New Zealand Employment Relations Authority Decisions

Wycliff v Fonterra Co-Operative Group Limited (Christchurch) [2018] NZERA 1039; [2018] NZERA Christchurch 39 (28 March 2018)

Last Updated: 9 April 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

[2018] NZERA Christchurch 39
3015395

BETWEEN JAMES WYCLIFF Applicant

AND FONTERRA CO-OPERATIVE GROUP LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: Alex Kersjes, Advocate for Applicant

Matthew Piper, Counsel for Respondent

Investigation Meeting: 12 and 13 December 2017 at Christchurch

Submissions Received: 13 December 2017 and 10 January 2018 from Applicant

13 December 2017 and 15 December 2017 from Respondent

Determination: 28 March 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. James Wycliff was justifiably dismissed from his employment with

Fonterra Co-operative Group Limited.

B. **Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.**

Prohibition from Publication

[1] I prohibit from publication under clause 10 of the second schedule of the Employment Relations Act 2000 ("the Act") the name of the competitor whose milk powder bag was placed on the packing line and the name of the bag's supplier.

Employment relationship problem

[2] James Wycliff commenced employment with Fonterra Co-operative Group Limited ("Fonterra") on 29 September 2008 as a

tanker driver. He was appointed to a L6 charge hand position from 3 September 2014 at the Darfield Powder Plant. His duties in that role included supervising other employees while they worked on the milk powder packing line.

[3] On 28 November 2016 Mr Wycliff placed a competitors bag on the packing line and it was filled with milk powder. One of Mr Wycliff's team members removed it from the line and reported it to his team leader Craig Fay at a 7am shift meeting. Mr Wycliff was late for the 7am shift meeting. It was unclear to Mr Fay what had occurred but he regarded the situation as serious.

[4] At about 8am Mr Fay raised the issue with Kieran Aynsley who is the Process Manager at the Darfield Powder Plant. The concern was that a competitors bag had made it through the de-stacker when that had previously been regarded as not possible. The de- stacker is an automated machine that scans bags before they are placed on the product line. Different milk powders go in different Fonterra bags and the machine ensures that the bags that go on the line to be filled with powder are only those that are found in a pre-programmed database. The expectation is that an unknown bag would not be allowed on the line because its pattern would not be recognised by the de-stacker.

[5] The discovery of the competitors bag filled with milk powder also came at a time when there had been some issues experienced by Fonterra with its supplier of bags. Some three days earlier 14 competitors bags had been found in a pallet of bags and that had been raised with the supplier. There had also been issues with some bags being insufficiently glued.

[6] Mr Aynsley raised the concerns that a bag had made it past the de-stacker at the 9am tier two management meeting on 28 November 2016 and began taking steps to understand what had happened.

[7] Operations manager Alan Maitland sent an email on 28 November 2016 at 11.40am to management about an escalation. There was a question in the email as to whether there was a need for a 100% inspection. Although the knowledge about the matter was expressed not to be "great" in the email Mr Maitland asked for consideration as to whether there needed to be some external inspections of the finished units from the offending batch. He also wrote that he had "zero confidence" in the bag supplier at that time.

[8] Mr Aynsley spoke to the onsite automation team who had carried out programming and fine tuning of the de-stackers and they were convinced that it would not have recognised a competitors bag as a Fonterra bag and allowed it through.

[9] About midday Mr Anysley went to the de-stacker that had apparently allowed a competitors bag through without alerting the team. When he was there he saw Mr Wycliff and told him about the bag having got on the line. Mr Wycliff said words to the effect "it was me".

[10] Mr Aynsley said that he then moved quickly to initiate the de-escalation of the issue and from the brief discussion with Mr Wycliff only knew that he had placed the bag on the line.

[11] Mr Fay had some further discussions with Mr Wycliff which became quite material. There is dispute as to when the discussions were held and what was said.

[12] A disciplinary process followed and as a result Mr Wycliff was dismissed. Mr Wycliff says that his dismissal was unjustified.

[13] He seeks lost wages for the period that he was out of work which was about four weeks in the sum of $5,400 together with lost remuneration after that date to recognise that he was remunerated at a lower rate in his new position by about $900 per fortnight. Mr Wycliff also seeks an award of compensation and an award for costs.

[14] Fonterra say that the actions of Mr Wycliff amount to serious misconduct in that he irreparably damaged Fonterra's trust by placing the bag on the packing line and then mislead it as to why he had done so.

The issues for determination

[15] The Authority needs to determine the following issues in this case:

• What were the reasons for Mr Wycliff's dismissal?

• What provisions in the employment agreement and other material documents were relied on?

• Was there a full and fair investigation undertaken by Fonterra in accordance with s 103A of the Act from which there could be a finding of serious misconduct on the part of Mr Wycliff?

• Could a fair and reasonable employer have dismissed Mr Wycliff?

• If the dismissal was unjustified then what remedy should be awarded and are there issues of contribution?

The reasons for Mr Wycliff's dismissal

[16] Mr Aynsley made the decision to dismiss Mr Wycliff. He had been in the process manager role for a relatively short time at the date of Mr Wycliff's termination but had been employed by Fonterra since October 2008.

[17] Mr Aynsley concluded serious misconduct in respect of two of the three allegations put to Mr Wycliff throughout the disciplinary process. The third allegation was an alternative to the second allegation and as the second allegation was found to be proven he was not required to make a finding in respect of the third allegation.

[18] The first allegation found to be proven and serious misconduct was that Mr Wycliff had intentionally placed a competitors bag on the packing line that resulted in a widespread escalation across the business, had the potential to impact the reputation of Fonterra and could have impacted on the ongoing relationship with Fonterra's bag supplier.

[19] The second allegation found to be proven and serious misconduct was that there was a fundamental change to Mr Wycliff's version of events and therefore it was found that Mr Wycliff had lied about the reason for placing the bag on the line.

Provisions in the employment agreement and other material documents to the employment relationship relied on

The Employment Agreement

[20] Mr Wycliff was party to an individual employment agreement with Fonterra. His individual terms were contained in a letter dated 23 September 2014 effective from

3 September 2014. The remaining terms and conditions were expressed in the

23 September 2014 document to be those contained in the Fonterra Dairy Workers Collective Agreement 2013-2015 but only to the extent "that they are applicable to you as a dairy worker on an IEA/non-union member."

[21] There was a variation to the individual employment agreement in a document dated

14 December 2015 which was signed by Mr Wycliff on 26 January 2016. Amongst other matters in the variation clause 15.12 from the collective agreement was set out. It provided about food safety:

Food Safety and Environmental Requirements (clause 15.12 of the CEA)

The Company is committed to maintaining the highest standards of food safety and food quality to ensure that we always produce safe, quality food products for our customers and consumers. You are required to be familiar with and to comply with all aspects of the Company's food quality system. This includes the applicable food safety, quality and food regulatory requirements as well as the Company's food safety and food quality policies, standards, rules, procedures, directions and recommendations in force from time to time that apply to your role.

Conduct and Behaviour Standard (NZ and Australia)

[22] This document contains examples of serious misconduct.

[23] Fonterra relied on a breach that there were wilful and deliberate acts affecting food safety and quality.

[24] Another breach relied on was content in the Way We Work-Code of Business Conduct specific to the Fonterra values and associated behaviours. I will turn to that document now.

The Way We Work – Code of Business Conduct

[25] This is a document that set out the purpose and values of Fonterra and how they guide actions and behaviour in the workplace. Fonterra's purpose is to want to be the world's most trusted source of dairy nutrition. To "do what's right" features prominently in the document.

[26] In the letter of termination dated 11 January 2017 there was reference to the following values:

• Do what's right – speak openly and honestly

• Make it happen – step up take accountability

• Do what's right – treat others as I would expect to be treated

• Co-operative spirit – form lasting partnerships

• Do what's right – promote our reputation and honour our heritage

• Challenge boundaries – look at the future through customers' eyes

Was there a fair investigation undertaken by Fonterra in accordance with s 103A from which there could be a finding of serious misconduct?

What does the test of justification in s 103A of the Act require?

[27] When the Authority is asked to consider the justification of a dismissal or action it is required to apply the justification test in s 103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Fonterra and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[28] The Authority must consider the four procedural fairness factors set out in s 103A (3) of the Act. These are whether the allegations against Mr Wycliff were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether his explanations were considered genuinely by Fonterra before dismissal. Other factors may be taken into account as appropriate and the Authority must not determine an action or a dismissal to be unjustified solely because the defects in the process were minor and did not result in the employee being treated unfairly.

[29] A fair and reasonable employer could be expected to comply with the obligations of good faith as set out in s 4 of the Act.

The process

[30] The process commenced with a letter dated 6 December 2016 from Mr Aynsley to Mr Wycliff. The letter invited Mr Wycliff to an investigation meeting to respond to an allegation that he intentionally placed a competitors bag on the packing line and told Mr Fay, his team leader, on the afternoon of the incident that he had done so to "give the team the heebee geebees."

[31] It was stated that Mr Wycliff's actions had resulted in a widespread escalation across the business and had the potential to impact the reputation that Fonterra had with its customers and the future relationship with its bag supplier. The letter stated that if proven the conduct was of serious concern for six main reasons including that the actions were a potential breach of Fonterra's values. Another matter although not an allegation was the way Mr Wycliff interacted with colleagues and specifically one who I shall call T. Relevant documents were attached to the letter. These included a screen shot of Mr Wycliff placing the bag on the line, extracts from the documents referred to above, email communication between Mr Wycliff and T and a log entry of an earlier discussion between Mr Wycliff and Mr Fay. There was an escalation email attached as a result of the incident and an email that confirmed the potential outcome if Fonterra product was sent to a customer in a competitors bag.

[32] Mr Wycliff was advised of the place and time of the meeting and that it may result in disciplinary action being taken against Mr Wycliff up to and including dismissal. The letter made it clear that Mr Aynsley was the decision-maker. Mr Wycliff was encouraged to bring a support person or union representative to the meeting. Mr Aynsley also advised that he would

have the plant manager, Carl Shrimpton attending the meeting with him in order to take notes and provide support on the process to Mr Aynsley. The letter provided that Mr Wycliff would receive a copy of the notes to comment on.

[33] Mr Wycliff attended the first investigation meeting on 14 December 2016 with his representative Diamond Lill. Mr Aynsley attended with Mr Shrimpton.

Explanation given at the first disciplinary meeting 14 December 2016

[34] Mr Wycliff accepted that he had placed the competitors bag on the line. He explained that he had done this to test the response of the team and whether they were diligent and observant of a foreign bag coming in. He also set out that he wished to test the equipment to see if it was possible a competitors bag could enter and go out through palletising.

[35] Mr Wycliff explained that he proceeded to line three, stopped the conveyor and placed the bag on the conveyor then he had restarted the de-stacker. In doing so he bypassed the de- stacker. He explained that he ran to the window with tablet and radio to observe the bag coming through to the bag flattener and turned the metal detector on which stopped the line. He observed the reaction of the crew and it was 20 to 30 seconds before the crew realised the line had stopped.

[36] Mr Wycliff gave the names of the two crew operators although he could not confirm if anything was said on the radio but he signalled with his hands to pull the bag off which he observed was taken off. His representative explained that it was not done to harm the reputation of Fonterra.

The de-stacker

[37] Mr Shrimpton asked at the meeting about the point of control being the de-stacker camera recognition being bypassed by Mr Wycliff placing the bag on the conveyor belt.

[38] Mr Wycliff's response was that the de-stacker may not pick the bag up and that he was aware that bags could be stuck

together. There was some discussion about this.

Controls for a test

[39] There was some discussion about the appropriate controls for a test and that Mr Wycliff should have spoken to the team leader and plant/process manager. The response was that Mr Wycliff had been co-operative and honest and there was no danger that the bag was "past this." I have taken that to mean that the bag was monitored by Mr Wycliff and did not proceed to be pelleted with Fonterra bags at the end of the line.

What was said to Mr Fay

[40] There was a question asked about why Mr Wycliff had not mentioned to Mr Fay that he was doing it to test the team. Mr Wycliff said that he did not recall the discussion [with Mr Fay] but "believed it was not why & straight away I said it was me but don't remember the discussion word by word."

Meeting ends

[41] Mr Aynsley explained that he was not expecting an explanation that Mr Wycliff had been conducting a test because that was not what Mr Fay had advised him. He ended the meeting to consider what had been said and wanted to give some thought to whether Mr Wycliff should be suspended while the matter was being investigated.

Suspension

[42] In a letter dated 15 December 2015 Mr Aynsley wrote to Mr Wycliff and proposed that he was considering suspending him while the matter was being investigated. A time was set for a meeting to hear Mr Wycliff's view before a decision as to the suspension was made. Mr Wycliff explained at a meeting on 15 December to discuss the proposal for suspension that he didn't believe it was necessary because of the fact the bag was placed on the line for a test and that Mr Wycliff maintained control over the bag for the whole time.

[43] Mr Aynsley advised by letter dated 16 December 2016 that he had considered the comments but had decided in the circumstances suspension was appropriate because of the information that had come to his attention during the investigation meeting on 14 December

2016. He wrote that he had lost trust and confidence in Mr Wycliff's ability to make good

decisions and demonstrate sound judgement in his leadership role. Mr Wycliff was thereafter suspended on full pay.

Invitation to a second disciplinary investigation meeting and additional allegation

[44] By letter dated 21 December 2016 Mr Wycliff was invited to a second disciplinary meeting. There was an additional allegation that there was a fundamental change to Mr Wycliff's version of events and therefore it was alleged that he had lied during the investigation meeting on 14 December 2016. It was set out that on 28 November Mr Wycliff had told Mr Fay was that he put the competitors bag on the packing line to give them the "heebee geebees" and that on 29 November he told Mr Fay that putting the bag on the line was "stupid" and he "shouldn't have done it".

[45] An alternative allegation was put that if in fact the events were true and Mr Wycliff was conducting a test then there was a lack of judgement in conducting an unauthorised test with no controls in place and without authorised approval. It was set out why the conduct was of serious concern and reference was made again to the Fonterra values.

[46] Mr Wycliff was provided with the meeting minutes from the first investigation meeting and a statement from Mr Fay as to the nature of the discussions he said occurred on

28 and 29 November 2016 with Mr Wycliff. Mr Wycliff was invited to a second disciplinary meeting and advised that the meeting may result in disciplinary action up to and including dismissal. There was advice that Mr Shrimpton would also be attending the meeting again.

Second disciplinary investigation meeting 29 December 2016

[47] Mr Wycliff attended again with his representative and Mr Aynsley with the Depot

Manager Shane Taylor.

Explanation to the changed allegations

[48] Mr Wycliff and his representative denied he changed his story and disputed the dates on Mr Fay's statement and the detail. There was mention that Mr Wycliff and Mr Fay did not see "eye to eye." Mr Wycliff said that when he attended the usual morning meeting he knew of the escalation but Mr Aynsley concluded Mr Wycliff could not explain why he did

not tell Mr Fay at that time about the test. There was considerable discussion about the nature of the test, plans to communicate about it and discussions with Mr Fay.

Further investigations

[49] Mr Aynsley again spoke to Mr Fay about his recollection of events and asked him about Mr Wycliff's comments on his statement. Mr Fay confirmed to Mr Aynsley that he was completely sure his statement was an accurate account of his discussions with Mr Wycliff and although Mr Wycliff had made some comments about issues in his relationship with Mr Fay, Mr Fay said that he did believe there were any such issues.

Proposed sanction letter 30 December 2016

[50] On 30 December 2016 Mr Aynsley wrote a full letter to Mr Wycliff setting out Mr Wycliff's explanations, recording his findings that allegations 1 and 2 were proven and proposing dismissal as an appropriate sanction. A meeting was proposed for a response to the findings and the proposal to dismiss.

Decision to dismiss meeting 6 January 2017

[51] On 6 January 2017 there was a meeting with Mr Wycliff, his partner and his representatives including a union official. There were a number of points raised by Mr Wycliff and his representatives about why Mr Wycliff should not be dismissed. Mr Aynsley concluded that the actions were so serious he was unable to trust Mr Wycliff and he made the decision to dismiss recording the reasons for that in a letter dated 11 January

2017.

Conclusion about full and fair investigation

[52] Mr Kersjes accepts in his submission that the process was a thorough one but says that

there was "apparent pre-determination."

Pre-determination

Emails shut down

[53] There was an issue raised about Mr Wycliff's email access being shut down two days

before he received the letter advising of dismissal. Mr Aynsley explained that turning off the

email system access only took place after he had considered comments from the proposed sanction meeting and at a time when the dismissal letter was about to be sent. I am not satisfied that there was pre-determination given the timing of the removal of access to the email system.

Suspension letter

[54] I have considered amongst other matters the wording in the suspension letter dated

16 December 2016. That letter provides that as a result of the information from the investigation meeting on 14 December 2016 Mr Aynsley had lost trust and confidence in Mr Wycliff to make good decisions and demonstrate sound judgement in his leadership role.

[55] There was a concern at that stage after the first disciplinary meeting that Mr Wycliff was potentially not telling the truth about a test because it seemed to Mr Aynsley to be generally implausible.

[56] After Mr Wycliff was suspended there was a further invitation to a second investigation meeting. The allegations were expanded to include that there was a fundamental change to Mr Wycliff's version of events to what he told Mr Fay and alternatively, if there was the conducting of a test, there was lack of judgement with no controls in place and without authorised approvals.

[57] Mr Wycliff was given an opportunity to be heard about the allegations/concerns that were clearly put by Mr Aynsley. He was represented throughout the process.

[58] Objectively assessed whilst the suspension letter may at first glance suggest some level of pre-determination the subsequent questioning and further investigation undertaken including about the explanation that Mr Wycliff was undertaking a test do not objectively assessed support a closed mind which denied Mr Wycliff an opportunity for a fair hearing.

Was there adequate investigation of the phrase "heebee geebees" and whether there was in

fact a test?

[59] I have considered whether there was a failure to investigate the meaning of "heebee geebees". I accept that objectively assessed the phrase to give them the "heebee geebees" may not be inconsistent with a subsequent explanation of a test. Had that been the only

discussion about which a record was provided during the disciplinary process then further and more targeted investigation could be necessary before reaching a conclusion that there was a changed explanation for the conduct. The second discussion that Mr Fay said occurred on

29 November is however more clearly inconsistent with a test because it records Mr Wycliff agreeing that he should not have put the competitors bag on the line and that it was stupid.

[60] That record of the second discussion from Mr Fay was put as well as the first "heebee geebees" discussion to Mr Wycliff with the allegation that there had been a fundamental change to his version of events in the letter dated 21 December 2016. A fair and reasonable employer could consider the two statements together appeared on their face to be inconsistent with the subsequent explanation of a test. Fairness in those circumstances required an opportunity for Mr Wycliff to be provided with the record of the discussions Mr Fay said he had with Mr Wycliff and an opportunity to explain. That occurred.

Could a fair and reasonable employer have preferred Mr Fay's recollection of two

discussions he had with Mr Wycliff?

[61] Mr Wycliff disputed in the second disciplinary meeting the dates on the written statement of Mr Fay and the detail in the statements and said that there was some animosity between him and Mr Fay. Mr Aynsley agreed to further investigate the concerns with Mr Fay's statement and about the relationship.

[62] In his letter to Mr Wycliff of 30 December 2016 in which Mr Aynsley proposed the disciplinary outcome of termination he set out that he had further investigated concerns about the accuracy of Mr Fay's statement. He confirmed in his oral evidence that he spoke again with Mr Fay. Mr Aynsley wrote in his letter that Mr Fay had re-confirmed that he is "100% sure of the statement as a true account of the two discussions he had with Mr Wycliff." He further wrote that Mr Fay did not believe there was any issue with the relationship with Mr Wycliff other than he had to set clear expectations of his performance as a leader in packing. Further investigation with Mr Fay about the content of his statement about the two conversations and about the relationship between Mr Fay and Mr Wycliff was the action of a fair and reasonable employer. Mr Aynsley concluded in his letter about this matter that he had no reason to believe that Mr Fay's statement about what was discussed was not true.

[63] Mr Piper submits correctly that an employer is entitled to prefer one person's version

of events over another where there is conflict. There has to be a reasonable basis for doing so

– *Ritchies Transport Holdings Ltd v Merennage.*1

[64] Mr Wycliff agreed that there was a discussion on 28 November 2016 with Mr Fay but he disagreed with Mr Fay's written account on 28 and 29 November 2016 and disputed the dates of the conversations. The only clear reason advanced as to why Mr Aynsley could not prefer Mr Fay's account was that Mr Wycliff and Mr Fay did not see "eye to eye." There was no elaboration about why that was so. Mr Fay did not accept when questioned by Mr Aynsley there were any issues in the relationship with Mr Wycliff.

[65] Mr Fay had spoken to Mr Wycliff as recorded in the plant discussion log 2016/17 C shift on 7 November 2016. That entry referred to Mr Fay talking to Mr Wycliff about leader standards in packing and asking him to do three things. These were to always wear his safety glasses, not to chew gum in packing and always use a permit for unplanned mechanical work. Mr Fay, it is set out in the plant discussion log, explained that as a leader in packing it is not acceptable to not follow the rules and the record shows that Mr Wycliff agreed and said that this was a reasonable instruction. A copy of that entry was attached to the letter of

6 December 2016 inviting Mr Wycliff to the first disciplinary meeting. Whilst recognising there can be some discomfort with such a discussion it was not the sort of matter which on its own assessed objectively supports the relationship was difficult.

[66] I find that a fair and reasonable employer could have preferred Mr Fay's record about the discussions on the day of the incident and the day after the incident over Mr Wycliff's. I find that for the following reasons.

[67] Mr Fay's recollection of the discussions were clear including times and the area where the discussions took place. At the Authority investigation meeting Mr Fay said in evidence that he had taken a note after each conversation. A fair and reasonable employer could conclude Mr Fay had a particular interest in understanding what had occurred with the bag and on that basis he would have listened carefully to what was said. Mr Wycliff however

could not recall the nature or timing of the discussions.

1 *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198; [2015] ERNZ 361 at [108]

[68] There was no good reason advanced why Mr Fay would simply fabricate the nature of discussions that he had with Mr Wycliff about a matter. It was directly put to Mr Wycliff at the second disciplinary meeting whether Mr Wycliff considered Mr Fay had lied. The answer was "No, but it was only a short discussion about the bag".

[69] Mr Fay in his oral evidence said that when Mr Wycliff said that placing the bag on the line was "stupid" and that "he should not have done it" he thought Mr Wycliff was being quite frank. The record of the discussion on 29 November 2016 also refers to discussion about the email sent to another employee T. It records that Mr Wycliff disagreed that the email to T was unacceptable and said amongst other matters that T should not tell him what to do. The record provided Mr Fay told Mr Wycliff that both matters were being investigated by management and they would be in touch in due course. That part of the record is in fact consistent with what then occurred and on that basis could fairly and reasonably be considered reliable.

Could a fair and reasonable employer conclude that there was a fundamental change to

Mr Wycliff's version of events when he said that he was conducting a test?

[70] I have found that a fair and reasonable employer could have preferred Mr Fay's recollection of discussions that he says he had with Mr Wycliff on 28 and 29 November 2016. What Mr Fay was told or not told by Mr Wycliff about his actions when both discussions are considered together does not support the undertaking of a test. This is strengthened by the questions during the disciplinary process in assessing whether there was a fundamental change to the version of events.

[71] Mr Wycliff was asked during the disciplinary process about whether he was aware of the escalation when he came into the 7am team meeting on 28 November 2016 shortly after the bag was pulled off the line. He answered in the second disciplinary meeting that he was not 100% sure if it was escalated but that he knew Mr Fay knew about it [the bag]. He was asked why he did not tell Mr Fay it was just a test but replied that "honestly he did not know". He was asked why he did not tell Mr Fay when he spoke to him later on 28 November that he had been undertaking a test and as set out earlier answered about the discussion "believe it was not why." A fair and reasonable employer could have concluded that both those occasions when Mr Wycliff clearly agreed he had either awareness about Mr Fay's knowledge of the bag or agreed a discussion took place were times a clear explanation about a

test could be expected if indeed that was what was being conducted. The absence of such an explanation at that point could fairly and reasonably support a change to the version of events.

[72] On a broader basis a fair and reasonable employer with knowledge of the process could conclude carrying out a test by bypassing the de-stacker which acts as a safety control and placing a competitors bag on the line without alerting anyone to the plan did not make sense. Significantly in terms of testing the team's reaction the evidence is that whilst spot checks are carried out at various points in the process staff do not stand by the line and check every bag because they come through too fast. About 40,000 bags are put through in a day. The team also take breaks away from the line relying on a tablet to let them know of any faults. Mr Aynsley explained that the process is run as a "lights out" operation with fully automated processes where bags are unloaded, filled with powder and put on pallets and wrapped.

Was further investigation with the team members required?

[73] Initially there was a suggestion from Mr Wycliff that two of his team be spoken to about whether the placement of the bag on the packing line had caused them stress. That matter was overtaken by the expanded allegations and findings were not made about this aspect so I do not find that the failure to talk to those two team members as part of the investigation caused unfairness.

[74] In conclusion I find that the process adopted by Fonterra to investigate the incident where a competitors bag was placed on the packing line on 28 November 2016 was full and fair and what a fair and reasonable employer could have done in all the circumstances. It satisfied the requirement of s 103A (3) of the Act. I now turn to consider whether the investigation disclosed serious misconduct on the part of Mr Wycliff.

Did the full and fair investigation disclose serious misconduct?

Intentionally placing a competitors bag on the line

[75] Mr Wycliff accepted he had intentionally placed a competitors bag on the line. Mr Kersjes submits that Mr Wycliff had no knowledge by doing so that he was breaking a rule and that he could not and did not know that his action was misconduct. Mr Piper submits that it is not possible to have rules or standard operating procedures (SOP) for all "rogue

employee actions". I accept that there cannot be a rule against all behaviours that could possibly occur. The focus where there is no clear rule needs to be on the conduct itself informed by the circumstances. The circumstances can include whether the action was done deliberately in the knowledge it was wrong or whether there was some room for

misunderstanding.2

[76] A fair and reasonable employer could conclude that Mr Wycliff had knowledge of the importance of food safety and quality to Fonterra and the mission statement of Fonterra "to be the most trusted source of dairy nutrition." The importance of following rules had been emphasised by Mr Fay on 7 November 2016 as set out above.

[77] I find that a fair and reasonable employer could conclude that someone of Mr Wycliff's experience in the position of L6 charge hand would know that bypassing the de- stacker control and intentionally placing a competitors bag directly on the line is not in accordance with Fonterra's expectations and therefore is wrong. That is because only Fonterra bags are allowed on the packing line to stop the risk of customers receiving the product in a competitors bag. Whilst Mr Wycliff continued to maintain that he was carrying out a test I accept that a fair and reasonable employer could conclude that explanation simply did not make sense and was not consistent with an earlier explanation given at the time to Mr Fay.

[78] Mr Kersjes submits that one of the breaches found to constitute serious misconduct of wilful and deliberate acts affecting food safety and quality was conceded by Mr Aysnley under cross examination not to have been breached. I accept Mr Kersjes submission about that.

[79] During the disciplinary process however there was no level of misunderstanding about what the concern was in that regard. It was clear that the concern was about the potential quality risk if a customer received Fonterra product in a competitors bag and there was also a potential regulatory issue with the Ministry of Primary Industries. The word quality was highlighted in the correspondence during the disciplinary process when that part of the standard was referred to as a potential breach. That potential risk does not fit neatly into the

wording in the standards document but I do not find that is sufficient to vitiate a conclusion

2 *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 at [81]

that Mr Wycliff's action in placing a competitors bag on the line could be viewed as serious misconduct.

[80] A breach of Fonterra's values was also relied on to support a finding of serious misconduct. Whilst Mr Kersjes submits that there was no breach of the values I find that the action of placing a competitors bag on the line and bypassing the de-stacker could be found by a fair and reasonable employer to breach values such as "do what's right."

[81] Mr Kersjes submits that the action did not result in widespread escalation across the business. I accept escalation was able to be stopped before it had an impact to the reputation of Fonterra and its relationship with its bag supplier but before that occurred there was an escalation from Mr Fay to Mr Aynsley and then to the plant and site management, regional scheduling management and the senior vendor management. Objectively assessed that was reasonably widespread. Questions were asked of the automation team about the de-stacker. A fair and reasonable employer could conclude that whilst Mr Wycliff said he maintained control over the bag it was not to the extent to prevent an internal escalation.

[82] Mr Kersjes has referred to Mr Maitland's email and submits that it refers to a loss of confidence in the supplier rather than internal Fonterra systems. At that stage however there was no knowledge that Mr Wycliff had taken one of the 14 competitors bags from the place where they were stored and deliberately bypassed the de-stacker to place it on the line. It was understandable in those circumstances that the focus fell on the supplier rather than an internal system issue.

[83] Mr Kersjes submits that a team leader could reasonably undertake such an action and that it was minor and in line with his control and experience. The evidence supported that Mr Wycliff could have conducted minor trouble shooting of potentially faulty machinery but that did not extend to bypassing a safeguard which provides quality control. Mr Fay explained that testing systems would require him to be notified as well as obtaining approval from the Plant Manager. He said that there would have been considerable work to then make sure all risks were covered and approval to undertake the test may not have been granted given the potential risks. A fair and reasonable employer could conclude that deliberately placing a competitors bag on the line is not something that Fonterra would anticipate or expect from someone in Mr Wycliff's position. The evidence supported there were SOP's for all but the most minor trouble shooting.

[84] I find that a fair and reasonable employer could conclude that the action of placing a competitors bag on the line constituted serious misconduct. It is an action not in accordance with the mission statement of Fonterra and the focus on food safety and quality.

Fundamental change to version of events and conclusion of dishonesty

[85] Mr Wycliff explained his action during the disciplinary process of placing the competitors bag on the packing line as a legitimate test. That objectively assessed was fairly and reasonably concluded by Mr Aynsley to be an implausible explanation. I have found that a fair and reasonable employer could prefer Mr Fay's record of discussions he had with Mr Wycliff on 28 and 29 November 2016 and the record of discussions on both days assessed together does not support the reason for placing a bag on the line was for a test.

[86] Mr Piper referred the Authority to the Court of Appeal judgment in *George v Auckland Council.* 3 The Court of Appeal held in that case in agreement with the conclusions reached by the Employment Court that an employer may seek to rely on the untruthfulness of an employee in his or her response to other allegations of misconduct. It was also observed that differences in recollection or inconsistencies were not in themselves sufficient to support a finding the employee had lied and that an employee may honestly and mistakenly have a

different recollection of events. It was held that in order to establish that the employee has

lied there must be proof of a deliberate untruth on the employee's part.

[87] Mr Wycliff maintained that Mr Fay's recollection of the discussions were incorrect whilst also being unsure of matters that may have given some level of credibility to his explanation about a test. For example he was unsure when he was going to report his findings and why he did not tell Mr Fay when there was an obvious opportunity to do so that he was undertaking a test.

[88] Objectively assessed I find that it was open to a fair and reasonable employer to conclude that Mr Wycliff's version of events as to why he had placed the bag on the line had changed from what he had told Mr Fay. A concern about his truthfulness was put together

with the statement from Mr Fay clearly and in a fair way.

3 *George v Auckland Council* [2014] NZCA 209 at [35]

[89] The placement of a competitors bag on the packing line was a serious matter and Fonterra was entitled to expect that Mr Wycliff in his charge hand role would be open and straightforward about why he had undertaken the action. Objectively assessed a fair and reasonable employer could have concluded Mr Wycliff was deliberately not straightforward in his responses and find serious misconduct in that respect.

Could a fair and reasonable employer have made the decision to dismiss?

[90] I have found that Fonterra carried out a full and fair investigation into the two allegations that satisfied the requirements of s 103A (3) of the Act. As a result of the investigation conduct was disclosed that a fair and reasonable employer could regard as serious misconduct. Mr Wycliff had an opportunity to comment on the proposed termination of his employment and his representatives made extensive submissions about why he should retain his employment.

[91] Mr Aynsley said that he took into account Mr Wycliff's eight years' service and that he had no previous disciplinary matters but concluded that Mr Wycliff's actions were so serious so as to erode the necessary trust that Fonterra must have in him. Mr Aynsley said that he needed to have trust in Mr Wycliff because of his role but was unable to accept that Mr Wycliff was straight with him.

[92] I find that in all the circumstances dismissal was within the range of reasonable responses available to Fonterra. A fair and reasonable employer could have dismissed Mr Wycliff.

[93] Mr Wycliff's dismissal was justified.

Costs

[94] I reserve the issue of costs. Agreement may be able to be reached failing which Mr Piper has until 12 April 2018 to lodge and serve submissions as to costs and Mr Kersjes has until 26 April 2018 to lodge and serve submissions in response.

Helen Doyle

Member of the Employment Relations Authority