

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 74
5428249

BETWEEN PHILLIPPA PUANAKI
Applicant

AND AFFCO NZ LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Stan Austin for Applicant
Rachel Webster for Respondent

Investigation Meeting: 1 April 2014 at Gisborne

Submissions Due: By 9 July 2014

Determination: 16 July 2014

DETERMINATION OF THE AUTHORITY

[1] This determination relates to the preliminary issue of whether or not Ms Puanaki raised her personal grievance for unjustifiable dismissal within the 90 days normally required by law or, in the alternative, whether there are exceptional circumstances occasioning the delay and the Authority considers it just to investigate the personal grievance.

[2] Ms Puanaki, a former meat worker at AFFCO's Wairoa plant, claims that her grievance was raised in time by her then representative, Ms Aroha Moeau. If not, then Ms Puanaki claims that she made reasonable arrangements to have the grievance raised on her behalf by either Ms Moeau or Mr Stan Austin, her current representative, and that either or both of them unreasonably failed to ensure that the grievance was raised within time.

[3] AFFCO considers that Ms Moeau never properly raised the grievance in time, even in a meeting with Mr Darden King, AFFCO Wairoa's Production Manager. It denies that there are any exceptional circumstances occasioning the delay in the raising of the grievance, which did not occur until two days after the 90 day period had expired, or that it is just to grant leave.

Factual discussion

[4] Ms Puanaki was summarily dismissed for allegedly replacing a carcass onto the line after it had fallen to the ground. All parties accept that this is an absolute no-no in the meat industry and would have justified summary dismissal had she been guilty of the offence. Ms Puanaki denies doing so. Mr King relied in his decision to dismiss on a video that allegedly showed Ms Puanaki doing so, which he says, and she denies, he showed to her at a disciplinary meeting.

[5] While that video was later automatically deleted by the effluxion of time, AFFCO also had a production supervisor present at the meeting at which Mr King claims Ms Puanaki was shown the video.

[6] So the substantive investigation meeting, if one is required, will be impacted by the deletion of the video, but the Authority will be able to question all three participants present at the disciplinary meeting about what happened at it.

[7] Ms Puanaki was concerned about her dismissal and immediately sought the assistance of Ms Moeau, who, amongst many other things, assists employees with employment relationship problems. Ms Moeau acts for employees on a voluntary basis. Normally such problems are resolved with her assistance and Ms Moeau does not take matters beyond mediation.

[8] Ms Puanaki acted promptly in obtaining representation by Ms Moeau and in obtaining alternative employment, which she started almost immediately, albeit at a much lesser remuneration.

[9] Ms Moeau was able to meet Mr King two days after Ms Puanaki's dismissal. It was clear from Ms Moeau's and Ms Puanaki's evidence that prior to the meeting they were considering raising a personal grievance and that they wanted more information from Mr King. I accept that at the meeting Ms Moeau told Mr King that she was representing Ms Puanaki and that she would like a letter explaining the

reasons for her dismissal. I accept that Ms Moeau gave Mr King her business card so that he could later contact her by email.

[10] At best, Ms Moreau stated that Ms Puanaki had an intention to bring a personal grievance. She did not, however, state that Ms Puanaki had or was raising a personal grievance or what, if any, response Ms Puanaki wanted from AFFCO, other than a letter explaining the reasons for her dismissal. The latter request, together with Ms Puanaki's and Ms Moeau's subsequent decision to seek the local community law centre's advice, were actions consistent with someone seeking information and advice before raising a personal grievance, rather than such a grievance having already been raised.

[11] At the meeting Mr King explained the dismissal in the terms set out in his later email, as set out below:

As requested in our discussion Phillipa was dismissed for a breach of her employment contract. We had a serious misconduct ruled against her for picking up a carcass off the floor and putting this carcass back onto the production line.

This brought our quality systems into question in having to downgrade a total of 4 hours production to non-exportable.

Phillippa was questioned on the actions she had taken with this carcass and is fully competent in the process of the dropped meat procedure and knew what needed to happen.

Our decision to dismiss Phillipa wasn't taken lightly, we had taken the time to go over the video footage of the event, ensuring Phillipa was fully aware of her dropped meat procedures and what was expected of her, taking her through the video footage.

At the end of it all management concluded there was a breach and a serious misconduct ruled against Phillipa for this matter.

[12] The email was unacceptable to Ms Puanaki and Ms Moeau, who wanted a formal letter from AFFCO. That letter, which was sought on 25 March, arrived very soon thereafter. Around the same time Ms Moeau took Ms Puanaki to an outreach meeting of the Gisborne Community Law Centre, in Wairoa. At that meeting, which was held to determine whether or not Ms Puanaki had a sustainable grievance and how to pursue it, she was referred to Mr Austin.

[13] Ms Puanaki and Ms Moeau and Mr Austin then met in Gisborne because Ms Puanaki, as she said in her own evidence, wanted to raise a grievance. In the

meantime Ms Moeau wrote to Mr King requesting information such as Ms Puanaki's individual employment agreement, a copy of the video and noting that Ms Puanaki was "*wishing to take this matter further*". This clearly implied that, once again, while a personal grievance was being considered, it had not been raised with sufficient specificity at that point.

[14] I accept on the balance of probabilities (i.e. what is more likely to be right than not) that AFFCO decided to ignore that letter knowing that a personal grievance had not yet been raised and no doubt hoping that one would not be raised. Subsequently, the video tape of the incident was automatically recorded over.

[15] I accept that it is most likely that at some point thereafter Ms Puanaki, who had been given an authorisation form by Mr Austin, decided to utilise his services to raise and pursue a personal grievance on her behalf. I accept that she did so on the date she signed a representation authorisation form, namely 3 May, still within the 90 day period. The signing of that form is consistent with Ms Puanaki's evidence that she had at that time properly arranged for Mr Austin to represent her in furthering her concerns over her dismissal (including raising a grievance) , as is the background of the series of meetings Ms Puanaki and/or Ms Moeau attended or arranged.

[16] Ms Moeau was still involved, essentially as a go-between, because Ms Puanaki did not have email and had lost her mobile phone and had not replaced it. However, no grievance was properly raised until 11 June, two days after the 90 day period had expired. Ms Puanaki had no explanation for why the grievance was not raised on time, but stated that Mr Austin was well aware that she wanted a personal grievance raised and pursued. AFFCO declined to deal with the grievance, once raised, on the basis that it was out of time.

[17] There is no explanation as to why the grievance was not raised until 92 days after the dismissal, even after Mr Austin started formally representing Ms Puanaki - some 53 days after the dismissal - other than an erroneous belief that a grievance had been already raised.

The law

[18] In *Creedy v. Commissioner of Police* [2007] ERNZ 517, it was held at paras.[36]-[37]:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... That is not to find, however, that the raising cannot be oral or that any particularly formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

... it is clearly unnecessary for all the details of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it soon and informally, at least in the first instance.

[19] When a claim for exceptional circumstances is made the Authority may only grant leave if it is satisfied that the delay was occasioned by exceptional circumstances and that it is just to do so.

[20] One specific example of exceptional circumstances is where an employee has made reasonable arrangements to have the grievance raised by an agent and the agent unreasonably failed to ensure this was done. As *McMillan v. Waikanae Holdings (Gisborne) Ltd* [2005] 7 NZELC 97,859 makes clear:

This will apply only where the employee has made reasonable arrangements to have the grievance raised and the agent has unreasonably failed to ensure that it was.

Determination

[21] It is clear from the evidence that Ms Puanaki was unclear for some time as to whether or not she had a claim for personal grievance. That was the purpose of her getting Ms Moeau to assist her and Ms Moeau's involvement with Mr King at the meeting and thereafter. While they were considering raising a personal grievance,

they clearly did not. It was not until the Community Law Centre became involved and arranged for Mr Austin's involvement that I conclude that Ms Puanaki had made up her mind on that matter. It is axiomatic that Ms Puanaki was not able to raise a grievance until she had made up her mind to do so.

[22] The only possible exceptional circumstances raised involved failures by Mr Austin. I have accepted Ms Puanaki's evidence that she instructed Mr Austin on 3 May to act for her and, given that that was after the discussion about whether she had any real prospects of success with a personal grievance, it is reasonable to conclude that she instructed him to raise such a grievance. Thus she had made reasonable arrangements to have her grievance raised.

[23] There was no explanation as to why the grievance was not raised until over a month later and two days out of time. Mr Austin knows of the 90 day rule and should have known the date on which the 90 days elapsed in Ms Puanaki's case. It is therefore appropriate to conclude that Mr Austin unreasonably failed to ensure that Ms Puanaki's grievance was raised. Certainly, the only action taken within time was by Ms Moeau and her last involvement with AFFCO was to ask for more information, a request which was ignored.

[24] I turn, therefore, to consider whether it is just for the grievance to be allowed to be investigated.

[25] The only prejudice raised on AFFCO's behalf was the erasure of the video tape. However, that was a matter within its control, and given that AFFCO was asked for a copy of that video tape before it was erased and it chose to ignore that request, it cannot in equity and good conscience rely on any prejudice to it arising.

[26] It is not possible at this stage to judge the prospects of success in the claim for unjustified dismissal. A lot will turn on the apparently disputed evidence of the three participants, especially given the absence of the video tape, relating both to procedure (how the employer acted) and substance (what the employer did) and I have not yet heard from one of those witnesses.

[27] I conclude that the just thing to do in such circumstances is for the Authority to investigate the merits of the claim, which is likely to focus on the disciplinary process and whether or not Ms Puanaki was given an opportunity to view the video

tape, which allegedly showed her picking a carcass up off the floor and replacing it onto the line.

[28] I therefore grant the applicant, Ms Phillippa Puanaki, leave to raise her personal grievance after the expiration of the 90 day period. The parties will be directed, pursuant to s. 114(5), to attend mediation following a case management conference with the Authority.

G J Wood
Member of the Employment Relations Authority