

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 102
3291099

BETWEEN FAISAL SHAIKH
 Applicant

AND AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Alex Leulu

Representatives: Sharon Greig, counsel for the Applicant
 Charlotte Parkhill and Laura Quinn, counsel for the
 Respondent

Investigation Meeting: On the papers

Submissions and further 26 July, 8 October, 20 November 2024 and 4 January
information received: 2025 from the Applicant
 26 July and 5 November 2024 from the Respondent

Determination: 21 February 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Faisal Shaikh is currently employed by AFFCO New Zealand Limited (AFFCO) as a slaughterman at AFFCO's Moerewa site. Mr Shaikh lodged several claims against AFFCO which included grievance claims which date back as far as 2021. AFFCO opposed some of Mr Shaikh's grievance claims because it said they were not raised within the statutory 90-day time period.¹

[2] This determination addresses the preliminary issue as to whether Mr Shaikh's disputed grievances were raised within the statutory timeframe. If the Authority determines these grievances were not raised within this time, the Authority must also

¹ Employment Relations Act, s 114.

consider whether leave should be granted to Mr Shaikh for his grievances to be raised out of time.

The Authority's investigation

[3] The parties agreed for this preliminary issue to be determined 'on the papers'. In doing so, the Authority considered an amended statement of problem, an amended statement in reply, an affidavit from Mr Shaikh and submissions from both parties. AFFCO did not file any evidence in response to Mr Shaikh and confirmed it agreed with dates referred to by Mr Shaikh in his affidavit.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Claims for unjustified disadvantage

Mr Shaikh's allegations

[5] Mr Shaikh made several claims of unjustified disadvantage against AFFCO which relate to events which occurred from February 2021 up until September 2023. AFFCO's 90-day dispute of Mr Shaikh's claims were in respect of events which occurred up until September 2022. During this timeframe, Mr Shaikh claimed he was subjected to bullying and harassment in the workplace and as a result, was exposed to a health and safety risk. In his amended statement of problem, he made the following allegations (which have been disputed by AFFCO as being out of time):

- (a) Mr Shaikh's initial employment with AFFCO from September 2020 to February 2021 where he resigned because of bullying from AFFCO staff;
- (b) Not being provided a written employment agreement until around a year after starting his second stint of employment for AFFCO in February 2021;
- (c) As a result of an unsuccessful halal slaughter in December 2021, Mr Shaikh claimed he was subject to various unreasonable actions and threats from his supervisors which included him being made to sign a blank halal incident report (halal incident);

- (d) In January 2022 Mr Shaikh claimed AFFCO's plant manager and an HR administrator had tried to coerce and mislead him to change his immigration visa status (the visa allegation);
- (e) Since the halal incident, Mr Shaikh claimed he was bullied and harassed by his supervisor up until April 2022. He also claimed he had raised complaints about the bullying behaviour in April and May 2022 which he said were not addressed by AFFCO (the bullying complaints);
- (f) On 19 May 2022 AFFCO issued Mr Shaikh with a breach of conduct notice in respect of a workplace action known as 'double stun'. Mr Shaikh made several allegations against AFFCO in respect of the notice and its implementation of the 'double stun' procedure in the workplace; and
- (g) On 10 June 2022 Ms Shaikh claimed he was coerced by AFFCO not to join the union.

[6] Mr Shaikh made further claims for events which occurred after September 2022. These included allegations of bullying and harassment, failure to provide a healthy and safe workplace, unjustified actions by AFFCO relating to a workplace assault by another staff member and disciplinary related actions against Mr Shaikh. These issues have not been disputed by AFFCO (as 90-day issues) and will be subject to the Authority's substantive investigation.

Mr Shaikh's personal grievances

[7] Mr Shaikh formally raised personal grievances with AFFCO on three occasions with his first personal grievance raised on 18 October 2022 (first personal grievance). The first personal grievance referred to much of the disputed events which are the subject of this determination.

[8] On 25 January 2023 Mr Shaikh raised a second personal grievance which reiterated much of his first personal grievance but also included matters which occurred since. A third personal grievance was raised by Mr Shaikh in September 2023 which again covered events which occurred since the last personal grievance was raised.

The statutory requirements

[9] Personal grievances must be raised by an employee with their employer within 90 days from when the alleged personal grievance action occurred or came to the notice

of the employee, whichever is the latter.² Alternatively, an employer can consent to the raising of a personal grievance outside of the 90-day timeframe.

[10] A personal grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This process provides an employer with sufficient notice to be able to appropriately respond to the grievance.³

[11] The Authority also has discretion to grant an employee leave to raise a personal grievance out of time and can impose any conditions it sees fit if it:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in s 115 of the Act); and
- (b) considers it just to do so.

The parties' positions

Mr Shaikh's submissions

[12] In response to Mr Shaikh's first personal grievance, AFFCO responded to him with a letter on 9 November 2022. This in turn led to the parties attending mediation to try and address the grievance claims in December 2022. Because the parties attended mediation, Mr Shaikh claimed AFFCO had consented to his disputed grievances being raised outside of the statutory timeframe.

[13] In the alternative, Mr Shaikh submitted there were exceptional circumstances which support the Authority granting leave for his disputed grievances to be raised out of time. Firstly, Mr Shaikh argued his status as a migrant employee as well as his language difficulties made it difficult for him to understand his employment rights.

[14] Secondly, Mr Shaikh also argued AFFCO's behaviour towards him in respect of his disputed claims were continuous and related actions to his other claims which are not disputed by AFFCO (and considered to be raised in time).

² Employment Relations Act 2000, s 114.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

[15] Thirdly, Mr Shaikh claimed he only knew his alleged experiences were grievances once he had engaged the services of a legal representative in October 2022. Mr Shaikh argued that for the purposes of the Act, it was at this time his grievances had come to his notice in accordance with s 114(7)(a) of the Act. Therefore, he submitted, the statutory timeframe commenced from when he engaged legal representation.

AFFCO's submissions

[16] AFFCO said it had never consented to Mr Shaikh's disputed grievances being raised out of time. After Mr Shaikh's first personal grievance, AFFCO said its attendance at mediation was merely following its own dispute resolution procedure which required it to address the grievance through mediation.

[17] In support of its argument, AFFCO reiterated the employee notification period requirement under the Act requiring Mr Shaikh to raise his grievance within:⁴

... the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later.

[18] In response to Mr Shaikh's arguments about when the disputed grievances came to his attention, AFFCO disagreed and argued the 90-day period commenced from when the alleged personal grievance action had come to the notice of the employee. It also said Mr Shaikh's failure to obtain legal advice should not mean the 90-day period is deferred to when he did receive legal advice.

[19] AFFCO also said there were no exceptional circumstances in this case warranting the Authority granting leave to Mr Shaikh for his grievances to be raised out of time.

[20] In support of its argument, AFFCO said there was no continuous or related action which linked Mr Shaikh's disputed out of time claims and his undisputed grievance claims. It said, Mr Shaikh's disputed claims were not sufficiently close in time and quality which would connect the two sets of claims.

⁴ Employment Relations Act 2000, s 114(7)(b).

The Authority's assessment

Mr Shaikh's first personal grievance

[21] Mr Shaikh's first personal grievance was formally raised with AFFCO by letter around 130 days after the date of his last disputed grievance allegation (the union membership allegation on 10 May 2022). In his letter, Mr Shaikh's representative specifically identified the detail of his grievances (which included the disputed grievances which are subject to this determination). As set out above, Mr Shaikh argued it was around this time when he first became aware, his allegations were grievances under the Act.

[22] One of Mr Shaikh's disputed allegations relate to whether he had signed two written employment agreements with AFFCO on 30 November 2021. Mr Shaikh denies signing the two agreements in November 2021 and admitted to signing an agreement on 28 February 2022. Although the Authority has evidence of the two November 2021 agreements, it did not have a copy of the February 2022 agreement.

[23] Based on the versions of the agreements before the Authority, the agreements both provided clear and detailed information explaining what an employment relationship problem is (including a reference to personal grievances) and what steps are to be taken to address such problems. The reference also sets out the statutory 90-day time frame for raising a grievance.

[24] Given the November 2021 agreements were the only versions before the Authority and assuming the employment relationship problem wording was the same as the alleged agreement Mr Shaikh signed, the Authority had to rely on the versions currently put before it. Based on these versions, Mr Shaikh should have been sufficiently aware that his disputed complaints were grievances and that he should have known to raise these grievances in time.

[25] For reasons stated above, Mr Shaikh's arguments relating to the lack of understanding of his obligations and when his grievances came to his notice (upon obtaining legal representation) are not accepted. When Mr Shaikh raised his first personal grievance in respect of the disputed 90-day matters, he raised these grievances out of time.

Did AFFCO consent to the disputed grievances being raised out of time?

[26] The next step in assessing this preliminary matter is to determine whether AFFCO had consented to Mr Shaikh's disputed grievances being raised after the statutory timeframe. Whether or not AFFCO had given consent should be assessed as a matter of fact and degree.⁵

[27] In assessing what constitutes as 'consent', mere acquiescence, or passive correspondence with what is raised with an employer would not be sufficiently meet the level of consent required under s 114 of the Act. Under these circumstances, consent requires a positive affirmative act from AFFCO.⁶

[28] Mr Sheikh's first grievance letter proposed to AFFCO two resolution options with the first being a without prejudice meeting between the parties or secondly, proceeding to mediation through mediation service provided by the Ministry of Business Innovation and Employment.

[29] On 9 November 2022 AFFCO responded to Mr Shaikh's first personal grievance and replied to each of Mr Shaikh's allegations to various degrees. The only matter AFFCO disputed as being outside the 90-day timeframe were Mr Shaikh's bullying complaints made in April and May 2022.

[30] In its first grievance response, AFFCO agreed to Mr Shaikh's options for resolution of his first personal grievance and effectively left the decision to Mr Shaikh as follows:

Without acceptance of fault or liability, I confirm that AFFCO is willing to attend a without prejudice meeting with the aim of resolving this grievance and/or attend mediation. Please confirm your preference and/or when the referral is made.

[31] The parties attended mediation on 21 December 2021 and subsequently Mr Shaikh raised two further personal grievances and lodged his initial statement or problem claim with the Authority on 15 April 2024.

⁵ *Vulcan Steel Limited v Kirean Wonnocott* [2013] NZEmpC 15 at [45] - [46].

⁶ *New Zealand Fisheries Ltd v Napier City Council* [1990] 1 NZ ConvC 342 at p 190.

[32] On 8 February 2023 AFFCO responded to Mr Shaikh's second personal grievance where it identified all the currently disputed grievance claims as being raised outside the 90-day time frame.

[33] Apart from Mr Shaikh's bullying complaints, I accept AFFCO provided sufficient consent for his remaining claims to be submitted outside the statutory 90-day period. The only claim that AFFCO had not consented to the bullying complaints from April and May 2022. This position is supported by the fact that AFFCO:

- (a) was provided sufficient information as to what Mr Shaikh's grievances were and how he wanted the matter resolved (as part of the first personal grievance);
- (b) provided a detailed response setting out its views on Mr Shaikh's claims and had specifically identified only the bullying complaints as not being raised within the 90-day timeframe; and
- (c) had taken its own steps to investigate some of Mr Shaikh's claims.

[34] This was further supported by AFFCO deciding on its own volition to engage in mediation with Mr Shaikh. As previously held by the Employment Court, an attempt by an employer to purposely resolve a matter through mediation may constitute consent to accept a grievance outside the 90-day time period.⁷

[35] Although AFFCO had subsequently identified all disputed claims as being outside the statutory time frame in its response to Mr Shaikh's second personal grievance, it was too late. For reasons already stated, it had already consented to grievances being raised out of time.

Are there any exceptional circumstances warranting granting leave?

[36] AFFCO had specifically identified Mr Shaikh's bullying complaints from 2022 as outside of the statutory timeframe and it had not given consent for it to be raised out of time. I must determine whether there were any exceptional circumstances which warrant leave being granted for his bullying complaints to be raised outside the statutory timeframe.

⁷ *Jacobsen Creative Surfaces Ltd v Findlater* [1994] 1 ERNZ 35 (EmpC).

[37] As already stated, Mr Shaikh's employment agreement sets out a clear and detailed explanation of what an employment relationship problem was. For this reason, his arguments in respect of status as a migrant employee are not accepted.

[38] However, Mr Shaikh's disputed bullying complaint is clearly an event which occurred amongst other alleged events and allegations and fall under the category of allegations framed as both bullying, and health and safety breaches. These events occurred from the start of his employment up until June 2022 and included allegations associated with the halal incident, visa allegation and union membership allegations. Further allegations of bullying and health and safety breaches occurred from September 2022 onwards. These later allegations are numerous and as previously stated, AFFCO confirmed these were raised in time.

[39] The totality of the number and frequency of Mr Shaikh's grievance allegations against AFFCO all relate to some alleged conduct of bullying and health and safety breaches from before, during and after Mr Shaikh made his bullying complaints in April and May 2022. These allegations sufficiently illustrate a series of continuous and related actions which fall within both Mr Shaikh's disputed and undisputed claims by AFFCO. For these reasons, due to the continuous nature and related nature of the AFFCO's alleged conduct leave is granted to Mr Shaikh for his bullying complaint to be raised outside of the statutory timeframe.

[40] In summary, for reasons stated, almost all of Mr Shaikh's disputed claims were consented to by AFFCO. The Authority grants leave to the remaining bullying complaint claims as being raised in time due to its link to Mr Shaikh's claims that are not disputed.

Costs

[41] Costs are reserved pending the final determination of the matter. The Authority will be in contact with both parties to arrange the next steps for the Authority's investigation.

Alex Leulu
Member of the Employment Relations Authority