

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2024] NZERA 714
3282319

BETWEEN

DARREN FAULKNER
Applicant

AND

AFFCO NEW ZEALAND
LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Adrian Plunket, advocate for the applicant
Roxy Robertson, counsel for the Respondent

Investigation Meeting: 8 August 2024 in Whanganui

Submissions and further information: Up to 30 September 2024

Determination: 29 November 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Darren Faulkner was employed at AFFCO New Zealand Limited's (AFFCO) Imlay meat processing plant as a stock handler from May 2022 until April 2023 when he was dismissed for serious misconduct. Mr Faulkner raised a claim he was unjustifiably dismissed.

[2] AFFCO says its decision to terminate Mr Faulkner's employment followed proper process and was justified.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged by Mr Faulkner and Shaina Kauika, a relative of Mr Faulkner, and for AFFCO by Walid

Mahmoud, Plant Manager at AFFCO's Imlay meat processing plant. All witnesses answered questions, under oath or affirmation, from me and from the representatives.

[4] At the conclusion of the investigation meeting I timetabled for evidence discussed during the investigation meeting to be provided and identified a number of points I considered it would be helpful for submissions to address. Mr Plunket and Mrs Robertson provided the directed information and written submissions in accordance with the timetable directions made at the conclusion of the investigation meeting.

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

The issues

[6] The issues requiring investigation and determination were:

- (a) Whether Mr Faulkner was unjustifiably dismissed by AFFCO?
- (b) If AFFCO's actions were not justified (in respect of dismissal) what remedies should be awarded, considering:
 - (i) Lost wages under ss 123(1)(b) and 128 of the Act, subject to quantification and evidence of reasonable endeavours to mitigate Mr Faulkner's losses; and
 - (ii) Compensation under s123(1)(c)(i) of the Act?
- (c) Should either party contribute to the costs of representation of the other party?

[7] The statement of problem for Mr Faulkner included a claim for holiday pay, however following a case management conference in March 2024 Mr Faulkner's former representative advised the holiday pay claim was no longer being advanced and it was not investigated further.

[8] Mr Plunket raised a claim for penalties for a breach of s 4 of the Act in May 2024. I indicated at the investigation meeting my preliminary view this claim had not been raised within time as required under s 135(5) of the Act and I did not consider it should be considered further, which was accepted on Mr Faulkner's behalf.

[9] Mr Plunket also raised a claim for unjustified disadvantage in relation to Mr Faulkner's suspension at the investigation meeting, which Mrs Robertson objected to being raised out of time as required under s 114 of the Act. I declined leave for this claim to be raised out of time at the investigation meeting.

Was Mr Faulkner unjustifiably dismissed by AFFCO?

Test of justification

[10] In assessing Mr Faulkner's claim he was unjustifiably dismissed I must apply the test of justification under s 103A of the Act, being whether AFFCO's actions, and how AFFCO acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[11] In reaching my conclusions about Mr Faulkner's claim, s 103A(3) requires I consider:

- a. having regard to the resources available to it, did AFFCO sufficiently investigate before taking action;
- b. did AFFCO raise concerns it had with Mr Faulkner before taking action;
- c. did Mr Faulkner have a reasonable opportunity to respond; and
- d. did AFFCO genuinely consider Mr Faulkner's explanation or comments.

[12] I may also take into account any other factors I think are appropriate (s 103A(4)). I must not determine an action to be unjustifiable where there were defects in AFFCO's process that were minor and did not result in Mr Faulkner being treated unfairly (s 103A(5)).

Events leading to Mr Faulkner's dismissal

[13] The following summary of events is based on documents provided to the Authority, evidence given during the investigation meeting and submissions.

[14] On 13 April 2023 Mr Faulkner was involved in an incident with another employee TJS¹ while working in the stockyards at AFFCO's Imlay meat processing plant. The details of this incident are contested between the parties, particularly whether

¹ I have referred to the three employees from whom witness statements were taken by randomly generated identifiers, which do not reflect their actual names. These individuals did not provide evidence to the Authority and I do not consider there is public interest in identifying them.

Mr Faulkner assaulted TJS. AFFCO accepts Mr Faulkner suffered injuries during the incident.

[15] Immediately following the incident Mr Faulkner left the stockyards, talking to a supervisor on the way to Mr Mahmoud's office. Mr Mahmoud agreed Mr Faulkner should seek medical attention, which Mr Faulkner then did as well as filing a police complaint of assault against the other employee. Mr Mahmoud arranged for an AFFCO HR adviser to obtain statements from TJS and two other employees who were present (GZU and CBT).

[16] The day after the incident Mr Faulkner provided ACC forms to AFFCO and was advised he was suspended on full pay while the incident was investigated. On the same day he was invited to an investigation meeting on 18 April 2023 to consider issues including assault², deliberate use of offensive or abusive language³ and leaving his workstation without authority from his supervisor.⁴ Mr Faulkner was provided with witness statements related to the incident.

[17] Two versions of the collated witness statements have been provided in evidence, both of which were on one page. The difference between the two versions was one included the statement of TJS while the other did not. Mr Faulkner said he was not provided TJS' witness statement. AFFCO checked its personnel records following the investigation meeting and advised it was unable to confirm which version of the collated statements was sent. I return to this point at paragraph [39] below.

[18] The investigation meeting was held starting about 10am on 18 April 2023 with Mr Faulkner, Mr Mahmoud and the HR adviser present, with minutes provided showing Mr Mahmoud asking questions about the incident and Mr Faulkner responding. In summary Mr Faulkner denied the allegations of swearing at and pushing a gate into TJS, and alleged TJS had shoved the gate into him and punched him. Mr Faulkner accepted CBT's statement was correct but did not accept GZU's statement was. Mr

² The full text of the letter and subsequent letters refers to expectations in the AFFCO Imlay Seasonal Induction Booklet rules where violation may lead to immediate dismissal. The specific expectation which I have shortened to "assault" reads "Assault, threatening, intimidating, coercing any employee, manager, director or shareholder of the company at any time on or off site".

³ The full text of this expectation, which may lead to "disciplinary action ranging from warnings to dismissals" reads "Deliberate use of offensive or abusive language to another person on Company premises".

⁴ The full text of this expectation, which also may lead to "disciplinary action ranging from warnings to dismissals" reads "Leaving your workstation without authority from your Supervisor, other than for meal breaks or limited personal needs".

Faulkner also raised a reason why TJS may have been motivated to misrepresent what had happened. There is no clear mention in these minutes of the witness statement of TJS.

[19] A separate investigation meeting was held with TJS starting at about 1pm on 18 April 2023 with Mr Mahmoud and the HR adviser present. The letter inviting TJS to this meeting was slightly different from the letter sent to Mr Faulkner, with only an allegation of assault presented.

[20] Minutes from this meeting show TJS alleged Mr Faulkner had sworn at him and then shoved a gate into his lower back. TJS admitted to pushing Mr Faulkner into a door, before saying CBT yelled at them to stop and Mr Faulkner ran off. Mr Mahmoud asked TJS to demonstrate what Mr Faulkner had done with the gate and when this appears to have occurred then questioned how it could have caused scratch injuries. TJS then says he could have been scratched during pushing and shoving, before advising he is resigning, and the meeting is then recorded as ending.

[21] Mr Faulkner was sent two letters inviting him to a disciplinary meeting. The first letter dated 19 April 2023 includes a summary of Mr Faulkner's comments from the investigation meeting and invites him to a disciplinary meeting on 21 April 2023. It indicated AFFCO had decided the incident may amount to assault, refers to deliberate use of offensive or abusive language, and indicates "This may lead to a final warning, or a dismissal being issued".

[22] The first disciplinary meeting was held on 21 April 2023 with Mr Faulkner, Mr Mahmoud and the HR adviser present, with minutes provided showing Mr Mahmoud moving quickly to assert AFFCO had established Mr Faulkner had pushed the gate into TJS. Mr Faulkner said he did not remember doing that, with Mr Mahmoud advising he was proposing dismissal as fighting was not tolerated. Mr Faulkner again asserted he had not done anything wrong.

[23] The second letter dated 21 April 2023 omitted the summary of Mr Faulkner's comments from the investigation meeting and invited him to attend a disciplinary meeting on 26 April 2023. It repeated AFFCO had decided the incident may amount to assault, again refers to deliberate use of offensive or abusive language, and again indicates "This may lead to a final warning, or a dismissal being issued".

[24] The second disciplinary meeting was held on 26 April 2023 with Mr Faulkner, Mr Mahmoud and the HR adviser present, with minutes provided showing Mr Mahmoud starting by saying a final decision would be delivered. I refer to this meeting as the decision meeting.

[25] Mr Faulkner was asked if there was anything he would like to add and when he said “nothing” Mr Mahmoud advised having “considered everything you have said along with all the evidence from all parties involved and the final outcome will be dismissal for the serious misconduct of assault”. Mr Faulkner objected saying it was not fair he was losing his job when TJS had assaulted him. Mr Mahmoud then advised he would need to fill out a termination form. The termination form records Mr Faulkner having been dismissed and is signed by Mr Faulkner and Mr Mahmoud, dated 27 April 2023.

Submissions of the parties

[26] Submissions for Mr Faulkner claimed Mr Mahmoud predetermined the investigation by deciding Mr Faulkner had pushed the gate into TJS prior to the disciplinary meeting. When Mr Faulkner denied this, his explanation was said to have been not considered fairly and reasonably due to a lack of further investigation, including not going to the site of the incident to check the accounts of Mr Faulkner, TJS, CBT and GZU.

[27] The brief investigation process and brevity of meetings is claimed to raise concerns about whether AFFCO had met the standards of a fair and reasonable employer, which could indicate insufficient gathering of all relevant facts and investigation of allegations. It was suggested brief meetings may not give an employee a fair opportunity to respond to allegations and might suggest an employer had not genuinely considered an employee’s comments. In totality it was submitted AFFCO had not satisfied the requirements of s 103A and Mr Faulkner’s dismissal was therefore unjustified.

[28] In addition, inconsistencies are alleged between the statements of TJS, CBT and GZU, and Mr Faulkner says he was never provided with the statement of TJS, which is said to explain his lack of reference to TJS’ statement during AFFCO’s investigation meeting. A failure to question each statement maker over the alleged inconsistencies was said to indicate predetermination and a failure to consider whether Mr Faulkner’s

account of events was more likely than other accounts also said to be unreasonable. The failure to provide Mr Faulkner with TJS' statement was said to have denied "a real opportunity to refute the allegations".

[29] Submissions compared this situation with the Court's finding in *Alatipi v Chief Executive of the Department of Corrections*⁵ there was a lack of "a sufficient and reliable evidential basis" to conclude Mr Alapiti had assaulted a prisoner. The Court went on to say:⁶

There were many issues arising out of the evidence before the investigator and the decision-maker which called for further inquiry. Those matters needed to be properly investigated before firm conclusions were drawn about Mr Alatipi's alleged conduct but that did not happen. A fair and reasonable employer would have ensured that those further inquiries were carried out. A fair and reasonable employer could not have drawn the conclusion that Mr Alatipi had been guilty of the alleged assault simply on the strength of the facts as they stood. ...

In terms of the s 103A test of justification, I am satisfied that the decision to dismiss Mr Alatipi was beyond that which a fair and reasonable employer could have reached in all the circumstances at the time the dismissal occurred.

[30] Disparity of treatment was also alleged in terms of AFFCO allowing TJS to resign and not concluding its investigation into his actions, and then re-hiring TJS the following season.

[31] Submissions for AFFCO said there are a range of reasonable responses an employer can take, a range of ways an employer can run an investigation or disciplinary process, and "what may be reasonable for an employer in a less dangerous industry may therefore not be appropriate or reasonable for one that is in an inherently more dangerous industry". Reference was made to a Court judgment accepting "AFFCO is an inherently dangerous workplace ... [which] needs to be assured, as well as it may be, that employees will deal with conflict and anger safely and sensibly".⁷

[32] AFFCO maintained it had provided Mr Faulkner "sufficient opportunity to consider the allegations that were raised" and said while it was "not certain" when TJS' statement was provided to Mr Faulkner, those statements were discussed during the meetings. AFFCO rejected the assertion the brevity of investigation meeting reflected

⁵ [2015] NZEmpC 7 at [123].

⁶ Ibid at [123] and [124]. This quote comes directly from the Court's judgment, which was paraphrased in submissions.

⁷ Submissions paraphrased *Clarke v AFFCO NZ Ltd* [2011] NZEmpC 17 at [28], with the last portion of this quote from submissions directly reflecting the Court's judgment.

the brevity of investigation and said all facts gathered were taken into consideration ahead of a decision being made.

[33] AFFCO acknowledged TJS was re-employed by it, but said Mr Mahmoud was on leave when that happened and the staff re-engaging TJS would not have known all the facts, with re-employing someone who had resigned appearing reasonable.

[34] AFFCO also said:

By making assumptions of drawing inferences into [TJS'] resignation, [it] would be going beyond how it ought to engage during employment relationships.

Nevertheless, and irrespective of [TJS'] resignation, Mr Faulkner was subject to an independent employment investigation, and ultimately disciplinary, in his own right. The findings and decisions made were not joint.

[35] In relation to the argued inconsistencies between witness statements AFFCO submitted:

... the statements are one part of the consideration that ultimately led to the decision in [Mr Faulkner's] termination. It is not the sole determining factor.

...

irrespective of who initiated the altercation, the investigation concluded that there was an altercation, and that the altercation involved both Mr Faulkner and TJS. As an inherently dangerous environment, as decision maker, Mr Mahmoud considered the altercation as a serious misconduct which needed to be dealt with, by ensuring the safety of all on plant.

AFFCO's overall investigation process was not sound and the conclusions it reached go beyond those open to a fair and reasonable employer

[36] In terms of AFFCO's investigation process I consider its actions were largely appropriate in determining to commence the investigation and in raising concerns with Mr Faulkner before taking action. AFFCO was aware there was an alleged incident or altercation between Mr Faulkner and TJS. I consider AFFCO's actions were reasonable in commencing an investigation on the basis of Mr Faulkner's complaint to Mr Mahmoud and the evidence which was gathered from TJS, CBT and GZU.

[37] I also accept AFFCO's processing plant could be viewed as an inherently dangerous workplace, where AFFCO may reasonably treat allegations of fighting very seriously, as reflected in the statements of expectations in the AFFCO Imlay Seasonal Induction Booklet where violation of rules related to assaults may lead to immediate dismissal.

[38] AFFCO is still however required to follow a sound investigation and disciplinary process, and to reach conclusions open to a fair and reasonable employer, and I do not consider it has demonstrated in totality having done so in this case.

[39] I find more likely than not Mr Faulkner was not provided with TJS' witness statement. I do not accept the minutes of AFFCO's investigation meeting with Mr Faulkner refer clearly to TJS' account or show Mr Faulkner responding to TJS' account. I consider it more likely than not the version of witness statements with TJS' account was provided to TJS for the purposes of his investigation meeting, while Mr Faulkner only received CBT and GZU's witness statements.

[40] TJS' witness statement was key as they were the other party to the incident with Mr Faulkner and AFFCO needed to ensure he had responded to it. This was more important than putting CBT and GZU's witness statements and in itself calls into doubt whether AFFCO's decision was sound.

[41] When Mr Faulkner disputed elements of GZU's statement, while accepting CBT's statement was correct, I consider Mr Mahmoud should have taken further steps to test the inconsistencies in witness statements. In addition, I consider Mr Mahmoud should have realised Mr Faulkner was not responding to all the information AFFCO had.

[42] This is analogous to the situation the Court said in *Alapiti* "called for further inquiry. ... A fair and reasonable employer would have ensured that those further inquiries were carried out".⁸

[43] While I accept Mr Mahmoud may well have known the stockyards well enough to not need to test evidence by going to the site of the altercation with the witnesses, I do not accept he could reach the conclusions he did without testing the inconsistencies in witness statements. This is particularly so in light of Mr Faulkner's adamant position during his investigation meeting on 18 April 2023 he had been punched by TJS and had not pushed the gate into TJS.

[44] I also consider Mr Mahmoud should have further tested the inconsistencies between physical evidence he accepted having seen of contusions on Mr Faulkner's head, with the witness statements of CBT and GZU saying they did not see any

⁸ Note 5 above at [123].

punching and TJS denying having punched Mr Faulkner. I consider Mr Mahmoud should have been particularly cautious in relation to TJS' evidence given he resigned when questioned by Mr Mahmoud about his account of how Mr Faulkner was alleged to have assaulted him.

[45] I consider these circumstances are also analogous to the situation where the Court said in *Alapiti* "A fair and reasonable employer could not have drawn the conclusion that Mr Alatipi had been guilty of the alleged assault simply on the strength of the facts as they stood". I find AFFCO's conclusion Mr Faulkner was guilty of the alleged assault of TJS was not a conclusion it could draw based on the facts it had established and consequently Mr Faulkner's dismissal was unjustified.

[46] I consider the findings above also call into question whether Mr Faulkner had a reasonable opportunity to respond, being unaware of TJS' account, and whether AFFCO genuinely considered Mr Faulkner's explanation or comments. While I am not satisfied AFFCO's actions reach the level of predetermination, they fall short of those of a fair and reasonable employer.

[47] I do not consider however the brevity of the investigation meetings was a material factor in whether AFFCO's process was fair and reasonable. Mr Mahmoud asked questions which were succinctly answered. The failing in AFFCO's process was what did not follow, not the brevity in investigation meetings in itself.

[48] For completeness, I consider AFFCO's decision to terminate Mr Faulkner was based on its conclusion he had been fighting with TJS. It would have been preferable for AFFCO to communicate more clearly that it had withdrawn the allegation of Mr Faulkner leaving his workstation without authority from his supervisor and that it was not relying on the allegation of deliberate use of offensive or abusive language. I consider this amounted to a minor defect in AFFCO's process, which did not further result in Mr Faulkner being treated unfairly.

Conclusion

[49] I find AFFCO's conclusion Mr Faulkner was guilty of the alleged assault of TJS was not a conclusion it could draw based on the facts it had established and consequently Mr Faulkner's dismissal was unjustified.

What remedies should be awarded to Mr Faulkner in relation to his unjustified dismissal?

[50] Having determined Mr Faulkner was unjustifiably dismissed, I need to consider what remedies should follow. Mr Faulkner sought three months' lost wages under s 123(1)(b) of the Act, less income earned during that period and compensation of \$30,000 for hurt and humiliation under s 123(1)(c)(i) of the Act. AFFCO did not make any submissions on Mr Faulkner's calculation of lost wages or claim for compensation.

[51] Mr Faulkner provided evidence of applying for a number of other jobs, saying he started work in a new role on 26 May 2023. He claimed for full lost wages of \$1,200 per week for four weeks, then the difference between what he would have earned at AFFCO and what he earned in his new role for the following nine weeks.

[52] I accept Mr Faulkner's evidence he was paid \$1,200 gross per week from AFFCO in the absence of evidence to the contrary. Bank statements he provided showed his final pay from AFFCO, which was not inconsistent with this claim. I accept based on this Mr Faulkner is entitled to an award of lost wages for the first four weeks after he was dismissed of \$4,800 gross.

[53] For the period where Mr Faulkner claimed the difference between his new wages and his wages at AFFCO. He said in his new job he was paid on average 40 hours at \$26.50 for the first two weeks, then 47 hours at \$26.50 for the following seven weeks. These amounts mean he was paid \$1,060 gross on average for the first two weeks, then \$1,245.50 gross on average for the following seven weeks. As the payment for the final seven weeks is more than Mr Faulkner was paid at AFFCO, he cannot claim lost wages for those weeks. He is however entitled to the difference between his new wages and his wages at AFFCO for the first two weeks, which I calculate as \$280 gross.⁹

[54] I order AFCCO to pay Mr Faulkner lost wages of \$5,080 gross.¹⁰

[55] Mr Faulkner gave evidence of being stressed from his dismissal and feeling AFFCO did not do anything about him being assaulted. He said he was still "a little pissed off" about how he had been treated and the situation had been quite depressing,

⁹ Being the difference between 2 x \$1,200 gross and 2 x \$1,060 gross.

¹⁰ This amount is higher than the \$4,761.50 gross claimed in Mr Faulkner's witness statement as he incorrectly claimed for the seven weeks when he earned more in his new wages, which reduced his total claim.

with him needing to seek medical assistance to deal with the impacts on him. Ms Kauika said Mr Faulkner had become very negative, grumpy and stressed by his situation and was not nice to be around for a while, and she did not think he had fully moved on.

[56] Based on Mr Faulkner evidence of the impacts of AFFCO's actions on him related to his dismissal, taking into account comparable cases, I consider compensation of \$15,000 under s 123(1)(c)(i) of the Act is appropriate, before considering contribution.

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Faulkner that contributed to the situation giving rise to his grievance?

[57] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Faulkner that contributed to the situation giving rise to his grievance.

[58] I have found Mr Faulkner's dismissal was unjustified as failings in AFFCO's investigation process meant it could not have reached the conclusion Mr Faulkner was guilty of the alleged assault of TJS. Given these findings, I do not consider Mr Faulkner to be at fault in relation to the situation giving rise to his grievance. No reduction in remedies is ordered accordingly.

Summary of outcome

[59] I have found:

- a. more likely than not Mr Faulkner was not provided with TJS' witness statements;
- b. AFFCO's conclusion Mr Faulkner was guilty of the alleged assault of TJS was not a conclusion it could draw based on the facts it had established; and
- c. consequently Mr Faulkner's dismissal was unjustified.

Orders

[60] For the above reasons I order AFFCO New Zealand Limited to pay Darren Faulkner within 28 days of the date of this determination:

- a. \$5,080 gross in lost wages under s 123(1)(b) of the Employment Relations Act (the Act); and
- b. \$15,000 in compensation under s 123(1)(c)(i) of the Act.

Costs

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

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

[63] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.¹¹

[64] As the investigation meeting for this matter took almost one full day, my preliminary view is the notional daily rate for one day is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

¹¹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1