New Zealand Employment Relations Authority Decisions

Harris v Fonterra Co-Operative Group Limited (Christchurch) [2011] NZERA 949; [2011] NZERA Christchurch 197 (13 December 2011)

Last Updated: 25 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 197
5346288

BETWEEN BLAIR HARRIS Applicant

A N D FONTERRA CO-OPERATIVE GROUP LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, Counsel for Applicant

John Rooney, Counsel for Respondent

Investigation Meeting 6 September 2011at Christchurch

Submissions Received: On the day

Supplementary

Submissions:

9 and 12 December 2011

Date of Determination: 13 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Blair Harris worked for Fonterra Co-Operative Group Limited (Fonterra) and its predecessor for 18 years. At the material time, he was employed in the role of seconded Level 8 Production Supervisor in the Cream Products Department at the Clandeboye Plant in Timaru.

[2] Mr Harris was dismissed on 1 June 2011 for photographing two work employees who were suspending themselves from a height within the butter plant at the Clandeboye site and, as their supervisor, not stopping their behaviour. It was found that this conduct was a breach of Fonterra's health and safety policy, code of conduct and Fonterra values.

[3] Mr Harris says that his dismissal was unjustified and he seeks, by way of remedy, reinstatement, reimbursement of lost wages, compensation for humiliation, loss of dignity and distress in the sum of $10,000 and costs.

[4] Fonterra denies that Mr Harris was unjustifiably dismissed and says that he is not entitled to any of the remedies he seeks.

Test of justification

[5] Mr Harris was dismissed after the new test of justification in s.103A of the

Employment Relations Act 2000 came into force. [6] The test of justification provides:

(1) For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider –

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer generally considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

(a) minor; and

(b) did not result in the employee being treated unfairly.

[7] The Full Court of the Employment Court had issued its judgment in *Angus v. Ports of Auckland* and *McKean v. Ports of Auckland Ltd* ARC 69/11 and ARC 72/11 [2011] NZEmpC 160 providing guidance about the interpretation and application of the new test of justification in s.103A and the test for reinstatement before I released this determination. I advised Mr McKenzie and Mr Rooney of this and invited them to make submissions if they so wished. They have done so and I have considered the submissions along with the earlier submissions made.

[8] Mr John Rooney and the decision-maker in this case, Grant Rooney, have the same surname. Where I need to refer to Mr John Rooney I shall use his Christian as well as his surname to distinguish him from Grant Rooney.

Issues

[9] The Authority is required, under s.103A to determine, on an objective basis: Was there a full and fair investigation undertaken by Fonterra into the

actions of Mr Harris;

Could a fair and reasonable employer have concluded the conduct disclosed from the investigation amounted to serious misconduct;

Was the dismissal of Mr Harris what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred including an assessment of any disparity in the treatment of Mr Harris compared with other employees;

If the Authority finds that the dismissal was unjustified, then what remedies should be awarded, is reinstatement practicable and reasonable and are there issues of mitigation and contribution?

Was there a full and fair investigation undertaken by Fonterra into the actions of

Mr Harris?

History of employment

[10] Mr Harris started working for Fonterra's predecessor in 1993 as a process worker at the Dunedin Milk Station. He then progressed into the role of supervisor at

the Dunedin Milk Station and when that station closed in or about 2003 he was redeployed to Mainland Products in Dunedin where he worked for around two years before a decision was made to close that factory. He was then redeployed to the Clandeboye cheese plant as a Level 7 Supervisor.

[11] The site at Clandeboye is a safety-sensitive site with operation of potentially dangerous equipment and machinery.

Provisions of the collective agreement and other policies and codes

The collective agreement

[12] Mr Harris was covered at the material time by the Fonterra Dairy Workers' Collective Agreement (2008-2011) (the collective agreement). The parties to the agreement are Fonterra and The New Zealand Dairy Workers Union Inc, Te Runanga Wai U (the Union).

[13] The collective agreement contained a disciplinary process in clause 8. Clause

8.5 referred to dismissal and clause 8.5.1 provided that serious misconduct may result in instant dismissal without notice.

[14] Clause 7.8 of the collective agreement refers to Fonterra and the Union viewing the safety and wellbeing of all workers as paramount and agreeing to maintain an employee participation agreement in accordance with Part 2A of the Health and Safety in Employment Act 2004.

[15] Clause 7.4.2 of the collective agreement refers to procedures in place for work control and the issuing of permits for work that potentially impacts on worker safety and product safety. Clause 7.4.3 provides that permit issuing is the responsibility of company-appointed plant operators and supervisors who are trained in a number of key areas. Clause 7.4.4 provides that a worker who has satisfactorily completed the required training to NZQA unit standard in all relevant permit-related courses and has training validated, shall be paid a qualification payment.

[16] Mr Harris had, since 2007, been a permit to work issuer having completed the necessary NZQA units and he received the qualification payment.

The health and safety group policy

[17] This policy emphasises the commitment by Fonterra to ensuring no harm to employees in its operation and that health and safety is an integral of everything done at Fonterra.

The way we work – code of business conduct

[18] The way we work document is described by the Chief Executive Officer, Andrew Ferrier, in its introduction as being designed to help support Fonterra people to do what is right and to apply high ethical and business standards. Amongst other matters, Mr Ferrier states that the document is mostly about applying commonsense and good judgement.

[19] This document was introduced to employees at Fonterra in March 2011. Part of the document is headed *Do what's right* and under this heading actions include *having the tough conversation* and *courage to challenge when things don't seem right*. There is also a process on pg. 33 if employees want to speak up about behaviour and a hotline.

[20] Under health and safety, the document provides:

We want our people to come to work safely, be safe at work and to get home to their families unharmed. We comply with all the rules and requirements of health and safety legislation wherever we operate, but that is just our minimum commitment.

Our Executive Committee (EXCO) is personally committed to ensuring Fonterra's health and safety performance continually improves. We are working hard to embed a safety first culture right across our operations and actively encourage our people to take personal responsibility for their safety and that of others who work alongside them. That includes ensuring we're fit for work and protect ourselves and others from unreasonable stress and unsafe working conditions. We ask that our people drive safely at all times.

We ensure that our employees are properly trained in health and safety procedures and we adhere to Fonterra's Good Manufacturing Practice Standards. All incidents must be reported as we can take steps to prevent them happening again.

Investigation process

[21] On 19 May 2011, Grant Rooney, Plant Manager at Clandeboye, was forwarded photographs of two Fonterra employees. I shall refer to these two

employees as M and J. The photographs showed M and J suspending themselves on various pieces of equipment within the butter plant. Mr Rooney understood that the photographs had been taken by Mr Harris and that the behaviour he saw in the photographs was an example of a phenomenon commonly referred to as planking.

Suspension meeting

[22] On 20 May 2011, Mr Harris started work at around 5.40am. At about

10.30am, Mr Harris was asked with M and J to attend a meeting in Mr Rooney's office. The Union delegate, Peter Stringer, accompanied them to the meeting. Mr Harris said he did not know what the meeting was to be about and even after discussing it with M and J before attending the meeting they did not connect it to the planking incident the previous day. Mr Rooney attended the meeting together with Wiari Christopher Tuite (Chris), the Process Manager at the butter plant and Rebecca Johnson the human resources adviser at Clandeboye.

[23] There were notes provided about this meeting by the company. Mr Harris accepted that they generally reflected the nature of the discussions that took place.

[24] Mr Rooney advised Mr Harris and the other two employees that he had become aware of an incident and that Fonterra was considering suspension on pay in order to conduct an investigation and that he wanted to hear from them on that matter (suspension). The notes reflect that there was clarification sought by J about the nature of the incident for which they were being suspended pending investigation. Mr Rooney explained that it was a planking incident that had occurred the previous day. It was made clear, though, to all three employees that no explanation to any allegation was required as the meeting on that particular day was only to discuss suspension. There was no comment from Mr Harris about the proposed suspension. Following an adjournment of about 10 minutes, Mr Harris and the other employees were then advised that they were suspended on full pay and that there would be a meeting on 24 May 2011 and that a letter would be provided to them confirming their suspension.

[25] A letter was then sent to Mr Harris on 20 May 2011 that confirmed his suspension and advised him of the allegations and the next steps of the investigation.

Further investigations

[26] Mr Rooney and Mr Tuite measured the equipment on which M and J had planked. There was a mobile tool and spares stand on which J had planked and that was 1.5" wide and 1.5m above the concrete floor. M had planked on the FMG carton erector ram guard which was 1.55m above the ground and 2.25" wide. J had also planked on the pipe work support structure between FMG butter packers that was 3" wide and 2.5m above the ground.

[27] Mr Rooney also spoke to other employees on the site at the time the planking took place but although some of them had heard about the incident nobody else had been involved in it or witnessed it.

[28] On 24 May 2011, Mr Rooney sent Mr Harris a letter advising that as discussed with him that day, there would be a meeting the following day, on 25 May, at 2pm. Mr Rooney provided details of the allegations and the photographs and measurements. There was an error in the letter about the description of the behaviour engaged in by Mr Harris. That was subsequently corrected in a letter handed to Mr Harris and his Union representative prior to the meeting on 25 May 2011. No unfairness was suggested as a result of that.

[29] In terms of the meeting that was to take place on 25 May 2011, Mr Harris was advised in the letter that the allegation was serious and may constitute serious misconduct if proven. He was advised that Mr Rooney would be attending the meeting with Ms Johnson and Mr Tuite and he was encouraged to bring a representative to the meeting.

The allegations

[30] The allegations in the amended letter provided on 25 May 2011 were as follows:

At approximately 1:00pm on Thursday 19th May 2011 it is alleged that you were involved in an unsafe act, where your colleagues suspended themselves from a height within the Butter Plant at Clandeboye. It is alleged that you took photos of them performing these acts and as their supervisor took no action to stop them from engaging in these acts. If proven this behaviour would be in breach of our Fonterra Health and Safety Policy, Code of Conduct (The Way We Work) and would contravene the Fonterra Values as this act could put your own and other peoples' lives in danger. The act(s) could also potentially bring Fonterra's reputation into disrepute if the

photos were to be seen by external parties and the people in the photos were identified as a Fonterra employee.

Meeting 25 May 2011

[31] At the meeting on 25 May 2011, Mr Harris was represented by Tom Faulkner, who is the Union site delegate at the Clandeboye site and Mr Stringer. Mr Rooney attended the meeting with Mr Tuite and Ms Johnson.

[32] Given that there is essentially no dispute about the minutes of the meeting, I

can set out succinctly the explanations given by Mr Harris:

...we were sitting in the control room, and I can't remember the discussion or why we decided to do it, there had been a lot on Facebook and in the media about planking. It was a joint decision.

I took the photos and didn't do anything to stop it.

I did say to J that I thought it was a really bad idea and not to do the one on the pipe but I still took the photo.

This has ramifications for my family.

It's the stupidest thing I have done in 18 years of working for Fonterra, the stupidest thing I've done in my life and I'm really sorry.

I didn't even think about it or what could potentially happen.

We didn't skite about it and it wasn't a competition we are having with other shifts or anything, no one else knew.

We went into the meeting on Friday [regarding the possible suspension] *in the dark as to why we were there.*

[33] Mr Harris confirmed the sequence of photo taking was J on the tool horse, M on the packer and then J on the pipe. He advised that if he kept his job he would stand up and talk to people about health and safety and also said *it was an extremely unsafe act and I was part of it and didn't stop it for want of a better word, I didn't cover my tracks properly"*. He agreed that he delivered health and safety moments and SHED (safely home every day) discussions. The SHED discussions take place at the start of every shift to focus on what is happening on plant that could pose a health and safety risk and what to do to mitigate that risk. The message from the discussion is passed on by the supervisors at shift handover. These discussions were implemented into the Cream product department from late October 2010.

[34] Mr Harris also said *I can't help but think there was a hidden agenda in whoever passed you the pictures, but I realise the pictures speak for themselves and I took the photos.*

Meeting 31 May 2011 10.15am

[35] Mr Harris attended a further meeting on this date with Mr Faulkner and Mr Rooney with Mr Tuite and Ms Johnson. Again, there is no dispute about the minutes taken by Fonterra.

[36] At this meeting there were some questions for Mr Harris. Ms Johnson specifically asked for any comments on the answers he had given at the meeting on

25 May 2011 regarding motivations behind the photographs being passed on and the comment about not covering his tracks properly. Ms Johnson told Mr Harris at this meeting that these statements concerned Fonterra as the feeling was that he was remorseful for getting caught rather than for engaging in the behaviour itself.

[37] Mr Harris responded that, at the end of the day, the acts did take place and he took responsibility. He agreed that he had taken the photographs and that if he was not there the photos would not have got out. He accepted that he questioned the motivations but that it did not take away from the situation.

[38] Mr Rooney asked:

Do you think the right thing to do was to pass the info on? How would you handle that situation?

Mr Harris responded:

Yes I do. I'd like to think if I was in that situation I would have had a good enough relationship to have a conversation with the person. I honestly don't know how I'd handle that situation. ... I'm a permit to work issuer so I'm not afraid to pull people up. I deliver SHED moments and I'm good at it. I have made a lot of improvements from L7 to L8. Its one hiccup in 18 years ...

Meeting 31 May 2011 2.30;m

[39] A second meeting with the same participants was held that same day to give Mr Harris a proposed disciplinary outcome and a chance to respond prior to a final decision being made and provided the following day. Mr Harris accepted that the minutes taken by the company at that meeting recorded the main points. Mr Rooney

advised Mr Harris that he had considered his length of service, his record, his explanation and he advised him that the proposed sanction was dismissal due to the serious nature of the incident that took place. He referred to Mr Harris' seniority and being the supervisor and permit issuer and that he had four opportunities to stop the acts from happening and that if he had acted as a leader he would have stopped them as Fonterra expected all leaders to be health and safety role models.

[40] Mr Harris left the meeting at that point because he was upset. Mr Faulkner left initially to try and comfort Mr Harris and then returned to provide alternatives to a dismissal outcome. I accept that these are recorded in the typed minutes provided by Fonterra. Mr Faulkner talked about a positive outcome if Mr Harris retained his role and he was to speak at training days with staff about the importance of health and safety.

Meeting 1 June 2011

[41] Mr Harris attended a final meeting on 1 June 2011 with Mr Faulkner. Mr Rooney was present at that meeting with Mr Tuite and Ms Johnson.

[42] Ms Johnson outlined the purpose of the meeting was to deliver the final outcome of the investigation process. As Mr Harris had not said anything about the proposed disciplinary outcome the previous day he was given a further opportunity to make any comment if he wished to do so. Mr Harris spoke about the effect on his family, that it was one mistake in 18 years and that he did not lie and told the truth. He spoke about how he loved his job and that he had been made redundant twice by the company and had moved his family to Timaru to work at Clandeboye because he believed he had a future with the company. Mr Faulkner made some further statements.

[43] The meeting then adjourned for 20 minutes for Mr Rooney to consider what was said by both Mr Harris and Mr Faulkner. Upon resumption, Mr Rooney advised that Mr Harris was to be dismissed.

[44] On 1 June 2011, Mr Harris received a letter confirming his dismissal and the reason for that advising him that his employment was terminated effective immediately.

[45] Mr Harris applied for over 25 jobs and was eventually successful in obtaining a lower paid role on 25 July 2011. Mr Harris says that he sincerely wants to go back to Fonterra and would agree to do so at a lesser role, although accepts that if the Authority was to get to that point, there are some legal issues with that. Mr Harris says that he was particularly upset that he was dismissed and J and M were not, simply because he was a supervisor. He says that this is unfair because he was not a permanent Level 8 Supervisor but was rather seconded to that position and that he believes that all three employees should have been treated the same.

Conclusion as to whether there was a full and fair investigation

[46] I am required to consider the factors earlier set out in s.103A(3):

Having regard to the resources available to the employer, did Fonterra sufficiently investigate the allegations against Mr Harris before dismissing him?

Fonterra is a large company and it employs a significant number of employees. It has significant resources and a high standard investigation could therefore be expected. The evidence does not support Fonterra conducted other than a sufficient investigation or that there were any lines of inquiry it failed to investigate. Objectively assessed, I am satisfied that Fonterra sufficiently investigated the allegations against Mr Harris before dismissing him.

Did Fonterra raise the concerns it had with Mr Harris before dismissing him?

I find that the amended letter provided to Mr Harris on 25 May 2011 set out the allegations, relevant policies/code of conduct alleged to have been breached and there was provision to him of photographs and measurements taken before he was required to make an explanation. I am satisfied that the concerns Fonterra had with Mr Harris were raised with him adequately before his dismissal.

Did Fonterra give Mr Harris a reasonable opportunity to respond to these concerns before dismissal?

I am satisfied there was a reasonable opportunity for Mr Harris to respond to these concerns because he was adequately informed of them and had an opportunity to give a full explanation to them.

Did Fonterra genuinely consider Mr Harris' explanation in relation to the allegations against him before dismissing?

I am satisfied Fonterra genuinely, and in good faith, considered Mr Harris' explanation and the matters put forward by him and his representative before dismissing him.

[47] I now turn to whether there are any other factors that are appropriate to consider under s.103A. I am satisfied that, throughout the investigation, Fonterra acted in good faith and that the process adopted by Fonterra was not inconsistent with that in the collective agreement.

[48] In conclusion, objectively assessed, I find there was a full and fair investigation into the actions of Mr Harris.

Could a fair and reasonable employer conclude that the conduct disclosed in the investigation amounted to serious misconduct?

[49] The investigation disclosed that Mr Harris, when acting as supervisor of M and J, did not stop them planking on equipment at various heights and photographed them undertaking this activity.

[50] Mr McKenzie in his submission, whilst accepting that Mr Harris' behaviour was misconduct and serious, said it could be argued that it falls below serious misconduct. The act of taking photos, he submits, was not per se dangerous and the

misconduct on the part of Mr Harris was an omission because of the failure to stop the misconduct rather than any positive action.

[51] In assessing the seriousness of the conduct as disclosed by the investigation, Fonterra had increased focus on health and safety over the last two years and regarded health and safety as paramount. There were policies that would have made it clear to employees the seriousness with which health and safety was regarded and equally how any breach would be viewed. Health and safety was discussed at the site almost every day and there was training in health and safety which the company encouraged

and supported. The policies encouraged employees to *stop and think* about conduct and health and safety.

[52] Mr Harris was a work permit issuer and knew therefore how to assess hazards. Fonterra requires a permit to work if an employee is working at a height of more than 2m and means are to be provided to prevent the person from falling that are suitable for the purpose. Mr Harris had also completed unit standards in height safety in March 2010.

[53] Part of being a permit issuer involves being able to say no to conduct that may be risky. There were questions asked of Mr Harris as to whether he was pressured when he talked to J about planking on the beam being unsafe. He responded no. A fair and reasonable employer could conclude that there was a risk to the safety of both M and J if they had fallen from the heights they were planking on to the concrete floor below and that Mr Harris had training to recognise that and could and should have stopped the conduct. Mr Harris accepted that he delivered health and safety moments and SHED discussions.

[54] As a supervisor a fair and reasonable employer could expect Mr Harris to ensure health and safety standards were maintained and that he should be a good role model for health and safety to others. There was no dispute from Mr Harris that J and M were not engaged in safe work practice and that as someone with responsibility he failed to stop them doing something unsafe.

[55] A fair and reasonable employer could, in assessing the conduct, take into account that there was more than one opportunity for Mr Harris to have stopped it, even though it all occurred within a matter of minutes. It could have been stopped at the time of the discussion in the control room and then before each of the three separate incidents of planking. That would be consistent with the stop and think type approach to health and safety.

[56] In conclusion, objectively assessed, the investigation that I have found was full and fair, disclosed conduct on the part of Mr Harris that he did not stop and photographed employees engaging in unsafe acts when he was their supervisor. That was conduct that a fair and reasonable employer could conclude was serious misconduct in all the circumstances.

Was the dismissal of Mr Harris what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred including an assessment of any disparity between the treatment of Mr Harris compared with other employees?

[57] Mr McKenzie submits that Mr Harris' dismissal was disparate in relation to those involved in the incident, M and J, and disparate when considered against other health and safety cases at Fonterra. In *Angus* and *McKean* it was confirmed in para.

27 that the new legislation has not affected longstanding considerations such as parity/disparity of treatment.

[58] Mr McKenzie and Mr John Rooney referred in final submissions to the general rule that an employer should treat similar offences in a similar manner and they should attract a like punishment. They also referred to the three step process for considering disparity in the Court of Appeal judgment in *Chief Executive of the Department of Inland Revenue v. Buchanan* [2005] NZCA 428; [2005] ERNZ 767:

(a) Is there disparity of treatment;

(b) If so, is there an adequate explanation for the disparity;

(c) If not, is the dismissal justified notwithstanding the disparity for which there is no adequate explanation?

[59] Mr Harris was treated differently from M and J. They were given a final written warning and demoted from a Level 5A and Level 6 role to Level 5B roles that are, save for entry level new employees, the lowest level roles in the hierarchy. That raises a prima facie case of disparity.

[60] Mr Rooney said that in determining what disciplinary action to take, he took into account that Mr Harris, as supervisor, was engaged in and condoned the actions of M and J. He took into account that M and J had both expressed genuine and unqualified remorse and that they held lower level positions, 5A and 6 at the material time, and they did not have the supervisory responsibilities that Mr Harris had.

[61] Mr McKenzie submits that the remorse argument is an inadequate reason for the difference in treatment and that Mr Harris immediately owned up to wrongdoing, describing it as the stupidest thing he had done in 18 years. J too asked about the person who handed the photos in. Mr McKenzie submits that J acted up on nine occasions as a Level 8 supervisor and that

Mr Harris was, in effect, also acting up at

the material time as well because he had been seconded from Level 7. He says further that J is also a permit issuer and has more years of service than Mr Harris. Mr McKenzie says that this was a joint enterprise where all three employees misconducted themselves through the planking experiments.

[62] Mr John Rooney submits that Fonterra was justified in treating Mr Harris differently from the other employees because he was the supervisor and Fonterra was entitled to have confidence in him in that role to stop the behaviour.

[63] It was clear during the Authority's investigation meeting that Mr Harris regarded the difference in the disciplinary outcome he received to M and J as very unfair and particularly difficult for him to accept.

[64] Although J at times in a more limited capacity had supervised at a Level 8 role, he was not a supervisor at the time of the planking and M was a lower level employee. Mr Harris was in charge on the day, and as such, was in a role that included a level of responsibility greater than that of J and M. Fonterra was entitled to rely on Mr Harris to recognise and stop unsafe acts and not condone them.

[65] I find that there is an adequate explanation for the difference in treatment between Mr Harris and J and M because of the role that Mr Harris held at that time and I am not required therefore to have further regard to the disparity between the three employees.

[66] There were four other cases put forward. I heard from Steven McKnight who is the Site Manager at the Clandeboye site about three of these cases and from Mr Tuite about the remaining case.

[67] Mr Tuite gave evidence he was responsible for investigating a health and safety matter involving two employees in lower level positions who had climbed a safety railing and bypassed a request to enter a Cat 4 safety gate during production. Neither employee had supervisory functions or the same level of health and safety training that Mr Harris did. Mr Tuite concluded the employees had had inadequate training on the Cat4 gate and it was felt that, on this occasion, a verbal warning and further training was the appropriate outcome. I find that there is an adequate explanation for the difference in treatment between those employees and Mr Harris.

[68] The second case involved sexual harassment. Although Mr McKnight was not directly involved in the investigation and outcome, he was kept informed as to the steps the decision-maker was following and about the conclusions and the decision that was eventually made. That was the same level of involvement he had in Mr Harris' case when he was advised by Mr Rooney about the steps in the process and the conclusions and decisions. Mr McKnight said that this case was a different sort of situation to Mr Harris because it did not involve health and safety issues. I am not satisfied that a prima facie case of disparity is made out and even if it is then I accept there is an adequate explanation for the difference in outcome because of the circumstances and the reasonably low level harassment in that matter.

[69] The third case involved a demotion for alcohol issues and rehabilitation of somebody at a supervisory level. Mr McKnight said that this case arose about three years ago and that since then the health and safety at Fonterra had changed dramatically. In relation to this particular matter, I accept that there are elements of health and safety involved. If it could be said that the situation in this case and Mr Harris' was the same, then I find that there is an explanation that the culture at Fonterra has changed, but even if I was incorrect in that the Court of Appeal in *Samu v Air NZ Ltd* [1994] 1 ERNZ 93 it was stated that there is no requirement that an employer is forever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

[70] The fourth case concerns a Level 8 Supervisor and is perhaps the closest case to Mr Harris. Mr McKnight was the decision-maker in that case. The employee had failed to complete a permit to work before entering a palletising safety cell following a breakdown. That was a breach of the health and safety policy. He received a final written warning. Mr McKnight said that there were several mitigating factors that led him to conclude a final written warning was the appropriate outcome. He said that the supervisor was sincere in his apologies and reflections on the incident, it was his first night shift back from illness, he had had little sleep and there were some other sensitive matters. Mr McKnight said that, as with Mr Harris, the employee volunteered to educate other members of the team. Mr McKnight said that he saw this as being a different breach to that of Mr Harris in that the supervisor, without thinking and certainly in breach of health and safety policy, had, in an attempt to continue production, made a wrong decision. He said that this incident occurred about a month after the SHED discussions had been implemented and that there was

value in the employee telling others that you can make a wrong decision if you take a blinkered approach to ensuring continuity of production.

[71] I have carefully considered the circumstances of this case and the evidence of Mr McKnight. I find that there is an adequate explanation for the difference in treatment between this employee and Mr Harris on the basis of the nature of the breach and the mitigating factors.

[72] Where there has in the above cases been disparity of treatment then I have found either an adequate explanation for it or that the circumstances are such that it does not render an otherwise justified dismissal unjustified.

[73] I now turn to whether dismissal of Mr Harris was what a fair and reasonable employer could have done in all the circumstances. In doing so, I have had regard to the statements made by the Full Court in *Angus and McKean* regarding the new test in s.103A. The Full Court confirmed that the most important change is from *would* in the former test to *could* in the new test in s.103A and stated that the effect of the new s.103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer, in all the circumstances, could have decided upon, then the Authority and the Court will find it justified. The Full Court confirmed that the new test allows for (usually) more than one possible justifiable outcome and more than one possible justifiable methodology. There was confirmation that there is no change to the previous position that the Authority can not decide justification by assessing what they would have done in the circumstances.

[74] There were a number of persuasive mitigating factors that were put forward by Mr Harris before Mr Rooney made his decision as to a disciplinary outcome. I accept Mr Rooney's evidence that he took them into account and that as he stated in his evidence dismissal was a difficult decision to make, no doubt because of them. Mr Harris had 18 years of faithful service with Fonterra and its predecessors through two restructuring events. He had no previous disciplinary matters and was honest about his actions and remorseful, albeit if that may have appeared somewhat qualified. He has a wife and three young children and loosing his job impacted on his ability to provide for them and he offered to educate other employees about health and safety issues as a result of the incident.

[75] Mr Rooney came to the conclusion that the seriousness of the breach by Mr Harris outweighed the mitigating factors and that the conduct fell *drastically short* of the standards he expected of a supervisor with training in health and safety. He said that Mr Harris was responsible for ensuring the safety of M and J and had not discouraged their behaviour but had encouraged and condoned it by taking photos. He considered potentially M and J's safety was at risk and they could have hit their heads on the concrete or machinery. He concluded that a positive spin could not be put on the behaviour of Mr Harris in training others and that the conduct was not spur of the moment and there were three separate incidents getting progressively higher and more dangerous. Mr Rooney considered all the information including the effect on Mr Harris and his family of dismissal, and the expression of remorse, although gaining the impression Mr Harris was as sorry for getting caught as for engaging in the conduct and then concluded that he had lost all trust in Mr Harris and that dismissal was appropriate.

[76] Objectively assessed Mr Rooney could fairly and reasonably have reached a conclusion that the conduct was serious enough to warrant Mr Harris's dismissal in all the circumstances.

[77] I find that following a full and fair investigation that disclosed serious misconduct a fair and reasonable employer could have dismissed Mr Harris in all the circumstances.

[78] In conclusion, I do not find that Mr Harris has made out his personal grievance that he was unjustifiably dismissed.

Costs

[79] I reserve the issue of costs. Bearing in mind the rapidly approaching holiday season, Mr John Rooney has until 27 January 2012 to lodge and serve submissions as to costs and Mr McKenzie has until 17 February 2012 to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority
