



# New Zealand Employment Relations Authority Decisions

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## Tuapawa v Affco New Zealand Limited [2011] NZERA 51; [2011] NZERA Wellington 8 (26 January 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 8 5311479

BETWEEN LISA MARIE TUAPAWA

Applicant

AND AFFCO NEW ZEALAND

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

P R Stapp

Simon Mitchell for Applicant

Graeme Malone for Respondent

7 October 2010 at Napier

12 November 2010 from Applicant

22 November 2010 from Respondent

Determination:

26 January 2011

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] The applicant has claimed AFFCO acted unjustifiably disadvantaging her. Ms Tuapawa, an AFFCO employee at its Wairoa meat processing plant, was given two warnings on 31 March and 7 April 2010 for not working reasonable overtime on 30 March and 1 April, when she went home early to care for her mother. She says she was waiting for the company to get back to her about working any overtime.

[2] AFFCO New Zealand Limited (AFFCO) denied the claims. AFFCO claims that Ms Tuapawa was required to work reasonable overtime and she left work without any authorisation.

#### Issues

[3] What was the understanding that both parties had on what Ms Tuapawa was to do in regard to working overtime? When, if at all, was the company going to get back to her about not working overtime?

[4] What was the procedure followed by AFFCO?

[5] Was AFFCO entitled to follow the terms of the collective employment agreement in regard to issuing the warnings?

[6] What were the reasons for the warnings?

[7] If there is a personal grievance, what remedies apply, and how much? **The facts**

[8] Ms Tuapawa believed that at the time she commenced the season's work in 2010 that AFFCO would be sympathetic to her needs to look after her ill mother, and that at the peak of the season she would have difficulties working 10 hour shifts.

[9] She relied on no one raising any concerns or saying her situation could not be accommodated. This included her claim that she discussed the matter on Saturday 27 March 2010 with her supervisor and next took the matter up with the plant production manager on Tuesday 30 March 2010 in the presence of her union delegate. The production manager, Mr King, denied seeing Ms Tuapawa on the Tuesday, but he says he did talk to her on Friday 26 March 2010 and says he told her that she could not leave early and that if she left it would be disruptive and that she would have to arrange cover. Also, he says she told him that any cover would depend on if her partner was working the dayshift. From this Mr King expected Ms Tuapawa to let him know on Monday (29 March).

[10] I hold that Ms Tuapawa is mistaken about the dates she says she met with Mr King. Mr Te Rangi, union delegate, could not accurately remember the exact date. I accept Mr King's evidence that the first time he saw Ms Tuapawa was on Friday 26 March and she was told she could not leave early, but would have to arrange cover. Mr King told her to inform him on the Monday (29 March) of her partner's arrangements for any absence and cover. She did not do this. But instead when she was told to go and see Mr King by her supervisor she did not do so and left her work. There was no meeting with Mr King on the Monday and or Tuesday, I hold. I accept Mr King's evidence because he was consistent, clear and unequivocal about the dates he was involved.

[11] Ms Tuapawa was specifically told by Mr Kelson the Beef Production manager to see Mr King on the Tuesday (30 March) when she asked to leave early, but did not and simply left. She accepted that she was aware and clear that a decision not to work overtime could result in consequences.

[12] She left work on 30 March an hour before others finished work to care for her mother. When she returned to work on 31 March she was informed by Mr Kelson that she would be receiving a warning, but did not get the documentation that day. When she was given the first warning it was dated 30 March, the date of her absence.

[13] Ms Tuapawa and Mr Te Rangi the union delegate say that she approached Mr Te Rangi during (Monday) 29 March and that the company had not got back to her at any time that day about not working overtime. They rely on going and talking to Mr King and they say that he never suggested that the company expected to hear back from her. Mr King says he was waiting on her to get back to him on the Monday (29 March).

[14] Next, she left early again on Thursday 1 April 2010 to be with her mother without telling anybody.

[15] Another warning dated 1 April 2010 was issued by Shane Hubbard supervisor on 7 April 2010 after he had heard from Ms Tuapawa, and at a separate meeting, which Mr Kelson attended the last part of. The former date on the warning was the date of the incident. This was clarified by Mr Hubbard in a sworn affidavit dated 12 October 2010. He says he gave her the warning because she left work without seeing Mr King and getting permission.

## **Determination**

[16] Under the collective employment agreement there is provision for employee's responsibilities to work eight ordinary hours per day for five days per week, or up to 10 hours for four days per week, and to work reasonable overtime (clause 12 (e) of the collective agreement).

[17] The Union has contested the overtime that Ms Tuapawa was required to work as being unreasonable, and that there were genuine reasons, which had been provided by Ms Tuapawa, as to why she would not have been able to work the overtime. Also the Union has claimed that AFFCO did not consider all the circumstances when it treated the matter as disobedience.

[18] I do not accept that it was clear to Ms Tuapawa that she considered that she was not obliged to stay at work and was entitled to leave having completed nine hours. She understood clearly the engagement and what was required, and notwithstanding raising her concerns early in her employment decided to act on a wrong understanding or impression, I hold.

[19] Also, I do not accept her explanation as to the reason why she did not get back to Mr King. She says it was enough for her to rely on her belief that Mr King never suggested that the company expected to hear back from her. In this regard I have accepted that Mr King met with her on Friday 26 March 2010 and told her to see him on Monday 29 March about cover.

[20] Ms Tuapawa was seeking the indulgence to be absent from work and excused from the conditions that she was employed under, and therefore, it was her responsibility to speak to Mr King. Also, the terms of the overtime applied to everyone. There has been no evidence that the union had any dispute over the overtime required (except as it has been raised only in Ms Tuapawa's case).

[21] AFFCO never committed to any conditions waiving its requirement on Ms Tuapawa to work 1 hour extra overtime at the commencement of her employment. Ms Tuapawa has not been able to support her claim that there was an agreement to cover her circumstances and that this would have been adequate notice. In fact she was clear that Mr Kelson did mention that there would be consequences if she decided to leave early, and thus, it is more than likely each time she needed time off it would have to be approved and cover obtained.

[22] Perhaps one explanation is that the situation involved what appears to be a misunderstanding about who was to get back to whom. First, on the Thursday 1 April 2010 Mr Te Rangi was reliant on what he was being told by Ms Tuapawa. He did not check with anyone about her situation or even what he was being told by her. The two mitigating factors relied upon by the applicant to make allowance for her circumstances are (1) that she had worked an hour's overtime and had met her obligations to her employer, and (2) that she had an obligation to care for her sick mother. I do not accept that at the time of her engagement she put the employer on notice for any agreed arrangement. She chanced her arm at that time; knowing what the employer's requirements were for her to work the hours required. She had an obligation to raise the matter when she wanted time off and when her supervisor told her to see Mr King she had a responsibility to do just that. The difficulty that has arisen is that she believed she had done enough by raising it with her supervisor and Mr King allegedly on the Tuesday. The difference between them all is that Mr King says the applicant's timing about contacting him is wrong (it was not the Tuesday), and he says when she did contact him the week before then, he told her that she was not to go, but to get back to him on the Monday, and she did not do so.

[23] Secondly, on the Thursday, she believed she was waiting on the company to get back to her, and that no one said to her to contact Mr King. This is not plausible I hold because:

- a. Mr King was very clear in his evidence about the timing he says that the applicant saw him.
- b. Messrs Kelson and Hubbard were very clear about the timing of the incidents of absence and their meetings with Ms Tuapawa and her union delegates. They also supported Mr King about the timing that he would have seen her because they knew that she had to see him to arrange cover and at least one of them had to work in her place.
  - c. Mr Te Rangi clearly knew that Mr Hubbard could not replace Ms Tuapawa.
  - d. Mr Te Rangi was relying on what Ms Tuapawa told him and he did not check the information with Mr King about whether or not she indeed was waiting on the company to get back to her.
  - e. Mr Te Rangi was not clear about the date when he and the applicant met with Mr King. Whenever they met he had every opportunity to clarify the situation, and did not do so, I hold, and indeed he was not sure at all about the situation.
  - f. Mr Te Rangi had no explanation about what he and the applicant did when they were asked to speak to Mr King.
  - g. Messrs Kelson and Hubbard are clear about telling the applicant and Mr Te Rangi that they had to see Mr King.
  - h. Mr Te Rangi could not accurately recall that he was not at work the week following Easter (according to the record produced by AFFCO).

[24] Therefore, I conclude that there was no misunderstanding. I have come to the conclusion that Ms Tuapawa is making the best of a difficult situation based on what she believed, and she has not been able to undermine Messrs, King's Hubbard's and Kelson's evidence of the dates, their conversations and what they said at the time.

[25] Ms Tuapawa's actions of leaving work without authorisation would amount to disobedience, I hold. Warnings are within the range of options available to a fair and reasonable employer. The warnings were issued in the work place, but I am satisfied they were issued on the basis of sound information obtained by Messrs Kelson and Hubbard and that they gave Ms Tuapawa an opportunity to be heard with her delegates involved. Ms Tuapawa should not have been surprised by the issues surrounding her non attendance because she was obviously aware that there was an issue because she contacted her delegates and has accepted she had discussions over leaving work with Messrs King, Hubbard and Kelson at various times. I accept that Messrs Kelson and Hubbard both reached an honestly held belief that she left work without authorisation due to her having no cover for her absences, and where one of them had to fill in for her and they had no approval from Mr King.

[26] There has been no explanation given by Messrs Hubbard, Kelson and King in regard to any discussions they might have had together. In particular I am not sure that there was any discussion between Mr Hubbard in regard to the second warning with Mr King except that Mr Hubbard was aware from Ms Tuapawa that she had not seen Mr King, because she told him and this is supported by her explanation that Mr King never suggested that the company expected to hear back from her.

[27] Ms Tuapawa was put on notice of the consequences of what could happen if she left work by Messrs Kelson and Hubbard. Her union delegates were involved. The pity is that in this case she did not do enough to get clearance and assumed wrongly that she could do what she wanted to do. Unfortunately for her she chanced it without getting cover, and having not gone back to Mr King, he reasonably concluded that as her partner was working dayshift those days he had no reason to

believe she would not be working. I have no reason to believe that Mr King would have been unsympathetic to Ms Tuapawa if only she had gone back to him. It was not enough for her to rely on a belief that she was waiting to hear back from the company on the basis that she believed Mr King had said nothing to the contrary. Indeed the thread of the evidence is that throughout these events the obligation was on Ms Tuapawa to go to her supervisors and Mr King to arrange time off. This thread is consistent with Messrs King's, Kelson's and Hubbard's evidence. Her decision to leave work puts the employer's response in the range of discipline taken.

### **Orders of the Authority**

[28] The applicant's claims are dismissed.

[29] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority

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