

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 50
5605234

BETWEEN CHARMAINE TAKAI
 Applicant

A N D AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Mitchell, Counsel for Applicant
 Christine Pidduck, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 05 February 2016 from Applicant
 11 February 2016 from Respondent
 12 February 2016 from Applicant

Date of Determination: 19 February 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] This determination resolves Ms Charmaine Takai's urgent application for interim reinstatement pending the outcome of her personal grievance claims.

[2] Ms Takai was employed by AFFCO New Zealand Limited (AFFCO) as a meat process worker at its meat processing plant situated at Rangiruru (the Plant). Ms Takai worked in the LambCuts Department. She is also a union delegate for the New Zealand Meat Workers Union (the Union).

[3] Ms Takai worked for AFFCO for nine years before she was dismissed for serious misconduct on 22 December 2015. Ms Takai claims her dismissal was

unjustified. Ms Takai also claims AFFCO unjustifiably disadvantaged her when it placed her on unpaid suspension on 01 December 2015.

[4] The terms and conditions of Ms Takai's employment are contained in an individual agreement which is based on the AFFCO New Zealand Core Employment Agreement in force between 01 May 2012 to 31 December 2013, but continuing in force until 31 December 2014 (the expired CA) pursuant to s.53 of the Employment Relations Act 2000 (the Act).

[5] At the beginning of the 2015/2016 season AFFCO declined to allow Union members to return to work unless they signed new individual employment agreements. The legality of this was challenged by the Union and as a result of these legal proceedings the Employment Court held that workers were entitled to the terms of individual employment agreements based on the expired CA.¹

[6] The Employment Court's decision was issued on 18 November 2015. AFFCO began implementing the return to Union conditions the week commencing 30 November.

[7] Ms Takai says that the following day (01 December) she got a phone call from Ms Ratu (who was also dismissed and who has also sought interim reinstatement) the Union Plant Secretary who said she had received calls from union members about issues at the Plant. Ms Ratu asked Ms Takai to go with her to the Plant to address these concerns.

[8] Ms Ratu and Ms Takai were rostered to work the Afternoon shift on 01 December but went to the Plant during the course of the Day shift. Ms Takai says she and Ms Ratu scanned in using their fingerprints as employees are required to do. They then went to the Slaughter Floor and spoke to Union members about their concerns.

[9] There is no dispute that Ms Takai and Ms Ratu entered the Slaughter Floor without notifying management or seeking consent to do so.

[10] They were approached by the Supervisor who called in the Production Manager Mr David (Ike) Tapsell who wanted to know what they were doing. Ms Takai says that during that discussion an issue involving a member in the Offal Room was also raised so she and Ms Ratu went to the Offal Room to discuss the matter.

¹ [2015] NZEmpC 204.

[11] Ms Takai says Mr Tapsell told her and Ms Ratu to go and see the Plant Manager, Mr Kevin Casey. Ms Takai says it was not an instruction or a direction but merely a discussion.

[12] Ms Takai says they agreed to go and see Mr Casey so there was no issue. Ms Takai says they did their best to comply because they did go to see Mr Casey after visiting the Offal Room. However because Mr Casey was occupied with visitors they left him a note then left the site.

[13] When Ms Ratu and Ms Takai arrived at work later that same day to start work for their Afternoon shift they were asked to attend a meeting with Mr Casey. Mr Tapsell was present as a note taker. Mr Casey advised them that he was suspending them without pay while AFFCO investigated their alleged breaches of health and safety rules.

[14] AFFCO says that Ms Ratu's and Ms Takai's actions put the workers at risk. AFFCO also says that Ms Ratu and Ms Takai failed to comply with a reasonable instruction to go and see Mr Casey because they visited another production department then left the site without speaking to Mr Casey.

[15] AFFCO denies that Ms Ratu and/or Ms Takai were acting as delegates on 01 December and it says that there were other delegates on site and working at the material time for workers to speak to. AFFCO also says the custom is for delegates to seek permission from the Plant Manager to speak to workers during production but that did not occur in this case.

[16] Ms Takai received a letter dated 04 December 2015 inviting her to an "*Investigation meeting*" on 9 December 2015. The letter identified the following "*allegations of serious misconduct*":

- a. She had endangered the health and safety of herself and others and had affected production and quality;
- b. Breached Plant Safety Rules;
- c. Failed to follow "*a reasonable instruction*" to see Mr Casey.

[17] Ms Takai attended that meeting on 09 December with her lawyer, Mr Simon Mitchell. Also present were Mr Casey, Mr Scott Fry - Industrial Relations Manager and Mr Tapsell.

[18] Ms Takai says that at the outset of the meeting Mr Mitchell asked for clarification of the status of the meeting because while the letter of 04 December is headed "*Investigation Meeting*" it also referred to "*Allegations of serious misconduct*" and stated that the purpose of the meeting was to provide Ms Takai with "*an opportunity to put forward your explanation*" and that if found guilty of serious misconduct she could be dismissed.

[19] There is no dispute that Mr Fry advised that the meeting was "*an investigation meeting*" and that the reference to "*disciplinary*" was a "*typo*". Ms Takai says that AFFCO made it clear they were simply investigating events and that the meeting was not disciplinary at that stage.

[20] Ms Takai claims that in light of that Mr Mitchell then stated he would not make submissions about the allegations of misconduct as the meeting was still at the investigative stage. Neither Mr Fry nor Mr Tapsell responded to that claim in their affidavits.

[21] Ms Takai says she responded to AFFCO's questions and that Mr Mitchell raised a personal grievance regarding her unpaid suspension which was confirmed in a letter he sent to AFFCO the following day.

[22] Mr Mitchell's letter dated 10 December 2015 also refers to AFFCO's "*advice that it was an investigation meeting*". A subsequent letter sent by Mr Mitchell on 17 December again refers to "*the investigation meeting*" on 09 December. A letter from Ms Pidduck to Mr Mitchell dated 18 December 2015 refers to "*the investigation meeting*" to a "*preliminary view [having] been formed*" and to the "*outcome of the investigation process*" being expected by 22 December.

[23] Ms Takai then received a dismissal letter dated 22 December 2015 informing her she had been summarily dismissed for serious misconduct and that AFFCO would not be reimbursing her for her unpaid suspension.

[24] Ms Takai says she was expecting the outcome of the investigation to be communicated to her and if the matter was to go further then she believed that a

disciplinary process would have been undertaken before any disciplinary action would be taken against her.

[25] AFFCO says Ms Takai's unpaid suspension and dismissal were both procedurally and substantively justified. AFFCO opposes Ms Takai's application for reinstatement. It says that reinstatement poses an unacceptable safety risk.

Relevant law

[26] Section 127 of the Act allows the Authority to exercise its discretion to order interim reinstatement of an employee pending the substantive determination of the employee's dismissal grievance claim against their employer.

[27] When determining whether or not to exercise its discretion to order interim reinstatement, the Authority is required to act judicially by applying the law relating to interim injunctions having regard to the objects of the Act. I consider that the principles relating to interim injunction proceedings before the Authority are so well established I do not need to set them out here.

[28] This interim reinstatement application has been determined based on untested affidavit evidence only. Therefore conflicts in the evidence cannot be resolved from the affidavit evidence.

[29] In these circumstances it is important to keep in mind that any findings of, or discussions about, the facts at this interim stage are provisional only and the Authority's view on these matters may change after the claims have been fully investigated and the witnesses properly examined during the course of the Authority's substantive investigation meeting.

Issues

[30] The following issues are to be determined:

- (a) Does Ms Takai have an arguable case that her dismissal was unjustified?
- (b) If so, does Ms Takai have an arguable case for reinstatement?
- (c) Where does the balance of convenience lie until the substantive matter can be determined?

- (d) Where does the overall justice of the case lie until the substantive matter has been determined?

Does Ms Takai have an arguable case that her dismissal was unjustified?

[31] Whether there is an arguable case is to be determined in light of the justification test in s.103A(2) of the Act. This requires the Authority to assess whether AFFCO's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Ms Takai.²

[32] A fair and reasonable employer is expected to comply with its statutory obligations which includes the four procedural fairness tests in s.103A(3) of the Act and the good faith obligations in s.4(1A) of the Act. Failure to do so is likely to fundamentally undermine an employer's ability to justify its actions and/or dismissal.

[33] Ms Takai submits that her dismissal was unjustified because AFFCO breached its obligations under:

- a. s.103A(3)(c) of the Act because she was never given an opportunity to respond to AFFCO's specific concerns before she was dismissed; and
- b. s.103A(3)(d) of the Act because the failure to provide her with an opportunity to respond to AFFCO's specific disciplinary concerns meant that AFFCO was not in a position to, and therefore failed to, genuinely consider her explanations.

[34] Ms Takai says she believed that the meeting on 09 December only required her to give a factual account of the matters that had occurred on 01 December so AFFCO could decide whether or not it was appropriate to pursue a disciplinary process against her.

[35] Ms Takai claims that because of that representation by AFFCO she therefore did not provide the comprehensive sort of substantive explanations she would have about why her actions could not amount to serious misconduct.

[36] Ms Takai's evidence is that her lawyer made that clear and that she would have provided more comprehensive explanations if she knew that a disciplinary

² Section 103A(2) of the Act

outcome was going to be imposed (as opposed to a disciplinary process being entered into) as a result of the 09 December meeting.

[37] Ms Takai also says that she was denied any opportunity to raise mitigating factors for AFFCO to consider before it dismissed because she was unaware it had concluded that she had engaged in serious misconduct.

[38] I accept Mr Mitchell's submissions that there is a significant difference between an employee answering an employer's questions during a non-disciplinary (essentially fact finding) investigation process compared to responding to specific allegations during a formal disciplinary process on notice that a disciplinary sanction is likely to be imposed if the explanation is considered to be unsatisfactory.

[39] Ms Takai also challenges AFFCO's substantive justification of her dismissal. Her affidavit sets out in detail why her actions could not be viewed as serious misconduct by a fair and reasonable employer.

[40] For interim reinstatement purposes, on the basis of as yet untested evidence I consider that there is a properly arguable case that Ms Takai's dismissal was unjustified.

Does Ms Takai have an arguable case for reinstatement?

[41] It is also necessary for Ms Takai to establish that she has an arguable case for reinstatement should her dismissal grievance succeed.

[42] Section 125 of the Act provides that reinstatement is no longer the primary remedy, it is just one of a range of remedies that may be awarded. Reinstatement may be awarded if it is "*practicable and reasonable to do so*".

[43] AFFCO claims that the Plant may greatly reduce its capacity around the end of March which it says may put Ms Takai's employment in jeopardy if she were to be reinstated. It therefore says that reinstatement is not reasonable or practicable so Ms Takai does not have an arguable case for reinstatement.

[44] Mr Fry's second affidavit deposes that if interim reinstatement is granted, there is no guarantee that by the time the substantive matter is heard in April that Ms Takai will still have work available to do.

[45] I consider that this evidence is somewhat speculative at this stage. Mr Mitchell submits that seniority is the primary consideration in relation to layoffs and that Ms Takai is a long serving worker with nine years' service so it is not a forgone conclusion that she will not have work to do if layoffs are required.

[46] Mr Mitchell also identifies that even if Ms Takai were to be laid off there is Employment Court authority which provides that she will remain an employee during the period in which she is not working prior to the Plant commencing operations again.

[47] I accept Ms Takai's evidence that there are limited employment opportunities available for her. Ms Takai's employment by AFFCO is very important to her because her family relies on her income to cover their expenses. Although Ms Takai's husband is now working extremely long hours to support their family they are still struggling.

[48] I accept Ms Takai's evidence that there are limited alternative employment options in the area.

[49] I am satisfied that if Ms Takai's dismissal grievance succeeds then she has an arguable case for reinstatement.

Where does the balance of convenience lie until the substantive matter can be determined?

[50] The balance of the convenience requires the Authority to balance and assess the respective injustices to the parties for the period until the substantive merits of Ms Takai's claims can be determined. One aspect of this involves consideration of whether or not damages would be an adequate remedy for any injustice that may occur.

[51] The Authority is required to weigh the potential injustice to Ms Takai of not being reinstated before a substantive determination is issued by the Authority, assuming she is entitled to the remedy of reinstatement should her grievance succeed, against the potential injustice to AFFCO related to the burdens of having her back in the workplace on an interim basis if she is either found to have been justifiably dismissed or, if the dismissal is unjustified, the Authority declines to award reinstatement as a remedy.

[52] The timing of the substantive investigation meeting scheduled for 18 and 19 April 2016 is a significant factor. It is unlikely that a substantive determination will be available much before the end of April 2016.

[53] I consider this delay is a factor in favour of Ms Takai's interim reinstatement because her employment ended on 22 December 2015. I consider that the potential injustice of no or reduced income for Ms Takai for another two months outweighs the potential injustice to AFFCO of her being reinstated on an interim basis.

[54] I do not accept AFFCO's submissions that Ms Takai is likely to engage in activities which pose a significant risk to herself and/or other workers pending the determination of her substantive claims.

[55] There was no evidence of Ms Takai breaching health and safety in her previous nine years of employment. I do not consider there is a significant risk she will do so in the next two months if she returns to work.

[56] I consider that AFFCO's concerns about Ms Takai acting in an unsafe manner and not following instructions from her managers if she were to be reinstated on an interim basis can be addressed by a thorough safety briefing to be held at the beginning of her shift on the day she returns to work.

[57] In terms of the strength of the parties' respective cases based on the untested affidavit evidence before me I consider that at this initial stage her case is marginally stronger than AFFCO's.

[58] I consider that it is arguable that AFFCO did not properly put its concerns to Ms Takai to respond to and that she was deprived of an opportunity to provide her explanation as to whether or not the allegations were capable of amounting to serious misconduct and, if so, to raise matters in mitigation.

[59] I accept AFFCO's submission that any financial losses faced by Ms Takai could potentially be remedied by the payment of damages.

[60] After careful consideration of all relevant circumstances, I consider that the balance of convenience is neutral with factors favouring both Ms Takai and AFFCO.

Where does the overall justice lie until the substantive matter has been determined?

[61] The overall justice of the case requires the Authority to stand back and assess where the overall justice of the case lies for the interim period until the substantive claim has been determined. This involves an exercise of the Authority's discretion.

[62] Although the evidence is as yet untested the Authority must adopt a robust assessment of the relative strengths of each party's case.

[63] I consider that the context of the matters in issue needs to be considered. This arose after the Employment Court made specific findings that AFFCO had acted unlawfully in relation to its treatment of Union members at Rangiruru. Ms Takai was asked by the Union Secretary Ms Ratu to support members who had raised concerns about being harassed.

[64] I also consider that another factor to be weighed in the mix is that Ms Ratu was the ringleader and instigator of the visit to the Slaughter Floor and she has obtained interim reinstatement.

[65] For these reasons, I consider that the overall justice marginally weighs in favour of Ms Takai being reinstated.

Orders

[66] I am satisfied that it is appropriate to exercise the Authority's discretion to order AFFCO to reinstate Ms Takai until further order of the Authority. This leaves it open to the parties to return to the Authority should the Plant close and there is no work for Ms Takai to do before the substantive matter has been determined.

[67] Accordingly, within seven days of the date of this determination AFFCO is ordered to reinstate Ms Takai on an interim basis only until her substantive claims have been determined or until further order of the Authority.

Costs

[68] Costs are reserved pending the outcome of the substantive matter.

Rachel Larmer
Member of the Employment Relations Authority