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Waihape v AFFCO New Zealand Limited (Wellington) [2017] NZERA 2013; [2017] NZERA Wellington 13 (2 March 2017)

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Waihape v AFFCO New Zealand Limited (Wellington) [2017] NZERA 2013 (2 March 2017); [2017] NZERA Wellington 13

Last Updated: 9 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 13
5640887

BETWEEN HENRY WAIHAPE Applicant

AND AFFCO NEW ZEALAND LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: Simon Mitchell and Jeremy Lynch, Counsel for

Applicant

Max Williams, Counsel for Respondent

Investigation Meeting: 18 November 2016 at Napier

Submissions Received: 22 November and 2 December 2016 from Applicant

29 November 2016 from Respondent

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, Henry Waihape, claims he was unjustifiably dismissed by the respondent, AFFCO New Zealand Limited (AFFCO), on 1 September 2016.

[2] AFFCO accepts it dismissed Mr Waihape but says the decision was justified.

Background

[3] Mr Waihape was employed by AFFCO at its Napier tannery. He was also the Union's site secretary and as such responsible for representing the interests of the unions members on site. Mr Waihape's terms and conditions of employment were

governed by an expired collective agreement augmented by a document known as the

Napier Site Agreement.

[4] Contained in the Site Agreement is an overtime provision. About that, Mr

Waihape says:

We are required to work overtime including Saturdays. It has always been agreed that when we work overtime, we would process perishable items that needed to be dealt with that day. We did not process non-perishable items. This is a long standing agreement between the company and the union, and a provision specifying this is contained in clause 2.3 of the Site Agreement. That states:

"If there are no shipments required on the Monday or Tuesday and the Sammer or Salt production can be accommodated in normal work hours, Tuesday to Friday, the work may normally be left until the following week providing the week's blue packs can be held over in the processes until the following Tuesday."¹

[5] Mr Waihape summarises this provision by saying *We do not complete work other than perishables on Saturdays, other than in exceptional cases*² and Saturday work was essentially job and finish given the throughput that existed at the time.

[6] The events that led to Mr Waihape's dismissal occurred in August 2016. He says that on Saturday 6 August he and others were asked to complete non-perishable work. This was an issue he had discussed with management only a couple of day earlier and he raised this with the production supervisor, Darren Ward, who agreed production should be limited to perishable items and, as a result, staff could finish and go home.

[7] At a production meeting the following Thursday, 11 August, Mr Ward advised there would be work the following Saturday. He asked the staff start at 7am rather than the usual 6am as one of the trucks delivering hides was expected to be late.

[8] That was to be the cause of some dissatisfaction which may have aggravated the events which followed as according to Mr Waihape the truck in question had already delivered its product when he arrived at work on 13 August. There is some debate about whether the truck which had arrived was this one or another but

ultimately the issue need not be decided to resolve this claim.

¹ Waihape brief of evidence at [4]

² Waihape brief of evidence at [5]

[9] In any event it appears Mr Ward had directed staff first perform Fleshing and then move to the Sammer at around 9.15. Mr Waihape told staff to perform the work in the opposite order which is what occurred. Mr Ward says some words resulted and he felt disappointed and let down as he had made arrangements with engineering staff predicated on his order of work but he does not appear to have taken any further action at the time.

[10] Mr Waihape goes on to say

We completed the perishable work. After the perishable work had been completed we packed up as usual to go home. Darren Ward approached me and said "*What the f... are you doing? Get back on the Sammer*".³

[11] Mr Waihape accepts he responded by saying *For f... 's sake Darren, what are you on about?* He justifies this by saying Mr Ward was well aware staff did not process non-perishable goods on a Saturday.

[12] Mr Waihape says Mr Ward responded by *ranting and raving and swearing at me*. He says he pointed out that all the perishable work had been done and he was therefore finishing for the day which he subsequently did. Mr Waihape says Mr Ward finished the discussion by saying *I won't talk any more you swore at me* which he found surprising since swearing is a common practice in the workplace and on in which Mr Ward participates.

[13] Mr Ward's version differs though the tenor is the same. He says he approached Mr Waihape when he saw the staff cleaning up. He says he asked what was going on and was told *we are finished*. He says he made it clear the hours of work were 7am to 12pm. He goes on to say:

We exchanged words before the applicant raised his voice and yelled at me: "*Who the f... do you think you are*". The applicant repeated this statement again as I walked off.⁴

[14] Mr Waihape worked on the Tuesday and nothing was said. On the

Wednesday he was called to a meeting with the production manager, Cayne Pratt, at about 10.15am.

³ Waihape brief of evidence at [12]

⁴ Ward brief of evidence at [19]

[15] Mr Waihape says Mr Pratt advised he wished to discuss the incident on Saturday and then gave him a letter. The letter, dated 17 August, advises Mr Waihape he was being summoned to an investigation/disciplinary meeting on 19 August. It advises the purpose was to discuss four allegations of serious misconduct. They were that:

(a) Mr Waihape was threatening and intimidating towards a person on company premises and deliberately used offensive and abusive language;

(b) He left his work station without authority from his supervisor;

(c) He refused to follow his supervisors lawful and reasonable instruction by:

a. performing Fleshing before Samming that day; and

b. leaving the site around 10am rather than working till midday as instructed; and

(d) He had breached the implied duty of good faith, fidelity and loyalty by instructing other staff to cease production two hours before schedule completion.

[16] The letter was accompanied by a statement Mr Ward had provided outlining his view of what occurred.

[17] The following day, 18 August, Mr Waihape was given advice of a second investigation/disciplinary meeting. It contains another allegation of using offensive and abusive language and relates to the way Mr Waihape was said to have instructed one of his colleagues about his decision to flesh first on 13 August. This allegation was scheduled to be discussed at the already arranged meeting of 19 August.

[18] The meeting went ahead as scheduled. Mr Waihape was accompanied by a Union organiser, Keith Allison (a former employee who had been a Union official at the site) and Mr Mitchell. Mr Waihape presented a written chronology of events and Mr Mitchell spoke on his behalf. He goes on to say

There was not much discussion at that meeting. It was agreed that Simon Mitchell would set a summary of my position in the matter on the following Monday.

[19] That was done.

[20] A further letter from AFFCO followed on 23 August. It advised that further to the meeting of 19 August AFFCO was forwarding information gathered from meetings and discussions with other employees. This comprised sheets with the answers to eight questions put to colleagues of Mr Waihape who might have witnessed the events being investigated. The letter also invited Mr Waihape to a further meeting on 25 August during which he would be provided with an opportunity to reply to *this additional information*.

[21] The meeting of 25 August proceeded as scheduled. Mr Waihape was represented by Mr Allison. Mr Pratt and an HR manager attended for AFFCO. About the meeting Mr Waihape says :

The company was only willing to talk about allegations that I had been threatening, abusive and swearing, and walking off the job.⁵

and

Keith Allison tried to discuss with them the contents of the agreement. The company refused to listen. They insisted on raising their points but were not willing to discuss mine. The meeting took around thirty minutes. It was very frustrating as the company insisted they were correct and would not let Keith or I respond to the allegations.⁶

[22] Mr Waihape was asked to attend a further meeting on 1 September 2016. At it he was presented a letter entitled *Investigation Meeting and Decision*. The letter outlined the five allegations that Mr Waihape faced as well as a chronological summary. It then went on to advise AFFCO had concluded Mr Waihape was guilty of all four infractions raised in the letter received on 16 August ([15] above) but there was insufficient evidence to support the fifth allegation about which he was notified on 18 August ([17] above).

[23] In respect to Mr Waihape's argument the site agreement supported his

decision to leave the workplace the letter says:

⁵ Waihape brief of evidence at [25]

⁶ Waihape brief of evidence at [24]

I note that you did not immediately raise a dispute or disagreement to the hours of work and the production programme instructed at the production meeting on 11 August 2016 and again reinforced on the morning of Saturday 13 August 2016. The company does not accept your allegation that the custom and practice at the plant differed from the Production Programme as set out by Darren Ward on 11 and 13

August 2016 and if that had been the case, an employer would fairly and reasonably have expected this to be raised immediately if not

within the two days provided from first being notified prior to the commencement of that shift. However, it was not.

[24] The letter closes by advising that as a result of these conclusions it had been decided Mr Waihape was to be dismissed, effective immediately.

Determination

[25] Mr Waihape claims he was unjustifiably dismissed.

[26] AFFCO accepts it dismissed Mr Waihape and, in doing so, accepts it is therefore required to justify the dismissal. Section 103A of the Act states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[27] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and procedural perspective. While issues of substance and process overlap and there is no firm delineation separation provides a useful means of analysis especially as some of the requirements of s 103A have a procedural focus.

[28] Section 103A requires the Authority consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[29] Turning first to substance. AFFCO relies on four findings of wrongdoing to justify the dismissal but, I conclude, it will have some difficulty doing so. I reach this conclusion as Mr Pratt, the decision maker, accepted when questioned that none of Mr Waihape's offences would, on its own, have led to dismissal, but that the outcome

was due to the cumulative effect of all four though the decision to leave early was more significant than the others.

[30] The first of Mr Waihape's alleged offences was that he swore when speaking to Mr Ward. There are differences about what was said with Mr Ward alleging he was sworn at. To use Mr Pratt's analogy there is a culture of swearing but not to intimidate. Mr Ward claims this was intimidatory. Mr Waihape says no it was in line with the way people normally expressed themselves in this workplace.

[31] On this I prefer Mr Waihape's evidence. I do so on the basis of the witness statements AFFCO gathered. While all present said there as a heated discussion and both Messrs Waihape and Ward were active participants only one said he heard the actual comments and his recollection agrees with Mr Waihape's. I also note Mr Pratt's concession, when questioned, that he had found no evidence of intimidation and Mr Ward's concession he himself had been known to swear directly at others in the past.

[32] It is well established that an employer will fail to justify a dismissal where ... *communications do not appear to be greatly out of character with others apparently condoned by management in the workplace.*⁷

[33] There is then Mr Waihape's decision to have his colleagues do the fleshing first. It turns out there is evidence Mr Waihape, whether formally or not, was known to arrange work and had not been told to desist. To that I add Mr Ward's evidence (in response to questions from Mr Mitchell) fleshing would normally be performed before Samming and the reason for the change on 13 August was not explained. It is, I conclude, hard for an employer to conclude there has been wrongdoing warranting dismissal in such circumstances.

[34] The other alleged offences all relate to the early departure on 13 August. Again I conclude AFFCO will have some difficulty. Its witnesses accept it is normal to leave non-perishable product on a Saturday and work that day is normally job and finish. Those concessions sit well with the Unions evidence about the terms and in my view support a conclusion Mr Waihape was doing little more than trying to ensure long standing conditions continued to be applied. I also note no action was taken

against any of the others who left early which raises issues of disparate treatment.

⁷ *Howe v The Internet Group (IHUG)* [1999] NZEmpC 147; [1999] 1 ERNZ 879

[35] Turning to procedure. Again there are problems with AFFCO's approach with the most serious being Mr Pratt's admission the company did, as alleged, refuse to listen to explanations and justification based on the site agreement and

work practices when Mr Allison tried to raise these. He attributes that decision to the HR manager who was present and who, according to Mr Pratt, advised he was not there to hear about the clause and its history. These explanations are at the heart of Mr Waihape's defence and the refusal to hear, let alone consider, them flies in the face of the requirements of s 103A. To that I add the fact some factors were not put such as Mr Ward's view he was intimidated which was in the mind of Mr Pratt when he made the decision to dismiss.

[36] These deficiencies in both substance and process raise the question of what was really going on here. The answer I conclude lies in two responses given by Mr Pratt. He was asked whether he accepted the purpose of clause 2.3 of the Site agreement was to let people go and not keep them at work. He said yes. He was then asked *But you wanted more work for the money you were spending?* Again the answer was yes.

[37] If an employer feels it can no longer live with what it considers a contractual imposition it has previously agreed it is bound to negotiate the issue and seek a variation as Mr Pratt accepted he could do here. A reasonable employer will not address such an issue by singling out a union delegate for disciplinary action when he is doing little more than acting on behalf of his membership and pointing out what he understands to be their rights. This is especially so when the employer accepts, as Mr Pratt did, that Mr Waihape was someone to whom the staff looked for guidance.

[38] For the above reasons I conclude AFFCO has failed to justify Mr Waihape's

dismissal – indeed it has fallen well short.

[39] The conclusion the dismissal is unjustified raises the question of remedies. Mr Waihape seeks reinstatement, lost wages, compensation pursuant to s 123(1)(c)(i) of the Act and costs.

[40] The evidence makes it clear reinstatement is the remedy Mr Waihape seeks first and foremost. Reinstatement is a remedy that may be provided if it is practical and reasonable to do so.

[41] In opposing the remedy and arguing why it should not be granted AFFCO say it no longer has trust and confidence in Mr Waihape given four of the five allegations were found substantiated after a full and fair investigation. It also raises concerns that some would feel at risk should Mr Waihape return with knowledge about who gave statements to the employer when it was conducting its investigation.

[42] These arguments fail to convince. Firstly my conclusion is a reasonable employer who conducted a thorough investigation would have been unlikely to find all four allegations had merit. To that I add the fact not one of the co-workers who might have felt at risk gave evidence to that effect and while the assertion was made by affidavit in response to an initial claim for interim reinstatement it was not repeated in the substantive investigation.

[43] The fact is Mr Waihape is serious in pursuing this claim and there is simply no evidence upon which to base a conclusion it is neither practical nor reasonable. Add to that my finding AFFCO fell woefully short in trying to justify the dismissal I conclude it appropriate I grant the remedy.

[44] Mr Waihape also seeks wages lost as a result of the dismissal. The fact I have reinstated means, on the fact of it, he should not suffer a loss. I have no evidence that would lead me to a contrary view so I order the payment of Mr Waihape's wages from the date of dismissal to the date of reinstatement. I do not put a figure on the loss as the evidence suggests there was a close down period in the interim and he may not have earned wages during that period. I leave it the parties to agree the loss but in the event they have difficulty doing so they may return to the Authority for a determination.

[45] Compensation pursuant to s 123(1)(c)(i) was also sought but no amount specified. That said evidence was offered in support of the claim though it was not extensive. Having considered that evidence I conclude an award of \$6,000 appropriate.

[46] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Mr Wiahape contributed to his dismissal in a way that warrants a reduction in remedies. While he transgressed I find he did so in either a manner condoned by his employer (the use of foul language) or his actions were potentially justified given he was trying to ensure his members were treated in a

manner consistent with their employment agreements. AFFCO's failure to receive, let alone consider, arguments in that respect mean there is no evidence upon which I can base a finding of contribution.

Conclusion and orders

[47] For the above reasons I conclude Mr Waihape has a personal grievance in that he was unjustifiably dismissed. As a result I make the following orders:

i. Mr Waihape is to be reinstated to the position he held at AFFCO's;

Napier tannery prior to his dismissal; and

ii. AFFCO is to pay Mr Waihape the wages he lost as a result of the dismissal. The amount is to be calculated by the parties but should they have difficulty they may return to the Authority for a determination; and

iii. AFFCO is to pay Mr Waihape the sum of \$6,000.00 (six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[48] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority

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