

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN James Morrell (Applicant)
AND AFFCO New Zealand Limited (Respondent)
REPRESENTATIVES Simon Mitchell, Counsel for the Applicant
Garry Pollak, Counsel for the Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 23 October 2003
DATE OF DETERMINATION 18 November 2003

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

Mr Morrell claims that he was unjustifiably dismissed from his employment on 11 June 2003. He seeks that the Authority finds that he has a personal grievance and award him the remedies of reimbursement of wages, compensation, and costs.

On the other hand, AFFCO New Zealand Limited (“AFFCO”) says that Mr Morrell was in breach of the terms of his employment agreement in that he was involved in serious misconduct and hence his dismissal was justified.

Background Facts and Evidence

Mr Morrell commenced his employment at the Wairoa plant of AFFCO, approximately seven years ago. At the time of his dismissal, and at the date of the investigation meeting, Mr Morrell was receiving accident compensation payments at the rate of 80% of his previous income, having incurred an injury while working as a meat boner. Up until his dismissal, Mr Morrell continued to be employed in the same work area on alternative duties.

At approximately 12:30pm on 10 June 2003, the Foreman of the boning room, Mr Derek Westrup, entered the locker room/shower room used by boning room employees. Upon entering the area, Mr Westrup noticed that the shower room door was closed. His evidence being, that the door is not usually closed at that time of the day. Upon opening the shower room door, Mr Westrup discovered Mr Morrell and his friend, Mr Lee Nia Nia present in the shower room. Upon Mr Westrup questioning why the two men were in the shower room, no response was forthcoming. Mr Westrup noticed that Mr Morrell probably had something in his closed hands. Mr Westrup says that Mr Morrell was reluctant to open his hands and upon prising Mr Morrell’s hands open, Mr Westrup says that Mr Morrell had in one hand, a cigarette lighter, and in the other hand, he had some tin foil and what has been described as a “pipe” or a “straw”. Mr Morrell says that it

was a cardboard tube. Mr Westrup opened up the tin foil and observed that there was cannabis residue present. He came to the conclusion that given the existence of the cannabis residue and the cigarette lighter, that Mr Morrell probably intended to heat the residue and inhale it.

However, Mr Morrell says that in addition to the cigarette lighter in his hand, he also had a cigarette. On that matter, taking into account the totality of the evidence, I prefer the evidence of Mr Westrup and conclude that Mr Morrell did not have cigarette in his hand and that he constructed this story later in an attempt to explain away the existence of the cigarette lighter, that possibly, had it not been for the arrival of Mr Westrup on the scene, may have been used to heat the cannabis residue.

Later in the afternoon of June 10 2003, a meeting took place involving Mr Morrell, Mr Nia Nia, a union representative, Mr Wayne Thompson, and Mr Mike Laurence, the Production Manager at the Wairoa plant. Regarding Mr Morrell's possession of what has been referred to as "drug paraphernalia", it was explained that Mr Nia Nia had discovered the tin foil and "straw" in question on the floor of the locker room and had given it to Mr Morrell. The presence in the shower room was explained as being simply a private chat between two friends about Mr Nia Nia's domestic circumstances. Mr Laurence says that Mr Thompson presented a denial that Mr Morrell had a cigarette lighter. Mr Morrell and Mr Nia Nia were suspended on pay while matters were investigated further.

A further meeting took place the next day. The matter of Mr Morrell's possession of the drug material in question was discussed again. Mr Laurence says that Mr Morrell continued to deny that he had a cigarette lighter, albeit his evidence now is that he did have a cigarette lighter.

Following some further discussions, a decision was made to dismiss Mr Morrell upon the grounds that under the terms of clause 32 b) ii) of the collective agreement, the possession of illicit drugs on site is forbidden. Mr Nia Nia was not disciplined in any way.

The Issues

The onus is upon AFFCO, as the employer, to show that the decision to dismiss Mr Morrell was one which a fair and reasonable employer could have taken in the particular circumstances. In regard to the justification for the dismissal of Mr Morrell, AFFCO point to the following:

1. Under the provisions of clause 32 b) ii) of the *Process Employees Core Collective Agreement*, the possession of illicit drugs on the work site is forbidden and is an offence warranting dismissal. The Company has a zero tolerance policy in regard to the possession and/or use of illicit drugs on site and that this policy is well known and accepted by employees and the Meat Workers Union.
2. Mr Morrell was found to be in possession of an illicit drug.
3. The explanations from Mr Morrell as to the circumstances pertaining to his possession of the illicit drug were found to be unacceptable, particularly given his overall actions and demeanour.

On the other hand, Mr Morrell says that:

1. The drug paraphernalia was found on the locker room floor by Mr Nia Nia, and given to Mr Morrell for his inspection, just prior to Mr Westrup arriving on the scene.

2. The cigarette lighter was in his hand along with a cigarette and hence can be explained away accordingly.
3. The reluctance to reveal what he had in his hands when approached by Mr Westrup was because he understood the consequences of being found in possession of drug paraphernalia and panicked.

In addition to the above, it has been advanced for Mr Morrell that the employer had insufficient evidence to form a conclusion that dismissal was warranted and that the reasons given by Mr Morrell relating to his possession of the illicit drug should have been accepted as a reasonable explanation. Finally, it has been argued for Mr Morrell, that he received disparate treatment in that Mr Nia Nia was not dismissed or disciplined in any manner.

Analysis and Conclusions

There are two main issues that require some examination in reaching a determination of this matter. Firstly, there is the issue pertaining to Mr Morrell's explanation as to why he was found to be in possession of an illicit drug. It is not the role of the Authority to "second guess" the decision making role of the employer. Rather, it has to be shown that that the decision to dismiss was one that a fair and reasonable employer could take in the particular circumstances. There was the evidence of Mr Roche that he had found "bits of discarded tin foil" in the area of the locker room in question. He also told of his knowledge of the discovery of a "rolled up ball of tin foil" and his discussion with Mr Laurence at the time that Mr Morrell was dismissed.

I have no reason to doubt what Mr Roche had to say, and that it may well be that other employees have brought drugs into the work place. And, perhaps there is a remote possibility that Mr Morrell and Mr Nia Nia could have come across such a find. But, given the totality of the behaviour of Mr Morrell, in particular, his overall evasiveness, and his misguided attempts to provide an acceptable version of events, I find that the conclusions reached by Mr Laurence were fair and reasonable given the overall evidence available to him. It then follows that the decision to dismiss Mr Morrell was also a decision that was open to Mr Laurence.

The second issue is the matter of the alleged disparity of treatment. The argument advanced for Mr Morrell appears to be that because Mr Nia Nia was in effect an accomplice of Mr Morrell, in that they were both found together in a situation involving the possession of an illicit drug, and because Mr Nia Nia was not dismissed or disciplined in any way, then it is unfair that Mr Morrell was dismissed.

However, whatever the intentions of Mr Morrell and Mr Nia Nia were in regard to the drug material that was found, I accept the evidence of Mr Laurence that no action was taken against Mr Nia Nia as he was not in possession of an illicit drug and there was no evidence of any particular misconduct on his part. I suspect that if Mr Westrup had arrived in the shower room a little later, the situation may have been quite different, but I am not required to, nor do I, arrive at any conclusion about that. I simply find that there was no element of disparity visited upon Mr Morrell.

Determination

I find that given the overall evidence that was available to the employer, the decision to dismiss Mr Morrell on the grounds that he was in possession of an illicit drug and hence in serious breach of his employment agreement, was one that was open to AFFCO as his employer. Mr Morrell does not have a personal grievance and hence the remedies that he seeks cannot be granted.

Costs

Costs are reserved and I would request that the parties attempt to resolve that issue themselves if they can, taking into account the usual awards of costs issued by the Authority in similar circumstances. In the event that a resolution is not possible, Mr Pollak is invited to file submissions with the Authority and copy to Mr Mitchell, within 21 days of the date of this determination. Mr Mitchell will have a further 14 days to respond to the Authority and copy to Mr Pollak.

Ken Anderson
Member
Employment Relations Authority