IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 80
WRC 19/09

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

Hearing: 15 and 16 March 2010
20 April 2010

Appearances: Monica Singleton, counsel for the plaintiff
John Rooney, counsel for the defendant

Judgment: 29 June 2010

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has challenged a determination of the Employment Relations Authority which found that his dismissal by the defendant (Fonterra) was justified. The plaintiff was neither present nor represented at the investigation meeting. The Chief Judge called for a good faith report and in his judgment dated 8 October 2009[1] concluded that there was no good reason to deny the plaintiff a de novo hearing.

Factual findings

[2] Mr Willis was employed by Fonterra in 2004 as a mechanical technician at its Whareroa site in Hawera. He had an unblemished employment record until

[1] WC 22/09

19 September 2007, when he received a "first written warning" for breaching the "Permit to Work Policy" (the permit policy). The permit policy deals with health and safety issues and sets out those areas of Fonterra's site where work tasks require a written permit from responsible administrators to ensure the work can be carried out safely. One situation which requires a permit is where the location of the task involves exposing the workers to a hazardous environment and the first example given is "confined space entry". Such a space is defined as having two components: a restricted space and a hazardous atmosphere. A safety observer is required to be present while an employee is working in such areas.

[3] On 7 September 2007 the plaintiff had been found at the end of a tunnel by an emergency exit and there appeared to be no legitimate reason for him to be there. The matter was reported to Brian Purser, Fonterra's Maintenance Manager on the site. He carried out an investigation which resulted in the first written warning for the plaintiff being found in a restricted area without the appropriate authorisation or permits. The warning informed the plaintiff that any further misconduct or poor performance could result in more serious disciplinary action, including dismissal. The first written warning was to remain in force for a period of 6 months from 19 September 2007.

[4] The plaintiff had subsequently undergone comprehensive retraining on the permit policy. However, the plaintiff was aggrieved at having received the written warning because he claimed that he was not aware that the area in which he had been found was covered by the permit policy and it was an area where others had gone to on other occasions. He claims to have been told by Mr Purser that in such circumstances every person who went there would be given a first written warning and all employees would be advised of that. He claims that such advice was not given to the other employees and he was not aware of any other such written warnings being given. He tried to get an audience with Mr Purser on more than one occasion as he considered he had been mislead as to the consequences of the warning which he had initially accepted on the basis of what he had been told at the time by Mr Purser as to the policy affecting all employees.

[5] There is an email trail which shows repeated requests from the plaintiff after 21 September 2007 for Mr Purser to deal with his concerns and his requests for a formal meeting, Mr Purser replied on 3 October 2007 that he was sorry if the plaintiff felt aggrieved. In spite of those requests Mr Purser did not convene a meeting and the plaintiff did not raise a grievance concerning the matter.

[6] On 8 February 2008 Ricky Clement, Fonterra's Maintenance Team Leader for the Powders Department and the plaintiff's team leader, went looking for the plaintiff. There is a direct conflict between Mr Clement and the plaintiff as to where Mr Clement found the plaintiff at approximately 12.20 pm and what the plaintiff was apparently doing at the time. What is not in issue, because it is admitted by the plaintiff, is that Mr Clement said he would be taking the matter further and the plaintiff asked him not to.

[7] After the incident with the plaintiff Mr Clement reported it to Mr Purser that day and was told by him to put it in writing. Mr Clement did so that day in the following terms. He had, on four occasions during the week, seen the plaintiff heading towards an area in which the plaintiff did not usually work. Mr Clement suspected that the plaintiff had found an area to get out of work. On 8 February Mr Clement decided to go into that area to confirm or deny his suspicions. He checked under "Powder 4 milk silos" and while doing so found the plaintiff sitting underneath silo 3, playing games on his mobile phone. The plaintiff claimed that he was carrying out silo agitator checks, but the agitators are not located under the silos. Mr Clement asked for the plaintiff's worksheets to confirm this and the plaintiff passed them out through an inspection hole in the base of the silo. He then exited through an access manhole on the side of the silo and had to climb over pipework. Mr Clement told the plaintiff he was going to take the matter further as he felt he should be working and said something to the effect that he thought that the plaintiff was "shagging the dog" (an expression Mr Clement explained to the Court as meaning avoiding work). The plaintiff pleaded with him not to take the matter further and claimed to be having an early lunch break.

[8] Mr Clement then checked and found that the plaintiff had been issued a verbal permit to perform the silo agitator checks.

[9] On Monday 11 February 2007 Mr Purser, having received Mr Clement's written report dated 8 February, contacted Alisa Ravji, an Human Resources Advisor at the Fonterra site, and she advised him on the investigation process he needed to follow. That same day Mr Purser said he spoke to the plaintiff and told him about Mr Clement's written statement and the allegation that the plaintiff had been under the Powder 4 milk silo playing games on his mobile phone during work time and that he would be conducting a formal investigation. Mr Purser claims he asked the plaintiff whether the plaintiff would like Mr Purser to arrange for Paul Dye, the EPMU union delegate, to be present at the first meeting, but the plaintiff did not respond either way.

[10] The plaintiff denies that this conversation ever took place. Mr Purser says he followed it up the same day with an email. The plaintiff accepts he received an email on 11 February which stated:

> Phillip, we need to have discussions re last week when you were spoken to by Ricky. I have asked Paul to be present as your Union rep etc.
>
> Thanks, BP.

[11] I find that the wording of the email is inconsistent with the conversation Mr Purser alleges he had with the plaintiff giving him details of the allegation. If such a conversation had taken place it is more likely than not that Mr Purser would have referred to it in an email that purported to confirm the contents of that discussion. The email is consistent with it being the first advice to the plaintiff rather than confirmation of detailed oral advice. I find that the conversation did not take place.

[12] The plaintiff claims that on receipt of the 11 February email he did not know what the meeting was going to be about but assumed that Mr Clement had told management that Mr Clement did not think that the plaintiff was working at the time of the incident. He claims he assumed the meeting would be about whether or not he had been taking a break and not working. That, I find, was a reasonable assumption to make from the 11 February email.

[13] The plaintiff attended the meeting on 13 February at which were present Ms Ravji, Mr Purser and Mr Dye. The plaintiff claims that, although he was aware Mr

Dye was a union representative, he was surprised to see him at the meeting because he had not at any stage understood the gravity of the situation. I find that evidence difficult to accept in light of the 11 February email and the plaintiff's request of Mr Clement not to take the matter any further. I accept his evidence that he did not discuss the matter with Mr Dye prior to the meeting. That is confirmed by Mr Dye.

[14] There is some confusion as to what took place at the 13 February meeting. Mr Purser says that the plaintiff was wrong to say that Kerin Pollard was present and he and Ms Ravji claimed in their written briefs of evidence that Mr Clement was also present. Both Ms Ravji's and Mr Dye's notes of the 13 February meeting confirmed Mr Clement's presence at the meeting. Ms Ravji's notes say that Mr Clement was brought in part way through the meeting to explain his version of events.

[15] At trial it became clear that this had happened at the subsequent meeting, on 18 February, when Mr Purser read out Mr Clement's 8 February statement to the plaintiff for the first time, then adjourned the meeting to enable Mr Clement to be brought to the meeting. Mr Clement also changed his written brief of evidence to show that he had not attended the meeting of 13 February but had attended the meeting on 18 February.

[16] Mr Dye's notes of the 13 February meeting refer to questions being raised by the plaintiff about Mr Clement's view of the work the plaintiff performed on "a couple of jobs" but that they all decided that this was getting off track. That is recorded in Ms Ravji's notes as having taken place on 18 February 2010.

[17] I am satisfied that the notes produced by Ms Ravji and Mr Dye are both inaccurate as to what took place at the first meeting on 13 February. Most of what is described in their notes took place, I find, at the second interview on 18 February. This suggests that neither set of notes was prepared immediately after the respective meeting and may also suggest a level of cooperation in the preparation of those notes.

[18] As a result of the inadequacy of the notes, I am left in some considerable doubt as to precisely what took place on 13 February. Mr Purser's brief of evidence

says that he began the meeting by explaining to the plaintiff that they were conducting an investigation into the allegation that he had been sitting under "the Powder 4 milk silo playing games on his mobile phone during work time." Mr Clement's 8 February report states it was under "silo 3."

[19] The plaintiff denies that this was said and claims that he was asked by Mr Purser to decide what he had done at work on 8 February. He was asked also to be precise about the silo job and his encounter with Mr Clement. He also claims he was not read Mr Clement's account which Mr Purser had by that stage, but had not provided a copy of it to the plaintiff. He claimed to have no knowledge of Mr Clement's statement. He also denies that he was told that he could be the subject of disciplinary action including a dismissal. It has not been proved to my satisfaction that these maters were made clear to the plaintiff at the 13 February meeting. I find however, that the plaintiff did explain that when he saw Mr Clement on 8 February, he had completed his work and that he was taking a break to text his wife. The meeting was adjourned and the parties agreed to meet again on 18 February.

[20] At some point, possibly after the 13 February meeting, Mr Purser had met with Mr Clement and Mr Clement took Mr Purser and showed him where he said he found the plaintiff. Mr Clement has maintained throughout that he found the plaintiff under the skirts of silo 3 to which the only entry was through a manhole. This inspection did not apparently suggest to either Mr Purser or Mr Clement that the plaintiff was in a confined space for which he would have required a permit under the permit policy.

[21] The day after the 13 February meeting the plaintiff sent Mr Purser an email asking to meet with Mr Purser and stating:

> I really need your advice on the best way forward in regards to my very poor work ethics which seem to constantly come to your attention resulting in hearings. Your honest outright advice would be greatly appreciated as I am sure this can only be to my benefit. I am at a point where I am at cross-roads with no idea which direction to take.

[22] Mr Purser responded that same day, 14 February, thanking the plaintiff for his frank response stating that he wished to discuss all relevant issues at the next meeting as scheduled.

[23] At some point before the second meeting Mr Purser spoke to Carlos Kumeroa, a powder operator, to check Mr Purser's understanding of the area where Mr Clement said he had found the plaintiff. Mr Purser's evidence was that Mr Kumeroa confirmed that this area was deemed to be a "confined space" and would therefore require a written permit and an observer in accordance with the permit policy. No written statement or notes of that discussion with Mr Kumeroa were ever supplied to the plaintiff nor was he informed of this discussion.

[24] Mr Purser gave evidence that following the 13 February meeting he and Ms Ravji examined the plaintiff's personnel file and reviewed his previous warning for breaching the permit policy. He conceded in cross-examination that they were aware of this warning prior to the 13 February meeting.

[25] I find that it was not until the meeting of 18 February that Mr Clement's report was first read and shown to the plaintiff. It was during that meeting, that Mr Clement was, for the first time, invited to attend so that the plaintiff could be confronted with Mr Clement's allegation. At that meeting the plaintiff raised the issue of his relationship with Mr Clement, following a complaint relating to one job, and the plaintiff's feeling that Mr Clement had let him down over a subsequent job involving work on a conveyor. Ms Ravji intervened and said they might be getting a little off track and invited the plaintiff to add or discuss anything further before Mr Clement went back to work. The plaintiff did not raise anything further about Mr Clement.

[26] Mr Purser invited Mr Dye to attend the meeting as the union delegate. Mr Dye had very little experience acting as a union delegate in disciplinary matters having only had peripheral involvement on three previous occasions involving other employers. He frankly admitted that he considered his role was that as a witness to ensure that the plaintiff was fairly treated and it had had no discussions with the plaintiff prior to the first meeting.

[27] Mr Purser's evidence was that by the time of the 18 February meeting his concern about the plaintiff's conduct had moved from being about possible hiding from work to possibly a serious breach of the permit policy. Ms Ravji said she was aware of this prior to the 18 February meeting. She conceded that no mention is made in her notes of 18 February of the allegation of serious misconduct based on the alleged breach of the permit policy. Ms Ravji also conceded the allegation was not put to the plaintiff at the 18 February meeting.

[28] At the meeting of 18 February the plaintiff confirmed that he had received training in the permit policy and procedures following the previous written warning and Mr Purser is recorded as saying that they knew now that the plaintiff was aware of the correct procedures around the permit policy and therefore expected him to follow these at all times.

[29] The next meeting took place on 25 February and I find for the first time it was clearly put to the plaintiff that the verbal permit he received for work on the silo agitators did not permit him to be under a silo in a restricted area and this meant that he was in breach of the permit policy. It was put to him that this was a serious allegation as if something had happened to him no one would have known where he was and the permit policy was in place to preserve the safety of all employees. It was not put to him he had breached a specific clause in the permit policy nor was he told what Mr Purser had been told by Mr Kumeroa.

[30] I find following that meeting, while they were considering what decision to make about the plaintiff, Mr Purser and Ms Ravji personally spoke to Mr Dye alone and asked him about his thoughts on the matter. Mr Dye said he did not question Mr Clement's statement as Mr Clement was a credible witness and that the plaintiff had a reputation on site for being "a bit of a wanderer". Mr Dye told them that the plaintiff had made a comment to him during an adjournment early on in the investigation along the lines of "they can't prove where I was".

[31] Ms Ravji also spoke to Ross Henderson, the Regional Organiser of the EPMU about the matter and he told her that he knew Mr Clement outside of work and would believe that his account of events was accurate. Mr Purser was informed

of Mr Henderson's statement. She said that these discussions simply confirmed the conclusions that she and Mr Purser had already reached. At no stage was the plaintiff told about these conversations with Messrs Dye and Henderson.

[32] Ms Ravji's evidence was that she and Mr Purser had also considered that the plaintiff had changed his story as to where Mr Clement had found him. This she said, had occurred in the course of the 25 February meeting. By contrast she considered Mr Clement's story had never changed. In the notes Ms Ravji took of the 25 February meeting it is recorded that she said to the plaintiff that there was an anomaly because at the first investigation he said that he was behind the two silos and had repeated that in the second investigation, but at the end had said he was between the two silos and he was asked if there was a difference. The plaintiff then drew a picture showing where he said he was. She said that picture had not been retained on Fonterra's files and was not able to be produced to the Court.

[33] At the 25 February meeting it is also recorded that Mr Purser put to the plaintiff that someone in his team was telling an untruth, either a team leader who had been with Fonterra for 11 years who had a credible work history (a reference to Mr Clement), or the plaintiff, who had been with Fonterra for less than 4 years. The plaintiff was asked by Mr Purser to honestly tell them if he was telling an untruth. The plaintiff responded in the negative.

[34] The final two meetings took place on 3 March. The first is recorded as having commenced at 4pm as an investigation meeting. The notes refer to a discussion at the previous meeting about testing options of both fingerprints and DNA on cigarette buts found under silo 3. Ms Ravji advised that as a result of the enquiry she had made, Fonterra had found that the testing options were not feasible or appropriate.

[35] The plaintiff was given the opportunity to say anything further and contended that Mr Clement was venting his anger at the plaintiff. Mr Purser then advised that this completed the investigation process and the meeting was adjourned to allow Mr Purser and Ms Ravji to consider the matter. A short while later they advised the plaintiff and Mr Dye that they wished to hold a disciplinary meeting and this could

either occur immediately or at another suitable time in order for the plaintiff to have the opportunity to seek further advice. The plaintiff agreed to have the process concluded there and then.

[36] The disciplinary meeting commenced at 4.55pm. Mr Purser announced that on the balance of probabilities they considered that the allegations had been substantiated and that on 8 February the plaintiff had breached the permit policy by wilfully placing himself in a "confined space" without the proper authorisation. This was said to be a serious breach of the health and safety procedures and amounted to serious misconduct. They also stated that the plaintiff had not been honest with them during the investigation and that Mr Purser felt there had been a significant breakdown in the trust and confidence necessary in the employment relationship. As a result Mr Purser advised the plaintiff and Mr Dye that it was their intention to dismiss the plaintiff from his employment with Fonterra.

[37] Mr Dye asked for an extension to the following day to obtain further advice. Discussions continued over the ensuing days with additional meetings and correspondence. Finally, by a letter of 17 March 2008 to the plaintiff's then solicitors, which expands on the matters outlined on 3 March, the plaintiff was summarily dismissed on the basis of serious misconduct.

Submissions and discussion

[38] Counsel were agreed that the matter falls to be determined under s 103A of the Employment Relations Act 2000, in light of the recent decisions including *Air New Zealand v V.*[2]

[39] Ms Singleton's main submission was that the defendant's process was so flawed that Fonterra could not have reached a substantively fair decision. She argued that the disciplinary process breached Fonterra's own disciplinary policies, generally accepted employment law principles and good faith obligations. Ms Singleton referred in detail to the Fonterra Workwise Handbook – Disciplinary Process (disciplinary handbook), which she had used to great effect when cross-

[2] [2009] ERNZ 185.

examining Ms Ravji and Mr Purser. She submitted that whether or not the disciplinary handbook formed part of the employment agreement, the implied term of fair dealing meant that "where an employer has published a formal disciplinary policy an employer is contractually entitled to expect that an employer will not contravene that policy": *Stimpson v Auckland Health Care Services Ltd (t/a Auckland Health Care).*[3] She submitted that Fonterra's prescribed process in the disciplinary handbook complied with the requirements generally accepted by the Court in applying the test for justification under s 103A of the Act. She submitted that the prescribed process did not place any additional requirements on Fonterra that would not otherwise be expected as a mater of course in a fair investigation process.

[40] Mr Rooney submitted that Fonterra had effectively followed the prescribed process in its disciplinary handbook, but noted that it expressly provided that it was a guide to be followed and that there may be circumstances by which the procedures are varied. To the extent that the permit policy was not followed he submitted the plaintiff had suffered no disadvantage and therefore this would not render his dismissal unfair, citing *Reid v NZ Fire Services Commission.*[4] He contended that under s 103A the issue is not whether or not an employee has followed every requirement of its policy but whether, in all the circumstances at the time the dismissal occurred, the employer's actions were what a fair and reasonable employer would have done citing *Butcher v OCS Ltd.*[5]

[41] I agree with Mr Rooney that s 103A has increased the flexibility the Authority or the Court may apply when considering an employer's actions where it is alleged there has been a failure to follow its own policy, because the test is not whether or not the employer has properly followed every requirement of a promulgated policy but whether in all the circumstances at the time when the dismissal occurred, the employer's actions were what a fair and reasonable employer would have done. The disciplinary handbook, however, provides a useful starting

[3] [1993] 2 ERNZ 614 at 628 per Judge Finnigan.
[4] [1999] 1 ERNZ 104.
[5] [2008] ERNZ 367.

point to consider Fonterra's actions in this case because I agree with Ms Singleton that the disciplinary handbook encapsulates a fair and reasonable process for an employer with the size and resources of Fonterra.

[42] The prescribed process describes a nine step approach to "Formal Discipline":

a) preliminary investigation;
b) advice to employee;
c) consideration of suspension;
d) formal investigation;
e) discipline interview;
f) employees explanation consideration of the facts;
g) decision (selecting appropriate action); and
h) implementation.

[43] I accept Ms Singleton's submission that a preliminary investigation, which includes assembling the facts and evidence and doing a preliminary evaluation, had never clearly been undertaken. Had Fonterra clearly carried out a preliminary investigation as outlined in the disciplinary handbook it would have avoided any confusion.

[44] As to step two - advice to the employee, the plaintiff was not notified, as required by the disciplinary handbook precisely of the allegation against him with respect to the permit policy until the third investigative meeting and was never advised what section of that permit policy he had actually breached. I have also found he was not expressly informed of the allegation that he was hiding to avoid work until the second meeting although it may be inferred he thought this was the issue he was facing at the first meeting.

[45] As part of step two, an employee is also to be advised "to contact their Union representative or other support person, (another employee or legal representative) if the matter is to be taken further", and advised of their entitlement to be represented by such a person at any disciplinary hearing. Further, the employee is to be advised of the possible consequences if the allegation is sustained.

[46] The second step concludes with the mandatory requirement:

> …in all cases where dismissal is a possible outcome … employees must be given a formal notification to attend a discipline interview that records the discussion at the meeting. See Sample Document One at the end of this section for an example of a formal notification.

[47] The standard letter giving an employee notice to attend a disciplinary meeting is one frequently seen by the Court, and sets out the allegations, the facts supporting them, the precise provision that is alleged to have been breached, provides copies of interview notes and relevant documentation and states the employee's right to be represented and the possible consequences. I find it remarkable that with an employer of the size of Fonterra with a human resources department onsite, that such a letter was not provided at any stage to the plaintiff during the course of the investigation. In assessing whether the actions of an employer were fair and reasonable, relevant factors include the size of the workplace, the resources available, including access to specialist human resources advice see *Chief Executive of the Department of Corrections v Tawhiwhirangi*.[6]

[48] The email of 11 February did not comply with the requirements of step two. He was not provided with the allegations that were to be investigated, or advised to contact his union representative or other support person including a legal representative. Ms Ravji acknowledged that such notice had not been given to the plaintiff which would have allowed for him to prepare for the 13 February meeting.

[49] An important issue in this case, because of the consequences it had, was the failure to advise the plaintiff to contact his union representative legal representative or other support person. The plaintiff had been represented by the union in relation to the first warning, but the particular delegate was no longer available. Whilst it may have been in accordance with normal practice on the site for management to simply tell a union delegate to turn up, this did not comply with the disciplinary handbook's requirements and the plaintiff was not advised of his right to obtain his own representative. The consequences have been unfortunate.

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[6] [2007] ERNZ 610, 613.

[50] Mr Dye was present throughout the investigation disciplinary meeting, but saw himself only as a witness and not as an advocate. He also found it very difficult to adequately represent the plaintiff because of his own personal views about the plaintiff. Even more damaging to the plaintiff were the statements he made to Mr Purser and Ms Ravji during the course of the investigation, preferring the credibility of Mr Clement to that of the plaintiff and telling them what the plaintiff had said about Fonterra not being able to prove where the plaintiff was at the time. The plaintiff was never made aware of this. Nor was he told what Mr Henderson said.

[51] I do not accept Fonterra's submission that this material merely confirmed the decision they had already made. If an employee's representative makes such concessions a fair and reasonable employer, who would be influenced by them, would have brought the statements to the attention of the employee. This is against the background of notes taken by Mr Dye at the meetings, which mirror the mistakes made by Ms Ravji. I note that once the plaintiff was dismissed he immediately engaged solicitors.

[52] Whilst I accept Mr Rooney's submission that the consequences of poor representation would normally rest upon the employee who had elected to use such a representative, in this case it was Fonterra who appointed the representative and the plaintiff did not object. He had not been informed of his right to seek independent advice. I therefore find this to be more than a procedural failing, but one, that on balance, had substantive consequences in the conclusion Fonterra reached that Mr Clement's account was more credible than that of the plaintiff.

[53] There is also an issue that the plaintiff was never told of the possible consequences of the allegations being sustained. The plaintiff's evidence was that he had laboured under the misapprehension that he would, at worst, get a final warning. Even Mr Dye says he was shocked at the outcome. I accept that during the course of the investigation meetings the plaintiff was warned of possible consequences, especially once the allegation had moved to the level of alleging a serious breach of the permit policy. That should, however, have been given to the plaintiff in writing as required by the disciplinary handbook as it may have been overlooked during the detailed discussions at the meetings.

[54] The disciplinary handbook also requires, as part of step two, the full disclosure of all relevant documentation, where it is necessary for the employee to know the case against him. Mr Clement's file note of 8 February, which apparently reached Mr Purser on 11 February, was not provided until it was read out at the 18 February meeting, and a copy emailed on 19 February. I accept Ms Singleton's submission that this ought to have been provided prior to the first meeting as this would have allowed the plaintiff the proper opportunity to consider the allegations against him, at least insofar as they related to the allegation that he was avoiding work.

[55] There is also a conflict as to what photographs were shown to the plaintiff and this issue could have been avoided had copies of the photographs been provided to the plaintiff either before or at the relevant meeting.

[56] Ms Singleton properly complains that no notes were taken of the inspection carried out by Mr Purser in the presence of Mr Clement, nor does it appear that the plaintiff was ever advised that such an inspection had taken place. Further, he was not advised of the investigation Mr Purser carried out with Mr Kumeora into the application of the permit policy.

[57] In relation to step four, formal investigation, Ms Singleton submitted the plaintiff's location at the time of the incident was at the heart of the investigation. It is clear that the plaintiff drew a picture showing his location. Fonterra did not know what happened to that picture. Further, the plaintiff was not given the same opportunity, as Mr Clement had been given, to accompany Mr Purser to the site and to show Mr Purser exactly where he believed he was standing when Mr Clement spoke to him.

[58] Ms Singleton observed that the plaintiff had consented to have DNA and fingerprinting done during the investigation and submitted that the carrying out of such tests were not fully explored by Fonterra, despite the fact that an expert had advised them that testing was possible. The carrying out of such tests would have been an unusual course, but it does not appear that the plaintiff was never given credit for his willingness to participate in the process. Although Fonterra received

the information that the testing was still possible, this was in a letter dated 7 March after the initial notification of Fonterra's intention to dismiss the plaintiff given on 3 March. I therefore do not accept Ms Singleton's submission that in this particular respect the plaintiff was not given the opportunity to support his explanation.

[59] Ms Singleton was on stronger grounds when she submitted that the plaintiff's explanation of the deterioration of his relationship with Mr Clement, as a basis for attacking Mr Clement's credibility, was cut off by Ms Ravji during the course of the investigation meeting. This is a matter on which more latitude should have been allowed so that this aspect could have been more fully investigated.

[60] Turning to the last steps in the disciplinary handbook, Ms Singleton observed that the final meeting commenced at 4pm and the disciplinary meeting at 4.55pm and that the defendant had gone back to work between the two meetings. She submitted that in these circumstances Fonterra had breached its own prescribed process which required him to be given advanced notice of the disciplinary meeting, advice of the allegations found proven and the possible consequences and the opportunity to give any explanation, in particular mitigating factors. She submitted that the evidence from the notes established that instead of going away to consider all information with an open mind as required, Mr Purser and Ms Ravji had concluded that there was a wilful breach of the permit policy and that the plaintiff had been dishonest during the investigation. I am not persuaded that the immediacy of the action disadvantaged the plaintiff because by this stage it was clear that nothing further was being advanced on behalf of the plaintiff, before the decision to dismiss was taken and then announced. I also find there were no material process failures in the events after the 3 March decision was announced.

[61] Ms Singleton then submitted that the process was substantively flawed for all the reasons canvassed. She correctly acknowledged that the Courts have confirmed that the process followed by an employer should not be subjected to minute and pedantic scrutiny see: *X v Auckland District Health Board*,[7] but that a flawed and

[7] [2007] ERNZ 66.

unfair investigation and decision making process can lead to an unfair and unreasonable outcome.

[62] Ms Singleton properly accepted that the defendant had obligations under the Health And Safety in Employment Act 1992 but she maintained that Fonterra could not have established that the plaintiff was guilty of serious misconduct through the deficient enquiries it had carried out. Ms Singleton supported this by linking the procedural failures to the good faith requirements in s 4 of the Act. These require the parties to be responsive and communicative and for the employer to provide access to all information relevant to the continuation of the employee's employment and an opportunity to comment on that information before the decision was made. She cited from *X v Auckland District Health Board*, para 100 where the Chief Judge stated:

> The fairness and reasonableness of the employer's actions and how it acted (the statutory test for personal grievances just discussed) are to be judged by their compliance with those statutory requirements of good faith dealing, in addition to the established judge-made law of personal grievances.

[63] Mr Rooney submitted that Fonterra, after a thorough investigation including four meetings over three weeks, had taken into account the following matters in concluding that it was more likely than not that the plaintiff was found under silo 3 inside the silo skirt:

a) Mr Clement had an unblemished and long work history with Fonterra, and was considered to be reliable and trustworthy.

b) There was no history of animosity between Mr Clement and the plaintiff. Mr Clement did not have it in for the plaintiff.

c) If Mr Clement had made up the entire story, it was a very serious step with serious consequences for Mr Clement.

d) The plaintiff had received a first warning only five months previously for similar conduct.

e) The plaintiff had undergone comprehensive retraining on the permit policy and was aware of the serious consequences of being found in a restricted area without the appropriate permit.

f) The plaintiff's explanation had not been completely consistent, initially saying he was behind the silos but later saying that he was between them. By contrast Mr Clement's version had not changed.

g) There was a clear breach of the permit policy and this amounted to serious misconduct.

h) The plaintiff had not been completely honest with Fonterra during the investigation.

i) The comments of Mr Dye or Mr Henderson had not been taken into account.

[64] Mr Rooney had referred to other factual matters but they had only emerged during the hearing and were not available to Fonterra at the time the decision to dismiss was made.

[65] Mr Rooney submitted that the decision to dismiss was Fonterra's to make and whilst the Court must determine whether it was what a fair and reasonable employer would have made, he relied on a statement in *Air NZ v Hudson*[8] that when evaluating an employee's actions the test in s 103A "does not give an unbridled license to substitute [the Authority's and the Court's] views for that of an employer". He also cited *Whanganui College Board of Trustees v Lewis*,[9] where the Court of Appeal held that the ascertainment of facts by an employer enquiring into allegations of serious misconduct where there are conflicting accounts does not involve any legal standard of proof. The employer: "acting reasonably, will be entitled to accept some in preference to others."

[66] Further, Mr Rooney submitted that any action by an employee that amounts to a breach of health and safety procedures which compromise the safety of others

[8] [2006] ERNZ 415 at 438.
[9] [2000] 1 ERNZ 397 at 403.

would be a breach of the obligations under the Health and Safety in Employment Act 1992. These, I agree, are circumstances that a fair and reasonable employer would take into account in deciding whether there has been serious misconduct. I also agree the Court should exercise caution in reaching a decision contrary to that of the employer where safety issues are involved.

[67] However, Mr Rooney's submission would have had more impact in this case if Mr Clement, the team leader, or Mr Purser, Fonterra's maintenance manager, had

immediately appreciated the significance of the area under the silo being a confined space for the purpose of the permit policy. They did not appreciate there was a health and safety issue initially and it is difficult to avoid the impression that this issue became something of a makeweight to what was initially an enquiry into work avoidance on the plaintiff's part.

[68] Standing back from the detail advanced by counsel in their submissions, I accept Ms Singleton's argument that in all the circumstances Fonterra had not conducted a fair investigation and its actions were not what a fair and reasonable employer would have done in all the circumstances. The issues that I particularly take into account are as follows:

a) The failure to advise the plaintiff to contact his union representative or legal representative.

b) Appointing a union representative to be present without the plaintiff's consent.

c) Failing to provide the plaintiff with a copy of the written complaint prior to the first and second meetings.

d) Failing to formally notify the plaintiff in a letter the allegations, the factual basis, the documentary source of the breach of any alleged conduct and his right to be represented.

e) Failing to properly investigate the plaintiff's allegations regarding his relationship with Mr Clement.

f) Failing to inspect the silos in the presence of the plaintiff and to retain his drawing, and to provide him with relevant photographs.

g) Failing to advise the plaintiff of what it had come to regard as the more serious allegation of breach of the permit policy prior to or at the 18 February meeting.

h) Failing to advise the plaintiff of the conversations Mr Purser and Ms Ravji had with Messrs Dye and Henderson, especially as Mr Purser had arranged for Mr Dye to be present as the plaintiff's representative.

[69] I have already found that neither Mr Clement nor Mr Purser initially observed that there was any potential breach of the permit policy or a health and safety issue and therefore conclude that if there was such a breach it is unlikely, in the circumstances, to have amounted to serious misconduct. This was not a situation such as that in *Fuiava v Air New Zealand*[10] where the employer had carried out a procedurally fair enquiry into what was clearly a critical safety issue during which the employee was advised of all the steps taken and given the full opportunity to offer explanations.

[70] Fonterra failed in material respects to apply its published disciplinary processes for conducting an investigation. Apart from the 11 February email and the 19 February brief email annexing Mr Clement's 8 February report, the allegations against the plaintiff were never reduced to writing in anything approaching the form which is expressed to be mandatory in Fonterra's own disciplinary handbook.

[71] Had a fair and full investigation been carried out it may well have been open to Fonterra to have concluded that the plaintiff was found under silo 3 in a confined space in circumstances which suggested that he was avoiding work. Such an enquiry may have resulted in an admission by the plaintiff, as were foreshadowed in his 14 February email and this could have led to a final warning rather than a summary dismissal. In all the circumstances Fonterra had not acted fairly and reasonably in

[10] [2006] ERNZ 806.

the actions it took and therefore has been unable to discharge the burden of justifying the plaintiff's dismissal. I allow the plaintiff's challenge and uphold his personal grievance.

Remedies

[72] Mr Willis is claiming three months lost salary and compensation for loss of dignity and injury to his feelings. He was paid up until 17 March 2008 but was not employed again until late April 2008. In his new position he worked for around 30 hours per week at $32 per hour. His salary at Fonterra equated to approximately $37 per hour. He therefore seeks six weeks reimbursement for the period he says he had no work, a total of $8,884 gross. In addition he seeks six weeks at the difference between the amount he would have earned with Fonterra and the amount that he did earn with the new employer, totalling $1,204.62. The total amount sought is $10,089.24 gross.

[73] No figure has been put on his claim for compensation under s 123(1)(c)(i). Ms Singleton submitted the plaintiff's evidence showed he was forced to relocate to Auckland to live with his wife's parents because he could not get work in the Hawera area and then had to move to Australia. As a result he has had to sell his house in New Zealand and was unable to be present at the birth of his fifth child because he was in Australia looking for work.

[74] Mr Rooney submitted that the plaintiff had not provided sufficient evidence of the steps he had taken to mitigate his loss. Any award of reimbursement should therefore be reduced accordingly. He cited *Argosy Imports Ltd v Lineham*[11] where the Court held that as the grievant had not provided evidence of job applications, he had not discharged the burden of proving lost remuneration.

[75] Mr Rooney submitted that there was insufficient evidence of humiliation, loss of dignity or injury to feelings and that the decision of the Court of Appeal in *NCR (NZ) Corporation Ltd v Blowes*[12] has provided guidance as to the appropriate level of

[11] [1998] 3 ERNZ 976.
[12] [2005] ERNZ 932.

compensation generally. As this was not a case such as *Blowes* where the plaintiff was "brutally dismissed" then, Mr Rooney submitted, the award should be significantly less than that awarded in the *Blowes* case, that is to say less than $7,000.

[76] The *Blowes* case has been reviewed again by the Court of Appeal in *Commissioner of Police v Hawkins.*[13] The Court in *Hawkins* endorsed what the Chief Judge had said in *Simpsons Farms Ltd v Aberhart*[14] that *Blowes* intended to signal that most awards will fall within a range up to about $27,000 but that exceptional cases may attract higher awards.

[77] Mr Rooney then turned to the issue of contributory conduct in terms of s 124 of the Act. He correctly submitted that the reduction of remedies for fault is mandatory in the event of a finding of fault citing *Pykel Ltd v Ahfield,*[15] and *Air New Zealand v Hudson*[16] where the Employment Court referred to recent decisions in the Court of Appeal that had confirmed that:

> …in cases where dismissal is regarded as unjustifiable on purely procedural grounds, the question of the chances of the employer being dismissed absent those procedural irregularities must be considered when fixing compensation.

[78] Mr Rooney submitted that the plaintiff's dismissal had arisen directly from his actions by wilfully having placed himself in a restricted area without the required authorisation permit in full knowledge of the permit policy. He submitted that the plaintiff had lied about where Mr Clement had found him and continued to maintain those lies during the course of the investigation and the Court hearing and that in light of that contributory conduct, it would be appropriate that any remedies should be reduced by 100 percent.

[79] Mr Rooney is correct when he submits that the Court is required by s 124, in deciding the nature and extent of the remedies to be provided in respect of a personal

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[13] [2009] NZCA 209, [2009] 3 NZLR 381.
[14] [2006] ERNZ 825.
[15] [1993] 1 ERNZ 334.
[16] [2006] ERNZ 415.

grievance, to consider the extent to which the actions of the employee have contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. It is clear from the authorities that the actions of the employee that may result in a reduction of remedies, must be actions that are blameworthy.

[80] At this point in my judgment I am no longer considering what a fair and reasonable employer would have done in the circumstances but whether it has been established in the trial that there is blameworthy conduct on the plaintiff's part which would require a reduction in his remedies. I must determine, as a fact, whether the plaintiff's account or Mr Clement's is to be believed. If the plaintiff is to be believed, he was either behind or between two silos and not in an area which could be regarded as a confined space. There would still be a question over whether or not he was in such a position to avoid work or whether his explanation that he was taking a lunch break and contacting his wife was reasonable.

[81] If Mr Clement's account is accepted then the plaintiff must be taken to have been hiding in a confined space under silo 3 which can only be entered through a manhole after clambering over pipe work. There is evidence that this is a confined space for the purpose of the permit policy, although this was not readily apparent to Mr Clement on 8 February or to Mr Clement and Mr Purser when they subsequently conducted their inspection.

[82] If the plaintiff was under silo 3 then it follows that he lied to Fonterra during the investigation. If he was not, then Mr Clement must have lied. There is a stark credibility issue which Fonterra also had to confront during the course of its investigations. I had the benefit of the parties being represented by counsel and the witnesses subjected to thorough cross-examination. Fonterra did not have that advantage and had hamstrung itself by the way it had carried out its investigation.

[83] The plaintiff attempted to undermine Mr Clement's credibility by reference to the incident involving a complaint over the plaintiff's work and the events relating to his callback one evening to deal with a conveyor. I am not persuaded that this

attempt succeeded. The plaintiff himself acknowledged that prior to 6 February 2008, that he had nothing but respect for Mr Clement and considered him to be "very up front".

[84] As Mr Rooney submitted, Mr Clement had a long unblemished work history with Fonterra and was considered to be reliable and trustworthy. That view of him was shared not only by the management but also by Mr Dye and Mr Henderson of the union. It is difficult to see what, if any, motive Mr Clement would have had for telling such a blatant lie about where he found the plaintiff and in the process putting his entire career and reputation at risk.

[85] Unfortunately for the plaintiff his evidence was undermined by Mr Dye. His account of what the plaintiff had said during one of the adjournments to the effect that Fonterra could not prove where he had been was, I find, more consistent with Mr Clement's account than that of the plaintiff.

[86] The plaintiff accepted that he previously had a good working relationship with Mr Clement and that if Mr Clement was lying it was out of character. By contrast the plaintiff had already received a written warning and on Mr Dye's evidence and that of Mr Clement, already had reputation for hiding to avoid work. I also take into account the plaintiff's admission of "very poor work ethics" in his 14 February email.

[87] For all these reasons I prefer Mr Clement's evidence to that of the plaintiff's on the key issues. The totality of the evidence satisfies me, on balance, that the plaintiff was under silo 3 when found by Mr Clement. He had no lawful reason for being there and that it was more likely than not that he was there to avoid having to work.

[88] Neither the plaintiff nor Messrs Clement and Purser had initially understood the significance of the space under silo 3 being a confined space for the purpose of the permit policy. Had the plaintiff admitted the true position, it is likely the matter would have been addressed as an attempt to avoid work immediately before lunch, rather than a health and safety issue under the permit policy. I find for those reasons,

that the plaintiff's conduct contributed directly towards the situation that gave rise to the personal grievance.

[89] Had the plaintiff been truthful during the investigation it is more likely than not that he would have received a final written warning, rather than a summary dismissal. He appeared to wish to be open and honest in his email of 14 February.

[90] I consider that his contribution was so substantial that it came close to depriving him of the benefit of all of the remedies he sought. I am, however, prepared to reduce the amount of his claim for lost remuneration by a little over 50 percent to $5,000 gross. I consider his contributory conduct should deprive him of any compensation under s123(1)(c)(i) of the Act. Even though he suffered humiliation, loss of dignity and injury to feeling he largely brought these upon himself by his conduct.

[91] At the request of counsel costs are reserved. If they cannot be agreed, a first memorandum is to be filed and served within 30 days of the date of this judgment with 30 days to respond.

B S Travis
Judge

Judgment signed at 4.30pm on 29 June 2010