

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 33/08  
5047574

BETWEEN                      BRYAN DUFFY  
   Applicant  
  
AND                              AFFCO HOLDINGS LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Rose Alchin for Applicant  
   Graeme Malone for Respondent  
  
Investigation Meeting      1 November 2007 at Hamilton  
  
Submissions Received      3 December 2007 and 4 February 2008 for Applicant  
   3 January 2008 For Respondent  
  
Determination:              7 February 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Bryan Duffy was employed by AFFCO New Zealand Limited from 26 July 1977 until he resigned in 2006. At the time this employment relationship problem arose he had been employed in the position of Cold Store Manager, a position he had held for nine years.

[2] In July 2006, two of Mr Duffy's direct reports, Mr Morris Rennie, and Ms Bridget Tamainu were given notice of redundancy. Following his notice of redundancy, Mr Rennie was offered, what Mr Duffy says, was his old job back, albeit on a seasonal, hourly rate basis.

[3] Mr Duffy raised concerns about the redundancies. His concerns related to the apparent lack of process used to implement the decisions which affected his staff and his view that the redundancies also affected his position as there would be an inevitable increase in his own workload.

[4] Mr Duffy also reminded AFFCO that he had suffered a previous depressive episode caused by workplace stress and suggested that it would be more prudent to declare his position surplus and make him redundant instead.

[5] In response Mr Duffy was advised that AFFCO had undertaken a review and it had been decided to multi-task the staff employed in the Cold Store rather than employ one person for each role.

[6] Mr Peter Lockley, who was the plant manager at the time, in his oral evidence at the investigation meeting told me that Mr Duffy's job was to manage the staff rather than trying to do the jobs. He says, Mr Duffy was told staff and training would be made available as needed and while training would be required for some of the other staff, cross-skilling was a positive step ensuring that there was always cover, not only for busy times but when people were away.

[7] On 4 August 2006 Mr Tony Miles, Operations Manager based at AFFCO's Head Office, advised Mr Duffy via email that:

...I am not interested in getting into a debate with you over the email as there will not be any winners in that. Understand your concerns and it is only natural that you support your colleagues throughout this.

We are however, going through a change process and a number of roles across the business have been disestablished. The basic function of a cool store supervisor is to be able to cover all tasks within the dept. This will include documentation tasks that [Ms Tamainu] had previously been carrying out. I believe that between yourself and [Mr Rennie] there is adequate cover for what is required at H2.

[8] Mr Duffy says he took Mr Mile's email as confirmation that he would be doing both his job and the documentation clerical work Ms Tamainu had previously undertaken. He says he felt overwhelmed by the requirement to learn Ms Tamainu's tasks as well as complete his own tasks and contacted the Department of Labour for advice.

[9] On 9 August 2006 Mr Duffy had a verbal exchange with Mr Tony Miles. Mr Duffy describes Mr Miles' approach as sarcastic and threatening.

[10] Mr Duffy spoke to Mr Lockley and advised him of the incident with Mr Miles. Mr Duffy advised Mr Lockley that he would be commencing dispute proceedings and sought a days' leave for the following day.

[11] After visiting his doctor Mr Duffy commenced a period of two weeks sick leave due to stress.

[12] Subsequently Mr Duffy attended a meeting as a support person for Mr Rennie, who had requested a meeting to discuss the changes in his position. At that meeting, Mr Duffy says it was confirmed that Mr Rennie's job would remain exactly as it had been, with the exception that his position would now be seasonal, rather than permanent.

[13] This reinforced Mr Duffy's understanding that it was he alone who would be required to pick up the tasks previously undertaken by Ms Tamainu. This led to concerns for Mr Duffy, with regard to his ability to cope with the extra demands, which the additional work would place on him.

[14] The parties resorted to mediation in an attempt to resolve Mr Duffy's concerns, however, that was unsuccessful.

[15] Following the unsuccessful mediation, and in response to a letter from Mr Duffy's representative, on 4 September 2006 AFFCO confirmed:

...there has been changes in the way the Company operates, not only in the Cool store operation, but across all its divisions and across all Plants. The result of these changes may mean various operations need to be managed and or carried out some what differently than they were before. We expect our Managers to manage this new process, not necessarily physically do it themselves. If help is needed to get through this process then Bryan needs to discuss it with his Manager.

[16] Offers and counter offers were now being exchanged with a view to Mr Duffy leaving the organisation by agreement. However, the negotiations were unsuccessful in bringing about a resolution and Mr Duffy advised AFFCO that he would continue to pursue his personal grievance for disadvantage to the Employment Relations Authority.

[17] On 20 October 2006 Mr Duffy was issued with a final written warning. For Mr Duffy this was the final straw. After giving careful consideration to his situation overall, he felt his employment with AFFCO was no longer tenable and resigned giving one months notice.

[18] Mr Duffy claims his resignation was caused by the stress originated by the increased burdens placed on him as Cold Store Manager which came about as a result of the redundancies within that department. Mr Duffy had previously raised the risk to his mental health and despite this, Mr Duffy says no steps were taken to manage the workplace environment. Mr Duffy says those factors, combined with the unsubstantiated attacks on his performance, led him to concluded that AFFCO had forced him to resign.

[19] Mr Duffy also claims, that the actions of AFFCO during his employment led to one or more terms and conditions of his employment being affected to his disadvantage.

[20] In addition to remedies for lost wages, and compensation for hurt and humiliation, Mr Duffy seeks payment of redundancy compensation, as he contends he should be been made redundant.

[21] The issues for this determination are:

- Was Mr Duffy disadvantaged in his employment?
- Was Mr Duffy constructively dismissed?
- Was Mr Duffy's position so significantly changed after the restructuring that he ought to have been given notice of redundancy?

### **Employment Agreement**

[22] Mr Duffy was subject to the terms of a written employment agreement. The relevant terms of that agreement include a redundancy clause at 8C which states:

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 month's notice (or payment in lieu of notice), plus a redundancy payment under the then prevailing company staff redundancy policy.

[23] In addition to the written employment agreement, various AFFCO policies and procedures also applied to Mr Duffy's employment. The respondents' redundancy policy is contained in the Human Resources Policy and Procedures Manual and states:

Salaried staff will receive redundancy based on four weeks pay for the first year of service, two weeks pay for each subsequent year or part thereof, 10% gratuity on the service calculation, unused sick leave to a maximum of three weeks.

[24] Further at paragraph 2.5.6 the Manual also provides for warnings to be issued pursuant to the following process:

The employee should be advised before the meeting of the allegation and that a consequence of the meeting, in the absence of any satisfactory explanation, may be that he/she is issued with a warning or dismissed.

[25] At the investigation meeting Mr Graeme Cox, Employee Relations Manager, told me that HR Manual extracts referred to above had been withdrawn and the manual was no longer operating as the plant manual. Mr Cox advised me that no other written documentation had been established to replace the manuals, and he

conceded that in the absence of any updated written documents, the policies contained in the manual would equate to best practice and he would expect managers to undertake a process similar to that contained in the extracts.

### **Disadvantage Claim**

[26] Mr Duffy is required to show on the balance of probabilities that one or more of his conditions of employment were affected to his disadvantage by an unjustifiable action by AFFCO (s.103(1)(b) Employment Relations Act 2000).

[27] The Employment Court has found that disadvantage grievances arise out of the employment activity, the on the job situation. The words "are affected" are related to physical conditions of employment, the environment in which the work is carried out, the amenities and facilities available, the payment to the employee and matters of that kind. (see *Wellington Area Health Board v Wellington Hotel IUOW* [1992] 2 ERNZ 466)

[28] Mr Duffy claims he was disadvantaged in his employment by unjustifiable actions of his employer when the Cold Store was restructured and the position of documentation clerk was disestablished. Mr Duffy raised with AFFCO his view that the changes were unreasonable, unworkable, unfair and unachievable.

[29] Further, Mr Duffy claims AFFCO refused to acknowledge or take any steps to address Mr Duffy's concerns relating to his deteriorating health brought about by the increasing stress levels which were made well known to AFFCO. Mr Duffy had previously suffered from work related stress and the health affects were known to AFFCO.

### *Changes to Mr Duffy's role*

[30] Depending on the season, there could be anything from 20 to 40 freezing workers working in the Cold Store together with Mr Duffy, as Cold Store Manager, Mr Rennie, Inventory Controller, and Ms Tamainu, who had responsibility as the Documentation Clerk.

[31] Mr Cox, told me a national review of manning levels was undertaken by AFFCO which involved plant managers and senior head office staff. He said as a result of the review and consequent restructuring, some 45 to 50 positions, salaried and trades, were made redundant including seven roles at Horotiu.

[32] Mr Cox confirmed that the seven roles at Horotiu included one position from the Cold Store. Mr Cox did not accept that the changes to the staffing levels in the Cold Store would impact on Mr Duffy's role.

[33] Areas for potential reduction were itemised by Head Office and after discussion with the plant managers, actual roles and jobs were identified that were considered to be no longer required or were able to be undertaken in another way.

[34] Plant managers were then asked to associate names with those roles, the premise being that the most suitable employees would be retained in roles that were available. After that process was completed, the potentially affected employees were spoken to and issues surrounding their role discussed with them, including potential redundancy and the possibility of a different role with compensation negotiated to assist with the move to the changed role.

[35] In answer to questions at the investigation meeting Mr Lockley, told me that following the review by head office he was provided with a template of what the staffing requirements should look like on each AFFCO site.

[36] Mr Lockley says he had discussions with Mr Tony Miles, the Operations Manager about the template and he agreed in principle to the plan. He said he discussed with Mr Miles what support coverage would be needed. It was common ground that no discussions or confirmation of decisions around adequate support coverage were undertaken with Mr Duffy. This is in contrast with the redundancies occurring in the trade's area, where Mr Lockley told me he discussed the review with the Plant Engineer. Mr Lockley told me three staff were to go from the trade's area and it was up to the supervisor to decide which roles were not required.

[37] At the investigation meeting Mr Lockley accepted that he never responded to questions raised by Mr Duffy as to when the review had taken place, how it was conducted and how the resulting freezer outcomes was decided. Mr Lockley also conceded that he never entered into any discussion with Mr Duffy about the redundancies.

[38] On 5 July 2006 Mr Rennie received notification in writing that his position was to be disestablished and his employment was to be terminated by reason of redundancy. Neither Mr Rennie nor his Supervisor, Mr Duffy, had any knowledge that a review of staffing levels had been undertaken, or that any positions in the Cold Store were in jeopardy.

[39] On 10 July 2006 Mr Duffy wrote to Mr Miles, Mr Cox and Mr Lockley setting out his concerns about the decision to declare Mr Rennie's position surplus. Mr Duffy recommended that the staff levels remain the same until a review which included discussion with himself as Cold Store Manager could take place after the upcoming beef season.

[40] On 11 July 2006 Ms Tamainu was offered a change in her job which would see her become a seasonal employee paid on an hourly rate. As with the notice to Mr Rennie, neither Ms Tamainu nor her supervisor, Mr Duffy, had any knowledge of the review nor that its outcomes would impact on Ms Tamainu in the way proposed. In any event, Ms Tamainu rejected that offer on the grounds that she did not believe it was fair and reasonable.

[41] Without any further discussion with her, on 18 July 2006 Ms Tamainu was given formal notification her position had been disestablished and her employment was to be terminated by reason of redundancy with effect from 15 August 2006.

[42] Unbeknown to Mr Duffy, on 12 August, Ms Allan, who is employed in the Boning Room, was told that she would be starting work in the freezers from the Monday morning and she was to start learning Ms Tamainu's job. Ms Allan refused.

[43] Following the notification to Ms Tamainu of her redundancy, Mr Rennie was approached by Mr Lockley, and offered what was essentially his old job back but on a seasonal basis. The offer was formalised in a letter dated 20 July 2006. The letter acknowledges that Mr Rennie's role is to be a "...seasonal Inventory Controller/operator."

[44] On 31 July, after querying the need for restructuring within the Cold Store, Mr Lockley advised Mr Duffy that roles would have to be covered differently, with multi skilling which may involve training. This letter indicates Mr Lockley's intention for Mr Duffy to utilise existing staff from within the cold store to assist in completing the documentation tasks required.

[45] Following further questions from Mr Duffy about the restructuring, Mr Miles advised Mr Duffy of his belief that between himself [Mr Duffy] and Mr Rennie, there was more than adequate coverage for what was required at Horotiu.

[46] Mr Duffy attended a meeting as a support person for Mr Rennie, when Mr Rennie sought clarification as to what his role would be. At this meeting it was confirmed that Mr Rennie would be doing the same job as he had previously. Mr

Lockley confirmed he told Mr Rennie at that meeting, that he [Mr Rennie] was not expected to do the documentation role.

[47] Mr Rennie, told me that no one wanted to do the documentation job. The other workers in the Cold Store were employed as chamber hands and they did not have the special skills required for the documentation role.

[48] Mr Duffy explained that previously he had asked the Union and other staff in the Cold Store if they would like to be trained in doing the documentation but there was no one interested. He said most of the guys had been there a long time and just wanted to come and do the job they were employed to do.

[49] At the investigation meeting Mr Cox told me of his belief that other resources were available and it was over to Mr Duffy to make the changes work. Mr Miles told me that in raising his concerns with AFFCO, Mr Duffy appeared to completely ignore the fact that he was not expected to do the work but to manage it. He said he did not expect Mr Duffy to do more than he normally did but did believe that the work could be carried out more efficiently utilising himself and Mr Rennie with the use of other Cold Store staff and where necessary bring in help as required.

[50] Mr Lockley told me AFFCO never refused to acknowledge that Mr Duffy raised valid concerns in his emails he was sending through, following Mr Rennie's notification originally that he was to be made redundant. He said Ms Tamainu was made redundant because the template required there only to be two people in the Cold Store. Mr Lockley was of the view that all roles could have been covered, and felt Mr Duffy's view was unreasonable. This is surprising given that Mr Lockley, in his oral evidence at the investigation meeting told me Horotiu currently had a person employed on a casual basis who was working 80% of five days a week doing the documentation role.

[51] Mr Rennie continues to work as a seasonal worker, carrying out the inventory controller role. Mr Rennie was not laid off in 2007 at the end of the season, as one would expect of a seasonal worker. Rather, it was Mr Rennie's uncontested evidence that he has been working up to 60 hours per week since he was put onto the seasonal contract. Further, I am satisfied from the evidence that since Mr Duffy left the Cold Store, apart from the chamber hands, there has generally been three people working in the Cold Store completing the same tasks as were previously undertaken by Mr Duffy, Mr Rennie and Ms Tamainu.

[52] Clearly, in terms of section 4 of the Act, Mr Duffy was an employee upon whom the proposal to restructure the staffing levels in the Cold Store might impact. This then, required AFFCO to consult in good faith with Mr Duffy.

[53] I am satisfied the process used by AFFCO in implementing the restructuring of the Cold Store was unfair and was not undertaken in good faith. There was no consultation with Mr Duffy (who strongly believed his employment would be impacted on significantly with one less staff member to complete what was by all accounts a very complex task) prior to the decision being made with regard, initially to Mr Rennie, and then Ms Tamainu. It is clear from the evidence that Mr Duffy did not understand why his staff numbers were being reduced and where the expertise to replace Ms Tamainu would be resourced.

#### *Health Issues*

[54] Mr Duffy relies on a failure by AFFCO to provide a safe work place to show that he has suffered a disadvantage. The requirement to provide a work place free from harm (including stress) is provided for in the Health and Safety in Employment Act 1993.

[55] On 4 August 2006 Mr Duffy notified AFFCO that the changes being made to the staffing levels in the Cold Store were beginning to affect his health. Mr Duffy reminded AFFCO that he had previously been diagnosed with depression caused by stress in the work place and was off work for several weeks. Mr Duffy reminded AFFCO that he had undertaken counselling at that time and was currently on anti-depressants.

[56] Mr Duffy then advised AFFCO that he was experiencing symptoms of depression once again and felt that he was being bullied into compromising compliance standards as a result of the restructuring.

[57] In response, on that same day, Mr Miles suggested to Mr Duffy that he work with Mr Lockley to ensure training was undertaken to provide for back-up to ensure adequate coverage of all the tasks required to be undertaken in the Cold Stores.

[58] On 9 August, in what I consider to be a response to Mr Duffy's notification that he was beginning to suffer from symptoms of depression, Mr Lockley advised Mr Duffy that as stock numbers would be decreasing over the next couple of weeks, Mr Duffy was to take two weeks annual leave from 30 August 2006. I am satisfied that this email was sent to Mr Duffy after he and Mr Lockley had discussed Mr Duffy taking the leave.

[59] Mr Duffy attended his doctor on 10 August and was off work for the next two weeks as a result of the depression symptoms he had recognised. That same day Mr Duffy formally raised a personal grievance relating to the changes in staffing levels in the Cold Store and an incident he had with Mr Miles during which Mr Duffy says Mr Miles had used bullying tactics.

[60] Mr Duffy took sick leave between 14 and 25 August and following on from that took his previously discussed, annual leave from 28 August until 11 September.

[61] In his written statement, Mr Duffy said that from 25 to 28 September he was off sick with the flu. He said he returned to work on 28 September but needed to go off sick again on 2 October. He said he believed he had gone back to work too early and was still suffering from a very bad cough.

[62] It was submitted that AFFCO failed to take any steps to address the issue of work related stress raised by Mr Duffy on 4 August. However, as can be seen from the facts set out above, Mr Duffy took two weeks leave as a result of symptoms of depression followed by two weeks annual leave, which he took after discussion with AFFCO. I find that the discussion about the taking of annual leave in August arose in direct response to the issues Mr Duffy raised in his email on 4 August.

[63] Mr Duffy then returned to work, but took further sick leave throughout September and October, not for depression, but as a result of suffering from the flu, which turned into Bronchitis.

### **Conclusion – Unjustified disadvantage**

[64] I am satisfied the process used to restructure the Cold Store was carried out in an unfair manner and was in breach of the good faith obligations AFFCO had towards Mr Duffy. I am also satisfied that the actions of AFFCO in not consulting with Mr Duffy with regard to the restructuring in the Cold Store was unjustified. These unjustified actions by AFFCO resulted in significant concerns by Mr Duffy with regard to how the work in the Cold Store would be completed. These concerns in turn led to Mr Duffy having to seek medical attention for the return of his symptoms of depression. This constitutes a disadvantage for which Mr Duffy is entitled to remedies.

### **Constructive Dismissal claim**

[65] Mr Duffy resigned his employment on 30 October 2006 giving one month's notice. He says his resignation was the culmination of the affects of the matters

related to his claim for unjustified disadvantage and the issue of two warnings, including a final written warning, to the extent that he lost trust and confidence in AFFCO.

[66] The concept of constructive dismissal was considered by the Court of Appeal in *Auckland Shop Employee's Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372. It has not been contended that this was a situation where an ultimatum was given to Mr Duffy to either resign or be dismissed, which is one particular category of constructive dismissal.

[67] A second category is where a course of conduct has been followed by the employer with the deliberate purpose of coercing the employee to resign. It was contended AFFCO had done this.

[68] A further Court of Appeal decision has closely considered a third category, where constructive dismissal arises out of a breach of duty on the part of the employer. In *Auckland Power Board v Auckland Local Authorities IUOW* [1994] 1 ERNZ 168, the Court held that in such cases there are two questions: first, whether a resignation has been caused by a breach of duty on the part of the employer; and second, whether the breach of duty was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing. The Court expressed this second question in the following way:

In other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[69] Further, following the approach of the Court in its recent decision *Gorrie Fuel (SI) Ltd v Gittoes*, unreported, 8 November 2007, Couch J, CC21/07, if I find that this was a constructive dismissal, I must then determine whether it was justifiable in accordance with s.103A of the Employment Relations Act 2000.

[70] In his letter of resignation Mr Duffy states:

My decision to take this step, after 29 years of loyal service, has been prompted by the recent changes to my position as Cold Store Manager with absolutely no consultation with myself. These significant changes to my role have put me in a position whereby I have been unable to carry out the duties required.

...

The combination of these factors, culminating in the recent unsubstantiated attacks on my performance, have put me in the position where I have completely lost trust and confidence in the Company. I further believe that the letter of 20 October was a deliberate attempt to force my resignation.

[71] Mr Duffy emailed a copy of his resignation to Mr Graham Cox, Tony Egan and Adam Talley to avoid going to head office. He said he did not receive a response from anyone.

[72] Mr Duffy's job was to supervise and manage the Cold Store. He did that by ensuring the required tasks were completed, and to do that he was expected to manage the resources available to him accordingly.

[73] There was no evidence that Mr Duffy was not able to have the resources available to complete all the required tasks, or that he would have to undertake the tasks himself. On the contrary, AFFCO brought in additional assistance not only during Mr Duffy's absence on sick leave, but also following his resignation and during his notice period.

[74] At the time Mr Duffy took sick leave in August and again in September 2006 he was of the understanding that it was possible his role had become a combination of his supervisor role and the documentation clerk role. However, by the time he returned from his sick leave in October 2006 it was clear that AFFCO were prepared to find additional resources to assist with the functions needing to be undertaken in the Cold Store.

[75] I am supported in my conclusions by the evidence provided to the Authority which shows that before and after Mr Duffy's resignation there were at times four people working in the Cold Store completing the three main functions that is supervising the Cold Store, the documentation and the inventory control.

[76] There was evidence that one other AFFCO employee had been brought in from another site, and another ex AFFCO employee also engaged to undertake all the duties while Mr Duffy was absent on leave. It was these two employees who were absent, undertaking other tasks, when Mr Duffy returned to work in September 2006.

[77] Further, a new employee, Natalie Arnold was employed after Mr Duffy had resigned, but while he was still working out his notice, to do predominantly the documentation role from which Ms Tamainu had been made redundant.

[78] Having said that, Mr Duffy also relies on the warnings issued to him following his return from sick leave in September in his claim for constructive dismissal.

#### *The Warning Letters*

[79] Mr Duffy complains the warnings were issued to him without a fair and reasonable process being followed and that it was the second letter, in particular,

which contributed to his belief that he had no option but to resign from his employment.

#### First warning

[80] On 22 September 2006 Mr Mark Patterson, AFFCO's Project Manager, wrote to Mr Duffy outlining his disappointment that Mr Duffy had failed to follow a simple instruction. Mr Patterson advised Mr Duffy that any future failure to carry out a simple instruction "...may result in an official warning or, if serious misconduct, dismissal."

[81] Mr Duffy says this was a warning and was unjustified. Mr Cox, denies the letter was a formal warning, however, Mr Lockley, who was Mr Duffy's immediate manager, did consider the letter to constitute a warning and he relied on this letter as a warning when he issued Mr Duffy the final warning on 20 October 2006.

[82] I find the letter dated 22 September 2006 does not constitute a warning. There was no statement or indication in the letter that Mr Duffy's job is in jeopardy. Not only that, but there was absolutely no regard taken of the process set out in the Human Resources Policy and Procedures Manual (or any notion of procedural fairness). Any further warnings issued in reliance on the 22 September 2006 letter will therefore not be valid.

#### Final written warning

[83] Mr Duffy returned to work on 16 October following his absence for Bronchitis. On the day he returned, Mr Rennie was still on holiday and the other employees who had been brought in to help cover were away on other projects. He said he was left on his own trying to run the Cold Store to the best of his ability.

[84] This evidence is supported by diary notes provided to the Authority and which were largely confirmed by witnesses at the investigation meeting as being correct.

[85] During the day Mr Duffy had a discussion with Mr Lockley about the removal of the sorting belt inside the freezer. Mr Lockley undertook to find out if the belt could be reinstalled. Mr Duffy was concerned that major problems would occur with sorting product.

[86] On 17 October Mr Lockley approached Mr Duffy and enquired as to the problems being experienced in the palletising area. Product was being sent into the freezers and the workers were having difficulty sorting out where to put the

pallets. Mr Duffy advised Mr Lockley that he had helped the men sort out the problem but that it would not have occurred if the belt had been left in place.

[87] On 20 October 2006 Mr Lockley handed Mr Duffy a letter which states:

I am very concerned with your current performance and apparent ability to fulfil your role as Freezer Supervisor.

There have been a number of issues which should be seen as normal day to day operational functions. The recent high level of failure to manage these issues is a matter of serious concern both for Horotiu Plant and the Company as a whole. I have taken into consideration your explanations for these short comings however cannot accept nor allow these poor management practices to continue.

The Plant will not get in a situation where we compromise production or load out commitments; With forward planning and Management it is clearly the responsibility of the Freezer Supervisor to cover all aspects of your role.

As a result of failing to meet your responsibilities I am placing you on a final warning.

I am happy to discuss this further with you and provide reasonable assistance to ensure appropriate performance standards are met. [my emphasis]

[88] The process adopted by AFFCO in issuing the final written warning, was fundamentally flawed. A process of discussion in which an employee has the opportunity to provide a full explanation with full knowledge of possible consequences is designed to ensure a fair result is reached before the issuing of warnings and/or dismissal. AFFCO's failure is compounded by the fact that it did not adhere to its own rules (or what Mr Cox accepted were written best practice guidelines).

[89] By the time the final written warning was issued Mr Duffy had already raised a personal grievance for disadvantage and the parties had been to mediation but had failed to resolve the employment relationship problem.

[90] I am satisfied that the issuing of a final written warning was excessive and unjustified. This action amounted to a breach of duty by AFFCO, in that it had conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and Mr Duffy.

[91] Having reached that conclusion I must consider whether the breach was such that it would have been sufficiently serious to make it foreseeable by a reasonable employer that Mr Duffy would respond by resigning. I am satisfied it was. The parties had already attended mediation in an attempt to resolve the issues relating to Mr Duffy's contended personal grievance for unjustified disadvantage. Following mediation the parties, through their respective representatives embarked on negotiations with a view to Mr Duffy exiting the organisation in an amicable way.

[92] It was therefore entirely foreseeable that in issuing a final written warning in the way it was, Mr Duffy would be likely to pre-empt the possibility of a dismissal after 29 years of faithful service by resigning. That finding is made in the context of the dispute already in train over the restructuring and Mr Duffy's perception of its impact on his role.

[93] I am not in a position to test the substantive justification of the warnings issued to Mr Duffy in the light of there being no investigation by AFFCO into the matters leading to the final written warning. It is clear from the wording that Mr Duffy's employment with AFFCO was very tenuous indeed. Further, the timing of the warnings is dubious given that the parties were in conflict over the restructuring.

[94] I find the actions of AFFCO were not those of a fair and reasonable employer in all the circumstances. Mr Duffy has a personal grievance and is entitled to remedies.

#### **Should Mr Duffy have been made redundant?**

[95] Mr Duffy says his job changed to such an extent that he should have been considered for redundancy pursuant to his employment agreement.

[96] No employee has the right to insist on being made redundant. Redundancy is a misfortune, not a privilege. It is for the employer to decide whether a redundancy situation exists (*NZ Public Service Assn v Land Corporation Limited* [1991] 1 ERNZ 741).

[97] The employment agreement provides for redundancy only where a position is surplus to company requirements. Clearly Mr Duffy's role did not fall into that category. Further, redundancy may apply in a situation where a position is redefined. There was no evidence that Mr Duffy's role was redefined.

[98] I have found earlier that Mr Duffy's understanding that his role was redefined to take into account the requirement for him to undertake both his role and the documentation role was misconceived. Indeed, as already set out in this determination, following Mr Duffy's sick leave it should have been clear to him that AFFCO were prepared to provide him with the necessary resources to enable him to complete his role as Cold Store Manager, as indeed it did.

[99] Mr Duffy's position as Cold Store Manager was not surplus to company requirements and he therefore was not redundant.

## Remedies

### *Lost Wages*

[100]Two weeks after resigning from his position with AFFCO, a position for a warehouse manager was advertised and was offered to Mr Duffy who took the job. He was unemployed for one week. He said he needed to have a week off albeit he would have liked it to be a bit longer. He says he was very stressed when he left.

**AFFCO Ltd is ordered to reimburse Mr Duffy one weeks pay pursuant to section 123 of the Employment Relations Act within 28 days of the date of this determination.**

### *Compensation*

[101]I have concluded that taking global approach to determining Mr Duffy's claim for compensation for both the unjustified disadvantage claim and his unjustified dismissal is the best approach in this matter.

[102]Mr Duffy gave compelling evidence as to the hurt and humiliation he suffered as a result of leaving a job he had enjoyed and working for a company he was very loyal to for 29 years.

[103]Mrs Duffy gave supporting evidence of the effect of the dismissal on her husband, which she witnessed during and after the ending of the employment relationship. She told me Mr Duffy became deeply depressed after receiving the final written warning.

[104]Having regard to the applicant's uncontested evidence as to the impact of the respondents actions, the impressively long tenure of his employment I am satisfied that the sum of \$10,000 is an appropriate award.

### *Contribution*

[105]I am bound by section 124 of the Act to consider the extent to which Mr Duffy's actions contributed towards the situation that gave rise to his personal grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[106]I am not satisfied it is just to reduce the remedies in this case. Mr Duffy's actions have not contributed towards the situation that gave rise to his personal grievances.

**AFFCO Ltd is ordered to pay to Mr Duffy the amount of \$10,000 without deduction, pursuant to section 123 of the Employment Relations Act within 28 days of the date of this determination.**

### **Interest**

[107]The applicant seeks the payment of interest. The amount of wages awarded as reimbursement reflects the actual loss which Mr Duffy suffered as a result of the ending of his employment. I direct that interest be paid on the one weeks wages at the rate of 8.5% per annum for the period from 30 November 2006 until the date on which payment is made in accordance with this determination.

### **Costs**

[108]Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority