



[3] Mr Waite says he was disadvantaged by Fonterra's actions in arranging a meeting to discuss the text message and then changing the purpose of the meeting to discuss the incident with Ms Beck. He also says there were delays to the investigation while he was suspended and Fonterra did not communicate with him in good faith about the delays. Finally, Mr Waite says his dismissal was not substantively justified or procedurally fair and reasonable.

[4] Fonterra says it was justified in holding a meeting to discuss the incident, and there were no unjustifiable delays to the investigation process. Mr Waite's behaviour was unacceptable, and it was open to a fair and reasonable employer to conclude his actions constituted serious misconduct and the most appropriate outcome was summary dismissal.

### **The Authority's investigation**

[5] Written witness statements were lodged from Mr Waite and four witnesses from Fonterra: Christina Beck, Process Manager; Catherine Lang, Principal Cheese Technologist; Jim Fryer, Site Manager; and Justine Pearce, Director Supply Chain and Operations. All witnesses attended the Investigation Meeting and answered questions from me under oath or affirmation.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

### **Issues**

[7] The issues the Authority is to investigate and determine are:

- (a) Whether Mr Waite was unjustifiably disadvantaged by the arranging of, and conduct in, the meeting of 8 February 2022.
- (b) Whether Mr Waite was unjustifiably disadvantaged by the length of his suspension period.
- (c) Whether Mr Waite was unjustifiably dismissed from his employment on 6 May 2022, in that there was no substantive justification for his dismissal, and Fonterra failed to follow a fair and reasonable process, or

whether the Fonterra's decision to dismiss Mr Waite for serious misconduct was justified.

- (d) If Mr Waite was unjustifiably disadvantaged in his employment, whether he should be awarded compensation under s 123(1)(c) of the Act.
- (e) If Mr Waite was unjustifiably dismissed from his employment, whether he should be awarded:
  - (i) Reimbursement of 3 months' lost wages under s 123(1)(b) of the Act (subject to mitigation of loss).
  - (ii) Loss of monetary benefits under s 123(1)(c)(ii) – superannuation fund.
  - (iii) Compensation under s 123(1)(c) of the Act.
- (f) If Mr Waite is provided remedies, whether they should be reduced on the basis of any contributing behaviour by him.
- (g) Costs and disbursements.

### **Relevant background**

[8] Steve Waite started working for Fonterra in 1995 and at the time of his dismissal, had been employed by Fonterra for 27 years. Mr Waite reported to Christina Beck and they shared an office. Previously Mr Waite and Ms Beck had worked together as team leads or line leads, but after a restructuring Ms Beck's role became a manager's role.

#### *Text message*

[9] On Monday 31 January 2022 Mr Waite called into work sick with vomiting and diarrhoea. On the same day, five other employees who were rostered on to the same production line were also away sick. Ms Beck suspected the absences were not genuine because she had previously heard employees on the floor planning a day off to disrupt production. Mr Waite's absence was particularly critical because he was the back-up control room operator. If there was no control room operator, production would be severely impacted. Ms Beck informed her two-up manager Jim Fryer about the issue of employees being off sick to cause disruption. Mr Fryer escalated the issue to Fonterra's employment relations (ER) team.

[10] ER gave Ms Beck content for a text message to send to the absent employees to understand why they were unable to attend work. She sent the following to Mr Waite in a text message:

I am concerned that you were unable to attend your rostered shift today. We have experienced a high degree of unplanned absence from your shift group today. This does give us cause for concern in light of some information the company has, suggesting that this may have been pre-planned. Should you attend work tomorrow as scheduled then I am prepared to take your absence today at face value. I am interested to know more about what has impacted your ability to attend work today and will discuss this with you on your return to work tomorrow as is our normal practice.

[11] The message goes on to say a medical certificate may be required and if not provided, Fonterra will treat the period of absence as unauthorised and it will be unpaid, and disciplinary action may follow. Ms Beck added to the text she sent Mr Waite:

This is a generic message sent to all staff who were not at work today as advised by ER. As you had rung in with a message you had diarrhoea due to stress I realise you won't be back in tomorrow as you need 48 hours clear before returning to work but you will still be required to provide a med cert for your absence as stated above at the company's expense. Thanks.

[12] Mr Waite was upset about the text message because he was genuinely sick and he felt that was being questioned and he was not sure who "ER" was. Mr Waite responded to Ms Beck the message was another example of bullying and victimisation within Fonterra, and he would be adding the message to his "case file of bullying in the workplace". Ms Beck was unsure how to deal with the messages and responses she was receiving from Mr Waite, so she escalated the matter to her manager. Ms Beck told Mr Waite that Mr Fryer would be the right person to answer any questions he had because the text was confidential.

[13] Mr Waite took Tuesday 1 February 2022 off on sick leave and then from 2 to 4 February, he was away from work on rostered days off. On 4 February, Ms Beck sent Mr Waite a text saying a meeting would be arranged with Mr Fryer to discuss the absence of many of the line staff on 31 January 2022. Monday 7 February 2022 was Waitangi Day, so it was not until Tuesday 8 February 2022 that Mr Waite returned to work.

#### *Incident*

[14] By the time Mr Waite returned to work on 8 February, Fonterra had decided to pay all the absent employees for their time away from work and did not require

Mr Waite to provide a medical certificate for his two days off sick. Ms Beck had confirmed this with Mr Waite in a text message. She asked whether Mr Waite wanted someone to talk to about his stress such as the Employee Assistance Programme (EAP). Mr Waite's messages in response suggested he was just happy to be paid, and Ms Beck thought Mr Waite's issues with the text message had been resolved.

[15] However, when Mr Waite arrived at the office he was still upset about the text message on 31 January 2022 and felt his questions had not been answered. He started a discussion with Ms Beck in their shared office about the text message, and specifically wanted to know who had "formatted" the text message.

[16] The conversation became heated. Ms Beck felt the discussion was escalating because Mr Waite was not getting the answers he wanted and he would not let up on her about who had written the message and why only some of the absent employees had been sent the message. Ms Beck told Mr Waite it was ER who wrote the content, but she was responsible as the manager for sending the message. Ms Beck felt the conversation was not going anywhere and Mr Waite was "fixated" on finding out who specifically wrote the text message. She told Mr Waite he needed to raise the issue with Mr Fryer. There was frustration on both sides, and Mr Waite and Ms Beck both raised their voices. Ms Beck was swearing. Mr Waite reported Ms Beck was standing next to him while he was sitting down and she seemed angry and agitated. The conversation ended when Ms Beck swore, and left the office, slamming the door.

[17] Ms Beck had previously had other conflict discussions with Mr Waite but they always resolved without escalation. Mr Waite's demeanour and tone made her feel extremely bullied and intimidated that day. Ms Beck reported being emotional, upset and crying. She had a gutsful and could not put up with it any more. Mr Waite did not see Ms Beck crying in front of him, and said he never shouted at her.

[18] After she left their office, Ms Beck called a fellow manager, Catherine Lang. There were no other managers on shift at the time. Ms Lang was surprised to get a phone call from Ms Beck early in the morning. She recalls Ms Beck was sobbing on the phone and saying she had had enough of Mr Waite and Mr Waite had talked about "taking someone down" which she took to mean a disruption of production or services, or possibly a strike. Ms Beck told Ms Lang with everything going on in the division with staff she did not feel like she could carry on working with Mr Waite. Ms Lang

advised Ms Beck to go to Ms Lang's office and said she would talk to Mr Fryer for Ms Beck.

[19] After talking to Ms Lang at length and then having a debrief with two managers, Ms Beck returned to the office she shared with Mr Waite. Mr Waite was still in the office, and although she did not expect him to be there, Ms Beck apologised for her part in the incident and said they would not talk about it again at that time. Ms Beck said she felt anxious. There was a lot of tension and it was awkward working with Mr Waite, but there was no other office down on the production floor for her to work from.

[20] Mr Waite said it did not cross his mind Ms Beck was that upset, and they carried on with a normal workday.

### *Initial Meeting*

[21] When Mr Fryer arrived at the office, Ms Lang spoke to him almost immediately about what had happened between Mr Waite and Ms Beck. Ms Beck set up a meeting for later that day with Mr Waite and Mr Fryer. Mr Waite was in the control room when Ms Beck rang and told him a meeting had been organised for 11:00 am but delayed until 2:30 pm and it would be with Mr Fryer. Mr Waite thought the meeting would be to discuss the 31 January 2022 text message, as that is what Ms Beck had told him on 4 February before he returned to work.

[22] Mr Fryer decided given the serious event, his responsibility for Ms Beck's welfare trumped the issue about the 31 January text message. At the meeting that afternoon, Mr Fryer wanted to discuss the incident between Mr Waite and Ms Beck. Mr Waite however, was focused on the 31 January text message, asking questions about what evidence the text was based on, and why it was only sent to three out of five absent employees. Mr Fryer attempted to explain the purpose of the meeting to Mr Waite, but Mr Waite talked over him and kept returning to the text message. Mr Waite felt the meeting morphed from its original purpose of answering his questions about the text, into an investigation meeting about the incident between himself and Ms Beck. Mr Fryer shut the meeting down, and asked to reconvene the next day on 9 February. Mr Waite was invited to provide his questions about the 31 January text message in writing. Mr Fryer did not allow Mr Waite to record the meeting and no notes were taken.

### *Suspension meeting*

[23] Mr Fryer asked Ms Lang to deliver a letter to Mr Waite entitled: “Meeting to Discuss Proposed Suspension”. The letter referred to Fonterra’s concern around Mr Waite’s alleged aggressive behaviour towards Ms Beck. Mr Fryer said Fonterra needed to conduct further investigations into the concerns to determine what happened and whether any additional action was needed. Mr Waite says he had been told he had to attend the meeting or he would be physically removed from the site.

[24] Mr Fryer wanted to move forward by obtaining information from Mr Waite to balance against the information he already had from Ms Beck and Ms Lang. He wanted to know the basic facts of what had happened, whether voices were raised, and what the conversation was about to get a full of picture of what had happened in the room. Mr Fryer said he tried to raise the behaviour with Mr Waite, but they could not have a conversation. He indicated he was considering putting Mr Waite on paid suspension but wanted to hear from Mr Waite before doing so. Mr Waite was encouraged to bring a representative or support person to the meeting.

[25] Mr Fryer held a meeting with Mr Waite and his union representative on 9 February. Ms Lang attended to take notes. The meeting was brief. Mr Fryer decided Fonterra needed to investigate the incident and suspending Mr Waite would be necessary to maintain the security and safety of the individuals involved including Ms Beck and others, and the fairness and integrity of the investigation. Effectively, Mr Fryer had not had a sufficient response from Mr Waite about the incident and he felt suspending Mr Waite would allow Fonterra to investigate and determine whether it was appropriate for Mr Waite to return to work. Suspension would remove any influence on witnesses and keep the process “clean”. At that point, Mr Fryer still only had Ms Beck’s and Ms Lang’s perspectives on what had happened, and Mr Waite’s alleged behaviour concerned him. Mr Fryer decided to suspend Mr Waite on full pay so he was not financially disadvantaged by the suspension and he told Mr Waite this at the meeting. Mr Waite said he never had an opportunity to speak or defend himself. After the meeting finished, everyone stood up. The union delegate asked Mr Fryer how long the process would take. Mr Fryer reminded everyone he was going on pre-planned leave. Ms Lang heard this, but Mr Waite and his representative deny hearing it.

[26] Mr Waite’s confirmation of suspension letter was delivered to his home by courier days later. From the time Mr Waite was suspended, everything was handled by

the union who liaised with Fonterra. The union delegate was at work and passing on messages to the union organiser including additional statements taken as part of the investigation.

[27] On 8 March 2022 Mr Waite raised a personal grievance for unjustified disadvantage over the length of his suspension. On 3 May 2022 Mr Waite raised a personal grievance relating to the meeting on 8 February saying he had been misled or deceived about the true nature of the meeting.

### **The law - unjustified disadvantages**

[28] For his disadvantage claims to succeed, Mr Waite must establish that one or more conditions of his employment was affected to his disadvantage by an unjustified action by Fonterra.<sup>1</sup> This means I need to determine whether Mr Waite suffered a disadvantage in his employment, and – if so – whether this was caused by an action by Fonterra and whether that action was unjustified.

[29] Fonterra's actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

#### *Disadvantage in relation to the 8 February 2022 meeting*

[30] Mr Waite says Fonterra misrepresented the purpose of the meeting on 8 February, and it consequently misled or deceived him which was a breach of Fonterra's good faith obligation to inform and advise. He had understood the meeting was to discuss the 31 January 2022 text message, not the incident with Ms Beck. Mr Waite says it is clear from the events that followed, the meeting was the first step in a disciplinary process, and he should have been given a chance to prepare including involving the union.

[31] Fonterra says the meeting was arranged by Ms Beck on Mr Fryer's behalf and conducted in good faith. Even if Mr Waite had understood the meeting was to discuss the text message, its purpose was usurped by Mr Fryer's need to discuss the incident. The meeting was informal, was not disciplinary, and there was no disadvantage to Mr Waite.

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<sup>1</sup> ANZ National Bank Ltd v Doidge [2005] ERNZ 518 (EmpC).

[32] Based on the evidence before the Authority, I find there may have been miscommunication and misunderstanding about the purpose of the meeting, but there was no disadvantage to Mr Waite, and no deliberate misrepresentation or intent to mislead or deceive on Fonterra's part. Once Mr Fryer realised Mr Waite was not at the meeting on the same understanding as he was, he acted promptly and appropriately to close the meeting down. Mr Fryer also gave Mr Waite the opportunity to provide his questions about the text message in writing – an offer which Mr Waite declined to take up. In the circumstances, I accept it was reasonable for discussion of the incident to take priority over a discussion about the origin of the text message.

[33] I conclude that Fonterra did not breach its obligation of good faith, there was no disadvantage to Mr Waite, and Fonterra acted as a fair and reasonable employer. Mr Waite's claim of unjustifiable disadvantage in relation to the 8 February 2022 meeting does not succeed.

*Disadvantage in relation to Mr Waite's suspension*

[34] On 8 March 2022, Mr Waite raised a personal grievance in relation to the length of his suspension from 9 February 2022. He claimed the length of his suspension was both excessive and punitive. In particular, Mr Waite says he was not advised of Mr Fryer's annual leave and communication from Fonterra did not start until 11 March 2022, almost two weeks after Mr Fryer's return. Mr Waite says this demonstrates Fonterra failed in its good faith obligations to be responsive and communicative and not to mislead or deceive him in relation to the effectiveness and timeliness of its process.

[35] There is a dispute in the evidence, because Mr Fryer says he did tell Mr Waite he would be on annual leave at the end of the suspension meeting and this was overheard by Ms Lang who was at the meeting to take notes. Based on the evidence before the Authority, I am unable to reach a firm conclusion about whether Fonterra advised Mr Waite of Mr Fryer's leave but I find it more likely than not Mr Fryer did mention this at the close of the meeting. I also accept in the circumstances Mr Waite and his representative did not hear what was said and consequently did not raise any concerns at the time. Mr Fryer's leave was not recorded in the meeting minutes or Ms Lang's notes, but given the company's view the delay would not be excessive, I find it unremarkable this was not noted in any written record.

[36] As part of the unjustifiable disadvantage claim, Mr Waite says delays in the investigation while he was suspended were breaches of Fonterra's obligation of good faith. Mr Waite says the delay disadvantaged him because he felt in limbo. However, while a delay in an investigation can amount to a disadvantage, Fonterra's actions were not unjustifiable. Fonterra had determined Mr Fryer was the appropriate person to conduct the investigation and disciplinary process as he had the appropriate seniority, as well as independence from the parties involved. Mr Fryer's leave was pre-scheduled, and only for a period of two weeks. The decision to wait for his return to resume the investigation was not unreasonable. This is especially so because during Mr Fryer's leave, Fonterra took some steps to progress the investigation such as finalising the meeting notes, and receiving statements from witnesses. Based on the evidence before the Authority, Mr Waite's feeling of being in limbo was - at least in part – attributable to a lack of communication from his union representatives rather than to Fonterra. Mr Waite was on full pay throughout his suspension and there was no financial disadvantage to him.

[37] I conclude Fonterra did not breach its obligation of good faith in relation to the length of Mr Waite's suspension, and its actions in waiting for Mr Fryer's return to progress the investigation were fair and reasonable. Mr Waite's claim of unjustifiable disadvantage does not succeed.

### **The law – unjustifiable dismissal**

[38] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether Fonterra's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[39] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment.<sup>2</sup>

[40] I need to assess whether the decision Ms Pearce made on Fonterra's behalf to summarily dismiss Mr Waite for serious misconduct, and how Ms Pearce reached that

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<sup>2</sup> Section 4(1A) of the Act.

decision were what a fair and reasonable employer could have done in all the circumstances at the time including whether:

- (a) Fonterra fully and fairly investigated the allegations against Mr Waite before dismissing him;
- (b) Fonterra raised the concerns it had with Mr Waite (including giving him relevant information) before dismissing him;
- (c) Fonterra gave Mr Waite a reasonable opportunity to respond to its concerns before dismissing him;
- (d) Fonterra genuinely considered Mr Waite's explanations before dismissing him (the decision was made without predetermination).

[41] The Authority must not find a dismissal to be unjustifiable solely because of minor defects that did not result in the employee being treated unfairly.<sup>3</sup> While adequate consideration of alternatives to dismissal are not one of the specific statutory factors to consider, evidence that an employer has fully considered alternatives to dismissal will support that the substantive decision to terminate was fair and reasonable.

*Relevant background to the dismissal*

[42] On 11 March 2022, Mr Waite was invited to a meeting the following week to discuss Fonterra's concerns that he had exhibited aggressive behaviour towards Ms Beck on 8 February 2022, and in particular that he raised his voice and shouted at her in a threatening and aggressive manner. Fonterra advised Mr Waite that his conduct, if proven, was of serious concern because it may be in breach of Fonterra's Conduct and Behaviour Standard and contrary to its values.

[43] At the meeting on 18 March 2022, Mr Waite admitted to raising his voice during the incident, but said Ms Beck was also raising her voice. He admitted the conversation was heated but says it was Ms Beck who was swearing and agitated. Mr Waite said following the incident he texted Ms Beck to come back to their office, she apologised, and they worked together. Mr Waite also sent a letter following the meeting responding to the allegations and the witness statements in which he said it was Ms Beck who pushed the issue and displayed aggressive and intimidating behaviour. Following the

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<sup>3</sup> Section 103A(5) of the Act.

meeting, Mr Waite presented a written statement on 20 March 2022, which Fonterra responded to on 24 March 2022.

[44] On 13 April 2022 a member of Fonterra's ER team responded to Mr Waite. He told Mr Waite Fonterra did not accept Ms Beck had displayed aggressive and intimidating behaviour, and it was Ms Beck who felt threatened and had to remove herself from the situation, reporting this to Ms Lang and then Mr Fryer. Fonterra said Ms Beck and Ms Lang provided broadly similar accounts of the situation, and it did not accept those accounts were inconsistent. Further statements from Ms Lang and Ms Beck in response to Mr Waite's statement were provided, along with brief statements from two Fonterra workers who had been in the vicinity at the time of the incident. In Ms Beck's statement, she said she had apologised to Mr Waite for her part in the incident, and told him it would not be spoken about again until the meeting later in the day with Mr Fryer. Ms Beck stated both parties needed to take ownership of their behaviour and actions.

[45] Also on 13 April 2022, in response to a request from Mr Waite, Mr Fryer stepped aside as the decision-maker and a director based at a different site - Justine Pearce – was appointed the decision-maker and took over the investigation. Ms Pearce received advice and background information and support from ER at Fonterra. Ms Pearce read all the materials and spoke to Mr Fryer to order events and sequence the process. Ms Pearce also spoke to Ms Beck and Ms Lang to ask them whether they were comfortable with the statements they had provided or whether there was anything else she should know. Concurrently, ER was dealing with and responding to the personal grievances being raised by Mr Waite. Mr Waite was invited to a further meeting, or to provide submissions in writing.

[46] On 19 April 2022, Mr Waite responded in writing to Fonterra's letter via his lawyer which included a proposal for a discussion between Ms Beck and Mr Waite as a way to move forward.

[47] On 26 April 2022, Ms Pearce wrote to Mr Waite with a "Proposed sanction". She presented the concern about Mr Waite's exhibition of aggressive behaviour towards his manager Ms Beck, in particular raising his voice and shouting at her in a threatening and aggressive manner. Ms Pearce noted Ms Beck felt threatened and intimidated as a result and immediately left the area and raised her concerns with a colleague and then Mr Fryer.

[48] Key amongst Ms Pearce's findings were she considered it more likely than not Mr Waite spoke to Ms Beck in an aggressive and intimidatory manner and Ms Beck was significantly impacted by the exchange. Ms Pearce said she considered Mr Waite's behaviour to be "entirely inappropriate" and his continuing to press Ms Beck on the subject of the text message led to the escalating situation that turned into a heated debate and Ms Beck having to remove herself.

[49] Ms Pearce found Mr Waite's actions amount to breaches of the Conduct and Behaviour Standard, obligations under his employment agreement, and Fonterra's organisational values, specifically:

- (a) The Conduct and Behaviour Standard (NZ and Australia): endangering the health, safety and/or wellbeing of employees.
- (b) The Collective Employment Agreement at 7.1.1 health and safety obligations which require employees not to undermine the health and safety of any other person.
- (c) Values – do what's right and cooperative spirit.

[50] Ms Pearce concluded Mr Waite's actions constituted serious misconduct. Ms Pearce acknowledged Mr Waite may have been frustrated, but said that was no excuse for aggressive behaviour towards others at work, which is entirely unacceptable behaviour in the workplace. Further, it is essential Fonterra staff are able to work in a safe environment where they are not threatened or subject to unreasonable intimidation. As Mr Waite had not demonstrated any accountability for the interaction and his contribution to the escalation, Ms Pearce expressed her concerns he had no awareness or insight into how his conduct impacted on others in the workplace, nor that he respected another individual's boundaries. That impacted her level of trust Mr Waite would not engage in this type of behaviour again. Ms Pearce advised Mr Waite as his actions constitute serious misconduct, she proposed to terminate his employment without notice.

[51] Mr Waite responded to the proposed sanction in writing on 3 May 2022. He disagreed with the basis for the findings, being the severity of the incident on 8 February 2022.

[52] On 6 May 2022, Ms Pearce confirmed her decision to terminate Mr Waite's employment on the basis of serious misconduct. Ms Pearce concluded Mr Waite's

conduct was of such a serious nature it undermined the necessary trust and confidence Fonterra needed to have in him as an employee. Ms Pearce advised Mr Waite it was critical Fonterra could trust he would not engage in aggressive or intimidatory behaviour again towards anyone in the workplace and she concluded she could not trust that, given the nature of the conduct and Mr Waite's responses throughout the disciplinary process.

[53] Ms Pearce stated Mr Waite had not disputed the proposed sanction of termination, and had made comments suggesting he was supportive of the outcome. Ms Pearce said she had considered a lesser sanction but given the lack of trust and confidence Fonterra now had in Mr Waite, the most appropriate option was termination without notice.

## **Analysis**

### *Procedure*

[54] Mr Waite says the incident did not happen in the way Fonterra says it did. Mr Waite denies he acted in a threatening, aggressive or intimidating manner towards Ms Beck, and says it was unreasonable for Fonterra to conclude that he had. He says Fonterra did not investigate the allegation in an objective manner and come to an objective conclusion, but instead took a subjective approach focusing on Ms Beck and ignoring him. Fonterra accepted Ms Beck's account as more credible, and they should not have because it was based on her subjective view, and there were inconsistencies in her statements. Mr Waite says even if Fonterra accepted the incident happened as Ms Beck had said, his actions did not amount to serious misconduct. And even if his actions were serious misconduct, they did not justify summary dismissal.

[55] Fonterra says it raised its concerns with Mr Waite and provided all information to him. It sufficiently investigated the incident and gave Mr Waite the opportunity to respond. It genuinely considered Mr Waite's responses including obtaining a number of further statements, offering meetings and changing decision makers at his request. Mr Waite's requests for extensions of time were accommodated and there was sufficient time to give due respect to the process. In terms of procedure, Ms Pearce did not believe Fonterra could have done more.

[56] Fonterra submits a single incident or breach of company policy can justify a summary dismissal. In doing so, it relies on the case of *Fuiava v Air New Zealand*<sup>4</sup> in which an employee was dismissed for serious misconduct for making a false declaration that a package did not contain dangerous goods when he arranged for a parcel to be sent as air cargo to Samoa.

[57] Based on the evidence before the Authority, I find Fonterra did not sufficiently investigate the incident. The key reason Fonterra relied on for its decision to dismiss Mr Waite was the seriousness of Mr Waite's alleged behaviour in the one-off incident and in particular, its impact on Ms Beck. It concluded Mr Waite presented a real health and safety risk to Ms Beck, others at the worksite and potentially even other employees at other worksites, to justify its decision to dismiss.

[58] Mr Waite denies any wrongdoing, and his view persisted before the Authority. However, unlike the case of *Fuiava*, this was not a simple matter of Fonterra assessing whether the alleged behaviour had happened, but rather in the full contextual circumstances whether the behaviour reached the level of serious misconduct and presented such a serious breach of its rules and policies that summary dismissal was justifiable. This required full and careful investigation into the incident to identify the severity of the alleged threatening or intimidating behaviour and whether it was likely to be repeated. Ms Beck's actions at the time also needed scrutiny, given Ms Beck and Mr Waite were the only direct witnesses to the incident and given Fonterra relied heavily on the impact on Ms Beck to justify its decisions. I find Fonterra's investigation was insufficient for the following reasons.

[59] Firstly, both parties admitted to raising their voices during the incident. While Ms Beck's behaviour does not excuse Mr Waite's, there was unchallenged evidence before the Authority there was mutual frustration and anger. It is relevant, in my assessment, Ms Beck later returned to the office and apologised to Mr Waite for her part in the incident. At the investigation meeting, I was advised there was a disciplinary outcome for Ms Beck. There is some force to Mr Waite's argument Ms Beck's return to the office, her decision to continue to work in the office when she knew he was there, and the discussions they had during the afternoon were inconsistent with the view later expressed by Fonterra that he had been aggressive and intimidating, and Ms Beck felt threatened and bullied. I prefer Ms Beck's evidence given at the investigation meeting

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<sup>4</sup> [2006] 1 ERNZ 806.

she felt more “anxious” about returning to the office because of the tension and awkwardness, than threatened or intimidated by Mr Waite.

[60] Given Fonterra’s view of the immediate impact of the incident on Ms Beck, it is also inconsistent that Fonterra permitted Ms Beck to return to the shared office after she had raised the incident with the company through Ms Lang, her own Manager and Mr Fryer. I find Mr Waite’s alleged behaviour - which was later categorised as aggressive and intimidatory to the level of undermining or endangering Ms Beck’s health, safety and wellbeing - became exaggerated by Fonterra throughout the process. One example of this is the allegation Mr Waite “shouted” at Ms Beck which persisted through the proposed sanction and confirmation of dismissal letters. Although Ms Pearce said there was no significance to Fonterra’s use of the word “shouting” in that it did not have a different meaning to raised voices, or heated discussion, this overlooks the allegation of shouting was one-sided, whereas “raised voices” and “heated discussion” implied participation by both parties. There were no witnesses to the heated exchange. Mr Waite consistently denied he shouted at Ms Beck, and I find the allegation he did so was objectively unsupportable on the evidence gathered by Fonterra.

[61] Based on the evidence before the Authority, Fonterra did not sufficiently investigate the context of Ms Beck and Mr Waite’s long work history and friendship, which included working through conflicts in the past. There was a singular focus on the 8 February incident which also excluded proper investigation of the catalyst for the incident being the text message threatening disciplinary action for Mr Waite’s absence from work, which Fonterra effectively resiled from.

[62] Secondly, throughout the investigate and disciplinary process, Fonterra was not fully transparent in raising the concerns it had with Mr Waite by giving him all relevant information. While Ms Pearce impressed as a diligent and fact-based decision maker, she told the Authority she had had follow-up discussions with Ms Beck, Ms Lang and Mr Fryer on site that were not documented or provided to Mr Waite to enable him to respond. They should have been - particularly because Mr Waite had been suspended and excluded from the worksite partly in order to keep the process “clean” and therefore he did not have the same (even incidental) access to the decision-maker as Ms Beck, Ms Lang and Mr Fryer did. I accept Ms Pearce’s evidence Mr Waite declined the two opportunities she offered to speak to her in person because he preferred to provide

statements and information in writing. However, the fact that discussions were had on site and not shared with Mr Waite – particularly between Ms Pearce and Mr Fryer who was of the view that Mr Waite’s conduct was serious misconduct - may have unfairly resulted in Ms Beck, Ms Lang and Mr Fryer having more influence over the process and eventual outcome than Mr Waite did.

[63] It logically follows that although Fonterra gave Mr Waite reasonable opportunities to respond to its concerns, it has not persuaded me all of Fonterra’s genuine concerns were fairly and reasonably put to Mr Waite. These defects were more than minor technical matters. I find Fonterra did not sufficiently investigate the allegations, nor did it fully and fairly raise the concerns it had with Mr Waite before dismissing him.

*Substantive justification*

[64] Mr Waite says a warning would have been an appropriate outcome for the alleged behaviour which was a one-off incident involving a heated discussion with no direct or physical threat. He feels Fonterra exaggerated his part in the incident – including by using the word “shouting” - to support a predetermined dismissal outcome that was inevitable following from his suspension.

[65] Fonterra said it was justified in summarily dismissing Mr Waite, irrespective of whether Mr Waite’s conduct was wilful and regardless of his length of service and clean employment record. Ms Beck said she felt extremely intimidated by Mr Waite, and his demeanour was threatening and aggressive. Ms Pearce also did not accept Mr Waite was unaware of the impact he had on Ms Beck at the time, because he agreed to stay out of their shared office and Ms Beck blocked his messages. Fonterra says there was no demonstration of accountability by Mr Waite. There was a lack of awareness or insight into his conduct and Fonterra had no assurance there would not be a repeat incident. Fonterra says alternatives were considered, but the significance of Mr Waite’s conduct presented a risk to others.

[66] Based on the evidence before the Authority, I am not persuaded there was a genuine consideration of alternatives to dismissal by Fonterra. Instead, Fonterra decided Mr Waite presented an unacceptable risk to the health, safety and wellbeing of Ms Beck and other staff and then closed its mind to whether there were options other than summary dismissal. One example of this is that Mr Waite raised the possibility of

a meeting between himself and Ms Beck shortly after Ms Pearce took over as the decision-maker. Ms Beck had attended the preliminary discussion about the incident with Mr Waite and Mr Fryer and there was nothing to suggest to Fonterra she would not have been open to a meeting. However, Fonterra did not consider or advance the proposal put forward by Mr Waite. A fair and reasonable employer could have considered a mediated discussion between Mr Waite and Ms Beck as a way to address the impact on her and assist them both to move forward with working together.

[67] Fonterra also determined there was a “health and safety risk that would present at other plants or worksites”. Ms Pearce said given the significance of the conduct, Mr Waite’s unwillingness to engage directly, and Fonterra’s obligations to all staff under its care, it would not have been appropriate to redeploy or relocate Mr Waite to another worksite. However, I conclude the perceived health and safety risk of a repeat incident due to Mr Waite’s refusal to assume responsibility for the incident, assumed greater significance in the decision to dismiss than was reasonable in the circumstances. This is because Fonterra’s conclusions were based on the single incident of 8 February and Mr Waite’s response to it, which – as I have found above – was not sufficiently investigated. There was no evidence of previous issues, and there was no pattern of behaviour. Based on the evidence before the Authority, there was no reliable information on which a fair and reasonable employer could rely to support the view that Mr Waite presented an ongoing health and safety risk to Ms Beck or to others more generally.

[68] I accept Fonterra did not deliberately pre-determine the appropriate outcome at the start of the investigative or disciplinary process, but the lack of an open mind is evident from the failure to fully consider alternatives to summary dismissal that objectively should have been considered. I conclude in all the circumstances, Fonterra did not act as a fair and reasonable employer could, and Mr Waite was unjustifiably dismissed.

### **Remedies – personal grievance**

[69] I have found Mr Waite’s dismissal to be unjustifiable and he is therefore entitled to an assessment of remedies.

[70] Mr Waite seeks:

- (a) Compensation under s 123(1)(c) of the Act.

- (b) Reimbursement of 3 months' lost wages under s 123(1)(b) of the Act (subject to mitigation of loss).
- (c) Loss of monetary benefits under s 123(1)(c)(ii) – superannuation fund.

### *Compensation*

[71] Mr Waite seeks an award of compensation for his unjustifiable dismissal claim under section 123(1)(c)(i) of the Act.

[72] Fonterra says there is a paucity of evidence regarding impact, and Mr Waite's serious misconduct is so egregious no awards should be made. If awards are made, Fonterra says they should be modest and fall within band 1 of the bands set by the Employment Court<sup>5</sup> of \$0-\$12,000.

[73] Mr Waite gave evidence about the impact of his dismissal. He feels deeply scarred by the experience and great embarrassment that he has let his family down. He says he has lost the job he was planning to stay at until retirement and his job prospects are limited. Based on the evidence before the Authority, it is clear Mr Waite has many unresolved issues around his dismissal and contrary to Fonterra's submission, I find there is significant evidence of hurt, humiliation and injury to feelings. I also take into account Mr Waite's significant tenure with Fonterra of 27 years.

[74] I have considered the general range of compensation awards in other cases. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$20,000.

### *Lost remuneration*

[75] Under section 128(2) of the Act, the Authority must order the employer to pay the employee the lesser of 3 months' ordinary time remuneration, or a sum equal to the actual lost remuneration. This is the default position if the employee has lost remuneration as a result of the personal grievance. Awards of compensation are discretionary and moderation is appropriate. Section 128(2) clarifies reimbursement will normally be limited to "the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration". However, s 128(3) allows that the Authority

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<sup>5</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132, and *Richora Group Limited v Cheng* [2018] NZEmpC 132 as adjusted in *GF Comptroller of the New Zealand Customs Services* [2023] NZEmpC 101.

“in its discretion” may award a greater sum where appropriate. There is no automatic entitlement to full loss.<sup>6</sup> Whether I award more than three months’ ordinary time remuneration, and if so how much more (bearing in mind actual loss merely represents the upper award) this should be assessed based on the circumstances of the case, allowing for any contingencies that might have resulted in termination of the employee’s employment such that they would not have earned the total amount of the claimed loss.<sup>7</sup> I need to ask and answer the hypothetical question as to how the employee would have been placed in the absence of the legal wrong in issue (counter-factual analysis). Mr Waite has the onus of showing he has lost income as a result of the personal grievance, which is subject to a duty to mitigate his loss.

[76] Mr Waite says his average fortnightly earnings including long service allowance and certificate allowances were \$3,212.03 (gross). Mr Waite obtained some part-time work in the three months following his dismissal on 6 May 2022 but advised the Authority he was paid in groceries and store vouchers, totalling around \$630. Following his dismissal, Mr Waite said he was mentally not in a good place and his family lived off his superannuation fund while he supported his partner, child and his mother. He says he has a goal of full-time employment, but based on his experience with Fonterra, he is worried about whether a future employer will question if he needs time off. Mr Waite seeks reimbursement of lost wages - three months’ lost wages amounts to a total of \$19,272.18.

[77] Fonterra says Mr Waite’s actual income was \$3,201.91 (gross) per fortnight. It submits Mr Waite did not take any steps to mitigate his losses including actively looking for alternative employment in the three months following his dismissal, and in fact it was not until 2023 that he looked for employment. Fonterra said it was Mr Waite’s choice not to apply for alternative employment immediately following his dismissal because of his family commitments, and because limited part-time or casual work suited Mr Waite’s lifestyle choices at the time.

[78] Mitigation of loss in the context of awarding the remedy of reimbursement is about mitigating loss of income as a result of the personal grievance. If the employee has not acted reasonably to mitigate the extent of their loss, they have not lost remuneration as a result of the grievance, and this will be a relevant factor for the

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<sup>6</sup> *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315

<sup>7</sup> *Sam’s Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

Authority to consider when exercising its discretion to reimburse the employee for their actual loss.

[79] The case of *Maddigan v Director-General of Conservation*<sup>8</sup> bears some similarities to Mr Waite's, where the Court found:

Mr Maddigan had been summarily dismissed after a 20-year career with the defendant, in circumstances he struggled to understand and following a process which was flawed. he was negatively impact by the dismissal and it would have taken him time to find his feet. I conclude that while it is true that Mr Maddigan was inactive on the job-seeking front in the period following his dismissal, this was reasonable in the particular circumstances.

[80] Based on the evidence before the Authority, I find Mr Waite lost remuneration as a result of the personal grievance. It was reasonable in the circumstances for Mr Waite to be inactive on the job-seeking front, given his evidence he worked his way up the ladder at Fonterra over his 27 year employment with the company, and felt his job prospects were limited. It is evident he has unresolved issues about the way his employment ended. Stepping back to look at the matter objectively, I see no reason to depart from the default position of ordering three months' ordinary time remuneration. There is a small difference between Mr Waite's fortnightly pay figure and Fonterra's, and I adopt the slightly more conservative amount. The amount of lost remuneration is \$19,211.46 (gross). That is an appropriate amount, and I order that to be paid.

#### *Loss of monetary benefit*

[81] Mr Waite claims a lost contribution towards his superannuation fund under s 123(1)(c)(ii) amounting to 6% of his gross earnings. Fonterra has clarified the employer contribution was 9% including employer superannuation contribution tax. I order Fonterra to calculate and pay the employer contribution (less tax) of Mr Waite's superannuation fund for the three month period following his dismissal, to Mr Waite. If there is any dispute in the calculation of this amount, the parties may return to the Authority for further determination.

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<sup>8</sup> [2019] NZEmpC 190 at [66].

## Contribution

[82] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Waite may have acted in a way that contributed to the situation that gave rise to his grievance.<sup>9</sup>

[83] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:<sup>10</sup>

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (b) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[84] The Court also stated:<sup>11</sup>

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[85] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[86] Mr Waite says he has not contributed to his personal grievance and throughout the matter he has only asked questions which were deflected by the investigative and disciplinary process into his behaviour.

[87] Fonterra submits any award of compensation or lost wages to Mr Waite should be reduced to reflect Mr Waite's dismissal arose directly from his threatening and intimidating conduct and he showed, and continues to show, no accountability or insight for his actions.

[88] I have found Fonterra did not sufficiently investigate the incident. Mr Waite consistently denied the basis for the findings, and I find Fonterra cannot rely on his lack of insight or accountability as a contributory factor for his dismissal. Based on the evidence before the Authority, I do not ascribe any responsibility to Mr Waite for the

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<sup>9</sup> Section 124 of the Act.

<sup>10</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

<sup>11</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

personal grievance, and I do not find any evidence of contribution such that any appropriate remedies are required to be reduced.

## **Orders**

[89] I order that within 28 days of the date of this determination:

- (a) Fonterra Brands (New Zealand) Limited is to pay Steve Waite compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of \$20,000.
- (b) Fonterra Brands (New Zealand) Limited is to pay Steve Waite his actual lost wages for a period of three months following his dismissal under s123(1)(b) of the Act in the amount of \$19,211.46 (gross).
- (c) Fonterra Brands (New Zealand) Limited is to calculate and pay Steve Waite the employer contribution (less tax) of Mr Waite's superannuation fund for the three month period following his dismissal.

## **Costs**

[90] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[91] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Waite may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Fonterra will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[92] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>12</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>12</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)