

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 422  
5403100

BETWEEN

KATHLEEN MONICA  
CLARKE  
Applicant

A N D

AFFCO NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: K J Anderson

Representatives: M Leaf, Counsel for Applicant  
R Webster, Counsel for Respondent

Investigation Meeting: 18 April 2013 at Hamilton

Submissions Received: 14 May 2013 from Applicant  
31 May 2013 from Respondent

Date of Determination: 17 September 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] This matter originally came to the Authority via a statement of problem received on 23 November 2012. The applicant, Ms Kathleen Clarke, raised two claims, being:

- (a) That she was unjustifiably dismissed; and
- (b) That she had been underpaid at the rate of \$12.475 per hour (a cleaner's rate) instead of at the rate of \$17 per hour as a mutton slaughter worker.

[2] In regard to the latter claim, the applicant was seeking a determination from the Authority that she should be paid wage arrears for a period of 2.5 years: being the sum of \$8,750.

[3] In regard to the claim of unjustifiable dismissal, the statement of problem is accompanied by an application to file a personal grievance out of time. It is acknowledged for the applicant that her personal grievance was raised outside the 90 days required by s.114 of the Employment Relations Act 2000 (the Act) and the respondent, AFFCO New Zealand Limited (AFFCO) does not consent to the grievance being raised out of time. The parties have agreed that there is a preliminary matter to be determined. This is whether exceptional circumstances exist pursuant to s.115(b) of the Act, whereby the Authority should grant leave for Ms Clarke to raise her personal grievance after the expiry of the 90 days period.

[4] The parties attended an investigation meeting on 18 April 2013 and evidence from Ms Clarke, and further evidence from her sister, Ms Liza Clarke, was heard. The Authority has also received sworn affidavits from Mr Andrew Stephenson and Mr John Waterman. For AFFCO, the Authority has received evidence from Ms Donna Hirina, Ms Jennifer Sauer and Mr Graeme Cox. The Authority subsequently interviewed Mr Andrew Stephenson; with Ms Leaf and Ms Webster participating in the teleconference for that purpose. Written submissions have now been received from both parties.

[5] It is also appropriate to record that at the investigation meeting, the parties agreed to attend mediation relating to Ms Clarke's wage arrears claim. The Authority has not been informed of the outcome of the mediation.

### **The preliminary matter**

[6] It is commonly accepted that Ms Clarke was dismissed from her employment with AFFCO on 23 September 2009, but inexplicably, a personal grievance was not raised with AFFCO until 17 July 2012. Pursuant to s.115(b) of the Act, Ms Clarke says that exceptional circumstances exist because she made reasonable arrangements with her agent, the New Zealand Meatworkers and Related Trades Union (the Union) to have her grievance raised; and the Union failed to ensure that the grievance was raised within the required 90 days.

**Background**

[7] Ms Clarke was employed at the AFFCO Rangiora meatworks from March 2006 until her dismissal on 23 September 2009. Ms Clarke worked in the mutton slaughter department, but for a period in 2007, she worked as an amenities cleaner. In July 2007, Ms Clarke had an accident that involved a knife cut. It appears that the cut may not have been adequately treated at the meat plant, nonetheless, Ms Clarke returned to her duties on the mutton slaughter board. Subsequently, Ms Clarke needed to attend a hospital accident and emergency department and she was admitted to the hospital for a short period of time. The outcome was that Ms Clarke needed to participate in a period of rehabilitation and eventually, was redeployed to carry out office work.

**The dismissal**

[8] Apparently, Ms Clarke was in some pain as a result of her accident and she had the use of a TENS (transcutaneous electrical nerve stimulation) machine which provides some muscle and nerve pain relief. Relevant to the dismissal of Ms Clarke is that the TENS machine has a high battery use and Ms Clarke had made a request for AFFCO to pay for a battery charger.

[9] The evidence of Ms Clarke is that because she had not received any satisfaction in regard to being provided with a battery charger, to have at her home, the receptionist in the AFFCO office told her to take home the battery charger that belonged to the company, because it was not being used. Ms Clarke says that she believed that the receptionist had authorised her to take the AFFCO charger home.

[10] Ms Clarke was subsequently required to attend a disciplinary meeting to answer an allegation made by AFFCO that she had taken the battery charger home without permission. Following an investigation, whereby the receptionist denied giving Ms Clarke permission to take the battery charger home, the outcome of the meeting on 23 September 2009, was that Ms Clarke was dismissed.

**The involvement of the Union**

[11] Ms Clarke was represented at the two disciplinary meetings (22 September and 23 September 2009) by the Union in the form of Mr John (Terrence) Waterman, also known as Tarz. Mr Waterman was the shed president of the Union at that time.

[12] In his sworn affidavit, Mr Waterman confirms that he was present at the meeting on 23 September 2009 when Ms Clarke was dismissed. Mr Waterman attests that after he left the meeting he “left matters for Andrew Stephenson to handle”, but did not advise Ms Clarke “about anything”. Mr Waterman says that he did not have any further contact with Ms Clarke after she was dismissed. He attests that he “didn’t do anything” or talk to the full time union official, Mr Mike Nahu. This was because, firstly, Mr Waterman did not think that there was any chance of Ms Clarke “getting out of a dismissal for theft”, and secondly, he thought Mr Stephenson was handling matters.

[13] Mr Andrew Stephenson also provided a sworn affidavit to the Authority and while he was not available to attend the investigation meeting, he was subsequently interviewed via a teleconference and he willingly responded to questions from the Authority, Ms Webster and Ms Leaf.

[14] The affidavit evidence of Mr Stephenson is that he was the health and safety representative for the Union and he was involved with Ms Clarke in regard to her wish to obtain a battery charger; and he also was aware of the circumstances of Ms Clarke’s injury.

[15] Mr Stephenson confirms that he was present at the disciplinary meetings on 22 and 23 September 2009. He attests that he recalls saying to Ms Clarke that he would look at lodging “a lump sum grievance” but this was a reference to a claim for lump sum compensation via the accident compensation avenues. Mr Stephenson accepts that he did not make it clear to Ms Clarke what “the difference between a personal grievance and a lump sum ACC grievance” was. Mr Stephenson also says that he met with Ms Clarke after she was dismissed. But the evidence is that his involvement was limited to pursuing a claim for lump sum compensation for the injury that Ms Clarke had suffered.

[16] Mr Stephenson attests to having discussions with Ms Clarke, and her sister, about following up the claim for a lump sum ACC payment. He has produced an Accident Compensation Corporation document (dated 18 December 2009) that confirms an application for a lump sum payment was filed with ACC. Mr Stephenson left the employment of AFFCO shortly after.

[17] During the teleconference, Mr Stephenson said that after the meeting on 23 September 2009, he told Mr Waterman that something should be done about the dismissal of Ms Clarke but he established that it was not his responsibility as a health and safety representative.

### **Post-termination events**

[18] The evidence of Ms Clarke is that she had some contact with Mr Stephenson after the termination of her employment. But it seems reasonably clear that she did not understand that his role was only to take whatever steps he could to obtain a lump sum payment from ACC pertaining to Ms Clarke's injury. Ms Clarke attests that Mr Stephenson told her that the full time union official, Mr Nahu, was aware of her "grievance" and was taking matters further. But the weight of the evidence, including that of Mr Stephenson and Mr Waterman, is that this was not so and it is most unlikely that Mr Nahu had any knowledge regarding the dismissal of Ms Clarke. This was confirmed by Mr Graeme Cox, the AFFCO Human Resources Manager. He related to a discussion with Mr Nahu in July 2012, as a consequence of the receipt of the letter dated 17 July 2012, that raised a grievance on behalf of Ms Clarke.

[19] There is a significant lack of evidence in regard to what Ms Clarke did in regard to pursuing a personal grievance with AFFCO from the date of her dismissal (23 September 2009) until she made contact with Ms Leaf, her barrister. This appears to have been some time in March 2010; as evidenced by the written authority for Ms Leaf to represent Ms Clarke, dated 17 March 2010.

[20] As I understand it, Ms Leaf first wrote to the Union on 15 March 2010. She requested the release to her of all information that the Union held pertaining to Ms Clarke. Ms Leaf informed the Union that she was particularly interested in "documents raising a personal grievance with [Ms Clarke's] employer". Apparently, there was no response from the Rangiora sub-branch of the Union and Ms Leaf corresponded with the National Office of the Union on 26 and 27 September 2010. There is no evidence of any response from the Union.

[21] Ms Leaf wrote to AFFCO on 21 October 2010, 11 November 2010 and 25 November 2010 requesting Ms Clarke's personal records. Among other things, Ms Leaf requested information relating to the dismissal of Ms Clarke. But there is no mention of a personal grievance being raised or being contemplated. Indeed, while

AFFCO provided various information relating to Ms Clarke, on 26 November 2010, a personal grievance was not raised until 17 July 2012.

### **Analysis and conclusions**

[22] Pursuant to s.114 of the Act, in regard to an application for leave to raise a personal grievance after the expiration of the 90 days period, leave may be granted, subject to such conditions (if any) as the Authority thinks fit; if the Authority:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in s.115); and
- (b) considers it just to do so.

[23] Then, at s.115, exceptional circumstances include:

- (a) Where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in s.114(1); or
- (b) Where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
- (c) Where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by s.54 or s.65, as the case may be; or
- (d) Where the employer has failed to comply with the obligation under s.120(1) to provide a statement of reasons for dismissal.

[24] The application for Ms Clarke relies on s.115(b) of the Act. Ms Clarke says that she "made reasonable arrangements" to have her grievance raised on her behalf by the Union (as her agent), and the Union "unreasonably failed" to ensure that the grievance was raised within 90 days of the date of her dismissal: 23 September 2009.

[25] Ms Clarke appears to believe that she made reasonable arrangements with Mr Stephenson, the health and safety representative for the Union, to raise a personal grievance on her behalf. But she obviously misunderstood Mr Stephenson's role within the Union. Apart from Mr Stephenson not having any authority, obligation or duty to raise a personal grievance with AFFCO, it seems that Ms Clarke not only was

mistaken about Mr Stephenson's role within the Union, she was also mistaken about the actions that he was taking on her behalf. That is, Mr Stephenson was attempting to obtain for Ms Clarke a lump sum payment from ACC, related to the injury that she incurred while still employed by AFFCO. Perhaps Mr Stephenson's use of the words "lump sum grievance" was unfortunate, but it is clear from the weight of the evidence that he was only ever referring to raising a lump sum compensation matter with ACC.

[26] In fairness to Ms Clarke, it is possible that her perception of Mr Stephenson's role in regard to raising her alleged grievance was genuinely, but mistakenly, held. However, the reality was quite different. I conclude Mr Stephenson was never at any time in a position to raise a personal grievance on behalf of Ms Clarke. And while Mr Waterman did, most probably, have the requisite authority to raise a personal grievance on behalf of Ms Clarke, it is clear from his evidence that he may have lacked the training and/or the inclination to do so. And perhaps more to the point, there is no evidence that Ms Clarke ever made any arrangements with Mr Waterman, or any other authorised officer of the Union, to raise a grievance on her behalf.

### **Determination**

[27] Having given close consideration to the evidence available, I find that Ms Clarke did not make reasonable arrangements to have a personal grievance raised by the Union. Therefore, it follows that the Union could not, and did not, fail to ensure a grievance was raised within the required time.

[28] Given the above finding, I am not required to give consideration to the second criteria set out by s.114(b): whether it would be just to grant leave to raise the grievance out of time. But even if it were otherwise, it is significant that even taking into account Ms Clarke's mistaken perception of Mr Stephenson's role, she has not explained why it took until 17 July 2012 for the grievance to be raised; given that she obtained legal advice from on or about sometime in March 2010.

**Costs**

[29] Costs are reserved. The parties are invited to resolve this issue if they can. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**