, in attempt to perform the laboratory's time critical analyses.

[7] Although Mr Te Stroet admitted that he had submitted incorrect test results and had also failed to follow procedures in such circumstances, he denied deliberately falsifying the results. Mr Te Stroet identified to his employer a longstanding anxiety and stress disorder which he said made it difficult for him to recall what he had done on 22 November 2009 and made it difficult for him to report his subsequent doubts about the test results.

[8] Amongst the evidence considered by the Authority at its investigation meeting was a statement from Mr Te Stroet's general medical practitioner, the contents of which were accepted by the Authority. It declined, however, to accept in evidence the opinion of a medical practitioner tendered by the company. This report of Dr Steve Culpan was based on a review of Mr Te Stroet's medical records but in the absence of meeting or examining him. One of the reasons for the Authority's rejection of this medical evidence was that it was lodged outside an agreed timetable for such material to be submitted to its investigation, and also because it was not available to Fonterra at the time it dismissed Mr Te Stroet. The Authority

considered that the collective agreement covering Mr Te Stroet's employment allowed for medical examination at the employer's direction and it was significant that Fonterra had failed to have any medical practitioner assess Mr Te Stroet before making its decision to dismiss him.

[9] The Authority saw as its task to determine whether Fonterra had established that it had conducted a full and fair investigation that had revealed conduct by Mr Te Stroet which a fair and reasonable employer would have found deeply impaired or destroyed its basic confidence and essential trust in its relationship with him. The Authority considered that it had to assess whether Mr Te Stroet's failure to comply with a policy or code was because of inadvertence, oversight or negligence or, alternatively, whether it was done deliberately in the knowledge that it was wrong. The Authority said that this was an incidental and not a central question. More important, however, was said to be how Fonterra reached its conclusions that Mr Te Stroet provided incorrect test results deliberately and intentionally.

[10] The Authority found that Fonterra justifiably concluded that some of Mr Te Stroet's acts or omissions amounted to serious misconduct "but not to the same extent or for the reasons expressed at the time". It concluded that "[the employer's] conclusion and how it was reached was flawed in some important respects."

[11] The Authority found that the inaccurate laboratory test results provided by Mr Te Stroet on 22 November 2009 were first identified by tests done by another technician on a later shift. Mr Te Stroet's samples were then re-tested and the errors discovered. This, in turn, triggered a review of the process which was part of the laboratory's quality control system. This caused the company's investigator to suspect that Mr Te Stroet had not finished full testing of the samples but had deliberately falsified the reported results so that they matched independent automated readings known as MPA readings.

[12] This suspicion led to a disciplinary investigation in which Mr Te Stroet accepted the accuracy of the investigation's results. He said that he recalled that something was wrong with them and admitted altering the results to what he thought they should have been. The Authority concluded that the employer ought not to

have relied upon that admission without further inquiry in view of Mr Te Stroet's explanations about why he might have done so. This included that he was having memory difficulties associated with a dosage of medication that had changed

recently.

[13] At a further disciplinary meeting Mr Te Stroet insisted that his actions or omissions were not intentional and apologised for compromising the integrity of the laboratory. He explained that he had not realised that he had done anything wrong on 22 November 2009 and only came to realise that there was a problem on the following day but did not then know what it was. Mr Te Stroet admitted that he had not advised anyone of these concerns.

[14] His union representative described the situation as being "a mental health issue" with which Mr Te Stroet needed assistance and which could be resolved. The union representative invoked a provision under the collective agreement allowing for Mr Te Stroet to be stood down on full pay and a medical certificate from his general practitioner was subsequently provided to the employer. This described the defendant's condition as "deeply distressed and showing signs of extreme anxiety" and certified for seven days' sick leave. A more detailed certificate from Mr Te Stroet's general practitioner reported that he suffered from a generalised anxiety disorder, had previously experienced severe depression, and took regular prescription medication at stressful times.

[15] Mr Te Stroet did not attend the next disciplinary meeting on 23 December

2009 but was represented by two union officials. The employer's view was that Mr Te Stroet's conduct was an unacceptable compromise of the laboratory's integrity. It reiterated that this was serious misconduct. The defendant's representatives insisted that his actions were neither deliberate nor malicious and they requested Fonterra to obtain a further report from a mental health specialist or psychologist as well as for an opportunity to identify other jobs within Fonterra to which Mr Te Stroet might be redeployed with a written warning rather than dismissal. It appears these requests of Fonterra were not agreed to.

[16] That meeting concluded with a decision by the employer to allow a period of one month to explore alternative positions within the company outside the laboratory and to avoid a summary dismissal immediately before Christmas. The company said, however, that the investigation and its findings would have to be disclosed to any manager who might be responsible for Mr Te Stroet in an alternative position.

[17] The Authority concluded that the defendant's explanation of "panic" on 22

November 2009 was "treated with some cynicism" by Fonterra management. The Authority found that the employer's representatives regarded the medical conditions as being a response to the disciplinary inquiry rather than the cause or a contributing factor to the earlier situation on 22 November 2009 and following days. The Authority found that Fonterra ignored or rejected the union representatives' proposal for examination and opinion from a mental health specialist or psychologist.

[18] The Authority also concluded that Fonterra management representatives failed to take into account at all or sufficiently a number of other explanations which it found were consistent with a significant increase in the stressfulness of Mr Te Stroet's work circumstances on 22 November 2009 and that when he had previously raised issues of work stress he had simply been told to "toughen up".

[19] In these circumstances the Authority concluded that Fonterra failed to make sufficient inquiries into the explanations for Mr Te Stroet's work performance failures in a way that a fair and reasonable employer would have done. The Authority found that these failures led to a conclusion by Fonterra of deliberate falsification. It concluded that Fonterra failed to explore fairly and eliminate a plausible medical explanation for Mr Te Stroet's acts and omissions. The Authority found that the employer was entitled to find serious misconduct when, on the following day, Mr Te Stroet omitted to alert his supervisors when he had real doubts about whether he had carried out his duties satisfactorily on 22 November 2009. In this respect the Authority found Mr Te Stroet to have been negligent.

[20] Nevertheless, the Authority concluded that Fonterra's decision to dismiss Mr Te Stroet was not what a fair and reasonable employer would have done and so was unjustified. That was also because, after an employment history of 27 years with

Fonterra and its predecessors, the company gave insufficient weight to a long and satisfactory employment record in light of a single incident attributable to incapacity and then negligence. The Authority described Fonterra's consideration of this factor as "little more than lip service". Further, the Authority concluded that there was no assessment of whether there was any risk of repetition or whether any additional measures or checks could have protected adequately against any risks of enabling Mr Te Stroet to stay employed. The Authority concluded that Fonterra's procedures were sufficiently robust to identify aberrant activities by technicians.

[21] There was a further reason for the Authority's conclusion of unjustified dismissal. That was its assessment of inconsistent and disparate treatment of Mr Te Stroet by Fonterra when compared to the cases of three other technicians who had falsified laboratory results in mid 2009. They had modified filter pads in 70 tests for foreign matter in milk powder although a disciplinary investigation concluded that the technicians were not aware of the consequences of doing so and a flawed training process had contributed to their actions. Each of those three technicians received a written warning because their actions were repeated and had serious consequences for the integrity of Fonterra's testing process.

[22] Applying established law on the matter of disparity of treatment, the Authority found that there was a significant difference in Mr Te Stroet's treatment a few months later which was not adequately explained.

[23] Another element of the absence of justification for Mr Te Stroet's dismissal found by the Authority was said to have been inadequate consideration of alternatives to dismissal. These had been requested specifically by Mr Te Stroet's representatives and indeed the company had allowed a period of a month for that to occur. The Authority concluded, however, that during the period of the month, one of the managers resiled from that position and conceded in evidence that he never really intended to allow Mr Te Stroet any prospect of continuing to work for Fonterra. The Authority found that the company acted in bad faith towards Mr Te Stroet and his representatives on this question and did not consider fairly any options other than dismissal.

[24] These are very strong findings on the question of justification for dismissal. The strength of Mr Te Stroet's case on liability is a relevant factor when considering whether the Authority's order for reinstatement may be continued by this Court after the challenge. That consideration will be a factor in determining the implications of a stay.

[25] It is significant also that the Authority has found no fair or reasonable basis for the plaintiff's managers' professed loss of trust and confidence in Mr Te Stroet. Despite the Authority's findings, relevant Fonterra managers continue to distrust and have no confidence in the performance by Mr Te Stroet of his resumed employment. An objective assessment of that kind of loss of trust and confidence will also be a factor affecting reinstatement and, therefore, whether the present order should be stayed.

[26] In its decision about whether Mr Te Stroet's reinstatement was practicable, the Authority considered the four separate grounds of impracticability advanced by the company. It found categorically that Fonterra had failed to establish a sufficient case of impracticability to defeat the primacy of this remedy.

[27] The Authority reduced Mr Te Stroet's monetary remedies for lost remuneration by one-third. Also to reflect his contributory conduct, the Authority refused to order compensation for the non-economic consequences to him of his unjustified dismissal.

[28] The Authority directed reinstatement on the terms already set out at the start of this judgment. These conditions impress me as reflecting a careful and deliberative approach to the order for reinstatement but also setting parameters for compliance in the event that there was resistance to this by Fonterra or unforseen events arose.

[29] Either way, the Authority's order should have seen Mr Te Stroet back at work with Fonterra by about the end of June 2010. It was, however, at least another month before Fonterra applied either to this Court or to the Authority for a stay of its orders. Mr Te Stroet had by then sought an order from the Authority for compliance

with its reinstatement order. Consideration of that application for compliance has been delayed by the Authority pending the outcome of this application for stay.

[30] The grounds for stay include the following. First, its human resources' manager, Sally Beard, deposes to comments that are said to have been made by Mr Te Stroet's representatives during the employer's investigation, indicating that a return by him to his former position "would not be appropriate". Ms Beard accepts, however, that these comments appear to have been made in relation to Mr Te Stroet's laboratory technician position and do not affect his claim to reinstatement to another position no less advantageous to him. Indeed, Ms Beard concedes that the size of the enterprise means that Fonterra has regular vacancies and, as she says in her affidavit, "... any delay in reinstating Mr Te Stroet will not adversely affect his ability to secure a suitable alternative position with Fonterra."

[31] Next, and most strongly, Ms Beard says that if Mr Te Stroet is reinstated to a laboratory position before Fonterra's challenge can be heard, the company will be exposed to unacceptable risk for product safety. Mr Te Stroet was involved in testing infant foods, an area in which accuracy of test results is critical. Ms Beard deposes that she is unaware of any viable steps that can be taken to mitigate sufficiently this risk and says that it would be "highly onerous" to provide constant supervision of Mr Te Stroet in the laboratory testing environment. Ms Beard says that the Authority's proposition that Fonterra's "buddy system" might help integrate the defendant back into the laboratory is impracticable. She says that given the nature of the work and the risks of inaccurate testing, the buddy system would require essentially Fonterra to employ an additional person to monitor Mr Te Stroet constantly.

[32] Further, Ms Beard says that it will be beneficial for Mr Te Stroet not to be reinstated because he has alternative employment which, if he is reinstated but ultimately found to have been dismissed justifiably, will see him again without any employment at all.

[33] Ms Beard on behalf of Fonterra says that it is unlikely that Mr Te Stroet will be in a position to repay the company any money received by him before the

determination of its challenge if it is wholly or partly successful in that exercise. That ignores, however, the fact that Mr Te Stroet will provide value for money to Fonterra when reinstated and working so that monetary loss to the company is likely to be modest at worst and probably non-existent.

[34] Fonterra has made a detailed proposal for conditions attaching to reinstatement as follows.

(i) The plaintiff will reinstate the defendant's right to medical insurance;

(ii) The plaintiff will give the defendant access to its employee assistance programme "SEED".

(iii) The defendant is currently in alternative employment. Therefore, if the plaintiff is unsuccessful in its challenge, the plaintiff undertakes to pay the difference between the defendant's current salary and what he would have earned with the plaintiff, plus interest at a rate of 5%, or as the Court determines, for the period between 12 June

2010 and the date of the Court's determination.

(iv) The plaintiff undertakes to pay the award of lost wages (less one- third, as per the Authority's determination), plus interest at a rate of

5%, to the defendant should the plaintiff be unsuccessful in its challenge. Such payment will be made following the Court's

decision.

(v) If the plaintiff is unsuccessful in its challenge, it also undertakes to pay a sum equivalent to what its employer contribution would have been over the relevant period, into the defendant's superannuation scheme following the Court's decision.

(vi) Should these undertakings not be sufficient, then the plaintiff is prepared to make payment of a sum as determined by the Court into its Solicitor's trust account or to an interest-bearing account of the Court, pending determination of the challenge.

[35] What seemed to me on 13 August 2010 to be the most important consideration affecting reinstatement, but which was not dealt with as well as it might have been in the Authority, is Mr Te Stroet's current health status and its prognosis. It will be very important to Mr Te Stroet's reinstatement that the medical condition that appears likely to have brought about his lapses and negligence, is identified, treated and monitored. Given the importance of this question, it is not simply a matter that can be determined by a general practitioner's written certificate as the Authority had. Expert assessment and prognosis was necessary and that is now before the Court.

[36] If I am to be critical of the Authority's determination, it is on this important question of medical evidence. The Authority allowed the general practitioner's certificate but declined to consider evidence tendered by the company from an expert witness on two grounds. First, the Authority said this had not been timetabled for. Second, it said that this information was not before the employer when it made its decision to dismiss. Most importantly, however, this medical evidence was highly relevant to the important question of reinstatement. In this regard it was irrelevant that the employer may not have had it before dismissal.

[37] As to the first ground, timetables are intended to be adhered to so that investigations are structured. On the other hand, unswerving adherence to a timetable should not trump the interests of justice in admitting and considering relevant evidence, especially if disadvantage in that course can be compensated for by a combination of adjournment, costs and other mechanisms.

[38] Mr Te Stroet's medical condition was and remains at the heart of this case. The Authority ought not to have deprived itself of expert evidence about that important feature even if that may have required delaying somewhat its investigation.

[39] Whilst it may be correct also, that the employer did not have the information from its expert medical consultant at the time it dismissed Mr Te Stroet, that evidence was and remains highly relevant to his claim for reinstatement. For this reason alone the Authority ought to have accepted it and indeed provided Mr Te Stroet with an opportunity to obtain his own further expert medical evidence. It was not sufficient for the Authority to reject any consideration of that evidence on the basis that it could not have affected the employer's decision to dismiss so ought not to have been considered by the Authority in its examination of the justification for this.

**Medical evidence**

[40] As already noted, detailed assessments of Mr Te Stroet's condition and prognosis have now been put before the Court. The extent of the disagreements

between the parties' witnesses means that these can only be resolved at the substantive hearing of the challenge to the Authority's determination. Nevertheless, some assessment of Mr Te Stroet's circumstances, and the effect of these on his work for the period of any reinstatement before the substantive hearing, can be made by the Court on a better informed basis.

**Consensus of medical evidence**

[41] Although this is comprehensive, there has been no ability for cross- examination of the expert witnesses or even for them to confer and identify areas of agreement and disagreement. In these circumstances I propose to rely upon the consensus in their written reports which is, in fact, helpful in determining the question of stay of reinstatement and any conditions which should attach to an order.

[42] Although there is general practitioner medical evidence in documentary form, I propose to rely principally on the reports of specialists which are most recent and take account of those earlier reports in any event. For the plaintiff, Dr Hylton (Greig) McCormack, a psychiatrist in the Bexley Clinic practice, has examined and reported on Mr Te Stroet. For the defendant Dr David Black, an occupational medical specialist and Dr Rudi Kritzinger, another specialist psychiatrist, have provided reports. I am grateful to the doctors for having done so at short notice. Their evidence has assisted in the decision of difficult questions.

[43] There is a consensus that Mr Te Stroet has long suffered from generalised anxiety disorder, an anxiety neurosis with depressive symptoms which is sometimes categorised as dysthymia. Despite some very occasional but serious episodes of this disorder in the long ago past, but not affecting Mr Te Stroet's work, he did not disclose his condition to his employer. Although there are understandable human reasons for Mr Te Stroet not to have done so, the medical practitioners concur that this would have been the better course. The events of November 2009, which led to Mr Te Stroet's dismissal and this subsequent litigation, have, of course, changed the position.

[44] It seems clear that whilst maintained satisfactorily, especially with the help of his general practitioner, Mr Te Stroet's anxiety was triggered and elevated significantly by general stressors, including, in particular, the sudden and unforseen expectation that he would have to take on a significant additional work burden when an unusually high number of colleagues were absent through illness in November

2009.

[45] Since then and with the benefit of knowing about those events and their consequences, Mr Te Stroet's medication has decreased and suppressed his anxiety although, in the long term, it appears that he is unlikely to be free from the general anxiety disorder which will need to continue to be monitored and managed both by Mr Te Stroet himself and his medical advisors. The treatments that Mr Te Stroet currently undertakes, and should take in future, will probably decrease the intensity of his anxiety as that flared in November 2009. That is especially if he remains under the care of a psychiatrist and a clinical psychologist, the latter of whom can assist him with non-medication management of his anxiety.

[46] It is agreed that there has only been one episode of severe and disabling anxiety in Mr Te Stroet's[s 27](#) years of employment and although there is no certainty of either the fact or time of any recurrence, the doctors are confident that the risk of this can be minimised by a range of measures including medication, self-awareness, strategies for disclosure and management and assistance from Fonterra's managerial and medical personnel.

[47] There is a degree of disagreement between the experts. Dr McCormack advocates a more cautious gradual return to work by Mr Te Stroet overseen by an occupational health specialist and recommends the involvement of a Hamilton clinical psychiatrist and, through Fonterra's EAP, a clinical psychologist. Dr Black posits a more immediate and unconstrained return to the same work as previously.

[48] There is really no disagreement between the doctors that Mr Te Stroet can return to his work. Rather, the disagreement between them lies in the way in which this can be achieved so as to minimise risk. Dr Black would, I imagine, consider Dr McCormack's approach to be excessively cautious and indeed Dr Black goes further

and offers the opinion that there would be no need for Fonterra management to check Mr Te Stroet's performance of his work. That is an area of disagreement with Fonterra management, however, that I deal with subsequently.

[49] I do not understand Mr Te Stroet to do other than agree with the medical proposals put forward by the expert witnesses.

**The DAS role**

[50] Mr Te Stroet no longer seeks reinstatement to the analytical chemistry laboratory role from which he was dismissed. He does, however, wish the Authority's reinstatement order to apply to a position in what is known to the parties as DAS. This is a preliminary analytical centre at Fonterra's Waitoa plant, where product samples from that plant and other Fonterra plants are sent for preliminary processing before being dispatched to Fonterra or other laboratories for analysis. In addition to the timely receipt of these samples, a process known as "sub-sampling" whereby larger samples are broken down into small samples for subsequent analysis, the timely dispatch of samples from DAS, accurate checking, and record keeping are important functions of this operation.

[51] There are also elements or features of DAS work which may be affected by Mr Te Stroet's condition and prognosis. There is a higher level of what is described as "customer contact" by DAS staff than was the case in his previous chemistry analysis role. Communication, frequently at short notice, is required to be undertaken with others who send in samples, and with those to whom they are dispatched from DAS. There is sometimes the need to be resistant to corner-cutting blandishments from persons who want their samples confirmed promptly or who may not be enamoured of a need to re-sample where there may have been error and circumstances requiring a particular tight turn around time in relation to the bulk product that needs to be sampled.

[52] Next, there is a lower level of direct supervision of staff engaged in the DAS area as compared to the role Mr Te Stroet undertook previously in the laboratory. That is particularly so outside normal business hours when the DAS operation

continues and especially at weekends. Employees in DAS are expected to be even more self-sufficient than usual at these times and, I accept, it may also be more difficult for Mr Te Stroet to make contact with Fonterra supervisory or managerial staff generally and EAP or other medical assistance at such times if he were to be working in DAS.

[53] Although I accept that Mr Te Stroet may be well suited to the repetitive but exacting nature of DAS work which other employees might not perform to the same consistently high standards, and in this sense reinstatement in the DAS role would be advantageous for both parties, there are nevertheless some attendant risks in doing so.

[54] Fonterra says that if Mr Te Stroet were to be reinstated to a DAS position, it would have to appoint and allocate a full time supervisor/observer to closely monitor Mr Te Stroet's work performance at all times. The plaintiff and his medical expert say that this would be unnecessary, so long as appropriate support systems are in place. Fonterra says that it would be impracticable to expect it to put in place such a significant resource. In another sense, it would be Fonterra's election to adopt such a very conservative strategy in circumstances where less costly alternatives may be available to it, especially over the longer term and once Mr Te Stroet has re- established himself in work and proven its quality to his employer.

**A stay on conditions**

[55] I accept that there are some risks in Mr Te Stroet being simply reinstated without more to work in the DAS operation. They are fewer and less significant than Fonterra fears but, at the same time, probably more than the non-existent risks posited by Mr Te Stroet's occupational health specialist, Dr Black. I am impressed by Dr McCormack's proposals for a gradual re-establishment of the parties' employment relationship and on terms that minimise reasonably those risks of a major event such as occurred last November and its potential consequences to Fonterra (and to Mr Te Stroet). Fonterra must now accept that Mr Te Stroet is returning to work for and with it as directed by the Authority.

[56] Unfortunately, there will not be a short delay until Fonterra's challenge, including the question of reinstatement, can be heard and decided by the Court. This does, however, allow for a gradual and graduated process by which the Authority's order for reinstatement can be implemented taking account, to the extent that it can be, of the need to minimise risk to all concerned.

[57] Accordingly, the order for stay that I make of the Authority's reinstatement order will be on conditions intended to achieve this balance. Its features will include:

• An orderly and graduated transition for Mr Te Stroet from his current employment to re-established full time employment in his field of expertise with Fonterra.

• The payment to Mr Te Stroet henceforth of the income that he would have received had he not been dismissed unjustifiably earlier this year.

• The performance by Mr Te Stroet initially in a non-laboratory (including non-DAS) role with Fonterra, and preferably at the Waitoa plant or at another nearby facility in a role consistent with Mr Te Stroet's skills, abilities and experience, that I am satisfied will, if it is not immediately apparent, be available within a relatively short time.

• The arrangement of appropriate specialist medical assistance for Mr Te Stroet and, in an appropriately ethical manner, liaison between Mr Te Stroet's medical advisors and Fonterra's medical personnel.

• The ability for Fonterra's appropriate and relevant managerial personnel and its EAP system to be accessible by Mr Te Stroet, if necessary at short notice, to avoid any repetition of the circumstances that lead to the unfortunate events of 22 November 2009.

• The ability of Mr Te Stroet, once these systems are in place and the medical experts are satisfied of unimpaired work performance, to move to a role within Fonterra in which his skills and experience can be better utilised for both parties such as, but not restricted to, an appropriate and suitable DAS role.

• Allowing prompt independent mediation assistance if these arrangements require it, or if there is disagreement about them.

• Allowing leave for either party to apply to the Court for any further orders or directions.

**Orders of the Court**

[58] The Employment Relations Authority's orders for reinstatement are stayed until hearing of the plaintiff's challenge or further order of this Court on the following conditions.

[59] Until 15 September 2010, the current interim order for payment to Mr Te

Stroet by the plaintiff will continue.

[60] With effect from 15 September 2010 the plaintiff is to resume paying the defendant such remuneration as he would have received had he not been dismissed.

[61] As from 15 September 2010, the plaintiff is to place the defendant in the first available position for which the defendant is suited by training, qualification and experience, but, initially, excluding laboratory technician roles including in what is

known to the parties as DAS. Such a role should be at the defendant's Waitoa plant, or otherwise as near as possible to that plant.

[62] If necessary to implement these orders, there is a direction to urgent mediation.

[63] If a dispute arises about the interpretation or implementation of these orders in practice, the parties should first have recourse to mediation before exercising leave which I allow to apply to the Court for further orders or directions.

[64] It is a condition of the placement of the defendant in a working role, that he puts in place through his general medical practitioner, a consultative arrangement with a psychiatrist and a clinical psychologist as recommended by Dr Greig McCormack.

[65] It is a further condition of the stay that Fonterra establishes an appropriately ethical arrangement between the defendant's medical advisors as above and Fonterra's medical officer(s) and, as points of contact for Mr Te Stroet, Fonterra's relevant managerial supervisory staff and its EAP personnel.

[66] Following a reasonable period for the re-establishment of the parties' working relationship as set out above, and for the implementation of the medical and other processes, the plaintiff must, in conjunction with the defendant and the Dairy Workers Union Inc, consider seriously and in good faith the re-placement of Mr Te Stroet in another role within Fonterra that is appropriate to his experience and training and which may include a role in DAS.

[67] Costs are reserved for consideration at the same time as costs on the challenge are dealt with.

G L Colgan

Chief Judge

Judgment signed at 5pm on 2 September 2010

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[1] AA275/10.

[2] [2010] NZEmpC 106.

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