

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 140
5286328

BETWEEN HANNA RANGIAWHA
 Applicant

AND AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Simon Mitchell for Applicant
 Graeme Malone for Respondent

Investigation Meeting: 27 October 2010

Determination: 7 April 2011

DETERMINATION OF THE AUTHORITY

- A. The decision of AFFCO New Zealand Limited to dismiss Hanna Rangiawha, and how that decision was made, was unjustified.**
- B. In remedy of her personal grievance, AFFCO is to pay Ms Rangiawha the following sums without any reduction for contributory conduct:**
- (i) \$4183 under s123(1)(b) and s128 of the Employment Relations Act 2000; and**
- (ii) \$6000 under s123(1)(c)(i) of the Act; and**
- C. Costs are reserved.**

Employment Relationship Problem

[1] On 17 July 2009 AFFCO New Zealand Limited dismissed Hanna Rangiawha over allegations that she had deliberately failed to carry out some important testing

when she had been working in the compliance department of its Horotiu plant. By the time of the dismissal Ms Rangiawha had been transferred to work in the offal department but had worked in the compliance department since 2007, most recently as its micro co-ordinator.

[2] That role included carrying out a regular procedure of taking swabs and samples from carcasses and cuts of meat in the production areas of the plant and then packing those swabs and samples for despatch to an Auckland laboratory. That work – which the witnesses referred to in their evidence as NMD sampling – was carried out according to a schedule set by the Food Safety Authority.

[3] If AFFCO failed to have the NMD sampling carried out to the Food Safety Authority's prescribed timetable, there was a risk that orders could be made to stop production or refuse the official clearances necessary for export products, all with significant financial consequences for AFFCO.

[4] Through a disciplinary inquiry AFFCO managers concluded Ms Rangiawha had deliberately failed, firstly, to complete NMD sampling work assigned to her by Compliance Manager Glen Braddock and which she agreed to do by Wednesday, 8 July 2009 and, secondly, to advise Mr Braddock that the testing had not been completed before she left to start work in the offal department.

[5] Ms Rangiawha contended her dismissal was unjustified because there was no fair basis for AFFCO to conclude her failure to complete the testing was deliberate or that she was ultimately responsible for ensuring the testing took place.

The issue and investigation

[6] Because of AFFCO's specific finding on the point the Authority had to determine whether there was sufficient evidence for a fair and reasonable employer to conclude Ms Rangiawha's failure to complete the testing was deliberate and consequently justified its finding of serious misconduct. However the investigation was not confined solely to whether or not there was a deliberate refusal but also considered whether dismissal was justified in all the circumstances.

[7] Written witness statements were lodged by:

- (i) Ms Rangiawha; and
- (ii) Chanel Gillet, who also worked as a sampler at the Horotiu plant around the time of Ms Rangiawha's dismissal; and
- (iii) AFFCO production manager Rebecca Ogg, who made the decision to dismiss Ms Rangiawha.

[8] Each witness attended the investigation meeting and, under oath or affirmation, confirmed the contents of their written statements and answered questions from the Authority member and the parties' representatives. The representatives also provided closing submissions.

[9] Mr Braddock was not available to give evidence however Ms Ogg relied on information provided by him at the time of her disciplinary inquiry and decision to dismiss Ms Rangiawha. AFFCO accepted that it was Ms Ogg's actions which were to be measured against the standard of justification set by s103A of the Employment Relations Act 2000 (the Act).

What happened?

[10] As a result of seasonal changes in staffing arrangements, Ms Rangiawha was told in early July that her work in the compliance department was ending and arrangements were made for her to transfer to a job in the offal department, starting on Thursday, 9 July.

[11] One of the scheduled NMD sampling dates was due on Friday 10 July.

[12] In the previous week – on Friday 3 July 2009 – there was some discussion between staff members and Mr Braddock about arrangements for various compliance work in the following week. Both Ms Rangiawha and Ms Gillet were leaving the department in that following week. Another worker – the department's system co-ordinator Karen Jones, who worked three days a week – needed to be trained in sampling work, including the NMD work. Either Ms Rangiawha or Ms Gillet were expected to train Ms Jones in that week as the other staff member, Nicola Beehre, was scheduled to be away on annual leave.

[13] There is conflicting evidence about what was arranged between Ms Rangiawha and Mr Braddock. Ms Rangiawha says that when she and Mr Braddock discussed bringing forward the NMD sampling scheduled for Friday 10 July to Tuesday 7 July or Wednesday 8 July, she replied that she would complete the testing if she could or “*had time*”. However Ms Ogg concluded from her inquiry, relying on interviews with Mr Braddock and other compliance workers, that Ms Rangiawha simply agreed to do the testing without any condition or qualification about having the time or the capacity to do it.

[14] There was no production work at Horotiu on Monday 6 July so no sampling work could be done. Ms Gillet was off sick for the first three days of the week. Ms Rangiawha and Ms Jones spent most or all of Tuesday 7 July on Salmonella testing work. Ms Jones was not rostered on for the following day. According to Ms Ogg’s notes of her interview of Ms Jones, Ms Jones recalled that she and Ms Rangiawha had talked on the Tuesday about the NMD sampling and Ms Rangiawha said she would do it on Wednesday.

[15] Ms Rangiawha did not do the testing on Wednesday and began work in the offal department on Thursday.

[16] During the next week the failure to do the NMD sampling came to the attention of the plant manager Jamie Ginders. He spoke with Mr Braddock and got a written statement from him.

[17] Mr Braddock’s statement said he had not learned until 14 July that the previous week’s NMD sampling was not done and he only found this out because Ms Beehre told him of a conversation with Ms Rangiawha. Ms Beehre reported that Ms Rangiawha had asked who had done the NMD sampling last week because she had not.

[18] Mr Braddock then had a two minute conversation with Ms Rangiawha. He said Ms Rangiawha told him the NMD testing was not done because she “*did not have time*” and “*had too much other stuff to do*”. He asked why she had not told him and

said she replied: “*dunno, what else was the company going to do as there were no trained samplers*”.

[19] Mr Ginders gave Mr Braddock’s statement to Ms Ogg and asked her to investigate the matter. She interviewed Mr Braddock who told her that he believed Ms Rangiawha’s failure to carry out his instructions and to inform him was deliberate. Ms Ogg asked why Ms Rangiawha would do that and Mr Braddock suggested this was because Ms Rangiawha was angry that, despite being the senior person in the compliance department, she was being laid off from the department. He also suggested she was annoyed that an ACC claim lodged with AFFCO was declined.

[20] Ms Ogg then interviewed Ms Rangiawha, Ms Beehre, Ms Gillet and Ms Jones. Her inquiry focussed mainly on what had been said in staff discussions on 3 July about arrangements for NMD sampling in the following week. She also spoke to an on-site vet who told her that he knew Ms Rangiawha was very unhappy with the company regarding the staffing situation and that he knew Mr Braddock thought Ms Rangiawha deliberately failed to do the NMD sampling.

[21] After meeting with Ms Rangiawha and her union representative again, Ms Ogg decided that dismissal was the only reasonable option. Ms Ogg explained the basis for this conclusion in her witness statement in this way:

I honestly believe following the investigation and interviews, that the failure to do the testing and failure to advise [Mr Braddock] had been deliberate. The failure led to serious consequences with the issue of a [Corrective Action Report] and could have resulted in even more serious consequences, including a plant shut down.

Flaws in Ms Ogg’s decision

[22] I find Ms Ogg’s conclusion was not what a fair and reasonable employer would have decided. Her investigation and conclusion was flawed for the following reasons.

[23] Firstly, an employee’s actions or omissions in such cases are to be analysed according to how seriously their conduct falls short when measured against their duties and obligations in the employment relationship, rather than the seriousness of

the consequences of misconduct.¹ Baldly put, the standard measures not whether the alleged misconduct cost the employer ten dollars or ten thousand dollars but whether the employee did not properly do what they knew or should have known they had to do. Put another way, it would have been serious misconduct for Ms Rangiawha to intentionally not do the tests and then deliberately keep that fact from Mr Braddock, whether or not it had resulted in any serious financial or operational consequences for AFFCO. The serious misconduct would be having that state of mind and purposely omitting to do a required task. It was not the consequences but the intention or deliberation which needed to be established.

[24] Secondly, there are significant flaws in the basis on which Ms Ogg reached her conclusions about Ms Rangiawha's state of mind and actions.

[25] From the outset Mr Braddock alleged Ms Rangiawha's actions (or rather omissions) were deliberate and motivated by her dissatisfaction with having to change jobs at the plant. It was really an accusation of attempting industrial sabotage. The level of proof for such an allegation needed to be as high as the charge was serious.² It was not reached in this case.

[26] Ms Ogg's evidence to the Authority was that there were "*no witnesses who could confirm that timing was discussed*" by Mr Braddock and Ms Rangiawha. However I find that was not a fair conclusion based on the information available to Ms Ogg from her interviews with staff. She accepted statements by Mr Braddock and Ms Beehre that Ms Rangiawha had not mentioned doing the work being subject to having enough time to do it along with other tasks. Ms Ogg asserted this was a proper conclusion because Ms Gillet and Ms Jones had not positively stated, when asked by her, that Ms Rangiawha had mentioned time but rather they both "*sat on the fence*". However notes of her interview of Ms Jones show an indirect answer which accepted "*it would have been a time thing*". Ms Gillet said she could not answer whether Ms Rangiawha did mention time but – according to Ms Ogg's notes – Ms Gillet was not then asked why she could not answer. Ms Rangiawha's evidence to the Authority was that other staff in the work room on 3 July had returned to their work during her discussion with Mr Braddock and she doubted they heard all that was said. There is

¹ *Makatoa v Restaurant Brands (NZ) Limited* [1994] 2 ERNZ 311 at 319.

² *Honda NZ Limited v NZ Shipwrights Union* [1990] 3 NZLR 23.

nothing to indicate whether Ms Ogg checked with any of the staff whether they had heard all of the conversation, rather she was prepared to rely on the assertions of Mr Braddock and Ms Beehre.

[27] Ms Rangiawha's alleged motivation for not doing the sampling and not telling Mr Braddock never reached the level of anything other than speculation. That speculation was based on Ms Rangiawha being dissatisfied with staff changes – and having expressed that view to Mr Braddock and a plant vet, who repeated that view to Ms Ogg. Ms Ogg's notes of the disciplinary meeting show Ms Rangiawha adamantly rejected the accusation, put to her by Ms Ogg, that she was "*pissed ... off*" at being laid off from the compliance department so "*therefore did this as a rebuttal (sic) against [the] company*". Without more to support the inference suggested, I find a fair and reasonable employer would not have concluded Ms Rangiawha unhappiness with a staffing decision resulted in a deliberate act of spite.

[28] It is also apparent, from the totality of Ms Ogg's evidence, that her inquiry was focussed almost entirely on the prospect of deliberate actions by Ms Rangiawha and gave little attention to other explanations or whether other staff members should also bear responsibility for the sampling not being done that week. Ms Ogg noted in her interviews with Ms Gillet and Ms Beehre that they were surprised Ms Jones had not done more to check that the NMD sampling was done or to let Mr Braddock know when it was not. Ms Ogg recorded Ms Beehre's comment as: "*Karen [Jones] is NMD controller so you would think she would have queried where the NMD results were*". And when interviewed by Ms Ogg on 16 July, Ms Jones was surprised to find the NMD testing had not been done in the previous week and said she "*hadn't thought about why [the results] weren't here*". However Ms Jones also said that she and Ms Rangiawha had talked on Tuesday, 7 July about whether the NMD testing could be done that day so her own evidence was that she was aware at that time of the need for it. Instead they had spent that day on salmonella testing, which Ms Jones described as the priority. Ms Ogg's notes show she knew Ms Jones was at work on 9 and 10 July but she sought no explanation as to why Ms Jones had not checked whether the NMD sampling was done.

[29] Similarly nothing was made of whether Mr Braddock – the compliance manager – could or should have done more to set up some means of being alerted if

the testing was not able to be done. At the disciplinary meeting Ms Rangiawha's union delegate Donny Arnold submitted the incident should be viewed as a "*system failure*" and asked what checks were in place to ensure the sampling was done. The question was answered with the assertion that it was sufficient for Mr Braddock to have asked for it to be done and trust that Ms Rangiawha would do so. In that respect I accept Ms Rangiawha's submission that AFFCO's disciplinary inquiry was less than even-handed in its attention on her actions compared with those of the responsible manager and the company's procedures.

[30] The particular category of serious misconduct, as identified in the applicable collective employment agreement, said to be committed by Ms Rangiawha was a "*deliberate refusal to comply with safety and hygiene standards*". Ms Rangiawha's own answers to Ms Ogg, and the information available to Ms Ogg from her interviews with other staff, show there was no refusal to do the work. As Ms Ogg's own notes of the disciplinary meeting record her saying to Ms Rangiawha: "*No, you didn't refuse – you just didn't do it*". Ms Rangiawha's explanation for that omission was that she was too busy with other work – which Ms Jones had told Ms Ogg included spending all of Tuesday 7 July on priority salmonella testing. On the following day Ms Rangiawha was working without assistance she might otherwise have had from Ms Jones (who was off duty), Ms Gillet (who was off sick) and Ms Beehre (who was off on annual leave).

[31] Objectively assessed, I consider a fair and reasonable employer would not have concluded Ms Rangiawha's failure to do the sampling, in the context of a changed deadline and limited staffing on the day it occurred, amounted to more than negligence or oversight and would have concluded that it fell short of the degree of intention needed to amount to serious misconduct.³ The same conclusion applies to why she had not mentioned the fact to Mr Braddock earlier than she did as the information available to Ms Ogg showed an assumption by Ms Rangiawha that the testing would have been done after she finished work in the department. This is apparent because, according to what Ms Beehre told Ms Ogg, Ms Rangiawha had asked her on 14 July who had done the testing in the previous week because she had run out of time.

³ *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 at [79]-[80].

[32] I also find Ms Ogg unfairly concluded Ms Rangiawha could no longer have been trusted to continue working in the offal department job to which she had been transferred. The conclusion was said to be necessary because of a loss of trust but was based on mere speculation that Ms Rangiawha sought revenge against AFFCO and would do some other deliberate act affecting food safety. It appeared to take no account of the different levels of responsibility and supervision likely to apply to the packing job to which Ms Rangiawha had been assigned.

Remedies

[33] Ms Rangiawha sought remedies of lost wages and distress compensation for her personal grievance.

Lost wages

[34] Ms Rangiawha would have earned \$4183 if she had worked through to the end of the season on 21 August rather than being dismissed on 17 July 2009. She was too discouraged by the circumstances of her dismissal to look for further work, apart from applying for a part-time supermarket job which she did not get. After a certain period she received a welfare benefit and has since enrolled in tertiary education with plans for a career in teaching.

[35] In light of very limited measures to mitigate her loss, but also accepting the effect of the dismissal on her confidence to seek new work, any award for lost wages must be limited to the earnings Ms Rangiawha would otherwise have earned in the short period to the end of the season. AFFCO is ordered to pay Ms Rangiawha \$4183 under s123(1)(b) and s128 of the Act.

Compensation for hurt and humiliation

[36] I accept Ms Rangiawha's evidence of feeling ashamed and embarrassed by her dismissal from a job in which she took considerable pride. It also affected her standing among people who were not only co-workers but also friends. Her distress was compounded by having to move her family from their rented accommodation and stay in her sister's garage until she was granted a benefit. While she has now set

about seeking new skills and a new career, AFFCO must compensate Ms Rangiawha for the loss of dignity and injury to her feelings caused by her unjustified dismissal. Taking account of the particular circumstances of the case and the general range of awards in cases of this type, AFFCO is ordered to pay Ms Rangiawha \$6000 under s123(1)(c)(i) of the Act.

Contribution

[37] Under section 124 of the Act the Authority must consider whether remedies awarded should be reduced because of any blameworthy conduct by Ms Rangiawha contributing to the situation giving rise to her personal grievance.

[38] No fault can be ascribed to Ms Rangiawha for AFFCO's failure to fairly investigate its allegations against her. Neither was the evidence on whether she had unequivocally committed to doing the NMD testing sufficiently clear to say her failure to complete it during her last two days of work in the compliance department warranted a reduction of remedies for contributory conduct.

Costs

[39] Costs are reserved with the parties encouraged to resolve any issue of costs between themselves. As a preliminary indication, subject to submissions or other information of which the Authority is not aware, this appears to be a case which would attract the usual daily tariff as a costs award. If the parties are not able to resolve costs and a determination is required, Ms Rangiawha may lodge and serve a memorandum on costs within 28 days of the date of this determination. AFFCO would then have 14 days from service for AFFCO to lodge a reply.