**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2013] Auckland NZERA 230
5415550 and 5415553

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| | BETWEEN | HENRY TAUFUA<br>Applicant |
| | A N D | FONTERRA BRANDS (NEW ZEALAND) LIMITED<br>Respondent |
| | BETWEEN | CRAIG FLYNN<br>Applicant |
| | A N D | FONTERRA BRANDS (NEW ZEALAND) LIMITED<br>Respondent |
| Member of Authority: | T G Tetitaha | |
| Representatives: | H White, Counsel for Applicants<br>S J Turner/S J Clark, Counsel for Respondent | |
| Investigation Meeting: | On the papers | |
| Submissions Received | 21 May 2013 from Applicant<br>20 May 2013 from Respondent | |
| Date of Determination: | 7 June 2013 | |

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## DETERMINATION OF THE AUTHORITY

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**Orders/Directions**

**A**. **Pursuant to an undertaking as to damages, an order for the interim reinstatement of Mr Taufua and Mr Flynn to their jobs with Fonterra until the hearing of the personal grievances.**

**B. A direction for a teleconference to be convened for timetabling evidence and setting down a fixture date.**

**C. Costs are reserved**.

**Employment relationship problem**

[1] The applicants, Henry Taufua and Craig Flynn, were employed by Fonterra Brands (New Zealand) Limited, as a packer and robot operator and filling machine operator respectively.

[2] Both applicants were dismissed after Fonterra discovered two videos uploaded to YouTube. The videos showed the applicants and other employees re-enacting their own version of the "Harlem Shake" internet memo at the Fonterra plant in Takanini. An internet memo is a short video where people perform a comedy sketch accompanied by a short excerpt from the song "Harlem Shake" by Baauer, an American DJ and producer.

[3] The applicants seek reinstatement. They submit their behaviour did not justify dismissal in all the circumstances and there were procedural flaws in the process of dismissal. They say reinstatement is practical and reasonable and there are no considerations against reinstatement.

[4] The respondent disagrees. It states the applicants conduct breached Fonterra's Code of Conduct and Health and Safety Policies and constituted serious misconduct. Reinstatement is not practical and reasonable because the applicants never accepted the serious nature of their actions, contributed to the situation giving rise to their dismissal and Fonterra had lost trust and confidence. It submitted damages were an adequate remedy for the applicants, but not Fonterra, and the overall justice of the case did not favour reinstatement.

**Issues**

[5] Given both matters arise out of the same set of facts the Authority has dealt with both applications within the same decision.

[6] In determining an application for interim reinstatement, the Authority must apply the law relating to interim injunctions (s 127(4)). Accordingly the following issues arise:

(a) Do the applicants have an arguable case they were unjustifiably dismissed?

(b) Do the applicants have an arguable case for reinstatement?

(c) Where does the balance of convenience lie between the parties in the period until the Authority's determination is given?

(d) Does the overall justice of the case dictate interim reinstatement of employment is appropriate?

**Do the applicants have an arguable case that they were unjustifiably dismissed?**

[7] Fonterra alleges the two videos showed health and safety breaches which constituted serious misconduct capable of summary dismissal. In regard to Mr Taufua, it submits he rode a paper trolley or pallet jack in an unsafe manner endangering himself and others and failed to report unsafe acts by other employees.[1] In regard to Mr Flynn, it submits he put himself and others at risk of harm by organising the videos', dancing with a shovel between his legs, hosing water where another employee was dancing and splashing a pallet endangering himself and others, inappropriate use of equipment and failure to report or prevent unsafe acts by other employees.[2]

[8] The unsafe acts of others refer to an employee hanging from a pipe 2.5 m from the ground, Mr Taufua riding the paper trolley in an unsafe manner, Mr Flynn hosing water on the floor where others were dancing, work equipment being used as a part of horse-play, objects thrown onto the floor and employees not wearing protective clothing such as hair nets, safety glasses, workboots and ear muffs.[3]

[9] Two videos have been produced as attachments to the statement in reply (SIR). The first video (Attachment SIR–E) shows one employee (A) dancing in a stationery position by wiggling, pointing and clapping his hands. Mr Flynn is hosing water into a square steel tray which is running onto the floor near A's feet. Four employees are standing around. Mr Taufua moves across the screen with a paper trolley. The video then cuts to a scene where the water has been removed and the six employees, including both applicants, are dancing around. Mr Taufua is standing upon a pallet jack or paper trolley moving towards the camera waving his hand above

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1 Affidavit C R Rooks sworn 18 April 2013 at para 69

2 Affidavit C R Rooks sworn 18 April 2013 at para 92; Statement in reply (SIR) para 2.39 and attachment SIR-M

3 Affidavit C R Rooks sworn 18 April 2013 at para 24

his head like a lasso. Objects are thrown at him, causing him to lean to one side and the trolley to tip then right itself. One employee appears to be hanging from the roof at the top right hand corner.

[10] The second video (Attachment SIR–F) shows one employee (A) standing by a pallet doing 'the robot', a street dance style made popular by Michael Jackson which imitates a dancing robot. The video then cuts to a scene where Mr Flynn and A are dancing around the pallet. Mr Flynn has a shovel between his legs. Both videos are 30 seconds in length.

[11] It is accepted the applicants were dismissed. The burden of justifying the dismissal lies with the employer.[4] At an interim stage, it is difficult for an employer to assert there is no arguable case.[5] Conflicts of evidence cannot be resolved at an interim hearing on the papers.

[12] An arguable case is "a case with some serious or arguable, but not necessarily certain, prospects of success."[6] Serious misconduct *will generally involve deliberate action inimical to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*[7]

[13] The kind of conduct that will justify summary dismissal is a matter of fact and degree. What is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.[8]

[14] The parties' employment relationship was governed by the New Zealand Dairyworkers Union Collective Employment Agreement 2010-2013 (collective agreement). Failure to use protective clothing may constitute serious misconduct (clause 9.5(i). Horseplay, or unauthorised irresponsible use, or unauthorised removal of fire protection or safety equipment may lead to dismissal (clause 9.1.1(d).

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4 Section 103A

5 *Ansley v P and O Services (NZ) Ltd* (Unreported Employment Court, 3 June 1998, WC 34/98) at p2

6 *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, 872-3.

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

8 *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) at 487.

[15] Fonterra's discipline and dismissal policy (SIR – D) sets out two categories of serious misconduct and less serious misconduct. Fonterra asserts this behaviour falls within the first category of serious misconduct, namely:[9]

- Endangering the health, safety and/or wellbeing of Employees and members of the public;
- Wilful and deliberate acts affecting quality and safety;
- Failure to comply with safety procedures, policies or rules, or working or acting in an unsafe manner, including failure to report accidents, personal injury or damage;
- Dishonesty: Unauthorised possession, use, removal, interference or deliberate damage to goods or property belonging to Fonterra, a fellow employee, contractor or customer/client.

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

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

***Failure to wear Protective Clothing***

[17] Hairnets are not specified in the collective agreement as protective clothing. Hairnets are worn to prevent contamination of the product[10] presumably by keeping hair out of the way. Fonterra asserts Mr Taufua confirmed to them he *did not wear a hairnet as required.*[11] This is contradicted by the video (SIR – E). It shows Mr Taufua and Mr Flynn wearing hairnets. All employees are initially shown wearing

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9 Attachment SIR – G, SIR
10 Affidavit C R Rooks, sworn 18 April 2013 at para 27.
11 Affidavit C R Rooks, sworn 18 April 2013 at para 45.5.

hairnets and other headgear. In the second part of the video, with the exception of two employees with a blue bucket and yellow bucket on their heads, all employees appear to be wearing hairnets or head gear. It is arguable any requirement to wear protective clothing such as hairnets was met by the applicants.

[18] Protective clothing is to be worn *"as required"* (clause 9.5(i). This contemplates situations where it may not be required. All employees in the video can be seen wearing safety glasses or headgear fitted with safety shields (except the two bucket wearers above) and workboots. They are not wearing ear muffs but this would only arise in areas with high noise levels. This does not appear to be the case in the videos. It is arguable the protective clothing requirements have been met.

***Horseplay***

[19] Horse-play, even resulting in physical contact, may not justify dismissal in circumstances where management over-reacted and it was not the type of assault or incident contemplated by the staff manual.[12]

[20] It is arguable clause 9.1.1(d) reference to 'horseplay' is in reference to the misuse of fire protection or safety equipment, not horseplay generally. There is no evidence the equipment used or damaged in these videos' was fire protection or safety equipment.

***Serious Misconduct***

[21] There is no evidence of accident, injury or damage to property. At best there is an allegation of the potential for damage, injury or accident. Whether the applicants' actions endangered the health, safety and/or wellbeing of employees as contemplated by the collective agreement and discipline and dismissal policy is disputed. This is a matter for determination at substantive hearing.

[22] None of the employees knew what they were going to do in advance. Everyone did their own thing.[13] It is arguable the behaviour may be less than wilful or deliberate action as a consequence.

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12 *New Zealand (with exceptions) Shop Employees and Related Trades RUOW v Woolworths (New Zealand) Limited* [1984] ACJ 37

13 Affidavit C R Rooks, sworn 18 April 2013 at para 54.

[23] The collective agreement requires reporting of damage to plant and equipment and work related accidents or near misses (clause 9.1.1(c) and(f). It is arguable there is no obligation to report any of the alleged unsafe acts unless they fall within clause 9. Fonterra's discipline and dismissal policy (SIR – D) implies reporting is required for "accidents, personal injury or damage". No plant and equipment was damaged, personal injury, work related accidents or near misses occurred in the making of the videos. It is arguable there was no positive obligation to report the conduct upon the videos as a result.

***Less Serious Misconduct***

[24] The second category of less serious misconduct contemplates *"less serious breaches of those policies referred to above where abuse of the standard is considered serious misconduct"* shall be dealt with differently by Fonterra. It is arguable the applicants' behaviour falls within the second category of less serious misconduct. It is also arguable it does not warrant dismissal because that requires repeated infringements and application of the disciplinary procedure possibly in the form of previous warnings etc. There do not appear to have been repeated infringements in the form of previous disciplinary action against these applicants.[14] The fact two videos were made does not necessarily fall within the definition of repeated incidents within the policy justifying dismissal.

[25] The disciplinary procedures in the collective agreement set out a process of warnings prior to dismissal occurring (clause 11.6). If this was less serious misconduct without repeated infringement it may still warrant disciplinary action in the form of warnings. There is no evidence the decision maker considered this alternative.[15] Whether a fair and reasonable employer would have dismissed these applicants as opposed to the alternative of warnings is a matter for hearing.

***Disparity***

[26] Three of the six employees investigated were dismissed. There is no evidence regarding the outcomes for at least two of the three remaining employees. It is

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14 The Applicant submits this was a one off incident and the applicants had good records. This infers no prior infringements.

15 Affidavit C R Rooks sworn 18 April 2013 at para 77 to 79 and para 90 to 92 under the heading decision to dismiss makes no reference to consideration of alternatives to dismissal.

inferred they have retained their employment. The basis for any disparity is not evidenced and is a matter for substantive hearing.

[27] Having regard to the above matters, the Authority determines there is an arguable case.

**Do the applicants have an arguable case for reinstatement?**

[28] Fonterra resists reinstatement. It submits it is no longer the primary remedy, the applicants have contributed to the situation by their conduct and reinstatement is not reasonable or practicable.

[29] Reinstatement is no longer the primary remedy for an unjustified disadvantage or dismissal,[16] but may still be ordered where it is *"practicable and reasonable"* to do so[17].

[30] The respondent's authorities[18] had contribution involving actual injury and potential for much more serious injury. Contribution by these applicants gives rise to the possibility of injury or damage only. Their individual actions do not seem factually similar to the facts alleged in the respondent's authorities. Hosing an area of floor then cleaning the water up prior to employees dancing around indicates preventative steps to ensure employee safety. Falling or tipping the paper trolley may have resulted in minimal (if any) injury or damage or none at all. Neither of the applicants conduct necessarily had the potential for the serious injury contemplated in the respondent's authorities. While contribution is a factor to be taken into account in reducing remedies, these facts would not necessarily bar permanent reinstatement.

[31] Fonterra submits a lack of remorse and/or doubts the applicants' credibility regarding their remorse about the conduct.[19] Mr Flynn gave a statement apologising for his conduct[20] and Mr Taufua apologised in an email,[21] both prior to dismissal. There is a conflict of evidence. Resolving conflicts and credibility cannot be determined on the papers. That is a matter for substantive hearing.

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16 *Angus & McKean v Ports of Auckland* [2011] NZEmpC 160 at [61]
17 Section 125(2) of the Act and see above at [62]
18 *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40
19 Affidavit C R Rooks sworn 18 April 2013 at para 90
20 Statement C Flynn Attachment CRR 16, Affidavit C R Rooks, sworn 18 April 2013
21 Email H Taufua, Attachment CRR 12, Affidavit C R Rooks, sworn 18 April 2013

[32] There is a matter regarding the impact upon third parties of reinstatement which is dealt with below. No other matters have been raised to prevent permanent reinstatement.

[33] The Authority determines there is an arguable case for reinstatement.

**Where does the balance of convenience lie between the parties in the period until the Authority's determination is given?**

[34] Fonterra submits it has lost trust and confidence due to doubts about the applicants' judgment given the health and safety breaches, damages are an adequate remedy for the applicants but not Fonterra and the detrimental effect upon work colleagues of reinstatement.

[35] Prior to the video incident, there was no evidence of concerns about the applicants' performance or conduct. There was no evidence of previous health and safety breaches. There is no other dysfunctional behaviour or incidents which would give rise to concerns about judgment. The concerns which give rise to the loss of trust and confidence are solely based upon the video incident currently before the Authority. Whether those concerns are justified can only be determined at substantive hearing.

[36] Damages would not necessarily be an adequate remedy for the applicants. Both Mr Taufua and Mr Flynn applied unsuccessfully for jobs and depose to immediate financial hardship for their families and themselves. Both applicants are the principal earners in their respective households. The loss of their income would create financial hardship in the interim until hearing.

[37] The alleged detrimental effect upon employees of reinstatement and Fonterra's credibility upon health and safety is speculative, and insufficient to weigh the balance of convenience in its favour. It is also dependent upon the findings of fact regarding health and safety risk at substantive hearing.

[38] Any concerns can also be met by garden leave.

[39] Early substantive hearing dates are available in July, August and September 2013. Given the availability of Counsel and witnesses is unknown, this factor does not favour either party.

[40] The Authority determines the balance of convenience favours the applicants.

**Does the overall justice of the case dictate interim reinstatement of employment is appropriate?**

[41] Fonterra submits the applicants have alternative remedies available, there is no evidence the applicants shall be prejudiced and there are 'admitted contributions'.

[42] These matters were dealt with above. The Authority determines the overall justice of the case dictates interim reinstatement is appropriate.

[43] Given the above determinations, the Authority makes the following orders/directions:

A. Pursuant to an undertaking as to damages, an order for the interim reinstatement of applicants to their jobs with Fonterra until the hearing of the personal grievances.

B. A direction for a teleconference to be convened for timetabling evidence and setting down a fixture date.

C. Costs are reserved.

**T G Tetitaha**
**Member of the Employment Relations Authority**