

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 75/10  
5273419

BETWEEN

ANTHONY QUAIFFE  
Applicant

AND

AFFCO NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: K J Anderson

Representatives: Applicant In Person  
G Malone, Counsel for Respondent

Investigation Meeting: 7 December 2009 at Hamilton

Determination: 17 February 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Quaife claims that he was unjustifiably dismissed on 6<sup>th</sup> July 2009. He asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of wages for 17 weeks and compensation of \$10,000. AFFCO New Zealand Limited (“AFFCO”) refutes the claim and says that Mr Quaife was employed subject to a two month trial period which allowed for termination of employment within the two month period, if it became apparent that the employee’s performance was unsatisfactory.

[2] In addition to the evidence of Mr Quaife, the Authority heard evidence for AFFCO from Ms Jillian Elliott, Executive Assistant, Mr Trevor Weir, Transport Manager, and Mr Graeme Cox, Human Resources Manager.

## Background Facts and Evidence

[3] In May 2009, AFFCO decided to purchase two stock trucks. Mr Ken Atkinson was engaged to purchase the trucks, arrange for them to be painted and delivered to the Horotiu meatworks at Hamilton. Mr Atkinson then engaged Mr Quaife for that purpose.

[4] On 2<sup>nd</sup> June 2009, upon delivering a truck to Horotiu, Mr Quaife advised Mr Weir that he had driving and livestock experience; working as a stockman and driving trucks and trailers in Australia. Mr Quaife had no experience in driving stock trucks. Mr Quaife was employed by AFFCO as a stock truck driver commencing his employment on or about 7<sup>th</sup> June 2009. Another driver (Luke) was also employed for the second truck.

[5] An employment agreement was provided. While it shows that it was signed by Mr Quaife on 7<sup>th</sup> June, he says he didn't receive it until 12<sup>th</sup> June and was asked to backdate his signature to 7<sup>th</sup> June but nothing rests on this. It was signed for the employer, by Mr Weir, on 12<sup>th</sup> June 2009. Relevant to the issues to be determined, is the following provision:

2. ***Term and trial period***

- 2.1 *This agreement shall be deemed to commence on 7<sup>th</sup> June 2009 and shall continue for 12 twelve [sic] months from date of signing unless terminated by other provisions with in [sic] this agreement.*
- 2.2 *A review of the employee's employment will be undertaken during the two months of employment. Although the probationary period covers the first two months, the employer reserves the right to terminate your employment at any time during the probationary period if it considers that you will not be able to work to the required standard or that there are personality issues involved which make you unsuitable.*
- 2.3 *The purpose of the probationary period of employment is:*
- A. *To allow you to assess whether you are happy with the job.*
  - B. *To allow the employer to assess whether you are capable of doing the job;*
  - C. *To allow the employer to assess that you have the personal attributes and attitude to be able to work without any personality conflicts or difficulties arising.*
- 2.4 *In terms of your work performance, you will be assessed by your superiors throughout the probationary period, will be advised when*

*you are not performing work to the required standard and will be advised of what standard is required.*

- 2.5 *If during or at the conclusion of the probationary period the employer concludes that the employee is unlikely to be satisfactory, the employer will give the employee an opportunity to respond to such concerns as the employer may have.*
- 2.6 *After considering such response as the employee may wish to make the employer may:*
- 2.6.1 *Conform the appointment of the employee to the permanent staff; or*
- 2.6.2 *Extend the probationary period for such further period as the employer considers necessary to enable a further assessment of the employee to be made in which event the employer will inform the employee for [sic] the reasons for the extension; or*
- 2.6.3 *Terminate the employment on giving the employee such notice, being not less than 1 week, as the employer may in the circumstances decide.*
- 2.6.4 *If the employer decides to extend the probationary period the employer may reassign the employee to different duties for which the employee is or appears to be better suited.*
- 2.7 *In respect of personality issues, you should be aware that it is essential for the smooth functioning of the business that all employees are able to cope with the unique situations and general conditions of work, handle the stresses involved, display the right attitude to their work and work mates and are able to get along with other employees and the employer and or its officers.*

[6] The evidence of Mr Weir is that because Mr Quaife had little experience with driving in New Zealand and no experience driving a stock truck, he was initially placed with the other driver; Luke. Mr Weir says that because Luke indicated to him that he felt Mr Quaife needed more training, he employed an experienced stock truck driver on a short-term engagement from 15<sup>th</sup> June, to assist in “upskilling” Mr Quaife. Also on 15<sup>th</sup> June, Mr Weir received a phone call from an AFFCO agent asking Mr Weir not to send Mr Quaife to any of the agent’s clients because of Mr Quaife’s lack of stockmanship. Mr Weir says that although this was a concern, he did not raise the matter with Mr Quaife as the training driver (Jason) had only started that day and he felt it was better to wait until Jason had an opportunity to observe Mr Quaife and make comment. The evidence of Mr Quaife is that he thought Jason “knew less” about driving and stock handling than he did. But, Mr Weir says that Jason is an

experienced driver who had been made redundant after two years of working for another transport company. He has subsequently been employed full-time by AFFCO.

[7] Mr Weir told of a problem which occurred on 30<sup>th</sup> June whereby the unloading of stock from the truck which, would normally take an hour, took several hours because Mr Quaife: “*had no understanding of the importance of having and following a loading plan.*”

[8] Mr Weir says that there was a further issue on 1<sup>st</sup> July when Mr Quaife loaded cattle in the bottom deck of the truck and trailer; an exercise where the truck and trailer are closed together so the stock run through the trailer into the truck. It seems that Mr Quaife failed to shut the closing door between the truck and the trailer before being about to move the truck forward for reconnection to the trailer. It was only the fact that Jason (the training driver) noticed this which averted a possible exit of the stock. Mr Weir says that he was told by Jason that Mr Quaife would not take or listen to advice.

[9] The further evidence of Mr Weir is that because it appeared to him that there could be a conflict or personality issues between Mr Quaife and Luke, he personally accompanied Mr Quaife on a small run to pick up four lots of cattle. Following this, Mr Weir was of the view that while Mr Quaife’s handling of the cattle was “*okay for his experience,*” he considered that he needed more training as he was having difficulties with handling the gearbox. Mr Weir says that he showed Mr Quaife safe ways of loading and unloading as well repeating the importance of a load plan.

[10] On 5<sup>th</sup> July 2009 Mr Quaife and Luke were tasked with picking up a mixed load of sheep and lambs. Mr Quaife was to do the loading. Mr Weir says he prepared a load plan, explained it to the two men and again told Mr Quaife to make sure he used the load plan properly, stressing the need to be aware of where each lot of stock were. Mr Weir also gave oral evidence that he had 40 years in transport and had used the same loading plan for this time.

[11] It subsequently transpired that Luke became unwell and Mr Quaife was left to deliver the stock to the Imlay meatworks at Wanganui. Mr Weir says that the next morning he received a complaint from the stockyard men at Imlay as the truck had

taken hours to unload as Mr Quaife could not remember the load plan. There was also an issue about the time it took Mr Quaife to drive back from Wanganui to Hamilton.

[12] When Mr Quaife arrived back in Hamilton on Monday, 6<sup>th</sup> July, a discussion took place with Mr Weir. In regard to this, the evidence of Mr Weir and Mr Quaife is reasonably consistent. There was some discussion about the loading plan. Mr Quaife says that he prepared a new loading plan that he thought was “fantastic.” His oral evidence is that Mr Weir said: “It doesn’t matter; it’s not going to work.” Mr Quaife says that when he asked Mr Weir what was not going to work, he was told that, the job wasn’t going to work. Mr Quaife says that when he asked Mr Weir if he was sacking him, Mr Weir responded in the affirmative and told him he could work out the week if he wanted to. Mr Quaife said he saw no point in that as he didn’t want to be “humiliated” for any further period of time.

[13] The written evidence of Mr Weir is that:

*“I discussed the issues and told Tony that I didn’t think the job was for him and that he should think of finishing up at the end of the week. Tony asked whether I was telling him to go and I replied that I really thought the job was not for him and that he should think about finishing up at the end of the week. Tony replied that if that was the case he would rather leave now and I said that was okay.”*

And further:

*“I believe that by 5 July it was clear he [Mr Quaife] wasn’t going to fit in and that he would be better to take up employment elsewhere. I believe Tony was of the same view and was glad to go. He certainly did not question me when I said I thought it was better if he finished up and appeared of the same view.”*

[14] The oral evidence of Mr Quaife is that he left Mr Weir’s office and went to friend’s hotel and picked up his belongings. He then returned to see Mr Weir; “sorted out the hours” and went home to Mt Maunganui. Mr Quaife says that he rang Ms Elliott shortly after and asked her to send Kiwisaver details and other papers. It is the further evidence of Mr Quaife that during his discussion with Ms Elliott, she asked him why he required the information requested and when he told her he had been; “sacked by Trevor Weir” she asked if he wanted to talk to Mr Cox, the Human Resources Manager.

[15] The evidence of Ms Elliott is that on 6<sup>th</sup> July 2009, the last day of Mr Quaife’s employment, he came to her office, advised that he had just been sacked and wanted to check his final pay. Ms Elliott says that she asked if there was anything she could

do to resolve the situation and could she persuade him to stay and “*sort things out.*” She offered to set up a meeting with Mr Cox. As it happened, Mr Cox was not in his office but Ms Elliott says that she suggested that a discussion with Mr Cox could help, but Mr Quaife replied: “... *no, that there was a personality conflict right from day one and that he and Trevor had not got and would never get on, that he didn’t want to work here anymore and that he would have resigned anyway.*” Ms Elliott says that she continued to suggest that a discussion with Mr Cox could: “*resolve it; that I didn’t want him coming back at us at a later date and that it was better to sort out matters now.*” Ms Elliott says that Mr Quaife indicated he didn’t want to do that.

[16] Ms Elliott says that Mr Quaife phoned her a few days later to discuss superannuation details. Her evidence is that she asked him if everything was: “*going okay for him and he said yes, he had no regrets about leaving and that he was pretty sure that he had another job lined up. He was friendly during the conversation and gave no indication that he had a problem with what had occurred.*”

[17] On the other hand, the evidence of Mr Quaife is that he never went to Ms Elliott’s office. Rather, he had a telephone discussion with her on the day he left and then another a few days later. Mr Quaife says that it was during the second phone discussion that he asked Ms Elliott to arrange for him to meet Mr Cox and that as a result, he did meet with Mr Cox a few days later. While at first glance not much rests on which version of events is correct. However, it does, to some extent, go to the overall circumstances regarding whether Mr Quaife was dismissed or whether he left willingly. It seems to me that Mr Quaife’s recollection of events is more probable as Ms Elliott make no mention in her written statement about arranging a meeting between Mr Cox and Mr Quaife. In arriving at this conclusion I do not believe that Ms Elliott is “lying” as Mr Quaife improperly alleged, it is simply a matter of recollection about the order of things, dimmed somewhat by the lapse of time.

[18] The evidence of Mr Cox and Mr Quaife is reasonably consistent. Mr Cox says that after meeting with Mr Quaife he phoned him and asked him what he was seeking as an outcome. Mr Cox asked Mr Quaife if he wanted his job back but Mr Quaife’s response was he did not. The evidence of Mr Quaife is that he met with Mr Cox “a couple of days later” and “went through everything” and “sorted out the wages

owing.” Mr Quaife told the Authority: “He [Mr Cox] offered me the job back. I didn’t want the job back.”

### **Analysis and Conclusions**

[19] The first question that requires determination is: Was Mr Quaife dismissed or was there a mutual agreement that the job was not for him and as a consequence, a mutual termination of the employment agreement?

[20] Given the overall evidence, I do not accept that there was a mutual parting of the ways. While I accept that Mr Quaife was having considerable difficulty with how to plan his stock loads in order to ensure an efficient unloading of the animals at their destination, I do not accept that he agreed to an early termination of his employment agreement. Rather, I find that Mr Quaife arrived back in Hamilton on 6<sup>th</sup> July 2009 after an assignment to take stock to Wanganui that went particularly badly for him and he was not in a very good state of mind. Upon his attendance at Mr Weir’s office he was effectively presented with a *fait accompli* by Mr Weir, that is, it would be best if he just worked to the end of the week and then finished up. While there is no evidence that Mr Quaife protested against the decision of Mr Weir, given Mr Quaife’s state of mind following the difficulties which arose from his trip to Wanganui, it is hardly surprising that he would not have protested at the time. However, he subsequently and very soon after, made it clear that he believed he had been “sacked.”

[21] I conclude that Mr Quaife was dismissed from his employment on 6<sup>th</sup> July 2009 and that there was not a mutual agreement to terminate the employment agreement.

### **Was the dismissal of Mr Quaife unjustified?**

[22] There are two provisions of the Employment Relations Act 2000 (“the Act”) that apply in the circumstances. Firstly, as there was a probation or trial period contained in the employment agreement, s.67(1)(b) applies:

- (b) *neither the fact that the probation or trial period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustified dismissal to a situation where the employee is dismissed in*

*reliance on that agreement during or at the end of the probation or trial period.*

[23] Section 103A provides the test to be applied. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[24] As set out above (paragraph 2), the employment agreement provides a trial period. Particularly relevant is:

2.2 *A review of the employee's employment will be undertaken during the two months of employment. Although the probationary period covers the first two months, the employer reserves the right to terminate your employment at any time during the probationary period if it considers that you will not be able to work to the required standard or that there are personality issues involved which make you unsuitable.*

[25] Taken at face value, the above provision might be seen to have provided a contractual right for AFFCO to terminate the employment of Mr Quaife on the grounds that: "... you will not be able to work to the required standard or that there are personality issues involved which make you unsuitable." However, applying s.67(1)(b) of the Act, coupled with legal precedent, leads to a different conclusion. In *Nelson Air v NZAPLA* [1994] 2 ERNZ 665 at 669, the Court of Appeal held:

The whole purpose of a probationary period is to enable the employer to assess the suitability of the employee. That will normally be in terms of skills, diligence and personality.

And further:

If he [the employee] proved not to be, and of course if he proved unsatisfactory in any other respect, the airline was entitled not to confirm his appointment. It could either dismiss him or offer to extend the probationary period. But it had to act fairly.

The requirements of that obligation will vary from case to case. Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings to advise about necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the

probationary period that the employment will then be coming to an end. The 2 week period stipulated in Air Nelson's standard form contract would be a minimum, not only for dismissal for good cause during the probationary period, but also as notice that permanent employment will not be available when it runs out. (Emphasis added.)

[26] It is clear that Mr Quaife was struggling in regard to his stock loading management and Mr Weir was fully aware of this. But rather than pointing out Mr Quaife's shortcomings and advising him about necessary improvement and a warning of the likely consequences if his expectations were not met, Mr Weir simply presented Mr Quaife with his decision that things were not working out and that Mr Quaife could work the week out and finish up. Furthermore, in addition to being made aware what was required of him, Mr Quaife was entitled to fair warning, before the end of the probation period, that his employment would be coming to an end. Indeed, the employment agreement appears to envisage that such will happen:

2.4 *In terms of your work performance, you will be assessed by your superiors throughout the probationary period, will be advised when you are not performing work to the required standard and will be advised of what standard is required.*

2.5 *If during or at the conclusion of the probationary period the employer concludes that the employee is unlikely to be satisfactory, the employer will give the employee an opportunity to respond to such concerns as the employer may have.*

[27] Unfortunately, none of the above requirements were implemented by Mr Weir. At best, he emphasised to Mr Quaife the importance of adhering to the recognised stock loading plan. In fairness to Mr Weir, he did attempt to ensure that Mr Quaife had some training and assistance early in his employment, but one cannot escape the reality that Mr Quaife had no previous experience with stock trucks and only had approximately 20 working days before his employment was terminated; substantially less than the two months provided by the employment agreement. Furthermore, even if AFFCO had adhered to the above legal and contractual principles, Mr Quaife was also entitled to a two week notice period, as stipulated in clause 11.1 of the employment agreement, not somewhat less than a week as Mr Weir espoused.

[28] Taking all of the above failures on the part of AFFCO, I conclude that there was a total failure to recognise established legal principles, and the terms of the employment agreement, relating to the trial period of employment for Mr Quaife. It

follows that I must find that the actions of AFFCO in dismissing Mr Quaife were not those of a fair and reasonable employer in the circumstances and that the dismissal was unjustified. Mr Quaife has a personal grievance.

### **Remedies**

[29] Having determined that Mr Quaife has a personal grievance, pursuant to s.123(1) of the Act, the Authority may provide various remedies. Furthermore, pursuant to s.124 of the Act, the Authority must, in deciding both the nature and the extent of the remedies to be provided:

- (a) *consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievance; and*
- (b) *if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.”*

#### (a) Reimbursement of wages

[30] Mr Quaife seeks reimbursement of wages for 17 weeks. Given the evidence of the difficulties that Mr Quaife had accepting the proven loading plan provided by Mr Weir, and Mr Quaife’s obvious distain towards those that did try to assist him, I doubt very much if he would have been found suitable for permanent employment, even if the full trial period had been completed. Therefore, I feel I can only take into consideration the loss of income for the unfulfilled time of the trial period, that is, a further 4 weeks. I also must take into consideration that Mr Quaife was given the opportunity to work out the rest of the week from Monday 6<sup>th</sup> July to Friday 10<sup>th</sup> July 2009. Perhaps, given the substantial breach of the employment agreement and the legal principles applying to the trial period, Mr Quaife was entitled to consider the contract terminated from when this was conveyed to him by Mr Weir. However, had Mr Quaife chosen to continue to work for a few more days and in the meantime, sought appropriate advice (including the possibility of mediation) and/or taken matters to Mr Cox, a suitable resolution may have been possible. I must also take into consideration that Mr Cox offered to re-employ Mr Quaife and this offer was also rebuked, apparently on the grounds that Mr Quaife felt he could no longer work with Mr Weir. In the round, I conclude that Mr Quaife contributed to the situation that gave rise to the personal grievance by 50% and the remedies available to him must be reduced accordingly.

[31] Mr Quaife was paid \$19 per hour and while he says that some weeks he did not achieve 40 hours of work, I use this number of hours as a reasonable basis to calculate the loss of wages. Therefore, Mr Quaife's entitlement to reimbursement of wages is:  $\$19 \times 40 \text{ hours} \times 4 \text{ weeks} = \$3,040$  less 50% = \$1,520. An order follows.

(b) Compensation

[31] Mr Quaife seeks the sum of \$10,000 under s.123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. However, I heard no evidence at all from Mr Quaife as to the justification for this claim. Furthermore, I observed that Mr Quaife displayed very robust, forthright and confident characteristics and there was no evidence that his dismissal affected him to any degree that warrants compensation under the above provision of the Act.

**Determination**

[32] It is determined that:

- (a) For the reasons set out above, Mr Quaife was unjustifiably dismissed.
- (b) Pursuant to s.123(1)(b) of the Act, AFFCO New Zealand Limited is ordered to pay to Mr Quaife the gross sum of \$1,520.00 as reimbursement of lost wages.
- (c) There is no order for compensation.
- (d) AFFCO New Zealand Limited is ordered to pay to Mr Quaife the sum of \$70 being the application fee paid to the Authority.

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