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Clarke v Affco New Zealand Limited AA402/10 (Auckland) [2010] NZERA 726 (7 September 2010)

Last Updated: 11 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 402/10 5281291

BETWEEN LUCKY CLARKE

Applicant

AND AFFCO NEW ZEALAND

LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

K J Anderson

S Scott, Counsel for Applicant G Malone, Counsel for Respondent

5. July 2010 at Hamilton
6. July 2010 for the Respondent

21 July 2010 for the Applicant

Determination:

7 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Clarke claims that he was unjustifiably dismissed effective from 16th July 2009. Mr Clarke also claims that prior to his dismissal, he was unjustifiably disadvantaged in his employment because he was suspended from his employment without due process. Mr Clarke seeks that the Authority find that he has a personal grievance and award him various remedies. AFFCO New Zealand Limited ("AFFCO") says that the dismissal was justified due to the actions of Mr Clarke on 7th July 2009.

Background Facts and Evidence

[2] Since 1996, Mr Clarke had been employed as a slaughterman at the Horotiu meat processing plant. Early on the morning of 7th July 2007, a number of AFFCO staff were engaged in a drug search exercise at the entrance to the carpark associated with the Horotiu plant. The exercise involved stopping and checking the cars driven by employees as they arrived at work. Mr Clarke arrived in his car at approximately 5:30 to 5:45a.m. Being mid-winter, it was dark at this time.

[3] An incident arose regarding the actions of Mr Clarke at the checkpoint that morning. There is a marked conflict in the evidence as to what occurred relating to the actions of Mr Clarke in regard to whether or not he drove his car in such a manner that one of the AFFCO staff involved in the drug search exercise, a supervisor, Ms Yvonne Lloyd, was put in danger.

The Investigation

[4] Mr Kevin Casey is the Plant Operations Manger at the Horotiu plant. He was involved in the drug search exercise ("the exercise"). His evidence is that he was approached by Mr Manu Akapita, another member of the drug search team. Mr Casey says that Mr Akapita informed him that Mr Clarke needed to be spoken to, as he had refused to stop his car and then tried to run over Ms Lloyd. There was a debrief after the exercise and the matter of this incident was raised again. Mr Casey was requested by the Plant Manager, Mr Ginders, to discuss with Mr Clarke, his view of the incident. Mr Casey duly met with Mr Clarke, who was accompanied by a union representative, Mr Donny Arnold. Also present was Mr Peter Archer. Mr Archer is a consultant and had been involved with conducting the exercise and the debrief for AFFCO. Mr Clarke took exception to the involvement of Mr Archer but I conclude that his objections were, (and remain) without any foundation.

[5] Mr Casey attests that at this first meeting, Mr Clarke was informed that an allegation had been made, that during the exercise that morning, Mr Clarke had sworn at Ms Lloyd, telling her "*to get out get out of the fucking way*" and then he had almost run her over as she had to jump clear to avoid being hit by Mr Clarke's car. Mr Casey says that Mr Clarke explained that he had not seen any checkpoints, had not been asked to stop and that Ms Lloyd had not been front of his car. Mr Casey says that Mr Clarke and Mr Arnold were "*yelling at us*" about the involvement of Mr Archer, about the exercise, how it was unsafe, and that it was all "*bullshit!*"

[6] The further evidence of Mr Casey is that given the response of Mr Clarke and Mr Arnold, he decided that there was no point in continuing with the meeting and on the basis of the information he had received from Mr Akapita and Ms Lloyd, he considered that a disciplinary hearing was warranted. Mr Casey informed Mr Clarke and Mr Arnold that there would be a formal disciplinary hearing relating to a charge of serious misconduct for threatening and intimidating behaviour, as provided for by the terms of the *AFFCO Core Employment Agreement*. Mr Clarke was advised that he was suspended from his employment on full pay, pending a disciplinary meeting. Mr Casey says that he asked Mr Clarke and Mr Arnold if they wished to make any comment about the suspension but none was forthcoming. Mr Casey also says that he would have been surprised if there had been any objection to the suspension. It is an accepted practice between AFFCO and the union that in the event of an allegation of serious misconduct, suspension is appropriate, provided a union representative is present at the point of suspension.

[7] Following the suspension of Mr Clarke from his employment, Mr Ginders conducted an investigation into the allegation of serious misconduct. He met with Mr Clarke and his two union representatives on 9th July 2009. Mr Casey was also present. The notes of the meeting show that it lasted 55 minutes and the allegation was discussed. The meeting closed on the understanding that Mr Ginders would be talking to Ms Lloyd, Mr Akapita and Ms Teresa Briggs. The latter was also present at the checkpoint on the day of the incident.

[8] There was another meeting with Mr Clarke on 16th July 2009. Mr Ginders read statements he had received from Ms Lloyd, Mr Akapita and Ms Briggs. The evidence of Mr Clarke is that these statements were presented at the meeting on 9th July, but I find that he is mistaken about this.

The statement of Ms Lloyd

In her statement, among other things, Ms Lloyd records that a car was being searched and Mr Clarke drove in behind that car. Ms Lloyd indicates that she was positioned in front of Mr Clarke's car "waving a lit torch" with her other hand being used to display a stop signal. She identified Mr Clarke and said to him he had to stop.

"The car in front then left, Lucky put his head out and yelled "Get out of my fucking way." He then drove directly at me and I had to jump out of the way."

Ms Lloyd also records that she heard Ms Briggs scream.

The statement of Ms Briggs

"Lucky Clarke was driving in the gate, slowed down because there was a car in front being checked, the car in front then moved on, Lucky yelled out "Get out of the fucking way" and drove towards Yvonne. Yvonne was waving out with her torch to stop him and had to jump out of the way to avoid being hit."

Ms Briggs also records that if Ms Lloyd had not got out of the way she would have been hit and that she [Ms Briggs] was "shocked" at what she saw.

The statement of Mr Akapita

Mr Akapita records that:

"Clark [sic] was waiting to be searched, he was the second in line and had been there for a minute or 2, car in front was a suspect, asked him to move because we were getting a build up. At that the stage the second dog handler had become free, I advised Clark to go to second handler. He said abusively "Fuck this I don't do drugs." He yelled out "Get out of my fucking way" then drove directly at Yvonne. He didn't

stop."

Mr Akapita also records that he heard Ms Briggs scream and that she was "terrified." He also records that he heard Mr Clarke swear at a dog handler.

The three statements were each accompanied by a diagram indicating where the respective people were standing at the time in question.

[9] The reasonably detailed notes of the meeting on 9th July show that Mr Clarke gave an explanation of his view of what happened on the morning of 7th July, including providing a diagram of his version of where people were standing at the time. After considerable discussion relating to the respective versions of the incident, and several adjournments during the meeting (which appears to have lasted approximately two and a half hours), Mr Ginders informed Mr Clarke that; "after considering all the facts" Mr Clarke's action on 7th July, was seen as serious misconduct and a decision had been made to dismiss him.

Analysis and Conclusions

[10] There are two matters for determination.

1. Was there anything unjustified about the process or procedure applied to the suspension of Mr Clarke from his employment, which affected Mr Clarke to his disadvantage?
2. Was the dismissal of Mr Clarke unjustified?

[11] The test of justification for both matters is provided by [section 103A](#) of the [Employment Relations Act 2000](#). The Authority must determine, on an objective basis, whether the employer's actions and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time that firstly, the suspension, and then the dismissal, occurred.

The Suspension

[12] Mr Clarke claims in his *Statement of Problem* that: *I was suspended from my employment without due process*, but he has produced little evidence as to why this could be so. Mr Clarke did say that he was "*confused*" and that he "*felt ambushed*" at the meeting on 7th July, where the outcome was suspension from employment. I note that the matter of Mr Clarke's suspension has not been referred to at all in his closing submissions.

[13] The *AFFCO Core Employment Agreement* at clause 33(a) provides that:

Prior to any worker being dismissed or suspended, the delegate or deputy delegate and a site official must be informed and must be present, together with the worker concerned if the dismissal or suspension is to be carried out. The supervisor shall record the time, date and reason for the dismissal or suspension.

Mr Clarke was represented by a site union official and no objection was ever raised about the appropriateness of the suspension. Given that an allegation of serious misconduct had been made against Mr Clarke, and an investigation and possible disciplinary action was pending, I find that it was fair and reasonable for the employer to suspend the employment of Mr Clarke. Further, I do not find anything unfair or unreasonable pertaining to how the suspension was carried out.

Was the dismissal unjustified?

[14] In support of Mr Clarke's claim that the dismissal was unjustified, essentially, the argument is that there was not a full enough investigation into what occurred on the morning of 7th July 2009. In support of this contention, the submissions for Mr Clarke point to some inconsistency in regard to the detail of the respective diagrams provided Ms Lloyd, Ms Briggs and Mr Akapita. The attention of the Authority is also drawn to the differences between the recollection of events by Mr Akapita as compared with those of Ms Lloyd and Ms Briggs and the fact that Mr Akapita was not called as a witness at the investigation meeting. A submission for Mr Clarke is that given the inconsistencies referred to, a fair and reasonable employer would have made further enquiries before coming to the conclusion that AFFCO did.

[15] While I accept that the inconsistencies referred to, do exist, I also note that the written statements of Ms Lloyd and Ms Briggs are reasonably similar, as is the evidence they gave to the Authority with one obvious exception. This is in regard to whether Mr Clarke brought his car to a stop before driving towards Ms Lloyd. In her evidence to the Authority, Ms Briggs says that: "*Lucky slowed down. I can't recall whether he came to a complete stop or not but Yvonne was directly in front of him waving her torch at him. When the car in front moved on Lucky yelled out ... and drove off towards Yvonne who was still waving her torch. Yvonne had to jump out of the way to avoid being hit.*" But the latter part of her evidence is consistent with the statement that she provided to Mr Ginders. In this, Ms Briggs said that: "*Lucky yelled out "Get out of my fucking way" and then drove off toward Yvonne*"

[16] In her evidence to the Authority Ms Lloyd says that: *Also he stopped in front of me when he saw me waving my torch at*

him. In the statement given to Mr Ginders, Ms Lloyd says that: "I saw it was Lucky, [sic] said Lucky you have to stop, the car in front then left. Lucky put his head out and yelled "Get out of my fucking way" he then drove directly at me and I had to jump out of the way."

[17] While Mr Akapita did not give evidence to the Authority, a key part of the statement he provided to Mr Ginders is that Mr Clarke: "... yelled out "Get out of my fucking way"^[1] and then drove directly at Yvonne. He didn't stop."^[2]

[18] It is accepted that there is some inconsistency in the three statements provided to Mr Ginders in regard to whether and/or when Mr Clarke stopped his car before driving towards Ms Lloyd. There is also some inconsistency in the diagrams provided in regard to where people were located at the time in question. But there is no evidential inconsistency in regard to Mr Clarke swearing, and then driving his car directly at Ms Lloyd. The evidence before the Authority is also consistent in that if Ms Lloyd had not jumped clear, it is highly probable that she would have been hit by Mr Clarke's car. While I have identified the overall relevant evidence that was presented to the Authority, what is particularly significant, is the evidence that was before AFFCO, when it made the decision to dismiss Mr Clarke. The content of the three statements given to Mr Ginders, by the three witnesses to the incident, substantially confirmed the original allegation, that Mr Clarke had deliberately driven his car in such a manner as to put the safety of Ms Lloyd at risk.

[19] I find that on the basis of the evidence gathered by Mr Ginders, while conducting his investigation into the incident in question, it was fair and reasonable for AFFCO to conclude that the actions of Mr Clarke were "threatening and intimidating behaviour" under clause 31(b)(iii) of the collective employment agreement, an offence; "which would normally warrant dismissal" and that dismissal was an option that was reasonably available.

[20] It has also been advanced for Mr Clarke that AFFCO did not take into account the "environmental" factors at the time of the incident. Attention has been drawn to the darkness, poor lighting and staff not wearing high visibility vests. Mr Clarke says that he did not see Ms Lloyd in front of his vehicle. Contrary to this, Ms Lloyd says that: "I could see Lucky and believe that he could see me." Ms Briggs also says that she was; "... sure that Yvonne was visible and that Lucky had seen her. He could hardly have missed her torch shining at him from in front of his car and he slowed down for her."

[21] While given the circumstances, it is inexplicable that staff were not wearing high visibility vests, I conclude, as did AFFCO, that it is more probable than not that Ms Lloyd was clearly visible to Mr Clarke, and that there were no significant environmental factors that could be seen to mitigate the actions of Mr Clarke.

Determination

[22] For the reasons set out above, I find that following a reasonable investigation into the incident of 7th July 2009, AFFCO were entitled to conclude that the actions of Mr Clarke constituted serious misconduct, and that his suspension from employment and subsequent dismissal, were options available to a fair and reasonable employer in the circumstances. Mr Clarke does not have a personal grievance and his claims are dismissed.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, AFFCO has 28 days from the date of this determination to file and serve submissions with the Authority. Mr Clarke has a further 14 days to file and serve submissions

K J Anderson

Member of the Employment Relations Authority

[1] It was asserted by Mr Clarke that he was swearing at the car in front of him. This was not accepted by AFFCO. Given the overall evidence available it is not accepted by the Authority either.

[2] Underlining added by the Authority.
