

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Shelley Thornton (Applicant)
AND AFFCO Limited (Respondent)
REPRESENTATIVES Alan Millar for Applicant
Gillian Spry for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 15 September 2005
MEETING
FURTHER SUBMISSIONS Received by 26 September 2005
DATE OF
DETERMINATION 7 November 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. Ms Thornton claims that the respondent (AFFCO) has unilaterally altered their employment agreement unjustifiably to her disadvantage and seeks compensation for these actions. AFFCO denies this and claims that it was Ms Thornton who is acting in breach of her employment agreement by not working the hours she is contracted to do.

The Facts

2. Ms Thornton works for AFFCO at its Manawatu plant as the inventory control and shipping coordinator. She has worked for AFFCO since May 1996.
3. In 2002, AFFCO restructured its shipping and inventory control area and three jobs were condensed into one. Ms Thornton took up the remaining role and signed an employment agreement in April 2002 accordingly. The work hours were said to be 7.30am to 5.00pm with a minimum of 40 hours per week. Also amongst the conditions of employment was a requirement that employees are to work a minimum

of 40 hours per week although in order to perform these duties effectively employees may be required to work additional hours as necessary.

4. The reality of the agreement between Ms Thornton and AFFCO, however, which was later recorded in writing, was that once Ms Thornton had completed her duties she could leave for the day, but she would make herself available to return to the plant, including during the weekend, should the need arise.
5. This was recorded by way of a memorandum entitled "Confirmation of Agreement". In relation to hours of work it states:

"Shelley's hours of work are Monday-Friday 7.40am – 4pm including a half hour lunch break.

Work may be required outside these hours depending on certain circumstances.

Finish times are flexible taking into consideration of workload demand on the day."

6. Ms Thornton's hours of work caused problems during the annual shutdown in 2003 when there was a dispute over whether she should undertake general office duties because production was nil, but this was resolved by Ms Thornton agreeing to do such work during the shutdown period only.
7. In 2004, AFFCO implemented a new computer system known as Cedar Creek. Once it was properly bedded in, it meant that Ms Thornton could complete her duties in lesser time. Management became concerned that Ms Thornton was in effect working only around 20 hours per week, when it believed it had employed her for 40 hours. From Ms Thornton's perspective, she valued the flexibility of being able to leave work for the day once her work was complete as it allowed her to more time to care for her children. On the other hand, on occasion, AFFCO management believed that Ms Thornton should not have left while there were still difficulties in her area. Ms Thornton believed that she never left under such circumstances, but that there had been problems that arose following the appointment of a new freezer supervisor, Mr Kim Wickham. While she was prepared to help out while she was there, she made the point that the problems were not of her making. These points were made in several discussions between the parties towards the end of 2004 and early in 2005.

8. As a result of these discussions, AFFCO wrote to Ms Thornton on 7 February 2005 proposing she change to a contract with flexible hours of between 20 and 30 per week, at \$20 per hour. AFFCO also made it clear that redundancy for Ms Thornton was not an option even if that was her desire. Ms Thornton declined the proposal and indicated that her representative, Mr Alan Millar, should be approached if any further discussions were required.
9. The then manager, Mr Peter Lockley, determined that the current situation was unsustainable on the basis that her pattern of hours was impacting negatively on the business. As he stated in a letter to Ms Thornton of 10 March 2005:

“The flexibility arrangement was always required to be managed in such a way that the workload requirements for the day and the quality of work would not be compromised.

I am therefore instructing you to begin operating to the agreed hours as stated above from Monday 21 March 2005. You will also be required to swipe in and out daily as per all other employees.

Failure to maintain these hours of work may result in disciplinary action. If you wish to discuss this further please contact me to arrange a meeting.”

10. Significantly, Mr Lockley also wrote to Ms Thornton, on the very same day, about her unavailability to complete urgent documentation. In particular, there was concern over “date error product” on 1 January 2005 and an “e cert amendment” which was delayed. Mr Lockley noted:

“...I know that you have delivered a high standard of work in the past and so I can only suppose the errors are due to you rushing your tasks due to the reduced hours you have decided to work.

It is clear to me that you need to maintain the hours of work stated in your contract in order to exceed the agreed performance standards associated with your job. We acknowledge there has been flexibility regarding you working strictly to these hours but need to point out that you have fallen into a pattern of hours that is now impacting negatively on our business.

The flexibility arrangement was always required to be managed in such a way that the workload requirements of the day and the quality of work would not be compromised.

Please be advised that this letter serves as notice of concern regarding your performance and ongoing issues may result in disciplinary action.”

11. I do not accept that the two issues were unrelated. The letters use similar wording and relate to the flexible hours that Ms Thornton worked. The letters were sent on the

same day. It is quite clear that, in response to the concerns outlined, management decided not only to take up performance matters with Ms Thornton (as of course is its right), but also to cancel the flexibility arrangements that had been agreed between the parties, with effect from 21 March. The latter was a unilateral variation to her employment agreement.

12. Ms Thornton responded by denying being responsible for either of the errors. She also arranged for Mr Millar to file a personal grievance on her behalf due to the unilateral variation to the agreement. As a result, all matters were placed on hold until the Authority could determine the issues between the parties. In the meantime, Ms Thornton felt so badly about matters that she has had a long time off on sick leave.
13. In July 2005, Ms Thornton's former supervisor, Ms Nuku, became manager of the Manawatu plant. She has tried throughout to resolve the issue of what Ms Thornton's job involved and what hours she should work.
14. As a result of discussions between her and Ms Thornton, including discussions at the Authority's investigation meeting, it is clear that the parties have reached an agreement on a job description for Ms Thornton which will complement the employment agreement. It involves some new tasks for Ms Thornton and she is to be congratulated for her assistance in this regard. That agreement is as drafted by Ms Nuku below, subject to the changes I outline thereafter.

“POSITION: Inventory Control & Shipping Coordinator

POSITION DESCRIPTION

Responsible to: Production Manager

Purpose

The incumbent is responsible for the coordination and maintenance of key administration and inventory systems and the coordination and documentation of the plant shipping requirements to meet customer & regulatory compliance.

Nature & Scope

The position reports directly to the Production Manager and works in conjunction with the Freezer Supervisor. The position interacts with a wide range of people including supervisory staff, head office staff and suppliers of key services.

Major Job Functions, Key Result Areas & Performance Indicators

Coldstore Product Movements (Cedar Creek)

- *Product movements are processed in Cedar Creek according to Coldstore Supervisors loadout schedule. (following receipt of makeup documents)*
- *Process all Loadouts for product leaving premises (ie LO/TO)*
- *Process all documentation for incoming product (GR/TI)*
- *Complete carters note and send to identified receivers.*

Key Performance Indicators

- *Timely and accurate processing of loadouts and inward product*
- *Maintain records associated with loadouts and inward product*
- *Send information associated with loadouts and inward product to agreed parties as required.*

Inventory Control

- *(Reconciliation report of kill vs actual – Carcasses)*
- *Acquisition and deletion of non inventory production records (end panel labels).*
- *Reconciliation of Oracle/Cedar Creek carton inventory*
- *Adjustment to final inventory as required*
- *Review Cedar Creek/Oracle discrepancy report daily and make adjustments as directed by Head Office.*

Key Performance Indicators

- *Adjustments carried out are traceable and explainable.*
- *Records of adjustments are maintained*
- *Timely communication and feedback with Head Office Inventory contact/s*

Electronic Certification

- *Completion of electronic certificates prior to loads leaving the plant.*
- *Preparation of Manual e certs when electronic systems are not available.*
- *Deliver electronic certification documentation to NZFSA (MAFVA) for approval as soon as possible after load leaves the plant.*

Key Performance Indicators

- *100% compliance*
- *Accurate inputting of information*
- *Accurate reporting*
- *Timely delivery to NZFSA (MAFVA)*
- *Minimal number of amendments carried out.*

Other

- *Reconcile transport company invoices against consignment notes to confirm correct charges have been applied.*
- *Reconciliation of Petfood and other production not recorded by **Cedar Creek**. (produce and Ship in **Oracle**)*
- *Download all Loadout instructions from **Distribution**, detailing relative changes as necessary and presenting to Coldstore Supervisor.*
- *Liaise with Marketers re weight tolerances, eligibility issues and any identified discrepancies*

Key Performance Indicators

- *Timely and accurate recording and reporting*
- *Effective communication with stakeholders.*

15. This position description needs also to note that Ms Thornton is required to work and interact closely with the freezer supervisor. In relation to cold store product movements, it was agreed that loadouts did not involve local trade unless the freezer supervisor is unavailable. Furthermore, under the category “other”, rather than liaise with marketers it should state that adjustments on loadouts may sometimes be required, if the production supervisor is unavailable.

Determination

16. The parties now have clarity in terms of the position description, as set out above. Ms Thornton is required to work in accordance with that position description. If she fails to do so, she can be subject to performance management. There is nothing, for instance, to stop AFFCO pursuing its performance management concerns in its letter dated 10 March 2005, or any other concerns that may arise. However, AFFCO needs to operate within the confines of the employment agreement. The key to that is not only the scope of the job description but also Ms Thornton’s flexible finishing time, according to “workload demand on the day”. If Ms Thornton completes her workload on any given day, she is entitled under her employment agreement to leave for the day.
17. I also note that there is a great deal of overlap between Ms Thornton’s position and Mr Wickham’s position. There is nothing to stop AFFCO from requiring Ms Thornton to undertake tasks that might otherwise have been done by Mr Wickham’s predecessor provided they fit within the purpose, nature and scope of her position description. However, in the main part, the job I expect that she will be required to do will be covered by tasks contained in the major functions, key result areas and performance indicators of her position description. On the other hand, a position description is just that. An employer is not bound to maintain forever an employee’s tasks solely in terms of the job description.
18. However, if at some point a sufficient change is made to a position description as to make it a fundamentally different job, then a redundancy situation may arise. This has

clearly not happened in this case yet. It is the redundancy clause of the contract which would govern such a situation. It provides as follows:

“If your position becomes surplus to company requirements, or where the position is redefined to such a degree that you are no longer able to carry out the duties required and no acceptable alternative position is available elsewhere in the company, you would be entitled to a month’s notice (or payment in lieu of notice), plus redundancy payment under the then prevailing company staff redundancy policy. ”

19. If the parties require further assistance in this regard, they may well be guided by the Court of Appeal’s judgment in *Auckland Regional Council v. Sanson* [1999] 2 ERNZ 597.
20. I find that Ms Thornton’s employment was affected to her disadvantage by the unjustifiable action of AFFCO in unilaterally cancelling the agreement between the parties on flexibility of hours. I accept her evidence that this made her employment more tenuous, as AFFCO was aware that this would cause difficulties with her childcare arrangements. Ms Thornton is entitled to \$2,500 compensation for the impact this had on her. This sum would have been significantly greater if AFFCO had not held back on taking any further action over its move as soon as it was challenged by Ms Thornton. The award is not subject to any contributory fault as she was not the one who unilaterally cancelled that part of the employment agreement.
21. The parties need to get on with their employment relationship without these matters impacting any further negatively on that relationship. Ms Thornton and Ms Nuku appear to have the basis for redeveloping their previous good relationship. However, it may be that mediation may be of assistance in finalising any matters that may be outstanding.

Costs

22. Costs are reserved.

G J Wood
Member of Employment Relations Authority