IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 72
WRC 36/09

IN THE MATTER OF	de novo challenge to a determination of the Employment Relations Authority
BETWEEN	CLIVE JOHN HORTON Plaintiff
AND	FONTERRA COOPERATIVE GROUP LIMITED Defendant

Hearing: 17 March 2010
(Heard at New Plymouth)

Appearances: Greg Lloyd, counsel for plaintiff
Caroline McLorinan, counsel for defendant

Judgment: 8 June 2010

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff, Mr Horton, has challenged a determination of the Employment Relations Authority which found that his dismissal from his position as a mechanical technician with the defendant (Fonterra) on 29 May 2009 for serious misconduct was justified.

Factual findings

[2] Mr Horton was employed at Fonterra's Whareroa site in Hawera from September 1994 until his dismissal. It was not in issue that until the matter that led to his dismissal he had an exemplary work record and no form of disciplinary action was ever taken against him.

[3] Mr Horton was a member of the Amalgamated Engineering, Printing and Manufacturing Union Inc (EPMU or the Union). Prior to his dismissal he was a union delegate and his terms and conditions of employment were contained in Fonterra's Maintenance Best Practice Collective Employment Agreement October 2007-October 2009 (the collective agreement).

[4] In February 2009, Mr Horton saw some roofing iron in front of Fonterra's site which he thought might be good for a fence on his property. He claims that he knew one of the maintenance staff had taken some similar iron a year before. He contacted that person to ask about it and to obtain the name of the person from whom he had to obtain permission to remove it. He claims that that person told him that he could not remember who that person was but that he thought it was the roofing contactor.

[5] On or about 18 February, Mr Horton contacted PAE (NZ) Limited (PAE) the company contracted to provide maintenance services to Fonterra at its Whareroa site. He asked who was in charge of iron that had been removed from a cheese cool store roof. He was put through to Peter Jepsen, PAE's maintenance planner.

[6] In a later investigation meeting, held on Wednesday 20 May 2009, there is a record of what Mr Jepsen told Brian Purser, Fonterra's Maintenance Manager, and Emma Bennett, Fonterra's Human Resources Adviser on the site, concerning the removal of the iron. Comparing the record of that interview with Mr Jepsen and Mr Horton's account to Fonterra, it is common ground that Mr Horton told Mr Jepsen he wanted to take some roofing iron offsite to build a fence at his house. Mr Jepsen said he was not sure about what was to happen so he rang Jason Wills from Roofing Taranaki, who said it was dearer for them to remove it than to give it away because it was of no scrap value, so any scrap out the back was fine. Mr Jepsen told Mr Horton that they could go and look at the scrap out the back.

[7] They met together on the site to do this about a week later. Mr Jepsen had invited Nigel Nuku, a security officer for PAE, who previously had a similar role with Fonterra, to join them. Mr Jepsen saw quite a load had been taken away so he told Mr Horton to contact Stephan Tunbridge to find out what could be taken. Mr

Jepsen said it was his understanding that Mr Horton was going to see Mr Tunbridge because there were lengths of roofing iron that were not damaged but in reasonable condition. He told Mr Horton he could take them after checking this with Mr Tunbridge because Mr Jepsen could not say what was scrap and what was not. Mr Jepsen said he gave Mr Horton a "form", some four days later, from him and Mr Nuku so that Mr Horton could remove the reject roofing iron from the site.

[8] Mr Jepsen is recorded as saying when they met again on site the next day: "We were at the slip sheets by the back and we were told in no circumstances were these to be taken. He [Mr Horton] said it wasn't in the condition he wanted it anyhow. Apparently it had to be in some sort of reasonable condition for his fence".

[9] Mr Nuku was also interviewed by Mr Purser and Ms Bennett. He confirmed that he had been asked by Peter Jepsen to come over as a backup about the roofing iron when he and Mr Horton looked over the material. He referred to several piles of roofing iron which he said Mr Horton could not touch as they looked too new. That included three stacks of long sheets, two of which they looked at and which he said were too new. He said they needed confirmation on these. They had a discussion about some old ones, but Mr Horton did not want them as he said they were not long enough. Mr Nuku said they were probably the only ones he could have but that he still needed confirmation. Mr Nuku told Mr Horton that he would have to check with Roofing Taranaki with Mr Tunbridge or Mr Wills. Mr Nuku was told later by Mr Jepsen that he had signed the removal document for material to go off site and had put Mr Nuku's name on it. Mr Nuku was not happy with the procedure that had been followed but did nothing about it.

[10] It also appears to be common ground that at some point Mr Tunbridge also inspected the roofing iron with Mr Horton and they discussed what he could take. Mr Tunbridge, when interviewed by Mr Purser and Ms Bennett, said they told Mr Horton he could take off-cuts and he drew for them a map showing the two bundles that he said they told Mr Horton he could take. Mr Tunbridge is recorded as saying:

> I said there might be ones by Cameron's, some little ones, but said he had to ask Hugh Barnes and get a form before taking it off site. He would have to ask.

[11] Mr Tunbridge in the interview is recorded as saying that Mr Horton knew exactly what he could take – short pieces, off-cuts and "there are a couple of long bits in the pile I'd said okay to. They were damaged and he'd cut them down already". He is also recorded as saying that Mr Horton told him that he did not want "the old sheets that were coming off the lab". He concluded by saying "I said you just can't just take it, but you've got to speak to Hugh Barnes. Instead he went to PAE and did dodgy. I went to PAE to ask about the form and they showed me a bit of paper. I said, nah that's dodgy".

[12] Mr Horton's evidence was that Mr Tunbridge said that if Mr Horton wanted the iron from the laboratory roof he would have to contact Hugh Barnes who was the project roofing manager. Mr Horton claims that he told Mr Tunbridge that he was not interested in that iron because it looked too much like corrugated iron and his neighbouring property, a golf club, had a caveat over Mr Horton's property which prohibited the use of corrugated iron for boundary fences. He claims that they inspected another pile of roofing iron which Mr Tunbridge said was roofing iron that had been storm damaged so it could not be used for roofing any more. Mr Horton claimed that he told Mr Jepsen and Mr Nuku that he was interested in two piles, the first lot of reject roofing iron they had looked at and one from the second and asked Mr Jepsen to work out a price. He said that Mr Jepsen told him it was reject iron and it would cost more to have it removed than they would get for it if they tried to sell it. He said that Mr Jepsen told him that Mr Horton just needed to cover the cost of removal and to contact Larry Vickers from Vickers Transport to arrange that. Mr Jepsen then arranged the gate pass which was emailed to Mr Horton. The gate pass states:

> Clive Horton has been given permission to remove approx 200 meters of reject roofing iron from the Whareroa Fonterra site, these items have no scrap value and no intended purpose.
>
> If there are any problems please contact Peter Jepsen PAE maintenance planner on [phone number deleted].

[13] Mr Horton's evidence was that on 25 or 26 February he saw Mr Vickers loading up some scrap laboratory roofing iron, approached him and asked him if he would remove the reject roofing iron for him. He said that Mr Vickers replied that this would not be a problem provided Mr Horton gave him a gate pass. He claimed that he went over to where the reject roofing iron was and he pointed out three bundles that he had been given permission to take. Mr Vickers said he would deliver the iron at the end of the following day because Mr Horton's house was on the way back to Mr Vickers's depot. This would also allow Mr Horton to go to the supermarket and get some money from the bank to pay Mr Vickers before Mr Horton got home. He claimed he was not present when Mr Vickers picked up the reject roofing iron from Fonterra.

[14] In an interview Mr Vickers gave to Mr Purser and Ms Bennett on 29 May 2009 he is recorded as saying that Mr Horton was there when he had loaded the bundles.

[15] Mr Horton said he finished work at 3pm that day and had gone shopping before arriving home just before 4pm. He claimed that Mr Vickers and his co-worker, Ru Nuku, arrived at his place with three bundles of iron some time after 4pm. Mr Horton's evidence was that one of the bundles looked bigger than he recalled from what he had seen in the yard and that he pointed this out to either Mr Vickers or Mr Ru Nuku, who assured him that the three bundles delivered were the same three he had pointed out, which were the same three that Mr Jepsen had given Mr Horton permission to take. Mr Horton then paid Mr Vickers who left with Mr Ru Nuku.

[16] Mr Horton was at work for another 2 weeks before he went on annual leave on Friday 13 March 2009. On 6 March, Stuart Catling, a project manager for Fonterra, had apparently received a communication from Mr Willis of Roofing Taranaki regarding some diamond deck 630 roofing iron missing from the Fonterra site. An enquiry was commenced. While Mr Horton was still on leave, Mr Purser came to his home in early April. This was approximately 5 weeks after the iron had been delivered to Mr Horton's property. There was a discussion about the iron and Mr Purser was given permission by Mr Horton to inspect it. The following day Mr

Purser and Mr Catling went to Mr Horton's home. Mr Catling inspected the iron and confirmed it belonged to Fonterra and said it should never have left the site, especially the bundle with the steel straps. Mr Horton claims that was the bundle he had questioned either Mr Vickers or Mr Nuku about when it was delivered to his home. Mr Horton claims that when the bundle had been delivered it had a couple of off-cut pieces of iron strapped to the top so it looked like the other bundles. He claimed he had removed these off-cuts at his home a couple of days before Mr Purser's visit, but had not examined the bundle and had not registered any difference between it and the other two.

[17] A few days later Mr Vickers and his co-worker turned up at Mr Horton's property to remove the iron. Mr Horton told them not to come onto his property. Later that afternoon Mr Vickers returned with a docket from Fonterra authorising him to remove the iron. Mr Horton rang Mr Purser who told him that the iron had been removed without the correct authorisation. Mr Purser said he had arranged for it to be collected and returned. All the iron was duly returned to Fonterra.

[18] When Mr Horton returned from his leave on 4 May 2009 he received a letter requiring him to attend an investigation meeting into allegations that he had removed property belonging to Fonterra without the correct authorisation to do so. The letter warned of the seriousness of the allegation and the risk of dismissal and stated he was entitled to be represented. The meeting was later rescheduled.

[19] Mr Purser had declined the request of Mr Horton's representative, Neil Clough an EPMU delegate, to provide copies of any statements before the first investigation meeting which took place on 14 May. At that meeting Messrs Horton and Clough say they were given a copy of the statements made by Mr Jepsen and Mr Catling and was told to go away and read these. There may be some confusion for the statements they identified, (E&F), do not appear to have been taken until 20 May 2009.

[20] Another meeting was convened on 18 May at which Mr Horton confirmed that he had permission from Mr Jepsen to take the reject roofing iron and that Mr Jepsen had told him that he was the one who was authorised to give that permission.

He also said that he had offered to pay for the iron. Mr Horton produced a written account of the events.

[21] On 20 May Fonterra conducted interviews separately with Mr Jepsen, Mr Nigel Nuku, Mr Barnes and Mr Catling. On 22 May they conducted interviews separately with Mr Tunbridge, Jason Wills and Larry Vickers. Copies of all the statements were sent to Mr Horton under cover of letter of 25 May, advising him of the resumed investigation meeting. Immediately prior to this meeting Mr Purser and Ms Bennett decided that they needed to reinterview Mr Vickers. They transcribed the interview and provided a copy to Mr Horton and his representative to be read just before the meeting held on 29 May started.

[22] Mr Horton was represented at that meeting by Mr Clough and Colin Webster, an EPMU Organiser. Mr Horton was asked to comment on the apparent discrepancy between his statement and those of the others interviewed.

[23] During the course of the investigation Mr Clough took issue with the allegation that Mr Horton was in possession of company property without proper authorisation. He explained to Mr Purser he had viewed a number of different authorisation forms and that there was an issue as to how authorisations should be granted and recorded. He observed that there were holes in Fonterra's procedures and confusion between all the parties involved, but his points were not accepted.

[24] After about 90 minutes, Mr Purser and Ms Bennett asked for a short adjournment. When they returned after 20 or 30 minutes they told Mr Horton that they had decided to dismiss him. They stated that they believed Mr Vickers' account that Mr Horton was present when the iron was removed from the Fonterra site and therefore Mr Horton had told Mr Vickers to take the incorrect bundles. They also believed Mr Jepsen when he said he had authorised Mr Horton to take the scrap iron from the laboratory roof, but believed Mr Jepsen had told Mr Horton that Mr Horton needed to get permission from Mr Barnes first.

[25] Mr Horton claimed that he was told the purpose of this meeting was simply to answer a few more questions and there was no suggestion from Fonterra that it was a final meeting and that a final decision was going to be made.

[26] After the announcement of the dismissal Mr Clough sought another adjournment so they could discuss the matter privately. When they reconvened Mr Clough advised the Fonterra representatives that the union was raising a personal grievance. Ms Bennet then made a comment about involving the police. A meeting was later called for maintenance staff at which Mr Pursuer announced that Mr Horton had been dismissed and the police had been contacted regarding the matter. The police do not appear to have ever become involved.

[27] Mr Horton received a letter, dated 29 May 2009, confirming Fonterra's decision to summarily dismiss him for removing from site and being in possession of Fonterra's property, specifically three bundles of 600 series, diamond deck roofing iron, without correct authorisation to do so. The letter stated:

> We acknowledged that you had received authorisation to remove scrap iron from the site, but the iron you removed was new and still of considerable value and use to the Company. The explanation you gave was that you had received permission from PAE to remove the new iron. You acknowledged that the statements provided by witnesses, including PAE do not support this explanation and version of events, and further stated that the witnesses could be providing false statements because they felt guilty about the role they played in the removal.

[28] The letter went on to state that, on the balance of probabilities, Fonterra had concluded that Mr Horton's version of events was unlikely to accurately reflect the actual events and that his actions constituted serious misconduct which justified the termination of his employment.

[29] A neighbour of Mr Horton gave evidence to the Court that on 27 February 2009 at around 4pm he noticed iron being delivered to Mr Horton's property. Mr Horton's wife gave similar corroborative evidence to the Court that the delivery was at about 4pm on Friday 27 February 2009.

[30] At the hearing Mr Purser was skilfully cross-examined by Mr Lloyd, counsel for Mr Horton. Mr Purser confirmed at the outset that he had dismissed Mr Horton for being in possession of company property without correct authorisation. It was then put to Mr Purser that during the course of the trial it was said on behalf of Fonterra that correct authorisation had nothing to do with failing to follow the policy but related to Mr Horton not getting authorisation from Mr Barnes. Mr Purser responded that "[a]ll trails would have led to the correct policy."

[31] Mr Purser acknowledged in evidence that Mr Jepsen had since received training in the correct procedure for removing property from the site, and also referred in another part of his evidence to the correct forms and signatures necessary. In answers to questions from Mr Lloyd, Mr Purser asserted that there was a clear policy and that it was to be found in the Site Securities Manual, which was not then before the Court. He also accepted that the employees in question did not follow the procedures in that policy and that there was no evidence to suggest that Mr Horton was not telling the truth when he stated to the Court that he did not know anything about the policy. Mr Purser said that he had discussed the matter with the staff but acknowledged this was after Mr Horton's dismissal. Mr Purser acknowledged that even members of the security staff did not appear to know what the policy was. He also acknowledged that Mr Jepsen, who had only been in his role for about two months, did not know the policy and that Nigel Nuku, although he had been a security officer for Fonterra, knew that his name had previously been added to what was not the correct authorisation form.

[32] After some initial prevarication Mr Purser agreed that had Messrs Jepsen and Nuku followed the correct procedure the wrong iron would never have gone off site. Mr Purser was also forced to acknowledge that there were a number of contributory factors to the removal of the roofing iron, including Mr Horton's own activities.

[33] I arranged for the security manual to be produced to the Court on the basis that it be kept confidential. I am satisfied from reading the document that it governs the activities of the security people themselves and not the other Fonterra staff including Mr Horton.

[34] Mr Purser was then questioned on his understanding of what Mr Tunbridge had said to Mr Horton. He believed that Mr Horton was expressly told by Mr Tunbridge that Mr Horton was not allowed 600 series roofing iron and that he had to refer the matter to Mr Barnes, the project engineer. Mr Purser had stated in his written evidence that "we found Mr Horton was, more likely than not, told to see Mr Barnes, that he did not do so and that he was told not to remove the 600 series iron from site. He also removed far in excess of 200 metres."

[35] Mr Purser was then cross-examined as to who he thought had told Mr Horton that he could only have 400 series and that he could not have 600 series iron. He initially said it was Mr Nuku. He was forced to concede there was nothing in the interview statement taken by Mr Purser and Ms Bennet which stated that. Mr Purser was then referred to Mr Jepsen's interview record, which also did not refer to any embargo on Mr Horton taking 600 series iron. Mr Purser's initial response was that was the only iron being stored on the site. Mr Purser conceded that at one point Mr Jepsen apparently drew a map with the words "okay to take" which clearly referred to 600 series roofing iron and that what Mr Horton and Mr Jepsen had stepped out on the site was 600 series iron. Mr Lloyd then referred Mr Purser to Mr Tunbridge's interview record and Mr Purser was forced to concede that there was nowhere in that statement where Mr Tunbridge stated he had told Mr Horton that he could only have the 400 series.

[36] Mr Purser also eventually accepted that neither Mr Jepsen nor Mr Nuku had directed Mr Horton to obtain permission from Mr Barnes and that Mr Horton had complied with Mr Jepsen's instructions to talk to Mr Tunbridge.

[37] Mr Purser also conceded there was no record of himself and Ms Bennett considering that there might have been a misunderstanding between the parties on the iron that could be taken. Mr Purser asserted that although Mr Horton had not raised it, he and Ms Bennet had considered this and, presumably, had rejected it.

[38] Mr Purser was then questioned about his evidence that Mr Horton had removed far in excess of 200 metres. He accepted that this allegation was never ever put to Mr Horton at any time during the investigation, nor was Mr Purser's new

evidence at trial that they recovered approximately 800 metres from Mr Horton's property. I find from the cross-examination that there was clearly some confusion on the part of Mr Purser as to the amount of material that was taken from Mr Horton's property and he could not confirm precisely what was taken back to Fonterra.

[39] Mr Purser was then cross-examined on his understanding that Mr Vickers had said that Mr Horton was present when Mr Vickers had loaded the iron at Fonterra's premises. This was contained in the last sentences in the second interview, which is recorded as having taken two minutes, and reads:

BP [Mr Purser]:	So to re-clarify, he pointed out what bundles he wanted you to take?
LV [Mr Vickers]:	Yes. He was there when I loaded them.
BP:	Thanks Larry.

[40] In Mr Purser's brief of evidence, at para 33(e), he referred to "witness statements" which suggested Mr Horton was present when Mr Vickers loaded and unloaded the iron. When pressed in cross-examination he corrected this to mean statement in the singular, namely Mr Vickers's statement.

[41] Mr Horton had denied being present when Mr Vickers collected the iron and claimed to have arrived at his home while it was being unloaded. Mr Purser was asked in cross-examination whether steps had been taken to discover whether Mr Horton was present on the Fonterra site when the iron was uplifted by Mr Vickers. It appears that although there was a discussion with Mr Horton's supervisor and gate passes were checked, this was all done by Fonterra after Mr Horton was dismissed. This did not clarify the situation. It was also put to Mr Purser that the delivery at Mr Horton's house was at 4 o'clock whereas it appears to have been accepted by Mr Purser that Mr Vickers loaded the iron at 1 o'clock and would have then gone straight to the plaintiff's home. On the material that Mr Purser had at the time, or produced to the Court, there was no indication of the time that Mr Vickers said he had collected the iron at the Fonterra site. Mr Purser would not accept that at the time he made the second enquiry of Mr Vickers, the question of the time Mr Vickers had uplifted the iron was material to the investigation.

[42] Mr Purser would not accept the fact that Mr Horton was a fairly active union delegate had any impact on his decision making process.

[43] Ms Bennett gave evidence supporting that of Mr Purser, but it is clear that Mr Purser was the decision maker. I was also left in some doubt from Ms Bennett's evidence as to precisely which bundles of iron she and Mr Purser had considered Mr Horton had taken without authority.

The submissions

[44] Ms McLorinan, counsel for Fonterra, submitted that there were not simply a series of errors contributed to by failures on the part of the Fonterra's employees or sub-contractors, that the explanation the plaintiff gave was not plausible and depended upon a finding that everyone else was lying. She submitted Fonterra was entitled to conclude, after a full and fair investigation, that the iron the plaintiff had in his possession was taken without the correct authorisation. She accepted that the amount the plaintiff took was now in dispute and was not an allegation pursued in the series of investigation meetings. She did, however, contend that the amount taken by the plaintiff was of considerable value and referred to the plaintiff's evidence that he found he had new iron.

[45] Ms McLorinan submitted that was what he was after and that is what he got. She contended there was evidence that Mr Horton had agreed at the time that he was not allowed to take the 600 series iron. She also relied on the answer to a question she had put to Mr Webster in cross-examination that there was nothing wrong with the process the defendant had followed. She submitted that, in terms of s103A of the Employment Relations Act 2000, there was no requirement that an employer must turn over every stone in its investigation but had a duty to undertake a reasonable enquiry. She submitted that a fair and full process had been followed and that Fonterra had one version of events from a set of witnesses, who were largely unrelated to each other, which indicated that Mr Horton was told he needed particular permission to take any iron and was specifically told not to take the 600 series without permission from Mr Barnes. She contended that at no time during the investigation had the plaintiff argued that he was under a mistaken impression about

what he could take, but had simply contended that everyone else was not telling the truth.

[46] Mr Lloyd submitted that Fonterra did not have a clear, recognised and consistently enforced policy with respect to the removal of material from its site. He referred to the conflicting evidence as to what authorisation was required before the iron could be removed from the site. He relied on the evidence that Mr Horton was given certain instructions which he had followed and had therefore obtained the necessary authorisation. He referred to a number of important failings on the part of several people involved which contributed to the removal of the iron and, given the plausible explanation provided by the plaintiff, he submitted that a fair and reasonable employer would simply have given him the benefit of the doubt, treated it as a valuable learning experience and moved on. He relied on s 103A of the Act and referred to *Air New Zealand v V*[1]. He accepted that, generally, unauthorised possession of company property is conduct that can, if proven, amount to serious misconduct and cited *Wellington Road Transport etc IUOW v Fletcher Construction Ltd*[2]. He submitted that any breach of work rules or company policies could not in itself amount to serious misconduct, especially where the employer had failed to consistently apply and enforce those rules.

[47] Mr Lloyd submitted that a necessary element of any allegation of misconduct for unauthorised possession was a dishonest intent, citing *Farmers Trading Co Ltd v Deadman*[3]. He submitted Mr Horton's intention was in fact honest because he genuinely believed he had authorisation to take the roofing iron and had expressed his intention to Mr Jepsen to purchase the iron and had asked how much it would cost. It was Mr Jepsen's reply that it had no value and indeed would cost more for Fonterra to remove it from the site that led Mr Jepsen to tell Mr Horton that, provided Mr Horton met the costs of removal, there would be no other charges.

[48] Mr Lloyd submitted that a crucial issue in the case was whether the plaintiff was told to obtain the authorisation of Mr Barnes and whether he wilfully and

[1] [2009] ERNZ 185.
[2] (1983) ERNZ Sel Cas 59.
[3] [1998] 3 ERNZ 128.

intentionally ignored that instruction. He submitted that the evidence available to Fonterra at the time did not support the assertion that the plaintiff was required to obtain authorisation from Mr Barnes. There were only three people that could have told the plaintiff that he needed such authorisation, Messrs Jepsen, Nuku and Tunbridge. Neither Mr Jepsen nor Mr Nuku made any mention of requiring authorisation from Mr Barnes in their interviews. Mr Jepsen stated that Mr Horton would have to contact "Steph" (Mr Tunbridge) from Roofing Taranaki and Mr Nuku stated you would need to get in touch with Steph, Van or Jason from Roofing Taranaki. Mr Purser was therefore mistaken in his believe that Mr Jepsen told Mr Horton that he needed to obtain permission from Mr Barnes before removing any iron. Instead the plaintiff was expressly told to talk to Mr Tunbridge by both Mr Jepsen and Mr Nuku and this is exactly what he had done. He observed that Ms Bennett's conclusion that Mr Horton had deliberately circumvented the removal authorisation process described to her by a number of witnesses, was not supported by Fonterra's own records. There was only one person who made any reference in his interview to telling the plaintiff that he had to get authorisation from Mr Barnes and that was Mr Tunbridge. There was some considerable difference of opinion as to whether that advice was in relation to the iron from the laboratory roof which Mr Horton had not wanted. It was clear from Mr Jepsen's interview that he had told Fonterra that he had authorised Mr Horton to take some iron without any need to contact Mr Barnes.

[49] Mr Lloyd referred to Ms Bennett's evidence that it seemed odd that Mr Horton hadn't followed Mr Nuku's advice to make contact with Roofing Taranaki to check what iron could be removed from the site. Mr Lloyd submitted that Ms Bennett was simply wrong because Mr Horton did do exactly what Messrs Jepsen and Nuku advised him to do and had spoke to Mr Tunbridge. He referred in some detail to Mr Tunbridge's interview notes where Mr Tunbridge said he made it clear what Mr Horton could and could not take and had written on a diagram what bundles would be "okay to take". This appeared to have been unconditional and did not require Mr Barnes's consent.

[50] Mr Lloyd referred to a number of passages in the evidence of Ms Bennett and Mr Purser, which showed that conclusions they had reached were not supported by

the interviews they had conducted. Mr Lloyd also referred to Mr Tunbridge's statement which referred to Mr Barnes being happy to have the iron donated to the golf course. This indicated, on Mr Lloyd's submission, that Mr Barnes did in fact know about the removal of the roofing iron. He submitted that what was relevant was whether or not, given the conflicting statements and ambiguities and general uncertainty, Mr Horton could reasonably and understandably have concluded that he had obtained the necessary authority. He submitted therefore that Fonterra could not, in all the circumstances, reasonably justify its conclusion that Mr Horton had wilfully and intentionally failed to obtain the correct authority to remove the iron.

[51] Mr Lloyd then dealt with the allegation that Mr Horton was never given authority to take 600 series roofing iron and submitted this had clearly influenced the decision Mr Purser had made. He observed that the evidence simply did not support that assertion and that not one of the three people who had given statements during the course of the investigation had said that they had told the plaintiff he could only take 400 series and not 600 series. This was not expressly asked of those persons and their evidence supported the opposite conclusion. As a final point he noted on this issue that the gate pass only refers to reject roofing iron and did not specify the profile.

[52] Mr Lloyd then turned to the statements obtained from Mr Vickers. He observed that the defendant appeared to have elected to believe Mr Vickers over the plaintiff when he said the plaintiff was present when the roofing iron was loaded. This was categorically denied by the plaintiff and Fonterra was therefore faced with two conflicting accounts on an important issue.

[53] Mr Lloyd submitted that in these circumstances Fonterra was obligated to make further enquiries instead of simply electing to believe one over the other. When the timing issue became clear he observed that Mr Vickers was only making a single passing comment at the end of a two minute telephone interview. Neither Mr Purser nor Ms Bennett deemed it necessary to check Mr Horton's time records and the conclusion they had reached adversely affected the plaintiff.

[54] Mr Lloyd cited *Auckland etc Local Authorities Officers IUOW v Thames Valley Electric Power Board*[4] where the employer was alerted by answers given by the employee to the employee's alcoholism and the Court held that the employer was then obliged, in fairness, to make further enquiries before deciding to dismiss. He submitted the same basic principle applied here as the defendant was alerted to potentially relevant information and should have made further enquiries.

[55] Mr Lloyd then dealt with the contribution of the other persons but he also submitted Fonterra was at fault for failing to take any steps to recover the roofing iron for some three or four weeks after it was aware the plaintiff had possession of it. He submitted therefore there was a combination of factors which meant that a reasonable employer could not have reliably concluded there was wrongdoing on the part of Mr Horton who had given consistent and plausible explanations throughout the investigation.

Reasoning

[56] Applying the test under s 103A, I must determine on an objective basis, whether Fonterra's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. I have considered the respective submissions of counsel and, for the reasons which I will give, I accept and adopt those advanced by Mr Lloyd.

[57] On 20 May 2009 Mr Purser and Ms Bennett interviewed Messrs Jepsen, Catling and Nigel Nuku. Mr Catling, who was reporting what he had been told by others, understood that Mr Horton had been told he had to see Mr Barnes. This may have influenced Mr Purser from the outset of the investigation. Mr Tunbridge's interview notes show he told Mr Horton which iron he could take, but that there were some specific items that he had to ask Mr Barnes about. Throughout, Mr Horton has maintained he did not want that particular iron. From the answers given in cross-examination it is clear that Mr Purser had formed the view that, before any items were removed, Mr Horton had to obtain Mr Barnes's approval. That is not recorded

[4] [1989] 3 NZILR 255.

in Mr Tunbridge's statement and no other person interviewed was able to give that first hand unequivocal statement.

[58] Mr Purser had also formed the view, which was not supported by the investigation, that Mr Horton was prevented from taking any 600 series iron. These were two essential matters which led Mr Purser to conclude Mr Horton was dishonest and guilty of serious misconduct.

[59] A further issue developed during the investigation as to the time and date when Mr Horton met with Mr Vickers on the Fonterra site. It has been Mr Horton's evidence from the written statement he gave on 18 May, and in his recorded replies during the investigation, that it was only iron from the laboratory roof that required the approval of Mr Barnes. That is consistent with Mr Tunbridge's statement. Mr Horton's contemporaneous explanation was that after he and Mr Jepsen and Mr Nuku had agreed on what iron Mr Horton could take, the following day Mr Horton saw Mr Vickers on the site and pointed out to him the piles Mr Horton had picked out. The day after that, the bundles were delivered to his property. He said at the time of the delivery he was at home, and questioned the size of one of the bundles. Mr Vickers was asked about this and said Mr Horton had said absolutely nothing. This is a little hard to accept in light of Mr Horton's evidence that he had offered Mr Vickers, and his assistant who also had the surname of Nuku, beers. Mr Horton said he may have pointed out his concerns to Mr Nuku and not Mr Vickers.

[60] It was never put to Mr Vickers during the course of the investigation that he had been shown the bundles one day and had picked them up and delivered them to Mr Horton the following day. If that were so it would answer the concerns Ms Bennett and Mr Purser had that it was unlikely that Mr Vickers would have loaded the iron at 1pm and not delivered it until later in the day. Considering nearly three months had elapsed at the time of the second interview of Mr Vickers, it is likely that Mr Horton's recollection would have been more accurate than that of Mr Vickers.

[61] Mr Horton was adamant that he was not present when Mr Vickers picked up the roofing iron at Fonterra. This was a matter that was not probed in any depth with Mr Vickers. In these circumstances I consider a reasonable and fair employer would

have given Mr Horton the benefit of the doubt, as to whether he was present when Mr Vickers uplifted the iron from Fonterra. The evidence led at trial strongly supported Mr Horton's account that the delivery was the following day at 4 o'clock although this was not provided to Fonterra at the time the dismissal decision was made.

[62] It does appear that a bundle of new or near new roofing iron was delivered to Mr Horton's house. It also appears to be common ground between Mr Horton and Mr Vickers that it did have some old roofing iron on top if it. This bundle may well have been delivered by mistake. It may well have been the bundle that Mr Horton enquired about of either Mr Vickers or Mr Nuku when it was being delivered to his property. With the advantage of hindsight it would have been wise for Mr Horton to have checked that bundle more thoroughly than he did.

[63] In the second investigation interview it was put to Mr Horton that the other witnesses were clear in their statements that the 600 profile could not be taken. Mr Horton disagreed with them. Because it was put to Mr Horton that the witnesses were adamant that 600 series was not to be taken off site, Mr Horton responded that those witnesses might be covering themselves. A close analysis, however, shows, as Mr Purser's concessions in cross-examination demonstrated, and I have found, that Mr Horton had been given permission to remove 600 series iron. In these circumstances it is understandable why Mr Horton attacked the credibility of the other witnesses during the investigation.

[64] Finally, I find Mr Purser did not have available to him clear evidence of what bundles of iron had been retrieved from Mr Horton's property, other than his own observations. No photographs were taken at that time and the drawings and site plans were confusing. Further enquiries needed to have been undertaken to deal with the explanation that Mr Horton offered at the commencement of the investigation and had maintained throughout.

[65] I agree entirely with Mr Lloyd that the matter had become confused and a long serving employee like Mr Horton, who had no blemishes on his disciplinary record, ought to have been given the benefit of the doubt. The employer's

obligations in such a situation are spelt out in *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union*[5]. This too was a case where an employee was dismissed for unauthorised possession of company property, removing a can that contained thinners from Honda's premises. The Court of Appeal upheld the Labour Court's formulation of the standard of proof as follows:

> (i) A charge of the greatest gravity had been levelled against the worker and the burden of justifying the dismissal was, of course, on the respondent employer. It is well settled that the standard of proof which the employer must attain is the civil standard of balance of probabilities rather than the criminal standard of beyond reasonable doubt; however, where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave.

[66] When announcing the decision to dismiss Mr Horton, Mr Purser claimed that the investigation had produced two versions of events, Mr Horton's and the witnesses, and the witnesses were in agreement that Mr Horton had removed from the site bundles of roofing iron he was told not to. Mr Purser acknowledged that the process for removing items from the site should be improved but found that that did not negate Mr Horton's actions and inactions. On the balance of probabilities he stated they believed Mr Horton had knowingly removed roofing iron from the site he knew he should not take, and that this was a dishonesty offence, constituting serious misconduct.

[67] For the reasons I have given I am satisfied that this was not a decision that a fair and reasonable employer would have reached on the confused evidence and the serious factual errors which Mr Purser made. The interviews were not as starkly different from Mr Horton's explanation as Mr Purser had concluded. The evidence is clear that Mr Horton spoke to no less than four people about the iron, offered to pay for it, sought permission from the person he was told to approach, was given permission and given a permit to remove the iron from the Fonterra site. In all the

[5] [1993] (1990) ERNZ Sel Cas 855 (CA).

circumstances I find that Fonterra has not discharged the burden justifying Mr Horton's dismissal. Mr Horton was unjustifiably dismissed.

Reinstatement

[68] The main remedy sought by Mr Horton was permanent reinstatement to his former position of maintenance, technical. He referred to a letter Ms Bennett wrote to his representative Mr Webster which stated, as a sign of good will, that Fonterra undertook not to replace Mr Horton's position for at least three months following 10 June 2009, but did not wish this to constrain him from seeking other work.

[69] Mr Horton's evidence was that his colleagues were very keen to have him back and that he was sorely missed and he did not believe his reinstatement would cause any disruption in the workplace. He undertook to simply get on with his work and to work hard and do a good job as he always had done.

[70] Mr Purser's evidence was that it had been nearly a year since they had dismissed Mr Horton and they now had a full complement of staff and they would have to let another employee go to reinstate Mr Horton, which would be wholly impracticable. He also claimed that because Mr Horton called other fellow workers liars during the investigation in the Authority hearing, and would need to work with them again, it would be impracticable to reinstate him. He also claimed to have an issue of trust and confidence in Mr Horton should he be reinstated.

[71] Ms McLorinan, on the basis of Mr Purser's evidence, submitted that it was therefore not practicable to reinstate Mr Horton and asked whether Fonterra would have to select an employee to be dismissed because of the Court's order. She submitted that it would never have been the intention of the Act to jeopardise another employee's livelihood.

[72] The fallacy in that last submission is that the Act provides that reinstatement is the prime remedy and it was the actions of Fonterra in filling a position when it knew that reinstatement was being sought, that may lead to consequences for another employee, if that is in fact the case.

[73] As Mr Lloyd pointed out, there must be genuine reasons why reinstatement would be impracticable if it should be ordered. He cited *Ashton v Shoreline Hotel*[6], where Chief Judge Goddard held that the important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been, they should ordinarily be reinstated if they so wish. I agree that to routinely award compensation instead of reinstatement would be to create a system of licensing unjustified dismissals.

[74] Mr Horton's reaction to the other witnesses may have been strong in the circumstances. However, the way that the statements were presented to him during the investigation suggested a stark conflict which, when they were examined more closely, was more apparent than real. This is a large employer and the evidence suggests that Mr Horton did not have day to day contact with the employees that gave statements that led to his dismissal.

[75] Further, as Mr Lloyd submitted, if Mr Purser had issues with trust and confidence then the Court's judgment that Mr Horton was unjustifiably dismissed would mean Mr Purser should not harbour any legitimate concerns about Mr Horton's reliability.

[76] In all the circumstances I consider it to be practicable for reinstatement to be ordered.

[77] Before awarding reinstatement, however, I will deal with the issue of whether there is contributory conduct. Section 124 requires the Court, in deciding both the nature and extent of the remedies to be provided in respect of the personal grievance, to consider the extent to which the employee's actions have contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Court must reduce the remedies that would otherwise have been awarded. The authorities make it clear that what is required here is a finding that there has been blameworthy conduct on the part of the employee which has contributed towards the situation that gave rise to the grievance.

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[6] [1994] 1 ERNZ 421.

[78] Ms McLornian submitted that there was a high level of contribution by Mr Horton in failing to get permission from Mr Barnes and for removing the 600 series iron. She submitted that the level should be set at 100 percent. Mr Lloyd submitted that there was no contributory conduct in the removal of the iron. He submitted that the fault lay with Fonterra in failing to implement and enforce adequate procedures. I have already found that Mr Barne's permission was not required for the iron Mr Horton thought he was taking. Nor was he told not to take the 600 series. These matters cannot amount to blameworthy conduct. The only element of contributory conduct Mr Lloyd considered the Court might find related to a lack of thoroughness or rigour on Mr Horton's part in ensuring that the correct bundles of iron were delivered to his property. That reduction, he submitted, should be at the lower end of the scale and should not exceed five to 10 percent.

[79] Again I agree with Mr Lloyd that there was blameworthy contributory conduct in the plaintiff's failure to check whether what had been delivered to his property was what he had told Mr Vickers to uplift. This is especially so if one accepts Mr Horton's account that he was not present when Mr Vickers uplifted the bundles. One of the bundles was sufficiently new looking, even though there was new iron on top of it, to have raised Mr Horton's concerns. His failure to take those steps directly led to the situation that gave rise to his dismissal. That was, in my view, blameworthy conduct.

[80] I do not consider that the level of contribution, for this conduct, which I find to be considerably higher than the maximum of 10 percent conceded by Mr Lloyd, should, however, deprive Mr Horton of the prime remedy of reinstatement.

[81] I therefore order Mr Horton to be reinstated to his former position within 14 days from the date of this judgment. If this causes any problems associated with Mr Horton's current business or Fonterra's organisation, leave is reserved to apply to the Court in that time period to address these matters.

Other remedies

[82] I turn now to the other remedies sought.

[83] At the time of the dismissal Mr Horton gave evidence that his earnings were just under $88,000 per annum from Fonterra. He also claimed that, if he had been able to work until retirement, he would have received at least $150,000 in superannuation. In order to finance his current position as a self-employed Sky TV technician he withdrew some $42,000 from his superannuation entitlement.

[84] Apparently the plaintiff did not pursue an interim reinstatement injunction and was paid five weeks wages after his dismissal. He claimed that he was unable to obtain other jobs and went on the unemployment benefit with a 10 days stand-down period. He did not give evidence as to how much his earnings have been since the dismissal.

[85] He also claims to have been drawing down on his mortgage to assist in making ends meet.

[86] The onus is on the plaintiff to prove the losses that he has sustained as a result of the dismissal and the evidence he has produced is inadequate for me to be able to put a figure on those losses.

[87] Further, from the evidence I have been given, I am unclear whether, on the reinstatement order I have made, Mr Horton will be able to recover some of his superannuation entitlements. These were matters which should have been the subject of clear evidence.

[88] In the circumstances, and taking into account the level of contribution, I find that I cannot award any reimbursement of the sums alleged, but not proven, to have been lost as a result of the grievance.

[89] The sum of $20,000 was sought as compensation for distress and humiliation. Mrs Horton, who was called to give evidence about when the iron was delivered could have given supporting evidence of the plaintiff's distress and humiliation, but was not called upon to do so. Mr Horton gave evidence that he and his wife had been in desperate financial situation and they have found the ordeal incredibly stressful and upsetting. He considered that his unblemished work record should have

spoken for itself and that he would never have intentionally deceived or mislead anyone. He was also told that Fonterra were considering involving the police and that made his stress even worse. He was told that Mr Purser had advised everyone else at work after his dismissal, that the police were going to be involved. He observed that, if Fonterra had involved the police, that may well have produced a more accurate account from the witnesses when they were being questioned, but in the meantime it has carried the inference that he has committed a criminal offence which has caused him damage in a small close knit community where everyone knows what is going on. Knowing that others were aware that he had been dismissed for serious misconduct was both embarrassing and upsetting. In these circumstances an award of approximately of $15,000 would have been appropriate, but in view of the findings of contributory conduct, I consider that an award of $7,500 under this head is justified.

Costs

[90] At the request of the parties the costs are reserved, and, if they cannot be agreed, may be the subject of an exchange of memorandum, the first of which is to be filed and served within 60 days of this judgment. The memorandum in response should be filed and served within a further 30 days.

B S Travis
Judge

Judgment signed at 4.15pm on 8 June 2010