

Determination number: WA 100/07  
File number: 5053067

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

*Under the Employment Relations Act 2000*

BETWEEN	Graeme Corps (Applicant)
AND	AFFCO New Zealand Limited (Respondent)
Member of Authority:	P R Stapp
Representatives:	Stuart Webster for the Applicant Anthony Drake for the Respondent
Investigation Meeting:	Napier, 20 March 2007
Submissions received:	By 26 March 2007
Telephone conference:	26 April 2007
Further Information and Submissions:	By 12 April 2007. Replies received by 20 April 2007, and 2, 10 & 11 May and 1 June 2007
Determination:	19 July 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant says there was no justification for his dismissal. He claimed that his dismissal was predetermined and was made to avoid paying him redundancy. He says it was also unfair because of an inadequate investigation.

[2] AFFCO accepts that Graeme Corps was dismissed. Its justification of the dismissal is based on the grounds of serious misconduct because Mr Corps failed to act with reasonable care in his role. It denied Mr Corps's claim that his dismissal was to avoid redundancy. It rejected the

Applicant's claims to resolve the employment relationship problem as a personal grievance.

### **The issues in the employment relationship problem**

[3] What did the employer rely upon to conclude that Mr Corps "*continued and deliberately failed to adhere to the company's inventory protocols and policies*"? Did AFFCO follow a fair procedure, including following its Human Resources manual? What was involved in AFFCO's investigation in regard to Mr Corps's conduct and behaviour?

[4] Would Mr Corps have been made redundant?

[5] Was the dismissal carried out by AFFCO to avoid redundancy?

[6] Overall, would a fair and reasonable employer have reached the conclusion that Mr Corps's actions amounted to serious misconduct to justify dismissal?

### **The facts**

[7] Mr Corps worked at AFFCO and its predecessors since 1 March 1977. He was employed in a full time salaried position from 1981. He had an individual employment agreement and a job description "Inventory Manager", which applied to his role as the Inventory Controller at AFFCO's Wairoa plant. Also, the company's Human Resources manual applied to his salaried position. He was paid \$55,592.05 pa. There were no performance issues raised with his work by the plant manager to whom he reported.

[8] Tony Miles is responsible for the Wairoa plant, amongst other AFFCO plants: for example Rangiuru and Horotiu. He says he was made aware of the possibility of some serious thefts occurring from the Wairoa plant. He focussed attention on the inventory and security of the freezer operation. He involved one of his staff, Mark Patterson to start investigations and Peter Archer was also brought in to investigate the matter.

[9] The background to this matter is that in early 2006 AFFCO commenced an investigation into the theft of meat products from the Wairoa plant. Also in 2005-2006 a computerised inventory control system called "Cedar Creek" ("CCC") was adopted at the plant. CCC was developed in

Australia and used at a plant there with the same name. Mr Corps went to Australia to make an assessment of the programme for use at AFFCO.

[10] The plant manager at Wairoa was Mike Laurence. The “Cedar Creek” (“CCC”) inventory programme was put in place during his time at Wairoa. Mr Laurence says the software was written during the installation and there were no operating manuals available for the users. There were implementation difficulties and suspicions about the data and consequently mistakes made. Assistance was provided but there was nobody with sufficient knowledge and time to address the issues and reliance rested with various experts sent in during a crisis.

[11] Mr Corps and Mr Laurence become aware that Mr Archer, a private investigator, arrived at the plant site on 30 June as part of the theft investigation. At the same time Craig Fiskien, a forensic accountant, and Denis Smith from AFFCO’s “IS” were brought in to assist. At one stage Mr Corps showed Mr Fiskien and Mr Laurence what he did.

[12] Mr Laurence met with Mr Corps and raised some queries that Mr Archer had on Mr Corps’s involvement with the inventory and CCC. Problems were raised through a number of questions put to Mr Corps orally in May and June. Peter Archer’s documents relating to stock adjustment queries produced at the Authority’s investigation meeting, however, had never been given to Mr Corps earlier.

[13] Mr Laurence later raised with Mr Corps the possibility of a change in roles across AFFCO, where Mr Corps’s position was not included on a template list of permanent salaried employees to be retained. Before Mr Laurence left he says he received advice that any restructuring was put on hold. Messrs Graeme Cox, the Human Resources Manager at AFFCO and Tony Miles, the Operations Manager, agree that there was a hold put on the restructuring for “*about a couple of weeks*” to get more information about some of the positions.

[14] Mr Laurence left the employment of the company on 4 July 2006. Mr Laurence accepted that Mr Corps had previously raised matters and concerns with him about CCC. Although Mr Laurence says he did not have a detailed knowledge of the CCC system, he relied on Mr Corps and knew that Mr Corps was making deletions from the inventory and knew that they could be traced. He condoned Mr Corps’s performance in regard to the system.

[15] Craig Fiskén made a preliminary report on 3 July and presented a final report on 24 July 2006 about stock adjustments and the inventory. Mr Miles says Mr Fiskén reached damning conclusions about Mr Corps' operation of the inventory from the 3 July 2006 preliminary report, including the use of "Cedar Creek": *"taking matters into his own hands, operating outside the system and abusing the system to make it appear that everything was in order when it was not"* (Tony Miles's evidence paragraphs 10 and 11). Mr Miles says that this caused him serious concern about Mr Corps. Thus, a focus went on Mr Corps's role in deleting stock from the inventory using "Cedar Creek".

[16] Mr Corps was never given a copy of the 3 July report until the Authority's investigation.

[17] On 4 July 2006 there was a meeting between Messrs Miles and Mr Corps. Peter Archer also attended the meeting. Mr Corps declined an offer to be represented or have a support person present because he didn't think he needed one. He was not requested to confirm declining to have a support person, in writing, as required under the Human Resources manual.

[18] After an adjournment, Mr Miles concluded that he was not satisfied with Mr Corps's explanations in regard to the inventory and deletions, and he suspended Mr Corps, on full pay for further investigations to continue. The suspension was confirmed in a letter dated 5 July 2006. This letter also confirmed that the investigation was to continue.

[19] The further investigation involved Mr Miles:

- Asking Darden King, production manager, whether or not Mr Corps had ever complained to him about the "Cedar creek". He says he was told by Mr King that Mr Corps had not complained.
- Making enquiries with the company's marketing department about Mr Corps's explanations.
- Speaking to AFFCO's information services department to confirm the functioning of the "Cedar Creek" system.

[20] On 11 July 2006 Mr Miles called a meeting with Peter Archer and Mr Corps and Rangí Manual, Mr Corps's support person. Mr Miles said he had serious matters to explore and referred to the meeting as a disciplinary meeting. He covered the concerns he had about the inventory and the matters discussed on 4 July. Messrs Miles and Archer say Mr Corps admitted deleting stock off the system. Mr Miles concluded this action corrupted the inventory and impeded the company's

theft investigation as Mr Corps knew it was taking place at the plant yet continued to delete stock. Mr Miles told the Authority that he had suspicions that Mr Corps might have been involved in a theft ring. There was no evidence that Mr Corps was in any way requested to be involved in the theft investigation or that he was requested to do anything more than carry out his job, which he did not hide.

[21] Mr Archer added that Mr Corps admitted what he had done had a negative effect on the company's investigation and that he deleted stock off the system improperly. They say Mr Corps blamed "Cedar Creek". Mr Corps denied what he had done had a negative effect on the company's investigation, because he did his job, and had nothing to hide, and did not resile from any problems that existed with CCC to delete stock.

[22] Mr Miles says Mr Corps's actions were negligent and lacked integrity and he lost confidence in Mr Corps's ability to do his job. Instead of considering Mr Corps's action as a performance matter he dismissed Mr Corps on 11 July 2006.

[23] After the dismissal Mr Miles did not provide, as required under the manual, a written notice of termination that must be given to the employee, preferably by hand, and if that was impracticable, by registered mail. The written notice had to include brief factual reasons for the dismissal and the *right of appeal against the dismissal*. Instead the reasons for the dismissal were conveyed in a lawyer's letter dated 3 August and only after the reasons for the dismissal were requested by Mr Corps's lawyer on 26 July 2006.

## **Determination**

[24] Mr Corps says he provided an explanation on the matters put to him. He did not have anything to hide. He believed he was carrying out his job in the correct fashion and to the best of his ability, although he did make process errors in the allocation of stock to the wrong batches. He would have been aware on 4 July that the investigation involved a number of issues about his performance as they related to CCC. Evidence of Mr Corps giving explanations is found in the evidence with the meetings with Mr Laurence (on 29 & 30 June 2006) and the subsequent answers to Mr Archer's questions on stock adjustments. He showed his work to Mr Fiskien and Mr Laurence. Secondly, he gave explanations on 4 July 2006 at meetings held with Messrs Miles and Archer. Thirdly, he gave explanations during the meeting held on 11 July (meeting Miles, Archer, Corps and Manual).

[25] Mr Corps was not put on notice of the possibility of being suspended on 4 July. He was not told of any allegations about his behaviour and any suspicions held about him until the meeting. Thus, he had no input into the decision of the suspension. That was unfair. I have no doubt that if he had any knowledge of any allegations about his behaviour or the possibility that he could be suspended he would more than likely have arranged to have a support person or representative present. That opportunity was denied him.

[26] In addition, Mr Miles breached the Human Resources manual when he did not document, and get signed in writing by Mr Corps, at the commencement of the interview, that Mr Corps did not want to be represented. As such this would not be fatal, but it is a breach that supports a poorly and hastily executed process followed by Mr Miles.

[27] There were no written allegations and conclusions put to Mr Corps by Mr Miles. They seemed to evolve and remain unclear, although primarily to be that he had deleted stock from the CCC inventory while he knew an investigation was on going into theft at the plant. The points of concern were outlined in the company's statement in reply from AFFCO, after the event. They included amongst other things an allegation that Mr Corps "*instructed other employees to falsify company records*".

[28] Firstly, there was absolutely no evidence that Mr Corps had "*instructed other employees to falsify company records*". I could not get any details from Mr Miles on this allegation during his interview at the Authority's investigation. It is plainly and wontedly unfounded. On its own this would have been a serious matter if proven. However, it was relied upon together with the other matters in the statement in reply providing reasons for the dismissal and since it has not been proved must affect AFFCO's attempt to justify its decision considering it is relying on all the reasons put forward.

[29] Secondly, Mr Corps can be forgiven for any confusion he might have had about the process involving the company's concerns about him because he was not told clearly what the process was. It was open to him to reasonably understand that there was an on going investigation on his stock deletions and any investigations Mr Corps made to find missing stock. The distinction between a disciplinary meeting and investigation meeting became blurred and was also affected by an on going investigation into theft that did not seem to be fully disclosed to Mr Corps, so that he could reconcile his actions on the inventory and explain any missing stock. Moreover the letter of

suspension was misleading in as much as it only referred to on going investigations and that the next meeting would be for that purpose. I conclude Mr Corps was therefore ambushed at the meeting of 11 July when Mr Miles turned it into a disciplinary meeting without telling Mr Corps of the possibility of him being dismissed before it started.

[30] Amongst the allegations relied upon by the employer include the: “*Possible irregularities in relation to stock and write-offs at our Wairoa plant*” (suspension letter dated 5 July 2006) and that Mr Corps had “*continued and deliberately failed to adhere to the company’s inventory protocol and policies so deeply impaired, and was so destructive, of the basic confidence and trust essential to their employment relationship that the company had no option but to dismiss him*” (dismissal letter 3 August 2006).

[31] I am not satisfied that AFFCO can justify the above when there were explanations provided by Mr Corps that underlie performance issues existing in regard to the operation of the inventory and CCC. Mr Miles acknowledged there were problems with CCC. I am satisfied that there was some reference made to thefts occurring on site and at least one example given to Mr Corps. However, the situation seemed to be confused and no other clear details were provided to Mr Corps to reconcile any problems with missing stock and the inventory and any casual link to the thefts. AFFCO has not been able to establish what it was that involved Mr Corps *continuously and deliberately* failing to adhere to the company’s inventory protocol and policies, where there was an absence of any structured training and in house auditing not used and no written manuals on the protocols and policies available to Mr Corps at the time.

[32] Finally, the meeting became confusing about what Mr Miles’s conclusions were. Indeed he has not been able to explain how Mr Corps was negligent, and how he deliberately and wilfully failed to follow the inventory processes and policies, as well as the basis to his conclusion in his evidence that Mr Corps’s actions were “*basically cooking the books to show a favourable result*”. The evidence does not meet the standard that the more grave the allegation the greater the evidence has to be to prove the allegations (applying *Honda NZ Ltd v NZ Shipwrights Union* [1990] 3 NZLR 23, (1990) ERNZ Sel Case 855).

[33] A fair and reasonable employer would not have acted to dismiss Mr Corps on the allegations when a forensic accountant reported performance faults, Mr Miles acknowledged there were problems with the system, Mr Laurence had condoned Mr Corps’s work, there were no earlier performance issues raised about Mr Corps’s work, and AFFCO had not utilised its auditing

programme. Mr Miles's and AFFCO's position is entirely undermined when Mr Miles says that "*While we did not suspect Graeme of stealing any of the produce, his actions were so inconsistent with the principles and philosophies of inventory control, that we were concerned that we would have no faith in him to do his job*". That is entirely a performance matter that a fair and reasonable employer would have dealt with under the principles of *Trotter v Telecom Corporation NZ Ltd* [1993] 2 ERNZ 659 (applied).

[34] In addition, Mr Miles breached the company's Human Resources manual by not giving Mr Corps the opportunity to make a written statement for any further explanation of his actions and mitigating circumstances. Also, Mr Miles did not provide Mr Corps with any opportunity for input on a lesser penalty. Mr Miles says he decided on the course of action he took because Mr Corps's actions "*did not fit the criteria*". He could not explain what he meant by the criteria. Therefore, I do not accept his reasoning on this point. There was clearly a range of options open to the employer that could have included a lesser remedy on a scale between what might have constituted performance matters and serious misconduct for a breach of trust and confidence. Because any conclusion on a loss of trust and confidence was not able to be proved Mr Corps had every right to be involved on providing input on a lesser penalty or another option such as performance management.

[35] Mr Miles's breaches of the company's own manual undermine the employer's attempt to justify its actions. In addition it supports my conclusion of a hasty and poor process.

[36] Those breaches, the failure to give Mr Corps prior notice of what the personal allegations against him were, the failure to tell him of the possibility that he could be suspended and dismissed if his explanations were not satisfactory, and the confusion about what the investigation and disciplinary processes were, make this a situation where a fair and reasonable employer would not have dismissed Mr Corps in all the circumstances. In addition, the company's inability to prove its full range of reasoning for dismissing Mr Corps where there was an underlying performance issue and the plant manager, Mr Laurence, at the time, condoned Mr Corps's actions, mean that a fair and reasonable employer would not have dismissed Mr Corps. Furthermore, he was a long standing employee with 20 plus years service with an unblemished record and no performance issues raised previously by his manager. There was no evidence that Mr Corps was ever instructed to work any differently in order that he might be accused of *continuing to not adhere to the protocol and policies*. Incidentally, no written protocol or policy was provided during the Authority's

investigation. Anyway, by 4 July Mr Corps had been suspended and therefore could not have received any further instructions implied by AFFCO's accusation.

### **The Redundancy issue**

[37] I reject the claim from Mr Corps that his dismissal was made by AFFCO to avoid paying him redundancy. First a more likely explanation for the dismissal is that Mr Miles acted hastily given his breaches of the company manual and without regard to being fair. Secondly, I accept that the restructuring was put on hold for a very short time to enable further information on various positions to be gathered. Thirdly, Graeme Cox gave evidence of the scale and cost of the restructuring that would not have involved it avoiding its responsibilities. Fourthly, the company's policy on redundancy allowed it to consider alternative options including changes in employment and positions before any redundancies would be declared. This involved negotiated options. Mr Corps's position was not declared redundant although it probably was affected.

[38] The next question is would Mr Corps therefore have been made redundant?

[39] Since the Authority's investigation meeting more evidence has been produced by Mr Corps that he would have been made redundant at least from 8 August 2006 when another Wairoa employee was made redundant.

[40] Mr Corps says his employment agreement made provision for:

#### *Redundancy*

*If your position becomes surplus to Company requirements, or where the position is redefined to such a degree that you are no longer able to carry out the duties required and no acceptable alternative position is available elsewhere in the Company, you would be entitled to one months' notice (or payment in lieu of notice), plus a redundancy payment under the then prevailing Company Staff Redundancy Policy*

[41] Mr Corps says that consultation had started with his Plant Manager who approached him to talk about an email from Tony Egan, the CEO, and that Mr Laurence (the Plant Manager) was involved in selecting the full time employees within the Wairoa plant so that the Head Office would be provided with a list from which to draft a template of affected employees. Mr Laurence says that it was pretty obvious what was going to happen where freezer stocks were 60-70% less and most of Mr Corps' work had disappeared anyway. Mr Corps says his position therefore significantly

changed. Mr Cox says that there was generally a shift in emphasis on the volume of work and it is likely that tasks have been redistributed and that tasks could have impacted on Mr Corps retaining work but with a different emphasis. He did not provide much by way of any specifics and details. Messrs Cox and Miles say that the aim was to reduce fixed costs and that is why the focus went on full time and permanent positions. No one was hired to replace Mr Corps. Mr Corps says that he would not have agreed to become a seasonal employee, although other inventory controllers could have done that. Nothing has been produced to indicate Mr Corp's suitability for any other position. What I can say is that Mr Corps' wrongful dismissal could have deprived him of any redundancy pay if he had been made redundant and had he not been dismissed but there is some uncertainty surrounding that benefit arising out of his employment. It is uncertain that he would have been made redundant.

[42] Therefore any uncertainty means that I cannot compensate Mr Corps for his loss of potential benefit for redundancy.

### **Remedies**

[43] Mr Corps has a personal grievance. He was unjustifiably dismissed. He is entitled to remedies. There was no contributory conduct involved. He has claimed his full loss of wages from 11 July 2006 until the 20 March 2007. His base salary was \$55,592.05pa. However Mr Corps says he was not capable of getting alternative employment because of the effects of the dismissal on him and that he does not trust employers to work for one again. That may be so, but Mr Corps had a responsibility to mitigate his losses, and he has not satisfactorily done that either by not applying for alternative work and was not offered any employment although he says his situation was well known. Ordinarily this would impact on the amount of any award but in this case I accept there are some extenuating circumstances that apply. I accept that it would have taken Mr Corps time to get over his dismissal and find suitable alternative employment. Given the gravity of the unjustified nature of the dismissal I hold that he should get a significant portion of his loss. Mr Miles's failure to provide a letter as required under the Human Resources manual deprived Mr Corps of his right of appeal given he has been seeking vindication. Also, the letter received by Mr Corps with the reasons for dismissal was from the company's lawyers and only sent after it was requested by Mr Corps's lawyer. There was no reference to Mr Corps's right to appeal. This is a serious breach of that manual. Such an appeal could have been referred to Mr Miles's superiors. Also since the company says that Mr Corps would not necessarily have been made redundant I have assumed it therefore would accept that other than for his dismissal he could have expected to continue under

the same terms and conditions of employment. I conclude that Mr Corps would not have agreed to any change since he would not have agreed to become a seasonal employee. Furthermore Mr Corps has lived in the Wairoa community for many years and actively participated in various club activities. It is a small community and he would have had some difficulty in mitigating his full loss. Also he became reclusive caused by his dismissal and needed some medical help. No reason was given to me not to accept his evidence on this matter and the time involved. Since the dismissal and the medical intervention Mr Corps has decided to move to Australia and become self employed. This supports his feelings about not wanting to work for an employer again.

[44] I award him 6 months (26 weeks) lost wages to be calculated on his base salary of \$55,592.05 per annum. AFFCO New Zealand Ltd is to pay Mr Corps \$27,796.

[45] Mr Corps is entitled to compensation for humiliation, loss of dignity and injury to feelings. He has been treated badly and he has satisfied me that there was a significant impact on him because of his wholly unjustified dismissal. His partner supported his evidence of the impact of the dismissal on him and that he needed to get medical intervention. He says he was unable to face people and avoided going to various clubs, including fulfilling official roles as an elected officer. The circumstances of the impact of this wholly unjustified dismissal on Mr Corps warrants him receiving \$18,000 under s 123 (1) (c) (i) of the Act.

### **Orders**

[46] AFFCO New Zealand Limited is to pay Graeme Corps:

- \$27,796 lost wages.
- \$18,000 compensation for humiliation, loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Act.

### **Costs**

[47] Costs are reserved.

