

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 114
3006602

BETWEEN NATHAN FRAHM
Applicant

A N D FONTERRA CO-OPERATIVE
GROUP LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Timothy Jackson and Codi Lilley, Counsel for the
Applicant
Rachael Judge, Counsel for the Respondent

Investigation Meeting: 16,17 and 18 April 2018

Submissions Received: At the investigation meeting and on 27 April and 4 May
2018

Date of Determination: 10 August 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Nathan Frahm claims that he was unjustifiably disadvantaged by being suspended while Fonterra undertook an investigation into allegations of a sexual nature. He also claims that he was unjustifiably dismissed from his role as a Level 8 Whey Protein Concentrate (WPC) Shift supervisor.

[2] Mr Frahm claims reinstatement to his former role, lost remuneration and compensation.

[3] Fonterra Co-operative Group Limited (Fonterra) says that it justifiably suspended Mr Frahm during an investigation into allegations of serious misconduct. It says it was justified in dismissing him for serious misconduct following a full and fair investigation and disciplinary process.

The investigation meeting

[4] At the investigation meeting I heard sworn or affirmed evidence from the following witnesses, all of whom answered questions from me and both counsel:

- Mr Frahm;
- Mark Walter, Fonterra's Plant Manager Protein Products, who was Mr Frahm's manager and the decision-maker;
- Phillip Hammond, Fonterra's Process Manager of WPC, who Mr Frahm reported to;
- Susan Davidson, a complainant;
- Trudy McLean, a second complainant; and
- Martin Smith, a witness to an event that became one of the allegations.

[5] I heard oral submissions on the third and final day. I later received written submissions from counsel. Although I do not refer to all evidence and submissions in this determination, I have considered and taken all evidence and submissions into account.

[6] Under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) I prohibit from publication Ms A's real name and any identifying information that may identify her real name/identity.

[7] This determination, reserved at the conclusion of a three-day investigation meeting, has been issued four days outside the statutory period of three months after receiving the last submissions from one of the parties. The Chief of the Authority has decided, as he is permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

Background leading up to the suspension

Ms Davidson's informal complaint about Mr Frahm

[8] Susan Davidson is the Clandeboye Plant Operational Excellence Process Projects Manager. She did not have many work interactions with Mr Frahm, but they knew one another.

[9] Ms Davidson says that on 25 October 2016, she was in the WPC Control Room with Mr Frahm and at least one other staff member. She was not sure if she could take her own water bottle into that area so asked if she could. She says Mr Frahm said:

I could drink out of his and said he doesn't have germs.
Nathan then said you could kiss me on the mouth I won't use my tongue, my tongue is small anyway and it can go into different places.

[10] Ms Davidson says that later that day she was in the whey department, having taken some photos of the whey screen. She told Mr Frahm that she had some photos to show him:

He asked whether it was a picture of me naked. I said no. He then asked me whether I would like to see him naked and he zipped down his overalls. I got the impression he was pulling down his overalls gesturing to [bare] all.

...

The next day (26 October 2016) at around 11am, I was back down in the ... plant. Nathan was telling us about heat transfer and cooling with the pipes. He said I would know about how heat transfer feels because he is "hot" and he could "feel the heat transfer between us".

[11] Ms Davidson says that three other male staff members were present when that happened. She says when Mr Frahm left the control room she followed him to outside an office and asked to speak to him. She said:

I did not appreciate being spoken to in that manner and that I would not tolerate it. I said it was not appropriate and that I had had sexual harassment in the workplace before and I felt he was crossing the line, and if it continued I would take it further. Nathan sort of played with his overall zipper and he went red. He did not provide me with any apology, he just sort of nodded and said okay.

I spoke to Phillip Hammond ..., the Process Manager of Whey, on 26 October 2016. I spoke to Hammy because of his management role in Whey (and because he was Nathan's manager). I let him know that I had the conversation with Nathan and some of the detail of what he said, including the impact that it had on me, because I did feel shaken

at the time. Hammy asked me whether I wanted to take it further and I said no, but that I would let him know if it continued.

[12] Mr Hammond says that from his conversation with Ms Davidson on 26 October 2016 he had the impression that there had been a one-off incident (the drink bottle incident) and that Ms Davidson did not want him to take things further. He made a file note of the conversation and left it at that.

Mr Hammond's catalyst for further investigation

[13] In November 2016, Mr Hammond attended hospital to support a WPC operator who had an accident in the workplace and hurt her shoulder. When he arrived at the hospital, he realised that she would not look at him or speak to him. However, he heard her mumbling. He asked her who she was talking about. She said that she was talking about Mr Frahm and said that he had told her partner that Mr Hammond would fire her because of all her time off work.

[14] Mr Hammond told the operator that she was wrong, as he was not intending to fire her. The operator said that Mr Frahm was "such a prick" and "what he does to A". when Mr Hammond asked her what she meant she said that Mr Frahm was "fucking disgusting" because of the comments he makes to A. The operator told him he should talk to Trudy McLean, who is the operator's mother, and worked at the Clandeboye plant.

Mr Hammond informs Mr Walter of his concerns

[15] Mr Hammond said that after that conversation he suspected that the concerns raised by Ms Davidson a few weeks earlier might not have been in isolation. He told Mr Walter that he had heard of two issues now. They decided that he should speak to Ms Davidson again. Mr Walter agreed Mr Hammond should do some further investigation.

Mr Hammond interviews Ms Davidson

[16] On 23 November 2016, Mr Hammond met with Ms Davidson. In organising the meeting, he had told her that it may not just have been her that had experienced inappropriate behaviour from Mr Frahm. Mr Hammond interviewed Ms Davidson and took notes of the interview.

[17] Ms Davidson told Mr Hammond that because of her concern about Mr Frahm's behaviour towards her she had checked with all the other female employees of the team, Ms A, Ms B, Ms C and Ms McLean, about whether they had any concerns about any inappropriate behaviour towards them. She told him that Ms A, Ms B and Ms C had not raised any concerns, but that Ms McLean had.

[18] Mr Hammond said that Ms Davidson seemed more "collected" during the interview and that she had been quite flustered when she spoke to him in October.

[19] Ms Davidson told Mr Hammond for the first time about Mr Frahm's comments about naked pictures, about him unzipping his overalls and his heat transfer comments.

First interview with Ms McLean

[20] The following day, 24 November 2016, Mr Hammond met with Trudy McLean. She reported directly to Mr Frahm. Mr Hammond told Ms McLean, prior to meeting with her, that there had been an allegation of sexual harassment. He did not say who the allegation was against.

[21] Mr Hammond told Ms McLean that one person had come forward with a formal complaint and he believed there could be more than one "victim". He said he was speaking to her because it appeared that the alleged sexual harassment could have taken place on her shift.

[22] Ms McLean responded, "it's Nathan isn't it?" Mr Hammond then confirmed that the allegation had been made against Mr Frahm.

[23] Ms McLean said she was happy to talk to Mr Hammond about Mr Frahm but was worried that if nothing was done about it, it could be quite hard on her and she would not be able to work with him again.

[24] Mr Hammond asked her whether she had seen or had any unwanted sexual advances or comments that had made her uncomfortable. Ms McLean replied that she had but she could handle it.

[25] Ms McLean said that she had been talking to Mr Smith and told him how "creepy" she found Mr Frahm and how uncomfortable she found it to be around him.

Mr Smith told her he had pulled Mr Frahm up for making inappropriate comments to Ms A.

[26] Ms McLean also said that she was annoyed about the way Mr Frahm talks about other staff members who take sick leave and that he specifically said that Ms McLean's daughter's boyfriend needed to be sacked. Ms McLean said that she replied to Mr Frahm that the site union delegate would not be happy knowing you are a leader but talking about one of our staff members like that. She says that Mr Frahm replied that if the site union delegate said anything to him about it he would punch the delegate in the mouth.

[27] Ms McLean told Mr Hammond that another male staff member (X) was "right behind" Mr Frahm in relation to how he talked and acted.

[28] Mr Hammond repeated his question about whether Ms McLean had had any unwanted sexual advances or comments that made her feel uncomfortable. Ms McLean replied:

Yes but, no, I'm a strong person, I can understand it if it was directed to another female it could be different.

[29] Mr Hammond asked what Mr Frahm had said that was inappropriate. Ms McLean replied:

He just says rude stuff, it's disgusting. Like I know you want me, he flashes his vest and pulls the zip down of his overalls. I can handle it but I could see how that could get to some other people.

[30] Mr Hammond then asked what Mr Smith had said had happened. Ms McLean replied:

Marty said he had to pull Nathan up for making inappropriate comments to A. Nathan told A how good she looks from behind, she looks better from the back than the front. Marty said you need to watch what you say to your staff.

[31] Mr Hammond told Ms McLean he knew she already knew about what had happened to Ms Davidson before Ms Davidson told her:

Oh yeah, far out, really bad, I knew the day before. Nathan come up laughing and was telling X how he has just got told off because he's being inappropriate towards Susan and how she gave him a barrelling. X and Nathan were both laughing. X said Susan was a stupid c***

both X and Nathan were laughing, Nathan was laughing so much 'cos he kind of hiccups when he laughs.

[32] Ms McLean ended the interview by saying:

Nathan doesn't like me I know ... I hope something gets done about this because if I have to work with him, he's going to treat me like a dick.

She also said that unless something happened she didn't think she could work with him again.

[33] Mr Hammond told her that Fonterra needed to go through a process and told her that the notes from his interview with her, which he would ensure she could check, may be used in an investigation. He asked her if she was happy with that and she replied that she was.

Mr Smith's first interview

[34] On 25 November 2016, Mr Hammond interviewed Mr Smith. He told Mr Smith that he had been named as a possible witness to some form of sexual harassment. He clarified that the complaint was not against Mr Smith. Mr Smith responded:

I haven't really seen anything that would constitute sexual harassment. Nathan is a little different. He has said stuff that I wouldn't say.

What is sexual harassment, what does it constitute ...?

[35] Mr Hammond told Mr Smith that sexual harassment was unwanted or persistent sexual advances, touching, stalking, unwanted type gestures and "verbal". Mr Smith then said:

No, not really, haven't seen it. Nathan would take Ms A out to whey treatment and help her out there for a while, then they would go out for smoko. I think if she didn't like that type of stuff she wouldn't go with him, maybe you could check the cameras, have you done that? If there is anything it will be on the cameras.

Nathan is an intelligent person and a career man I don't think he would jeopardise that.

...

Nathan hasn't got a wife, partner or girlfriend. I don't know if he knows how to treat a female. I know guys do think differently. I know I do, but some things you think but shouldn't say.

[36] Mr Smith said that he had not heard Mr Frahm say anything blatantly, although a couple of times he had heard him talk “locker room talk, you know the stuff you shouldn’t say in front of everyone”. When Mr Hammond asked if he had any examples he answered “no, not really.”

[37] However, when Mr Hammond thanked him for his time and told him that the notes he was taking might be used in a further investigation, Mr Smith asked, “will Nathan be suspended?” Mr Hammond told him there was a process to go through and at the moment nothing had been decided. Mr Smith then said:

I think something will need to be done. They are both on Saturday, it would be really hard to separate them. Maybe one could work somewhere else.

...

Not telling you how to do your job just thought it would be a good idea.

[38] Mr Hammond said that he had the idea that Mr Smith was talking about Mr Frahm and Ms A both being at work together on the coming Saturday.

Other interviews

[39] Mr Hammond also interviewed Ms B and Ms C on 25 November 2016. Both of them said they had no concerns about sexual harassment and had not seen or heard anything that was sexual harassment.

Mr Hammond reported to Mr Walter

[40] Mr Hammond took his notes and spoke to Mr Walter about what he had found. Mr Walter decided to take over the investigation process.

The letter proposing suspension

[41] On 25 November 2016, Mr Walter emailed Mr Frahm a letter inviting him to a meeting to discuss the fact that Mr Walter was considering suspending him while serious allegations were being investigated:

The allegations that have come to my attention are regarding your verbal and physical behaviour towards a number of female employees. This behaviour is alleged to be of a sexual nature. This is very concerning and potentially in breach of our Conduct &

Behaviour Standard and the Way We Work – Code of Business Conduct.

I am still collecting information and will need to talk to others. All this information will be provided to you when I am in the position to invite you to an investigation meeting.

The reasons I am considering suspension is due to the potential level [of] discomfort that the complainants may feel with having you at work during this time, and also the potential health, safety & wellbeing concerns of others with having you remain in the workplace.

I have not made a final decision about whether to suspend you, and the purpose of the meeting is to hear your view before I make a decision.

... I encourage you to bring a representative or support person to attend the meeting.

...

I note that I anticipate the period of suspension will remain until I have completed the investigation which I hope to have completed within two weeks. I can confirm that you will be paid during this time.

[42] After Mr Walter sent Mr Frahm the letter on 25 November, he also rang Mr Frahm. Mr Frahm was not at work that day. Mr Walter told him that there had been some allegations made against him but he did not yet have all the details regarding the complaints.

[43] Mr Frahm says he was due to start work the next day, Saturday. Because of that, Mr Walter wanted to have the meeting that day at 5pm. Mr Frahm agreed.

[44] When he arrived at the meeting, Mr Walter asked Mr Frahm if he had read the letter that he had sent to his Fonterra email address. Mr Frahm had not yet read the letter and so was given time to read a copy of it. He said it was then that he learned that Fonterra was proposing to suspend him. Mr Frahm says he told Mr Walter he was shocked and extremely distressed and that the allegations were not true.

[45] Mr Hammond was present at the meeting and took notes which Mr Walter later sent to Mr Frahm.

[46] The notes show that Mr Frahm was happy to proceed without a representative or a support person. Mr Walter told Mr Frahm that a serious complaint had been raised about behaviour towards a number of female employees and that the

complaints were of a sexual nature. He told Mr Frahm there was very little detail he could yet talk about and he hoped to have more detail by the following week so that they could have a formal investigation meeting.

[47] Mr Walter asked Mr Frahm if he had any questions or any statements he wanted to make about the complaints or the proposed suspension. Mr Frahm said he took it very seriously and said it was about a loss of reputation and that he would fight the complaints exhaustively.

[48] Mr Walter said, “we are proposing to suspend you and I have to make a decision about that”. He asked Mr Frahm if he had anything to say about suspension. Mr Hammond’s notes record Mr Frahm replied:

That’s your decision. I have no knowledge of what’s happened apart from a minor event with Susan and she had talked to me about it. Other than this I have no knowledge around touchy or feely things.

However, Mr Frahm says he said:

something along the lines of “a minor event that Susan talked to me about that she wasn’t happy about something I said.” The “minor event” implies I was aware of the incident. That’s not what I meant.

[49] At that point, Mr Walter said that he would adjourn to discuss possible suspension with Mr Hammond. He and asked if there was anything else Mr Frahm wanted them to consider. Mr Frahm responded that if he were in Mr Walter’s position he would suspend him but asked Mr Walter to remember that that was about a loss of reputation for Mr Frahm.

[50] After eight minutes, Mr Walter and Mr Hammond came back into the room and conveyed their decision to suspend Mr Frahm on full pay. Mr Walter offered Mr Frahm the use of the Employee Assistance Programme.

[51] Mr Frahm asked what he could discuss about the allegations and Mr Walter told him not to discuss it with people at work and that Mr Walter would just say he was not at work. Mr Frahm stated that he intended to tell his family and friends and that included his brother who worked at the Fonterra plant. Mr Walter replied that would be alright as long as his brother did not talk about it at work. Later, having sought advice, Mr Walter left a voice message and emails for Mr Frahm to say that he

would not be making Mr Frahm's suspension public in order to ensure that they used a fair process.

[52] Mr Walter and Mr Hammond say that Mr Frahm agreed that he should be suspended. However, Mr Frahm denies that. He agrees that he said something like "If I was you I would suspend me."

After the suspension

Mr Walter's first interview with Ms A

[53] On 28 November 2016, Mr Walter started the meeting by telling Ms A that there had been an allegation of sexual harassment within the department. He told her that one person had come forward with a formal complaint. He said he believed there could be more than one victim and it appeared something could have happened on her shift.

[54] He asked Ms A whether she had seen or had any unwanted sexual advances or comments that had made her uncomfortable. Ms A replied, "Not really, she did not think so". She stated she would go and see her level 7 or 8 manager if she had a problem. She then started talking about some operational difficulties within the team.

[55] Mr Walter then went through a bullying and harassment fact sheet with Ms A, concentrating in particular on sexual harassment. He asked her if anyone had told her "You look better from the back than the front" or "You look good from behind".

[56] Ms A replied:

It was Nathan during the fire drill. I ignored it. It was not nice but I did not want to have a bad relationship with my team lead.

...

It was a hit below the belt. I tried to give him the benefit of the doubt. I'm very humiliated by it.

[57] Mr Walter then asked Ms A why Nathan did it:

I think he's tactless but he's very good from a technical point of view. He has helped me out numerous times. He moves you and gets you to do your best.

[58] Mr Walter asked her whether she had told Mr Frahm to stop or whether she had spoken up to someone else. She replied:

I did not want to humiliate him like he humiliated me.

...

Nathan is a good team leader but personally, he has a sharp mouth and is very tactless. I think it is the balance of the good and bad.

...

I didn't want to take it personally but it was humiliating.

[59] She said that it was the only thing like that that had happened. Mr Walter thanked her for her time and told her he might have follow-up questions later. Ms A began crying during the interview.

[60] Mr Walter says that the next day when he asked Ms A to sign the notes he had taken to certify that they were correct Ms A was crying again.

The allegations letter

[61] On Thursday, 1 December 2016, Mr Walter sent Mr Frahm an invitation to attend an investigation meeting:

It is alleged that your behaviour both physical and verbal towards some of the female individuals in the team has been inappropriate, in breach of our policies and potentially constitutes sexual harassment. This has come to my attention on the 23rd November 2016 when Phillip Hammond raised some serious concerns around your behaviour toward two females, Susan Davidson and Trudy McLean. From discussions with Susan and Trudy it highlighted additional people that may have been affected, which we have then interviewed.

As a result of speaking to some team members...it is alleged you have engaged in inappropriate language & behaviour.

Specifically, it is alleged that on a number of occasions you have displayed some inappropriate and unprofessional verbal and physical behaviour towards female staff members which may be of a sexual nature. I have listed the alleged behaviour that I am concerned about and would like to discuss:

- You mentioned to Trudy, "I know you want me" on a number of occasions despite Trudy trying to stop this behaviour by responding "yea right".
- Flashing your vest and pulling the zip of your overalls down in front of Trudy on a number of occasions;
- Saying to A, "You look good from behind". Marty Smith felt uncomfortable and then spoke to you about this, and mentioned to

watch what you say. A has reported that she felt humiliated and responded by ignoring the comment, not wanting to ruin the relationship with you, her team lead.

- On the 25th October you were in the control room with Susan Davidson. Susan mentioned that she wasn't aware of the drink bottle situation and whether she could bring hers into the control room. You responded saying that Susan could kiss you on the mouth and that you wouldn't use your tongue. You proceeded to mention that your tongue is small and can go into different places. Susan later mentioned that she had photos for you, you responded by saying, "is it of you naked", and then said, "would you like to see me naked", and pulled the zip of your overalls down.
- On 26th October you were in the control room with Susan again and you said to her that you could feel the heat transfer between you and Susan and said something along the lines of, "I know you want me... because I'm hot".

I am concerned that this behaviour may constitute harassment, sexual harassment, bullying and/or discrimination under our Bullying Harassment and Anti-discrimination Standard. If the above allegations are proven...

[62] Mr Walter included copies of Fonterra's Bullying, Harassment and Anti-discrimination Standard and its Conduct and Behaviour Standard. He also included notes from the interviews with Ms A, Ms Davidson, Ms MacLean, and Mr Smith.

[63] Mr Walter advised Mr Frahm the meeting might result in disciplinary action up to and including dismissal.

The investigation meeting – Mr Frahm's responses to the allegations

[64] The meeting took place on 14 December 2016. Mr Frahm was represented by Mr Jackson. Mr Frahm prepared an extensive written response, which he handed to Mr Walter at the beginning of the meeting. Mr Walter took a break to read through the response. Mr Frahm also read it out loud.

[65] Overall, Mr Frahm's response was that the allegations were malicious or mean-spirited. He felt that he was the subject of a witch-hunt. He raised a concern that he was being treated differently to a named pair of employees who he alleged had been involved in an incident of racial and physical harassment. He said in that case no one was suspended and no one was 'canvassed/pressurised for or asked to put in complaints'.

[66] He gave specific and detailed responses to the allegations, on the notes of the interviews with the three women Fonterra said were complainants, and on Mr Smith's interview.

[67] About the allegations based on Ms McLean's interview Mr Frahm wrote:

- "I know you want me" - this did not happen;
- Flashing my chest by unzipping part of my overalls – denied in the context alleged and noted that there was no time or place given so that it was difficult to respond to. Nevertheless, Mr Frahm raised a couple of alternative innocent scenarios that may have seen him unzip his overalls. One of those was that when he worked in Powder "we did a quick zip down and up while holding the collar part of the overalls going in and out as a way/form of acknowledging each other in passing". He pointed out he always wore a singlet or a tee-shirt under his overalls. In any event, he denied the allegation and wrote that if he had unzipped his overalls at all there "was no sexual innuendo implied or intended by this gesture."
- He did not accept that Ms McLean had seen or heard unwelcome sexual advances or comments by him.
- He denied most of the other things Ms McLean said in her interview. He wrote that her allegations might be motivated by her perception Mr Frahm was causing trouble for her daughter and her daughter's boyfriend, which he denied he had been doing.
- He pointed out that in November 2016 Ms McLean left a shift because she had a tooth abscess and her jaw was swollen. She invited Mr Frahm to touch her jaw, which he refused to do. "However, she is now prepared to say I am creepy to be around. Again, this is offensive to me."

[68] About the allegations based on A's interview Mr Frahm wrote:

This is miscommunication. ... I said 'your dark hair looks good on the white overalls', A turned around [at the same time Marty turned to look] and I said [so Marty could see what I was meaning] 'no, it looks better from the back'.

It was a compliment. ...

When Marty said about my comment being inappropriate I said ‘I’m referring to the contrasting colours’ – he couldn’t see as his back was toward her, he turned and looked and saw what I was meaning – it’s unfair of him to only quote part of the conversation, please ask him if he also remembers my explanation.

I was not aware A was hurt by the comment as I thought she heard the rest of what was said.

- He asked Mr Walter to convey to A that he did not intend any negative implication and he was commenting on the contrast of her dark black hair on the bright white overalls.

[69] About the allegations based on Mr Smith’s interview Mr Frahm wrote:

A comment that I do not know how to treat a female because I am single is discriminatory.

I have doubts about Marty’s capacity to determine what is or is not appropriate.

He was also concerned that Mr Walter viewed it as sexual harassment because he thought he had reached a conclusion before hearing from Mr Frahm.

[70] About the allegations based on Ms Davidson’s interview Mr Frahm wrote:

- He was highly offended by the allegations and denied them all.

From recollection I believe Susan talked to me on the 26th October 2016 about my comments said in a group conversation held in the control room on the 25th October she viewed as being inappropriate. In other words the next day.

I was quite shocked that she had singled me out and was interpreting my comments as being offensive/inappropriate.

...

I apologised to Susan in any event so she could not suggest I had intended any offence or wished to sustain it.

She told me she had been sexually harassed before and it wasn’t nice. I said I’m not like that and if I say anything she’s not happy with to let me know.

It appears Susan has not mentioned that I apologised for/in the event she took offence. Note again that the apology was not an admission I caused offence or intended rather, as a matter of courtesy.

...

From memory I went into the control room and was being teased about working with Susan ... – someone suggested I was her “bitch” – a comment that in itself could be offensive to me. However, in the interests of harmony and because the comment appeared light-hearted, I replied that I might have long arms and a long tongue - ... Susan didn’t find it offensive at the time and neither did anyone else. ...

It should be noted that I was speaking of my attributes – never in any way involving the use of on another person.

- Mr Frahm said that after that Ms Davidson mentioned to him a job he might be interested in – a management role.

... after my comments were said, Susan thought I was management material ... This confirms to me that my comments weren’t viewed as being out of context or alarming to Susan ...at the time.

[71] At the meeting, Mr Frahm read out his complete response and answered a number of Mr Walter’s questions. In relation to the zip, he replied that he has not said he had done it and “can’t remember times or dates when it happened”. He said that “I know you want me” and the zip waving “together did not happen. If Trudy was upset what date did it happen?”

[72] In relation to Ms Davidson, Mr Frahm said “she’s told lies” and “you have to ask her why she’s said those things”.

[73] Mr Frahm pointed out that Mr Walter had not sent him statements from people that had been interviewed and “not had negative things to say”.

Correspondence after the investigation meeting

[74] On 16 December 2016, Mr Jackson sent Mr Walter an email with a number of issues for him to consider in the investigation. He asked for details of all the people who had complained about Mr Frahm and/or were interviewed about him.

[75] Ms Davidson was clear that she did not want to make a formal complaint at the end of October when she spoke to Mr Hammond. Mr Frahm had concerns about why Mr Hammond decided to investigate and take things further a month later.

[76] Mr Frahm wanted to know in relation to all those interviewed whether the people came forward voluntarily or whether Fonterra asked to interview them. It appeared to Mr Frahm that a sole complainant had been garnering support and momentum.

[77] Mr Jackson provided a critique of the statements including a concern that Ms McLean was not making a complaint at all and was not interviewed of her own volition. Mr Jackson suggested that Ms McLean's views were not reliable and should not have much weight put on them.

[78] Similarly, Mr Jackson pointed out that Ms A did not make a complaint and was only interviewed because someone else had made a complaint about something said about or to Ms A. Ms A did not identify any unwanted sexual advances or comments. Mr Walter led her evidence and persisted until he got what he wanted to hear. Mr Frahm was concerned about Ms A having been put under pressure to make a statement.

[79] Mr Jackson suggested matters had been unnecessarily escalated and put Mr Frahm, who was a relatively senior employee of 15 years in a responsible role, into a position of jeopardy where he was suspended and subject to allegations that none of the complainants appeared to have initiated.

[80] Mr Jackson said that Mr Frahm did not think any more meetings with Fonterra would be necessary or helpful. Mr Frahm expected that the investigation would end, his suspension would be lifted, and he would face no disciplinary action.

[81] Mr Jackson suggested Fonterra should have started by talking to Mr Frahm and getting his views before deciding to escalate suggestions of his wrongdoing. Mr Jackson suggested that Fonterra could have initiated "closer oversight of this aspect of your workplace as well as some training ... centred around correct standards of behaviour and in particular, communication."

[82] Mr Walter responded to Mr Jackson that he was approaching the investigation with an open mind and had not decided yet whether any of the allegations had been proved.

Further Investigation

[83] After the meeting, Mr Walter decided some further investigation was necessary. He sought advice from a Fonterra HR advisor to formulate further questions. He interviewed Mr Smith, Ms A and Ms McLean on 15 December 2016 and Ms Davidson on 16 December.

[84] He asked Mr Smith what he said to Mr Frahm about what he said about Ms A. Mr Smith said “mate you cannot talk to her like that. You cannot say stuff like that now days.” Mr Smith also said he did not feel under any pressure to answer questions.

[85] Mr Walter asked Ms A whether she felt he had given her statement freely and by choice. She replied that she had felt no pressure.

[86] Mr Walter asked Ms A if what Mr Frahm said could be “mistaken as a compliment.” She replied, “definitely not, it is not a compliment.”

[87] Mr Walter asked Ms McLean whether the issues with what Mr Frahm said about her daughter’s boyfriend had affected the relationship she had with Mr Frahm. He asked if that was the actual reason she “had come forward.” She said that it was definitely not.

[88] Mr Walter asked Ms McLean about any context behind the “I know you want me” comments. She responded, “he rates himself ... It’s like sexual”. Mr Walter also asked Ms McLean if flashing a vest is an acknowledgement like waving at a person. Ms McLean said it was not and clarified that she had never done it. To Mr Walter’s question about whether it was a common practice Ms McLean asked if that was a joke and said that she knew nothing of that.

[89] Mr Walter asked why she interpreted the unzipping of the vest to be sexual and she said “it has sexual overtones to it. Like flashing”. She said she could not remember any specific dates and times.

[90] Mr Walter asked why she had sent a photo to the team lead’s phone. She said it was because Mr Frahm did not believe her about her tooth and that he always goes on about people’s sick days in public.

[91] Later, Mr Walter asked Ms McLean if she had invited Mr Frahm to feel her face. She replied that she had because she thought he did not believe she was sick.

[92] On 16 December 2016, Mr Walter interviewed Ms Davidson. He asked if she had ever had any previous conflict with Mr Frahm. She denied that she had.

[93] He asked her if Mr Frahm had apologised to her. She said that he had not apologised but just said “OK” to her when she finished telling him how she saw his behaviour.

[94] Mr Walter also interviewed three other male members of staff about whether flashing the vest was normal practice. They confirmed the practice did not happen in their work area.

[95] Mr Walter asked Ms C whether she had heard Mr Frahm apologise to Ms Davidson. Ms C did not remember the incident.

[96] Mr Walter asked Ms Davidson when she had talked about a possible manager’s role. Ms Davidson said it was “before he made the comments, SD stated very clearly that she would not have said it to him afterwards.”

[97] Mr Walter also asked her if unzipping overalls and flashing the chest was a common way of acknowledging each other. Ms Davidson replied that no else has done it, except Mr Frahm.

Mr Frahm’s further responses

[98] Mr Walter supplied his notes of the further investigations to Mr Frahm who responded in writing. He maintained that his explanation of the context of his comment on Ms A’s appearance being about her hair only was not put to her or Mr Smith.

[99] He made other critiques of Ms McLean and Ms Davison’s answers largely impugning the honesty of their responses. He pointed out that the two men on his shift confirmed that the practice does not happen in WPC, so they had not seen him flashing his vest.

[100] He raised a concern that Mr Hammond’s involvement may have been unfair because it arose after he sent an email suggesting that Mr Hammond and another staff member should shift roles. He criticised Mr Hammond’s work and suggested he was colluding with Ms Davidson to bring the complaints. He also suggested that Mr Hammond’s notes were not written at the time of his two discussions with Ms Davidson.

[101] Mr Frahm also criticised Mr Hammond confirming to Ms McLean at the beginning of his interview of her that the allegation was against Mr Frahm as being unfair to him.

[102] He asked for footage from the smoko room to be checked and supplied to him. In fact, the footage had been over-recorded a fortnight after the alleged incident.

Mr Walter's findings and proposed sanction letter

[103] On 30 December 2016, Mr Walter sent a letter stating his findings and his proposal that the appropriate sanction was dismissal. He asked for Mr Frahm's view on the appropriate sanction before "forming a final view."

[104] In relation to Ms McLean, Mr Walter found the "I know you want me" allegation not proved because there was insufficient detail and no corroborating evidence. However, he found it proved that Mr Frahm flashed his vest and pulled the zip of his overalls down in front of her a number of times. He concluded Ms McLean found the behaviour offensive and decided it met the definition of bullying.

[105] In relation to Ms A, he found it proved that he said to Ms A she looked good from behind. She felt humiliated. He did not accept that Mr Frahm intended he comment to be a compliment. He concluded that it was sexual harassment.

[106] In relation to Ms Davidson, he found all of Ms Davison's allegations proved and that they were sexual harassment. Mr Walter's evidence at the investigation meeting was that he considered Mr Frahm's comments about long arms and a long tongue to have been made at a different time to his comments to Ms Davidson.

[107] He concluded that Mr Frahm had negatively affected the wellbeing of the three team members.

[108] Mr Walter wrote:

I also have considered your feedback, and apparent lack of genuine remorse at the distress your actions have caused these staff members. Your account suggests that you believe you are the victim in this situation. I am concerned that you do not appreciate the impact of your behaviour on these staff members and that you are likely to act in an inappropriate manner. As a leader of staff I consider such behaviour particularly unacceptable.

[109] Mr Walter invited Mr Frahm to give him feedback before he made his final decision. He asked for a meeting on 20 January 2017. The meeting was eventually arranged for 25 January 2017.

Mr Frahm's own investigation

[110] Once Mr Frahm received Mr Walter's 30 December 2016 letter, he decided to undertake some investigation of his own. He contacted Mr Smith, Ms B, and four male staff, who had worked with him. He asked them a number of questions and made notes of their answers. The interviewees signed his notes.

[111] On 19 January 2017, Mr Frahm interviewed Ms A in his car and told her that Fonterra was planning to dismiss him. He took notes and she signed them.

Ms A seeks to withdraw her statements

[112] After that approach by Mr Frahm, Ms A contacted the union and asked to speak to Mr Walter again. On 23 January 2017, Mr Walter met Ms A at her request. She was accompanied by her union representative. Ms A read the statements she had given on 28 and 29 November and 15 December 2016. She asked not to be involved because "it gives me pressure and stress" and said that she "did not want to go to court."

[113] When Mr Walter asked what made her come to him at this stage she said that she was upset that Mr Frahm might be fired. The union representative stated that Ms A wanted to withdraw her statements.

[114] Mr Walter asked if she had any contact with Mr Frahm and she said that she had only texted to wish him a Happy New Year.

[115] The union representative said Ms A does not want to be involved on either the company or Mr Frahm's side, and that Ms A said she had been more affected by the group laughing at her. He said that Ms A respects Mr Frahm for the help he has given her.

[116] He also said that Ms A had not had contact with Mr Frahm and asked for that to be recorded in the meeting notes. He also said that in any further communication or interviews on the issue Ms A wanted union representation.

[117] Mr Walter clarified with Ms A that she had not had contact with Mr Frahm, other than the New Year text, because he said “this presents as witness intimidation.”

[118] The following day, the three met again. Ms A again insisted that she did not want to be involved. She said she knew nothing of what had happened with the other women. She agreed that her previous statements were correct and she had not been pressured into making them but she was sad that Mr Frahm had been suspended. The union representative stated that Ms A had been more embarrassed than humiliated. However, she was clear that she does not want to be involved in the process any more. She did not feel what Mr Frahm said was sexual harassment and wants to distance herself from the process. She did not want to be the reason someone was fired.

Mr Frahm supplies notes of his interviews

[119] On 25 January 2017, before the meeting arranged for Mr Frahm to give feedback to Mr Walter, Mr Jackson wrote and enclosed the statements Mr Frahm had collected and a detailed written response from Mr Frahm stating that Mr Walter’s letter demonstrated “a less than balanced view of the facts.” Mr Frahm did not believe that there had been a balanced investigation or that Mr Walter had properly considered Mr Frahm’s responses and statements.

[120] Mr Jackson submitted that Mr Frahm’s recent discussion with Ms A supported his view that she:

did not intend to make a complaint, did not want to be involved in an investigation and importantly, did not consider what took place was harassment or bullying, let alone of a sexual nature.

Mr Frahm’s complaint to Fonterra

[121] On 29 January 2017, Mr Frahm made a complaint to Fonterra that he was being victimised through the disciplinary process because he had challenged certain practices in the Protein Department. In particular, he alleged that Mr Hammond initiated and canvassed the allegations of sexual harassment against him.

[122] While Fonterra investigated the complaint, the disciplinary process was suspended. On 7 February 2017, Alex Chadwick, Fonterra’s employment relations manager issued a report concluding that there was no evidence that Mr Frahm had been victimised or targeted in response to challenges he raised about practices in the

Protein Department, and no evidence that Mr Hammond initiated or canvassed employees to obtain allegations against Mr Frahm. Therefore, the disciplinary process could continue.

Mr Walter's further investigation and consideration

[123] After receiving Mr Frahm's notes of interviews with Mr Smith and Ms B, Ms A and the four male employees Mr Walter decided to undertake some further investigation.

[124] He was concerned that Mr Frahm had spoken to the witnesses when he had specifically asked him not to do so in his 1 December letter:

I ask that you keep the matters relating to this investigation confidential and do not discuss it with the team and any of the witnesses.

[125] A number of Mr Frahm's interviewees confirmed that he fiddled with his zip/s at work but were of the opinion there was nothing sexual about that.

[126] Mr Walter realised that Ms A had only sought to withdraw her statements after Mr Frahm contacted her. He realised that Ms A had not told him the truth about her contact with Mr Frahm.

[127] Mr Walter met with Ms A again. Her union rep and Mr Hammond were also present.

[128] Ms A confirmed that Mr Frahm had contacted her and they had met outside in his car and he had then taken her home. When she spoke to Mr Frahm, he told her that the investigation was over.

[129] Mr Walter met with Ms Davidson again on 31 January 2017. He addressed the issue of one of Mr Frahm's interviewees recalling that Mr Frahm said something to Ms Davidson about a kiss "but not on the mouth, on the cheek. There was nothing in it. We all laughed because it was Susan and knew he would never do it" and "Nathan said to Susan 'I would let you kiss me, but not on the mouth'."

[130] Mr Davidson confirmed she did not see the comments as "banter" and that there was no reference to "not on the mouth" or to "on the cheek". She said there was definitely a reference to Mr Frahm's tongue, which she saw as a reference to oral sex.

[131] She reiterated that the heat exchange comments had been made to her by Mr Frahm.

[132] She confirmed that what she had said all along was true.

[133] Mr Walter also re-interviewed Ms McLean, who denied that she ever initiated conversations of sexual nature with Mr Frahm. She denied she had ever made a comment about wearing a push-up bra to breakfast with Mr Frahm.

[134] She confirmed that non-one else was present when Mr Frahm flashed his vest to her and was not sure if anyone else was present when he said “I know you want me”.

[135] Mr Walter put to her an allegation about her personal life that Mr Frahm had written in his response to Mr Walter. Ms McLean denied the allegation.

[136] Mr Walter also spoke to Mr Smith again. He also denied an allegation about his personal life that Mr Frahm had written in his response to Mr Walter. Mr Walter says Mr Smith was quite upset about the allegation.

Mr Smith seeks to withdraw his statement

[137] The following day, Mr Smith sent Mr Walter an email seeking to withdraw the first statement he made to Mr Hammond. In particular, he wanted to withdraw a negative comment about Ms A and some negative comments about Mr Frahm. He was happy for his subsequent interviews to be used, which focussed on Mr Frahm’s comment about Ms A.

The dismissal letter

[138] No further meeting took place between the parties and on 14 February 2017, Mr Walter confirmed his decision to dismiss Mr Frahm. He confirmed his findings first conveyed on 30 December 2016. Mr Walter’s letter concluded:

In short I believe that these breaches are of such a serious nature that they cut at the heart of our employment relationship. It was clear serious misconduct and a clear breach of our values. I gave consideration to whether a lesser sanction (such as demotion and redeployment) was appropriate but have concluded that the only option open to me is to terminate your employment immediately as of today.

Issues

[139] In deciding whether Fonterra acted as a fair and reasonable employer could have acted in all the circumstances, I need to determine whether:

- (i) Fonterra was justified in suspending Mr Frahm;
- (ii) Fonterra's processes of investigation and decision-making were fair and reasonable; and
- (iii) Fonterra had sufficient grounds to dismiss Mr Frahm.

Was Fonterra justified in suspending Mr Frahm?

[140] Mr Frahm was employed under an individual employment agreement based on the Fonterra collective agreement.

[141] I need to consider whether in all the circumstances at the time Fonterra acted as a fair and reasonable employer could have acted when it suspended Mr Frahm. I need to make that objective assessment by asking whether there was substantive justification for its decision and whether Fonterra used a process that a fair and reasonable employer could have used.

[142] Generally, an express contractual provision allowing suspension is necessary in order to suspend an employee. However:

[55] ... while that is not necessarily fatal, it will be an unusual case where it is justifiable to suspend an employee in the absence of a contractual clause authorising such a step. What will be required in such circumstances is good reason to believe that the employee's continued presence in the workplace may or will give rise to some other significant issue, such as safety issues, particularly relating to other employees ...¹

[143] Mr Frahm alleges that the suspension was unjustified because it showed that Mr Walter had pre-determined that the events had happened and were serious misconduct. Mr Frahm was also concerned that merely being suspended cast suspicion on him and damaged his reputation.

[144] Mr Walter was justified in deciding to undertake an investigation into Mr Frahm's behaviour. As soon as he decided that the investigation would proceed, he let Mr Frahm know. He let him know the kind of allegations he was investigating and

¹ *Hall v Dionex Pty Limited* [2015] NZEmpC 29.

why he considered that Mr Frahm should be suspended on full pay while the investigation proceeded.

[145] Mr Walter was concerned about the potential health, safety and well-being of staff if Mr Frahm remained in the workplace, in particular the potential difficulty the three women may have in continuing to work with Mr Frahm while the investigation took place.

[146] In all the circumstances, particularly the nature of the comments that Ms Davidson had alleged and Mr Frahm's role as the team leader managing Ms McLean and Ms A, Fonterra had substantive justification to suspend Mr Frahm. Its reasons for suspending him were to ensure that the affected staff did not feel pressured or intimidated by his continuing presence at work while Fonterra tried to ascertain what issues there might be for them to put to Mr Frahm.

[147] In fact, even without Mr Frahm's continued presence in the workplace, a certain amount of pressure was put on Ms A at work by her team members². In addition, Ms McLean was given a "hard time" by other members of her shift after Mr Frahm was suspended and while the investigation and disciplinary process were underway.

[148] Fonterra had a duty to have regard to the welfare of Ms A, Ms McLean and Ms Davidson during the investigation, as well as a duty to Mr Frahm.

[149] The process used was fair. Mr Walter put the possibility of suspension to Mr Frahm, including his reasons for considering it, heard Mr Frahm's view on the proposed suspension and his initial response to the allegation.

[150] Mr Frahm agreed to have the meeting about proposed suspension at short notice and without a representative. Mr Frahm may not have agreed that he should be suspended but he did agree at the meeting that if he was in Mr Walter's shoes he would suspend someone who faced similar allegations.

[151] I consider suspension was a decision a fair and reasonable employer could have made in all the circumstances at the time.

² Mr Smith's evidence was that he knew Ms A had not been the one to raise a complaint about what Mr Frahm said to her because he and other team members had "confronted her about it". Until then, they had assumed she had complained about Mr Frahm. Mr Smith said when he was first interviewed he did not think Mr Frahm should get into trouble for the comment he had made about Ms A.

Was the dismissal justified?

[152] Was Fonterra’s decision to dismiss Mr Frahm a decision a fair and reasonable employer could have made in all circumstances at the time?

[153] In assessing that, I need to be satisfied that Fonterra had substantive grounds to find that Mr Frahm was guilty of serious misconduct for which dismissal was one of a range of options open to a fair and reasonable employer. That decision must be based on evidence known to Fonterra at the time as well as evidence that would have been available to it after proper enquiry. Fonterra must have made its:

... decision to dismiss on a reasonably founded belief, honestly held, that serious misconduct has occurred.³

[154] I also need to be satisfied that Fonterra carried out its investigation and disciplinary processes fairly.

[155] Below, I examine Mr Frahm’s criticisms of Fonterra’s process and decisions as raised in correspondence before and after 30 December 2016 and in submissions made to me by Mr Jackson. However, I need to assess overall principles of fairness and be aware Fonterra did not have to conduct an investigation “akin to a judicial inquiry”.⁴ Instead, I need to assess the employer’s conduct for:

... substantive fairness and reasonableness rather than ‘minute and pedantic scrutiny’ to identify any failings.⁵

Pre-determination?

No formal complaints arising from the three women but initiated by Fonterra as a witch-hunt

[156] Mr Frahm says that from the outset Mr Hammond and Mr Walter believed the allegations. That is, the three complainants were treated as genuine, in the sense that they each wanted to make complaints, credible and significantly adversely affected by Mr Frahm’s behaviour.

³ *Ritchies Transport v Merennage* [2015] ERNZ 361 at [78].

⁴ *A Limited v H* [2016] NZCA 419; [2017] 2 NZLR 295 at [25]

⁵ Note 3, at [46]. The Court of Appeal quoted the Employment Court in *Angus v Ports of Auckland Ltd (No 2)* [2011] ERNZ 466, at [26].

[157] This concern is related to two other concerns Mr Frahm has, that Fonterra was conducting a witch-hunt against him and that Mr Hammond and Ms McLean's involvement was motivated by ill will towards Mr Frahm.

[158] There is also a link between these concerns and Mr Frahm's concern over Mr Hammond not carrying out a formal interview with Ms Davidson until about a month after she made her oral complaint to him.

[159] Initially, it was reasonable for Mr Hammond to take Ms Davidson's report to him at face value. I consider that shows he was not pre-disposed to cause trouble for Mr Frahm as at the end of October 2016.

[160] However, it was also reasonable for Mr Hammond to decide to make further enquiries after Ms McLean's daughter raised other issues she had heard about Mr Frahm.

[161] Mr Hammond and Mr Walter recognised that Fonterra had a responsibility towards staff Mr Frahm worked with to protect them from bullying and sexual harassment if that was what Mr Frahm's comments and behaviour amounted to upon further investigation. Therefore, Fonterra was justified in interviewing Ms Davidson, Mr Smith, Ms McLean, Ms B and Ms C a month after Ms Davidson's original report to Mr Hammond to assess whether there were grounds to initiate a formal investigation into Mr Frahm's behaviour.

[162] The fact that Ms Davidson approached the other women on the team after 26 October 2016 was outside of Fonterra's control. I do not consider her actions in that regard to have been unduly prejudicial to Mr Frahm. None of the women other than Ms McLean reported any issues with Mr Frahm in relation to sexual harassment and Ms Davidson did not take it any further with Fonterra.

[163] There was nothing by way of evidence to suggest to me that Mr Walter, Ms Davidson or Mr Hammond were motivated by any ill will to Mr Frahm unrelated to the sexual harassment/bullying allegations. In addition, Fonterra specifically investigated that allegation against Mr Hammond and concluded it was unfounded. Mr Walter specifically suggested to Ms McLean that she was motivated by what Mr Frahm had said about her daughter and about her daughter's boyfriend. She denied

that and there was no other evidence that pointed to any improper motives on behalf of Fonterra's representatives or the witnesses.

[164] Further, there was no evidence of the witnesses colluding against Mr Frahm.

[165] I consider the length of the investigation and its thoroughness, with some witnesses interviewed a number of times including having some of Mr Frahm's questions put to them, is an indicator that points away from Mr Walter having predetermined the truth of the allegations or the eventual outcome.

Failure to interview all available witnesses in a timely manner

[166] Mr Frahm's submission that the initial delay, particularly in relation to Ms Davidson's complaint, meant that he lost the opportunity to give evidence while it was fresh in his mind and for the other team members who were present when he allegedly sexually harassed Ms Davidson to be interviewed has some weight. However, I note that Mr Frahm did not suggest that Fonterra should interview his team about Ms Davidson's allegations at any time.

[167] Mr Walter received notes from Mr Frahm's own questioning of the team members who may have been present and took those into account in reconsidering whether the allegations were proved and what the outcome should be. I accept that Mr Walter limited the weight he put on the statements of some of the male staff members because of his own views about their reliability. However, if that was a defect in the process I consider it was a minor one that did not result in Mr Frahm being treated unfairly.

What is the relevance of the fact that the witnesses did not come forward on their own?

[168] Fonterra was justified in instigating a formal process to investigate what it suspected was more than one occurrence of sexual harassment by Mr Frahm.

Not all available evidence originally given to Mr Frahm

[169] Mr Walter did not include Ms B and Ms C's interview notes with the invitation to an investigation meeting. However, Mr Frahm was aware that they had not said anything negative about his behaviour. Mr Walter provided those statements

via Mr Jackson after he was asked about them. This was a minor defect in the process that was remedied and did not result in Mr Frahm being treated unfairly.

Disparity of treatment

[170] Mr Frahm raised an incident that he had observed that he said was racial and physical harassment. He alleged that there was unjustifiable disparity of treatment between that case and his situation. He says that two male employees had an argument and one of them physically assaulted the other, causing one to require medical treatment. Mr Frahm said that the incident involved racism. As far as Mr Frahm was aware, there had been no investigation or disciplinary sanction imposed by Fonterra. Both employees retained their jobs.

[171] Mr Walter's evidence was that Fonterra investigated but found it difficult to get any direct evidence of the incident because the parties and witnesses were reluctant to say exactly what had happened. The result was that Fonterra coached the two men on appropriate communication at work.

[172] I do not consider the events raised by Mr Frahm to be sufficiently similar to this case. Fonterra was justified in treating Mr Frahm differently in this case.

Mr Walter deciding to believe the women and Mr Smith rather than Mr Frahm

[173] Mr Frahm also questions Mr Walter's decision to believe the complainants instead of Mr Frahm and his witnesses.

[174] This was a situation in which Mr Walter had to weigh up all the evidence he had and make a decision about what had happened. He faced conflicting evidence from employees. An employer is "entitled to resolve conflicting versions of events, and prefer one over the other but must do so on a reasonable basis."⁶

[175] I am satisfied that Mr Walter did accept Ms Davidson's evidence over that of Mr Frahm on a reasonable basis. I am also satisfied that he accepted some of Ms McLean's claims over Mr Frahm's denial and did so on a reasonable basis.

[176] Mr Walter also accepted that Mr Frahm said what Mr Smith and Ms A's evidence supported, rather than Mr Frahm's explanation that he said that Ms A's dark

⁶ Note 3, at paragraph [108].

hair looked good on her light overalls. That may have been what he meant but it was reasonable of Mr Walter to believe Mr Smith and Ms A instead.

[177] Mr Walter gave evidence that he spent over 10 hours reconsidering all the evidence, including the notes of the interviews conducted by Mr Frahm and Ms A's interviews before confirming his findings of misconduct. He excluded Mr Smith's first interview.

[178] Overall, I consider the investigation and decision-making processes were carried out in a way open to a fair and reasonable employer.

Substantive justification?

[179] Did Fonterra have sufficient reason to find that Mr Frahm had committed serious misconduct for which dismissal was one of a range of options open to a fair and reasonable employer in the circumstances?

[180] Mr Walter considered Mr Frahm's comments and behaviour under Fonterra's policies. I set out the relevant policies below.

*The Way We Work – Code of Business Conduct*⁷

[181] The section headed "Harassment, bullying and victimisation" is in Part 4 headed "The Way We Work with Colleagues":

We expect our people to treat their colleagues as they would expect to be treated.

...

We do not tolerate any form of harassment (verbal, sexual or physical), bullying or victimisation, either directly (face-to-face) or indirectly... If you are concerned about any sort of harassment, bullying or victimisation, or you think a colleague is subject to this behaviour, please speak up. You can do this by talking to your manager or by contacting The Way We Work Hotline.

Bullying, Harassment and Anti-discrimination Standard

[182] In this document, Fonterra undertakes that it will investigate any verbal or written complaint by an employee who believes they have been bullied, harassed or discriminated against by another employee. Fonterra says that it will take all reasonably practicable steps to prevent repetition of the conduct.

⁷ Dated June 2016.

[183] The Standard defines harassment and bullying as including obscene or offensive language, gestures or material and unwanted sexual approaches or offers, and suggestive gestures. Harassment is defined from the point of view of the person being harassed. It does not rely on the intention, or lack of intention of the alleged harasser.⁸

[184] Harassment must be unwelcome, hurtful or offensive to the recipient, unsolicited or repeated and of a serious nature.

[185] Sexual harassment is defined separately as:

- Unwanted attention of a sexually oriented nature,
...

5.3.2 Examples of verbal, visual and physical sexual harassment may include but are not limited to:

- Verbal:
 - Personally offensive comments containing sexual innuendo
 - Sexual, crude or smutty jokes
 - ...
- Physical:
 - Offensive hand or body gestures.

5.3.3 Sexual harassment does not include:

- Occasional compliments
- Behaviour based on mutual attractions
- Developing friendships between consenting parties

[186] Bullying is also defined:

5.1.2 Fonterra identifies bullying as:

- Unreasonable behaviour directed toward an individual or group. Unreasonable behaviour is that which a reasonable person would see as unreasonable in the same circumstances. This includes victimisation, humiliation, intimidation, or making threats
- A repeated behaviour that is persistent and can involve a range of actions over time, and
- Behaviour that creates a risk to health and safety.

5.1.3 Harassment and discrimination may be part of bullying behaviour.

⁸ Page 4 of the Bullying, Harassment and Anti-discrimination Standard, Version 1.23 NZ only.

[187] The Standard lists a number of things that may be bullying, including gestures and suggestive glances.

Conduct and Behaviour Standard⁹

[188] The Fonterra Conduct and Behaviour Standard classifies different kinds of inappropriate conduct and behaviour. Sexual harassment and bullying are classified as serious misconduct.

Findings in relation to Ms McLean

[189] Mr Walter did not find that Mr Frahm said “I know you want me” to Ms McLean. However, he considered that there was sufficient evidence for him to conclude that Mr Frahm flashed his vest and pulled down the zip of his overalls on a number of occasions in a way that Ms McLean found to be offensive.

[190] Despite Ms McLean feeling the behaviour was offensive and sexual, Mr Walter did not classify this behaviour as sexual harassment, but as bullying.

[191] Under Fonterra’s definition, bullying needs to be repeated. The overall unzipping was repeated according to Ms McLean and Mr Walter found it to be so.

[192] I consider Mr Walter was justified in finding the behaviour to have been bullying as defined by Fonterra’s Standard.

Findings in relation to Ms A

[193] Mr Walter found Mr Frahm’s statement to Ms A of “you look good from behind” to be proved, and to be sexual harassment as defined in the Bullying, Harassment and Anti-discrimination Standard.

[194] Mr Frahm was clear that he never intended any offence or to hurt Ms A by his comment. Mr Walter had sufficient evidence to conclude that Ms A was subject to verbal harassment that was unwelcome to her, unsolicited and hurtful and of a serious nature.

[195] However, for Mr Frahm’s comment about Ms A to have been sexual harassment, as defined by Fonterra’s policy at clause 5.3.2, he would have had to

⁹ The version I have is Version 1.6.01/09/16 (NZ & Australia).

make a personally offensive comment containing sexual innuendo. It may be possible to read sexual innuendo into the comment, but Ms A did not do that.

[196] In clause 5.2.2, harassment is defined from the point of view of the person “being harassed”. Ms A did not consider herself to have been subject to sexual harassment by Mr Frahm’s comment. Therefore, I do not consider that Mr Walter’s decision that Ms A had been subjected to sexual harassment by Mr Frahm is a safe finding.

[197] Ms A was hurt, possibly humiliated and definitely embarrassed by Mr Frahm’s comment. Fonterra would have been entitled to consider what Mr Frahm said to have been inappropriate, particularly because of his role as Ms A’s team leader. However, classifying Mr Frahm’s behaviour as sexual harassment of Ms A was not a decision a fair and reasonable employer could have made in all the circumstances at the time.

Findings in relation to Ms Davidson

[198] Mr Walter found all of Ms Davidson’s allegations to be proved and to amount to sexual harassment.

[199] The drink bottle/kiss/tongue comments were verbally unwanted attention of a sexually oriented nature that was unsolicited, unwelcome and offensive to Ms Davidson. They were personally offensive comments containing sexual innuendo.

[200] The naked questions/comments were also verbally unwanted attention of a sexually oriented nature that was unsolicited, unwelcome and offensive to Ms Davidson. They were personally offensive comments containing sexual innuendo. Mr Frahm pulling his zip of his overalls down in the context of the naked comments was a gesture of sexual innuendo that was also unsolicited, unwelcome and offensive to Ms Davidson.

[201] The heat transfer/hot comments were likewise verbally unwanted attention of a sexually oriented nature that was unsolicited, unwelcome and offensive to Ms Davidson. They were personally offensive comments containing sexual innuendo.

[202] Fonterra was justified as viewing Mr Frahm’s behaviour towards Ms Davidson as serious misconduct.

Conclusion on substantive justification

[203] Despite its finding in relation to Ms A not being justified, overall I am satisfied that Fonterra had a sufficient and reliable evidential basis for concluding Mr Frahm was guilty of serious misconduct.

Was dismissal one of range of options open to a fair and reasonable employer?

[204] Mr Walter's evidence was that throughout the process of investigation he had not pre-determined that Mr Frahm would need to be dismissed. I accept his evidence of that. Instead, he considered that even if the allegations were proved, he would not need to dismiss Mr Frahm if he showed some remorse and insight into how his behaviour had affected the three women. Mr Frahm exhibited some remorse in relation to Ms A. However, Mr Walter did not accept that Mr Frahm exhibited any insight or sufficient remorse overall.

[205] Overall, despite the fact that Fonterra was not justified in finding Mr Frahm's comment about Ms A to be sexual harassment, Fonterra was entitled to find that Mr Frahm's behaviour towards the three women was below the standard expected of a Fonterra Team Leader and that it had lost trust and confidence in him.

[206] I consider that dismissal was within the range of responses open to a fair and reasonable employer in all the circumstances at the time. Therefore, Fonterra did not unjustifiably dismiss Mr Frahm.

Costs

[207] I reserve the issue of costs. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[208] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff for the first day of an investigation meeting is \$4,500 and for the second and subsequent days is \$3,500. The investigation meeting lasted two full days and much of the morning on the third day.

[209] If the parties cannot reach an agreement, the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file

submissions in reply. The parties should identify any factors they say should result in any adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority