

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 135
5580871

BETWEEN DENNIS HARRIS
 Applicant

AND AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Andrew Dallas

Representatives: Simon Mitchell, Counsel for Applicant
 Rachel Webster, Counsel for Respondent

Investigation Meeting: 3 March 2016 in Whangarei and 11 March 2016 in
 Auckland.

Submissions received: 16 March 2016 for the Applicant
 23 March 2016 for the Respondent

Determination: 3 May 2016

DETERMINATION OF THE AUTHORITY

- A. AFFCO New Zealand Limited (AFFCO) dismissed Dennis Harris unjustifiably.**
- B. AFFCO must settle Mr Harris' personal grievance by:**
- (i) Reinstating him to his former position or one no less favourable to him at its Moerewa Plant under s 123(1)(a) of the Employment Relations Act 2000 (the Act) (subject to particular conditions set out in this determination);**
 - (ii) Paying him three months' pay as reimbursement for lost wages under s 123(1)(b) of the Act within 28 days; and**



- (iii) Paying him \$7,500, without deduction, as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act within 28 days.

C. Costs are reserved.

Employment relationship problem

[1] Dennis Harris was employed as a meat processing worker at AFFCO New Zealand Limited's (AFFCO) Moerewa Plant. Mr Harris was a member of the New Zealand Meat Workers and Related Trades Union (MWU). His employment was governed by an individual employment agreement based on the expired AFFCO New Zealand Core Employment Agreement, 1 May 2012 – 31 December 2013 (core conditions).

[2] Mr Harris was dismissed from his employment on 20 August 2015. At the time of his dismissal, Mr Harris had worked at the Moerewa Plant for approximately 35 years.

[3] AFFCO's Operations Manager, Tony Miles, who was relieving manager at the Moerewa Plant, dismissed Mr Harris following an investigation into alleged serious misconduct. Mr Miles' investigation found Mr Harris had written the word "scab" six times inside the food locker of another employee, Reo White and had also destroyed company property, the locker.

[4] During the course of Mr Miles' investigation, Mr Harris denied writing "scab" in Mr White's locker and destroying company property.

[5] Mr Harris claimed his dismissal by AFFCO was procedurally and substantively unjustified. A personal grievance was raised on his behalf and subsequently a statement of problem was lodged with the Authority.

[6] In settlement of his personal grievance with AFFCO, Mr Harris sought reinstatement, an award of lost wages and compensation for hurt, humiliation and injury to feelings.



Issues

[7] The issues for investigation and determination were:

- (i) Was Mr Harris' dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?
- (ii) What role, if any, should expert evidence about handwriting play in the Authority's investigation?
- (iii) If AFFCO's actions were not justified, what remedies should be awarded, considering:
 - (a) Reinstatement under s 123(1)(a);
 - (b) Lost wages under s123(1)(b); and
 - (c) Compensation under s 123(1)(c)(i) of the Act.
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Harris, which contributed to the situation giving rise to his grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[8] After Mr Harris was dismissed, AFFCO obtained a report on the handwriting in the food locker from Mike Maran. This report was lodged with AFFCO's Statement in Reply of 30 September 2016. A handwriting report was also obtained on Mr Harris' behalf from Linda Morrell. Subsequently, AFFCO obtained an updated report from Mr Maran.

[9] As a preliminary matter, I was required to consider what role, if any, the evidence of Mr Maran and Ms Morrell would play in the Authority's investigation, given the reports were obtained after Mr Harris was dismissed.¹ After discussion with counsel during a case management conference, I decided to seek submissions about how this evidence should be dealt with. A timetable was established for an exchange of Memoranda.

¹Employment Relations Act 2000, s 103(2).



[10] Upon reviewing the Memoranda, there was also a dispute between the parties about whether Mr Maran was an “expert”. Counsel for Mr Harris referred me to a decision of the Court, which suggested he was not.² Counsel for AFFCO referred me to decisions of the High Court where Mr Maran had given evidence and said Mr Maran’s training and experience met the threshold of an “expert” as defined by s 4(1) of the Evidence Act 2006.³ Counsel for Mr Harris submitted that if the evidence was going to form part of the investigation, Mr Maran’s expertise needed to be determined as a preliminary issue. Counsel for AFFCO raised concerns about the potential for delay if a decision about the involvement of Mr Maran and Ms Morrell was not made until the end of the investigation meeting.

[11] A Member’s Minute was issued to the parties on 26 January 2016 setting out the procedure to be adopted. This was to hear the evidence as part of my investigation. I was satisfied that the dispute about Mr Maran’s expertise could be addressed as part of the investigation through questioning of Mr Maran and, as necessary, submissions of counsel. As it was neither practical nor cost effective for Mr Maran (based in Auckland) and Ms Morrell (based in Wellington) to come to Whangarei, the investigation meeting was adjourned and reconvened in Auckland.

[12] During the investigation, I heard evidence from the following: two MWU delegates, Lawrence Nankivell and Paul Owen; Reo White and Mr Miles in Whangarei and Mr Harris, Mr Maran and Ms Morrell in Auckland. Ms Morrell gave evidence via video-link from Wellington.

[13] I also received several relevant documents from the parties and AFFCO provided some CCTV footage. However, it did not provide all the CCTV footage relied on. A Member’s Minute dated 16 December 2015, issued following a case management conference with the parties, recorded:

[5] The Respondent relies on CCTV as part of its case. If not otherwise agreed, this should be disclosed to the Applicant and also lodged with the Authority.

²*Tan v Yang and Zhang* 91[2014] NZEmpC 65 at [12]; [15]

³*See, New Core Properties Ltd v Lee* [2015] HC 2072 and *NPNZ Investments Limited v Nelson* HC Hamilton CIV-2010-419-692, 15 June 2010.



[14] Despite this, some of the footage relied on by AFFCO was not provided, making it not possible to test veracity of the claims made by Mr Miles about it.

[15] Mr Miles also did not provide any notes from the investigation that he conducted into Mr Harris' conduct.

[16] Three AFFCO employees who directly or indirectly assisted Mr Miles in his investigation did not provide witness statements. One employee, Christine Strawbridge took notes during Mr Miles' interview with Mr Harris on 19 August 2015. On the evidence, this was a contentious meeting. A witness statement from Ms Strawbridge, or even her notes, may have assisted. A second employee was involved in a re-enactment with Mr Miles in the smoko room. A third employee was an offsite human resources manager who provided advice to Mr Miles during his investigation.

[17] However, AFFCO said only two witnesses were relevant from its perspective. This did not change after reviewing the evidence Mr Harris lodged in support of his claim. The Minute dated 16 December 2015 recorded:

[8] ... The Respondent indicated from its perspective that there are two relevant witnesses.

[18] I specifically deal with the evidence of Mr Maran and Ms Morrell below.

[19] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of Mr Harris' employment relationship problem.

[20] While I have not explicitly referred to all the submissions of counsel in this determination, I have fully considered them.

[21] After AFFCO lodged its submissions on 23 March 2016, the company's Executive Director Dane Gerrard wrote directly to the Authority on 24 March 2016 saying he wanted to:

... underline the serious threat of Union intimidation that was occurring in the factory at the time and the need for fair review that such threats be taken seriously and hope this be the case. The issue is about intimidation to other staff not wishing to accept a strike declaration from the Union after certain employees had already declined to accept which is their right.



[22] Mr Gerrard's concerns did not change what the Act required the Authority to consider in investigating AFFCO's decision to dismiss Mr Harris. In assessing whether an employer is justified in dismissing an employer, the statutory test set out in s 103A of the Act applies. The role of the Authority is to examine whether an employee's dismissal, and how the decision was made, was what a fair and reasonable employer could have done in all the circumstances at the time.

Mr Miles' employment investigation

Background

[23] Mr Miles said he was approached on 17 August 2015 by the compliance manager at the Moerewa Plant who told him a food locker in the main smoko room used by Mr White had been defaced with the word "scab".

[24] The Concise Oxford English Dictionary defines a scab as "a person who refuses to strike or takes the place of a striking worker". The New Zealand Oxford Dictionary gives a broader definition which is "a person who refuses to strike or join a trade union or who tries to break a strike by working; a blackleg". At the time "scab" was written in his locker, Mr White was a member of the MWU. He had declared at an MWU meeting that he was not prepared to participate in a planned strike. The MWU meeting had taken place several days before Mr White discovered the defacement of his locker.

[25] It was common ground Mr White was the only employee to use this particular locker. However, other employees shared lockers. There appeared to be several reasons for this, but generally it was because there were not enough lockers to accommodate the entire workforce. Mr Harris was one such employee and he shared two lockers.

[26] Mr Miles went to the smoko room and examined Mr White's locker. The word had been written six times, twice in the interior of the locker and four times on the door. Mr Miles provided pictures of the locker, the locker door and the bank of lockers of which the locker in question formed part.



CCTV footage

[27] There is a CCTV camera mounted at height in the smoko room in such a way as to show the entire bank of lockers from a side-on angle. There are no alternative angles. In the foreground of the area captured is a food vending machine, which sits in front of the bank of lockers. The camera also captures footage from a kitchen area immediately adjacent to the lockers on the left hand side of the smoko room and a corresponding area, in terms of angle, to the right of a locker bank, including partially taking in a row of tables. The footage also captures a rear door to the smoko room. The lockers open out towards the area containing the tables, rather than the kitchen area.

[28] Mr Miles said he reviewed the footage and saw Mr Harris going through a number of lockers and then kneeling in front of a locker, which he said was Mr White's locker, "for thirty seconds on Friday 14 August [2015] at 9.23pm". He said Mr Harris was resting his left arm on the door of the locker. Mr Miles provided a three minute segment of this CCTV footage to the Authority.

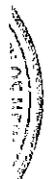
[29] Mr Miles then said in his witness statement:

I reviewed the footage from the afternoon of Friday 14 August to the morning of Monday 17 August and there was no evidence of anyone else lingering in the area of [Mr White's] locker, only [Mr Harris]. The CCTV footage showed another worker Wahanui Bray approach [Mr Harris] when he was crouching down.

In his oral evidence during the investigation meeting, Mr Miles said the CCTV camera was triggered by motion sensor and his review process took about two hours.

[30] Mr Miles considered there was enough evidence to investigate the matter further and met with Mr Harris to:

... [o]btain [his] response to the allegations of serious misconduct that he defaced Reo's food locker in the main smoko room by repeatedly writing 'scab', and that conduct was intimidating and abusive towards Reo. I was also concerned about the destruction of company property by defacing the locker.



First Meeting: 18 August 2015

[31] On 18 August 2015, Mr Harris was asked to attend a meeting with Mr Miles. He attended with an MWU delegate, Paul Owen. Mr Owen had been asked to attend the meeting by Mr Miles.

The Allegations

[32] Mr Miles provided Mr Harris with a letter. This letter stated:

I am writing to request that you attend a meeting at AFFCO Moerewa on Wednesday, 19 August at 10am. The purpose of the meeting is to consider allegation of serious misconduct against you. The allegation is that you have defaced Reo Whyte's food locker in the main smoko room by repeatedly writing 'scab' referring to whether or not he had planned to work through the Union's intended strike. As well as potentially amount to serious misconduct, the allegation is also potentially a breach of section 11(1) of the Employment Relations Act 2000 (prohibition on undue influence). You are welcome to bring a representative or support person to the meeting.

The basis of the allegation is video surveillance footage recorded at approx. 9.23pm on Friday 14 August in the main smoko room. I will be speaking to Wahanui Bray as part of my investigation. If there is anybody else that you believe I should interview as part of my investigation, then please advise as soon as possible.

I also wish to discuss a further matter of serious misconduct relating to deliberate destruction of company property when defacing the food locker.

If you are found guilty of either of the alleged serious misconduct then it could result in your dismissal.

Christine Strawbridge and I will be attending the meeting on behalf of the company.⁴

[33] Mr Harris denied the allegations. The evidence before the Authority was Mr Harris and Mr White were friends. They had regularly, as often as weekly, socialised together at Mr Harris' house and sat at the same table in the smoko room for several years. Mr White tried to downplay their friendship in his written evidence, he accepted during the investigation meeting, after initially appearing to refuse to answer questions about his friendship with Mr Harris, that they were "good friends".

[34] Mr Miles suspended Mr Harris at this meeting.

⁴AFFCO referred to "Mr Whyte" or "Mr White" in several documents. Mr White's witness statement spelt his surname as "White". This spelling has been adopted by the Authority.



Events between first and second meeting

[35] Mr Miles said he carried out his investigation on 18 August 2015. Mr

Meeting with Mr Bray

[36] Miles said he interviewed Mr Bray. Mr Bray told him he could not recall anything. Mr Miles said he showed Mr Bray the CCTV footage. Mr Bray said in response that he recalled commenting to Mr Harris that he was lucky to be finished for the night and that he did not see anything. Mr Miles said in his oral evidence there were no notes of his discussion with Mr Bray.

Meeting with Mr White

[37] Mr Miles also met with Mr White. Mr Miles said Mr White told him he felt intimidated and belittled about what had happened to his locker. He also said that Mr White claimed that Mr Harris had previously called him a scab.

[38] In his written evidence, Mr White stated that on 12 August 2015 he encountered Mr Harris during a shift changeover and Mr Harris said words to the effect of “there’s the new scab”. Mr Harris denied this. Mr White said he “knew” Mr Harris was referring to him and his “decision to work through the [planned] strike”. In his oral evidence, Mr Miles stated this interaction occurred in the smoko room. Mr White said it occurred in another part of the plant.

[39] When Mr Miles was asked if he took notes of his discussion with Mr White, Mr Miles suggested he “scribbled something on a pad”. When asked if anyone else was taking notes he said, “no”.

Re-enactment

[40] During the investigation meeting, Mr Miles said that sometime between Tuesday 18 August 2015 and Wednesday 19 August 2015, he had undertaken a “re-enactment” with the compliance manager. The compliance manager took up position at Mr White’s locker in the smoko room and Mr Miles said he watched the re-enactment on the CCTV monitor. This evidence did not feature in his witness statement.



Second Meeting: 19 August 2015

[41] Mr Harris was represented by Mr Nankivell and Mr Owen at the second meeting with Mr Miles on 19 August 2015. Ms Strawbridge attended with Mr Miles. Mr Harris, Mr Owen and Mr Nankivell all said that Ms Strawbridge took notes.

[42] Mr Miles said he began by asking Mr Harris if he had considered the events in the smoko room on the evening of 14 August 2015 when Mr White's locker was vandalised. Mr Harris said there was nothing to think about, as he had not done it. Mr Miles said he informed Mr Harris that the CCTV footage appeared to show he was the person who wrote the words. Mr Harris denied he did and said he was looking for his knife. Mr Nankivell said Mr Miles then shouted "I put it to you, you wrote this" and started badgering Mr Harris by saying the footage was "conclusive".

[43] Mr Miles then played the footage for Mr Harris, Mr Nankivell and Mr Owen. Mr Owen and Mr Nankivell told Mr Miles that the CCTV footage was inconclusive.

[44] Mr Harris said he explained there were not enough lockers for all employees at the plant and that some employees, including himself, shared lockers. Mr Harris said he told Mr Miles he used a locker near Mr White's locker at times. Mr Miles said in his written evidence that Mr Harris said he shared a locker with Rome Davis. In his oral evidence, Mr Miles said he accepted employees shared lockers at the plant and that Mr Harris shared a locker with Rome Davis. Mr Harris said in his oral evidence he had shared a locker with Mr Davis for about four years. Mr Harris said he also shared another locker with several members of his family.

[45] Mr Harris said he explained to Mr Miles that he had gone to his locker to get a knife, had found food in the locker and had cleaned it out. Mr Nankivell said Mr Harris and Mr Owen explained to Mr Miles that workers shared utensils and the like – described as "food gear" - at the plant. Mr Nankivell also said Mr Harris told Mr Miles he was looking for his knife, so he went through various lockers and then cleaned the locker. Mr Miles claimed that Mr Harris gave him three different explanations about why he was kneeling in front of the locker: he was looking for a "knife and fork", "wiping up crumbs" and looking for his "pocket knife" or "little pocket knife". Mr Harris denied changing his version of events and said he did not go to the locker for one reason.



[46] Mr Miles said Mr Harris became “agitated” so he adjourned the meeting to enable him to “compose” himself. The meeting reconvened in the smoko room where Mr Miles asked Mr Harris to point out the lockers he said he used. Mr Miles provided a photograph of the bank of lockers to the Authority, which marked two lockers and also showed the location of Mr White’s locker. There is a dispute on the facts about the location of Mr Davis’ locker. This is discussed below.

[47] The meeting reconvened in Mr Miles’ office and the CCTV footage was reviewed again. Mr Miles asked Mr Harris what he was looking for and whether he found it. Mr Harris said he did not. Mr Miles suggested to Mr Harris that he looked up at the camera before going through the lockers. Mr Miles suggested during the investigation meeting this was because he was trying to work out the angle of the camera. Mr Harris denied this and said he was actually looking at a large clock on the wall near the camera. Mr Harris said in his oral evidence that the camera had been in place for about four years. Mr Miles again asked Mr Harris what he was looking for. He said he was looking for a “small pocket knife”. Mr Miles again asked Mr Harris whether he found it. He said he did not.

[48] Mr Miles then asked Mr Harris about previously calling Mr White a scab. He said to Mr Harris: “why, did you call Reo a scab?”. Mr Harris denied he had.

[49] Mr Miles then directly accused Mr Harris of writing in Mr White’s locker. He then changed tack slightly and asked Mr Harris if he was right-handed or left-handed. Mr Harris said he was right-handed.

[50] Mr Owen and Mr Nankivell asked Mr Miles why so much effort was going into investigating Mr Harris when an employee had threatened to kill the plant manager, another employee had burnt down a Moerewa School and another employee had been involved in the theft of a farmer’s quad bike and a shooting. Mr Miles described these issues as irrelevant and said Mr Owen and Mr Nankivell were attempting to side-track the meeting. However, it appears Mr Miles also participated in the side-tracking of the meeting because Mr Owen said he raised an issue that during the lockout in 2012 the plant manager was asked not to go to the Moerewa Rugby Club due to the tensions with the workforce. Mr Miles did not deny this.



[51] Mr Miles said he brought the meeting to a close by saying “the Union needed to move on”.

[52] During the meeting Mr Owen said Mr Miles was “extremely difficult and aggressive”. Mr Harris said Mr Miles was “very angry”, “aggressive”, “very argumentative” and was “badgering” him. He also said it felt as if Mr Miles was trying to “bait” him. Mr Miles denied these accusations during the Authority’s investigation meeting.

Events between the second and third meeting

Decision to dismiss

[53] Mr Miles said in his written evidence that:

39. Taking into account all the information I gathered in the course of my investigation I considered that the allegations of serious misconduct were substantiated. I weigh Dennis’ blanket denials of having defaced the locker against the other information I had gather in the course of my investigation.
40. I considered that it was Dennis that wrote the word ‘scab’ repeatedly on the inside of the locker. I based this on the CCTV footage showing Dennis removing something from his bag, kneeling in front of Reo’s locker, that a review of the CCTV footage did not show anyone else within the area of Reo’s locker between the Friday night and when Reo discovered the tagging in his locker, and that Dennis gave three different and inconsistent explanations as to why he spent so long in that locker.
41. I accepted Reo’s statement that Dennis had previously called him a scab, and that language was consistent with the words on the locker. I also took into account the effect on Reo and that he felt intimidated and belittled by the word repeatedly written on the interior of his locker.

[54] In deciding whether or not to dismiss Mr Harris, Mr Miles said he took into account Mr Harris’ length of service, previous disciplinary record and work history. However, he said on balance as Mr Harris’ actions were so serious, this left him with no option but to dismiss Mr Harris. He also said he considered alternatives to dismissal, such as a warning but ruled this out because of Mr Harris’ blanket denial, the effect his actions had on Mr White and that he had no confidence that Mr Harris would act appropriately if given a lesser sanction.



Third Meeting: 20 August 2015

[55] Mr Miles met with Mr Harris, Mr Nankivell and Mr Owen. He said he advised Mr Harris that there was sufficient evidence to find that the allegations of serious misconduct were substantiated, that he had deliberately destroyed company property and had intimidated a fellow worker and that his employment would be terminated with immediate effect.

[56] Mr Miles said Mr Nankivell and Mr Owen objected to his decision. They said the CCTV was not clear and that Mr Harris was not in Mr White's locker. Mr Nankivell said he started arguing with Mr Miles about his decision. Mr Nankivell then said Mr Miles threatened to investigate him to see what he would find out. Mr Harris said Mr Miles "was threatening them" and "threatened to investigate them". Mr Owen said Mr Miles threatened to investigate both he and Mr Nankivell. During the Authority's investigation meeting, Mr Miles denied any such threat was made.

[57] Mr Harris said "Mr Miles was going hard from the first meeting, and his attitude never changed". Mr Owen said Mr Miles "seemed angry and aggressive throughout these discussions". Mr Nankivell said:

It was very difficult to make any sense of what [Mr Miles] was saying at either meeting. He was shouting at us. [Mr Miles] did not seem at all seem interested in listening to what we had to say. He was convinced [Mr Harris] had written the words, and was not interested in any explanation that was in any way to the contrary.

[58] Mr Miles said Mr Harris was being "difficult" and "provocative" in his responses. Mr Miles said he was conscious of the need to conduct a thorough investigation and denied behaving in ways alleged by Mr Harris, Mr Nankivell and Mr Owen. He said to do so would have "jeopardised the investigation". He further said:

I have read the witness statements of Dennis, Paul and Laurie, and deny their allegations that during the meetings I was badgering, shouting, or accusatory, or that I was angry or aggressive. Having previously worked on the chain in a unionised meat factory I have had firsthand experience in the "pack mentality" of the meat workers union and the elected delegates' persona and I am disappointed that after thirty years it still exists



Discussion

The Allegations

[59] There were several difficulties with the allegations made against Mr Harris.

[60] I accept the submission of Counsel for AFFCO that all witnesses conceded that Mr Harris had “received prior written notice of the allegation of serious misconduct” at the meeting on 18 August 2015. However, the construction of this “written notice” was problematic.

[61] Mr Miles confirmed in response to a question from the Authority that he sought assistance from a human resources manager located at AFFCO’s head office in preparing the letter. Mr Miles also said in his oral evidence that he had undertaken various senior management courses dealing with employment investigations.

Potential breach of s 11(1) of the Act

[62] The allegation that Mr Harris had potentially breached of s 11(1) of the Act (prohibition on undue influence) appears, based on Mr Miles’ evidence, not to have actually been put to him beyond the reference to it in the letter of 18 August 2015.

[63] However, also on Mr Miles evidence, it did not form part of the reason for Mr Harris’ dismissal. In the overall circumstances, nothing ultimately turns on this.

Further allegation: re-enactment

[64] As previously stated, Mr Miles conducted a “re-enactment” with the compliance manager for the plant. When asked if he put this to Mr Harris he said “I can’t recall”. He then said, “I would have”. Mr Harris said the first time he became aware of the re-enactment was at the investigation meeting. The compliance manager did not provide a witness statement, no notes were provided to the Authority about the re-enactment and there was no independent evidence, such as meetings notes, that it raised with Mr Harris during Mr Miles’ investigation. I accept Mr Harris’s evidence that it was not raised with him.



[65] Counsel for Mr Harris submitted Mr Miles had clearly formed the view that an employee could complete the writing in a manner consistent with the actions of Mr Harris shown on the CCTV footage but this was not put to Mr Harris. Further, counsel submitted the physical characteristics of the compliance manager, such as their height, were unknown. I accept both submissions.

[66] Counsel for AFFCO suggested that the re-enactment was “clear evidence that Mr Miles was genuinely considering Mr Harris’ explanation”. However, Mr Harris did not know Mr Miles was “genuinely considering” his explanation in this fashion until the Authority’s investigation meeting.

[67] I find the failure to raise the re-enactment with Mr Harris was a failure by AFFCO to act as a fair and reasonable employer in respect of s 103A(3)(b). It did not give him an opportunity to comment on the re-enactment and any conclusions based on it.⁵ This issue also goes to a failure by AFFCO to act as a fair and reasonable employer in respect of s 103A(3)(a) and s 103A(3)(c) and I find as such.

Suspension

AFFCO’s submission about Mr Harris’ suspension

[68] Counsel for AFFCO submitted, despite evidence before the Authority about it, the issue of Mr Harris’ suspension should not form part of the determination because it was not raised in his statement of problem nor otherwise pressed by his Counsel. This is a very technical and restrictive view about the role of the Authority in resolving employment relationship problems and one inconsistent with both the scheme of the Act and view of the Court.⁶ I decline to accept it.

[69] Mr Miles’ letter of 18 August 2015 did not mention suspension but he did suspend Mr Harris at the meeting. There was a dispute in the evidence about whether Mr Miles gave Mr Harris an opportunity to comment on the proposed suspension. Mr Miles said he did. Mr Owen and Mr Harris both said Mr Miles told Mr Harris he was suspended and he should get his gear and leave the premises. It was common ground Mr Miles had the power to suspend Mr Harris under the core conditions. However, a fair and reasonable employer would adopt a procedurally fair process when exercising

⁵See, similar observations by the Court in *Housham v Juken New Zealand Limited* [2007] NZEmpC 38 at [30].

⁶[2015] NZEmpC 54 at [52]–[57].



this power. Against this, the Court has found that a procedural unfair suspension of short duration on full pay may not prevent an employer from justifying a dismissal.⁷

Uninvestigated allegation: potential contamination of employment investigation

[70] During the investigation meeting, Mr Miles said he thought Mr Bray had been “got at” as Mr Bray had appeared not to be surprised to be asked to meet with him. Counsel for AFFCO said Mr Miles was “unequivocal in his evidence”. He did not, however, mention any of this in his witness statement. In his oral evidence, Mr Miles drew a clear link between the reference to Mr Bray in his letter of 18 August 2015 and Mr Bray’s lack of surprise.

[71] If Mr Miles believed his investigation had been potentially contaminated, it was incumbent upon him to investigate the circumstances of this. The letter was given to Mr Harris and Mr Owen, at least, had knowledge of its contents. Mr Miles’ view that someone had “got at” Mr Bray should have been put to Mr Harris and probably Mr Owen as well. It is simply unfair to Mr Harris, and contrary to AFFCO’s obligations under s 103A of the Act, for Mr Miles to form a view Mr Bray had been “got at” and draw a link to a letter given to Mr Harris, yet never put this to him.

[72] Mr Harris said in his oral evidence that he had no knowledge of anyone having “got at” Mr Bray. Mr Bray may have been able to assist the Authority with this issue, however he did not provide a witness statement.

[73] I find that Mr Miles’ failure to conduct an inquiry after forming a suspicion about the potential contamination of the employment investigation into Mr Harris, and also by failing to put this suspicion to Mr Harris for comment, was procedurally unfair and not the action of a fair and reasonable employer under s 103A(3)(a) and s 103A(3)(b) of the Act.

Investigation: methods

[74] Mr Harris attended three interviews with Mr Miles. During, at least the second meeting, Ms Strawbridge took notes. These notes were never provided to Mr Harris for comment or subsequently to the Authority.

⁷*Kereopa v Go Bus Transport Limited* [2009] NZEmpC 74 at [29]



[75] During the second meeting, in particular, Mr Harris' account of his actions was vigorously tested by Mr Miles. There is no evidence that Mr Miles similarly tested Mr White's evidence.

[76] As observed, Ms Strawbridge's notes taken at this meeting with Mr Harris were not provided to the Authority. Mr Miles also did not provide the note or notes he took from his discussion with Mr Harris in the smoko room about the lockers.

[77] Mr Miles confirmed that there were no notes from his meeting with Mr Bray. There were also no notes provided from the re-enactment conducted by Mr Miles and the compliance manager in the smoko room.

[78] When asked if he took notes of his meeting with Mr White, Mr Miles suggested he "scribbled something on a pad". Given the weight Mr Miles subsequently placed on the claim that Mr White made at this meeting - that Mr Harris had previously called him a scab - to justify Mr Harris' dismissal by relying on, in effect, similar fact evidence, this was quite an extraordinary concession. Mr Miles never provided these "notes" to the Authority.

[79] A fair and reasonable employer would have adopted a consistent process for interviewing witnesses,⁸ developed a consistent process for recording information,⁹ invited comment from witnesses about the recorded information,¹⁰ preserved the information and made it available for verification and examination.¹¹ AFFCO did none of these things.

CCTV footage

[80] The Court in *The Warehouse* case cautioned about subjective assessments of, and overreliance on, CCTV footage.¹² AFFCO's CCTV footage in this case was not particularly clear. It was grainy and lines ran across the screen at regular intervals. It is very difficult to discern faces.

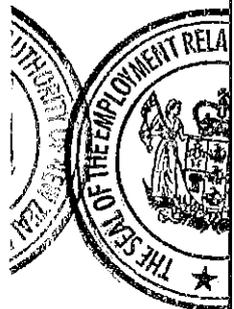
⁸*H v A Ltd* [2014] NZEmpC 189 at [79]. It is noted the Court of Appeal has granted leave to appeal this decision: *A Limited v H* [2015] NZCA 99.

⁹At [75]

¹⁰*Harris v The Warehouse Limited* [2014] NZEmpC 188 at [107]

¹¹At [110]

¹²At [111]-[117].



[81] I reviewed the CCTV footage approximately a dozen times in order to gain anything approaching a credible understanding of what was going on. As a result of this, I identified three potential witnesses who could have assisted Mr Miles with his investigation.

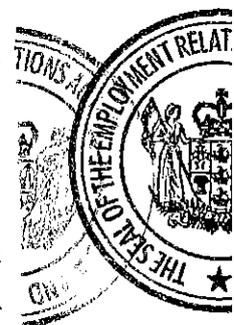


[82] Counsel for AFFCO said Mr Miles played the CCTV footage at least once during the meeting with Mr Harris on 19 August 2014. I accept Mr Miles' evidence that he played the CCTV footage twice, before and after the visit to the smoko room.

Potential witnesses

First Person

[83] A person wearing black pants, a yellow over-shirt and what looks to be a 'beanie, has a discussion with Mr Harris at the corner of the bank of lockers adjacent to the rear door of the smoko room. There is no evidence Mr Harris was ever asked about this interaction by Mr Miles. Mr Miles could easily have ascertained whom this person was as he could have simply asked Mr Harris. Mr Harris talked to this person almost immediately after looking in his bag at a table. Mr Miles claimed Mr Harris removed "something" from his bag. This person may have been in a position to confirm Mr Miles' view that Mr Harris had something in his bag or dissuade him from this view. This person was not interviewed.



Second person

[84] A second person in blue overalls carrying a white container walks around the bank of lockers from the direction of the kitchen area. This person walks past Mr Harris as he is looking through a series of lockers. This person then disappears from the footage. The person then reappears and is seen walking the length of the smoko room along the rear wall by which point Mr Harris is looking in Mr Davis' lockers or on Mr Miles' evidence, Mr White's locker. The locker doors opened away from this person based on their direction of travel. The word "scab" was written four times on Mr White's locker door. This person continues walking and joins the person subsequently identified as Mr Bray briefly in the kitchen area. Mr Miles could have asked Mr Bray who this person was. Mr Harris could have been asked who this person was. This person could have been able to provide valuable evidence about what Mr Harris was doing. This person was not interviewed.

Third person

[85] Another person wearing white overalls is seen standing in front of the bank of lockers (closer to the CCTV camera than Mr Harris' position) talking to another worker who is also wearing white overalls, but who looks to be wearing a white hardhat. At one point this person appears to be at such an angle that their view is not obstructed by the open door of the locker Mr Harris was kneeling in front of. This person could have been able to provide valuable evidence about what Mr Harris was doing. This person was not interviewed.

[86] Given the third person was wearing white, along with many others present in the smoko room as observed by Mr Nankivell, they may not have been as readily identifiable as the first and second person. However, a robust investigation would have been able to track this person down and ask them what, if anything, they saw.

[87] In his oral evidence, Mr Harris said there were also a number of other people sitting at tables in the smoko room. Counsel for AFFCO said it was notable Mr Harris did not advise Mr Miles who these people were given he specifically asked in his letter of 18 August 2015 for Mr Harris to identify witnesses other than Mr Bray. However, it was clear from Mr Miles' evidence that he did not have an interest in interviewing further witnesses.

[88] During the investigation meeting, I sat next to Mr Miles and we went through the footage together. At various stages I asked him about the three people identified above. His response was that they were either "irrelevant" or "not relevant". Mr Miles clearly decided interviewing these witnesses were not required, as he had formed a view that Mr Harris was responsible for the writing in the locker. Mr Miles had closed his mind.

[89] In any event, counsel's submission do not account for the three people identified by the Authority in the CCTV footage. As observed above it took a number of reviews to gain a credible understanding of what was occurring on the footage. It would be very unfair to suggest that after showing Mr Harris the footage twice during the meeting on 19 August 2015, he should have been in a position to identify those three people.



[90] The failure to interview relevant witnesses disclosed by the CCTV footage, particularly in circumstances where the footage was so heavily relied on, is a failure by a fair and reasonable employer to sufficiently investigate under s 103A(3)(a) of the Act.

[91] I further find that a fair and reasonable employer would not attempt to shift responsibility for conducting a proper investigation onto the person being investigated. Moreover, the three minute CCTV footage from which this information was garnered was only provided to Mr Harris, through his lawyer, by AFFCO after the Authority's case management conference on 16 December 2015 (or three months after Mr Harris' dismissal).

Entire CCTV footage

[92] Counsel for AFFCO suggested in submissions that Mr Miles reviewed the entire CCTV footage sequence for the period between the afternoon of Friday 14 August 2015 to the morning of Monday 17 August 2015 with Ms Strawbridge, personal assistant to the Moerewa Plant manager. However, Mr Miles did not mention Ms Strawbridge's involvement in his witness statement. Counsel further submitted that Mr Harris never requested to see the entire footage. Counsel for Mr Harris submitted the footage was never offered to Mr Harris during the investigation process.

[93] In such circumstances, Counsel for Mr Harris submitted the Authority could not find that nobody else had approached Mr White's locker during the period in question. I accept this submission.

[94] Absent the production of the entire CCTV footage, given the serious allegations that were levelled against Mr Harris and AFFCO's obligations under s 103A of the Act, I am not prepared to simply accept Mr Miles' uncorroborated evidence, especially in circumstances where only the short three minute sequence of the CCTV footage was played during the employment investigation and subsequently provided to Mr Harris and to the Authority.

[95] The circumstances surrounding this CCTV footage have never been properly explained by AFFCO. Logically, the short three minute sequence provided to the Authority must have formed part of the larger sequence. In fact, Mr Miles claimed it was relevant and he relied on it.



[96] There are simply too many variables to make a reliable finding based solely on Mr Miles' evidence. These variables include the possible non-preservation of the footage and/or the entire footage showing another person or persons in the area of Mr White's locker during the material period.

Location of Rome Davis' Locker

[97] There was a dispute in the evidence about the location of Mr Davis' locker, which Mr Miles accepted Mr Harris shared. Mr Miles attached a photo of the bank of lockers in the smoko room as Document 'D' to his witness statement. It identified Mr Davis' locker as being immediately *below* Mr White's locker in the bottom row and six lockers in from the end of the bank.

[98] When Mr Harris came to give his evidence, I asked him to point out where Mr Davis' locker was in the picture reproduced in Document "D". He was asked do this at least twice during his oral evidence. He identified Mr Davis' locker as being *beside* Mr White's locker. That is, on the same level as Mr White's and five lockers in from the end of the bank.

[99] Mr Miles said in his written statement that when he reconvened his investigation meeting in the smoko room on 19 August 2015, he asked Mr Harris to point out the lockers. He said these lockers were marked on Document 'D'. Document D also identified another locker used by Mr Harris, which was one up and three along from Mr White's locker towards the end of the bank.

[100] Counsel for AFFCO submitted Mr Miles made a note of the lockers pointed out by Mr Harris. Mr Miles provided no note to the Authority other than Document 'D'.

[101] Counsel for AFFCO further submitted:

... Mr Harris did not share a locker beside Mr Whyte's locker and counsel submits this is why Mr Harris was opening all the lockers on the CCTV footage to find My Whyte's locker.



[102] Mr Davis did not provide a witness statement, but Mr Harris said he had shared a locker with him for several years. Mr Harris identified this locker during the investigation meeting and it was different to the one identified by Mr Miles.

[103] In respect of the submission about Mr Harris opening all the lockers, it is relevant that both he and Mr White said they sat at the same smoko room table. Mr Harris said this had been for four years. The tables are positioned outward from the lockers. It is reasonable to assume, given the length of time they had sat at the table and given they were also good friends, Mr Harris would have known where Mr White's locker was. Indeed, Mr White's locker was very close to both lockers Mr Harris said he used.

[104] There was no evidence before the Authority that Mr Harris was engaged in some charade in opening the lockers and, in any event, this would be inconsistent with counsel's submission.

[105] What seems more likely than not, is that Mr Miles did not know or was confused about where Mr Davis' locker was. In a letter to Mr Harris' lawyer dated 8 September 2015, AFFCO stated:

Mr Harris claimed he was in *Rome* Davis' locker, but the angle of the camera does not pick up when Mr Davis' locker door is open like it does when Mr Whyte's locker door is open (emphasis added).

[106] In my view, this is not an observation about Mr Davis's locker being *below* Mr White's locker. It appears to be an observation about the depth of the locker within the bank relative to the CCTV camera. However, even then, having reviewed the CCTV footage, it does not, in my view, show such depth. The only way depth might be examined would be based on a largely subjective assessment of finding corresponding points in the kitchen area or among the arranged tables in the smoko room and using these as a gauge.

[107] Further, the Statement in Reply dated 28 September 2015, stated:

2.6 The applicant [Mr Harris] claimed he was in another employee's *Wayne* Davis. The angle of the camera does not pick up when Mr Davis' locker door is open like it does when Mr Whyte's locker door is open (emphasis added)



[108] Again, this is not an observation about Mr Davis' locker being below Mr White's locker. Also, the reference to "Wayne Davis" may have been made in error. However, the statement in reply was lodged almost three weeks after the letter was sent and the two paragraphs are materially similar.

[109] The location of the locker is significant for a number of reasons. First, it supports Mr Harris' contention that he was looking in Mr Davis' locker. Second, as he was looking in Mr Davis' locker, which he shared, it serves to demonstrate why he may have an interest in wiping out crumbs. Third, the re-enactment conducted by Mr Miles with the compliance manager occurred on the basis of a false premise. Fourth, if Mr Harris was in Mr Davis' locker, it is actually not relevant what he was doing there.

[110] The failure to properly identify the locker Mr Harris shared with Mr Davis is a failure by a fair and reasonable employer to conduct a sufficient investigation under s 103A(3)(a).

Events during the investigation meeting on 19 August 2015

Allegation of previously calling Mr White a 'scab'.

[111] During the investigation meeting, Mr Miles, on his own oral evidence, asked Mr Harris, "why did you call Reo a scab?". Mr Harris denied the allegation.

[112] I find that Mr Miles failed to properly investigate this allegation because his own evidence about where the interaction occurred contradicted that of the complainant, Mr White. His scribbled notation could have assisted him, but this was not provided.

[113] If Mr Miles wanted to put this allegation to Mr Harris, he should have been put on notice about it and given an opportunity to properly consider and respond to it. This was not done. Further, based on the way the allegation was actually put to Mr Harris, it was clear that Mr Miles had found the allegation proven before Mr Harris had an opportunity to comment on it.

[114] These were not of the actions of a fair and reasonable employer and are a breach of s 103A(3)(a), s 103(A)(3)(b), s 103(A)(3)(c) and s 103(A)(3)(d) of the Act.



Inconsistent explanations by Mr Harris

[115] Mr Miles claimed that Mr Harris gave him three different explanations about why he was kneeling in front of the locker: he was looking for a “knife and fork”, “wiping up crumbs” and looking for his “pocket knife” or “little pocket knife”. Mr Harris denied changing his version of events. When I asked Mr Harris about his “pocket knife”, he said this was the knife he was looking for and used in the smoko room. He said it had a retractable blade but the blade was rusted open. This is not a “pocket knife” as would be commonly understood. It is a knife.

[116] Looking for a “knife” or a “fork and knife”, both of which would easily fall within the broader definition Mr Owen and Mr Harris gave of “food gear”, are not inconsistent with wiping out crumbs either concurrently or sequentially.

[117] In any event, even if there were inconsistencies in Mr Harris’ explanation, this cannot be the end of the matter. There are a number of reasons why an employee’s explanation may change during an employment investigation other than because they are lying to conceal or confound the truth. These include: a lack of recall, stress, lack of experience in dealing with management and/or investigatory processes, the lack of experience of the investigator, the investigatory environment, poor advice or representation, a desire to be seen to co-operate and “puttage” – this is, putting words or suggested actions to witnesses rather than eliciting information through open questioning.

[118] Counsel for AFFCO submitted that Mr Miles “... considered on balance that Mr Harris was lying when he denied the allegation of serious misconduct against him”.

[119] In *George v Auckland Council*¹³, the Court of Appeal stated:

[36] We emphasise that mere differences in recollection are likely to be commonplace during the course of the disciplinary process including any earlier investigation stage. Deficiencies of recollection or inconsistencies are in not in themselves sufficient to support a finding that the employee has lied. An employee may honestly, but mistakenly, have a different recollection of events. In order to establish that the employee has lied, there must be proof of a deliberate untruth on the employee’s part. The standard of proof is the civil standard but to a level commensurate with the seriousness of such an allegation.

¹³[2014] NZCA 209 (CA) at [34].



[120] If the suggested inconsistencies in Mr Harris' explanation were so important as to contribute to the reason for his dismissal, Mr Miles should have squarely put an allegation of lying to Mr Harris and, if substantiated on the balance of probabilities, relied on it. It is consistent with the Court of Appeal's decision in *George*, that satisfaction of the test in s103A of the Act is not achieved by merely accepting that an employee's explanation contained inconsistencies so serious as to contribute to their dismissal, without examining the relevant circumstances.

Disciplinary meeting on 20 August 2015

Threat or threats to investigate Mr Nankivell and Mr Owens

[121] The evidence of Mr Harris, Mr Nankivell and Mr Owen was Mr Miles threatened to investigate both Mr Nankivell and Mr Owen to see what he could find out.

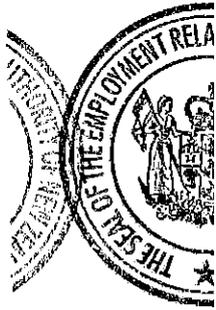
[122] There was some slight variation between the written and oral evidence of Mr Nankivell and Mr Owen on this but, in my view, it points to their reliability as independent witnesses rather than undermines it and also the clear absence of what Mr Miles alleged was the "pack mentality" of MWU delegates.

[123] On the balance of probabilities, I find that Mr Miles threatened to, at least, investigate Mr Nankivell and Mr Owen as they left the meeting after Mr Harris had been dismissed.

[124] This was completely inappropriate conduct by Mr Miles towards the representatives of Mr Harris.

Conclusion about Mr Harris' dismissal

[125] Drawing together all the factors detailed, discussed and analysed above and applying the test in s 103A of the Act, I find that the decision to dismiss Mr Harris and the process adopted to reach that decision were outside the range of what a fair and reasonable employer could have done in all the circumstances at the time. The investigation conducted by AFFCO into Mr Harris was procedurally unfair and was not the action of a fair and reasonable employer. The defects in the process followed by AFFCO to dismiss Mr Harris were not minor and they did result in him being



treated unfairly.¹⁴ The dismissal of Mr Harris by AFFCO was procedurally and substantively unjustifiable.

[126] Mr Miles clearly formed a view that Mr Harris was responsible for the writing in Mr White's locker. He could not be dissuaded from this view. The way he reached his findings in this regard denied Mr Harris procedural fairness and failed to yield a proper and substantive basis for his dismissal.

[127] The entire investigation process was contaminated by systematic errors of procedure undermining the evidence gathering process and by Mr Miles' closed mind to even the possibility of Mr Harris' 'innocence'. Important evidence was missed, particularly the location of Rome Davis' locker and potential eyewitness accounts in the smoko room. Some evidence was not even disclosed, yet was relied on - in particular, the full CCTV footage.

[128] There was no independent corroboration of Mr Miles' investigation in terms of documentary evidence or supporting witness statements from others involved in the investigation, such as Ms Strawbridge.

[129] In reaching this conclusion, I have not taken into account the evidence of Ms Morrell about the handwriting. While I found her evidence helpful this was only within the context of resolving the issue about handwriting, an issue put before the Authority by AFFCO. As the evidence about handwriting was obtained after Mr Harris was dismissed and Mr Miles did not rely on Mr Maran's evidence to justify the dismissal, it must ultimately be set aside.

Hand writing evidence

[130] As outlined above, handwriting evidence was provided to the Authority by the parties about the authorship of the word "scab" on Mr White's locker. Mr Harris relied on a report prepared by Ms Morrell. AFFCO relied on two reports prepared by Mr Maran.

¹⁴ Employment Relations Act, s 103A(5).

[131] The genesis of the handwriting evidence was, on the evidence of Mr Miles, that it was sought to provide valuable evidence to the Authority in response to a “parting shot” from Mr Owen and Mr Nankivell, after Mr Miles had dismissed Mr Harris, that AFFCO had not heard the last of it.

[132] Mr Maran was engaged on 31 August 2015. He provided the Authority with the letter of engagement. This was on Talley’s Group Ltd (Talley’s) letterhead and was issued over the name of Kelly Greenem, who described herself as personal assistant to the directors of Talley’s. Mr Maran also referred to this in his reports. The letter from Ms Greenem read:

Talley’s Group Ltd would like to engage your services to undertake an analysis of some documents to ascertain if the handwriting in the photograph provided is a match for an ex employee’s personal file.

We would like you to provide us a written documented report on your findings that could potentially be used by us if needed in a court hearing.

A brief description of the malicious act that has occurred at the AFFCO New Zealand, Moerewa plant, owned by Talley’s Group Ltd.

Employee Dennis Harris verbally abused another employee (Reo Whyte), calling him a scab.

Reo Whyte’s locker then had scab written on the inside door and shelf.

Dennis Harris was dismissed from AFFCO New Zealand.

The NZMWU has now filed a Personal Grievance claim on behalf of Dennis Harris against AFFCO New Zealand through the courts for unjustified dismissal.

The original copies of all documents will be couriered to you as soon as possible.

[133] The letter from Talley’s to Mr Maran is arguably not a neutral document seeking an independent report from an expert witness. It would be reasonable to conclude that the section containing the “brief description of the malicious act” sought an outcome from Mr Maran that was favourable to AFFCO.



Expert Evidence

[134] The requirements for being an “expert” capable of providing “expert evidence” in proceedings are set out in the Evidence Act 2006. Section 4(1) of that Act defines these terms as:

expert means a person who has specialised knowledge or skill based on training, study, or experience;

expert evidence means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion.

[135] Counsel for Mr Harris raised concerns about the qualifications and expertise of Mr Maran as an expert witness from the outset. AFFCO raised no such concerns about Ms Morrell. In a memorandum lodged before the investigation meeting, Counsel referred to the decision of the Court in *Tan v Yang and Zhang*¹⁵ where an assessment had been made of Mr Maran’s qualifications and expertise (and contrastingly those of Ms Morrell, who also gave evidence in that case). Relevantly, the Court stated:

[12] It is convenient to deal with issues relating to the expert evidence at this point. Mr Maran is a certified graphologist, which involves the study of handwriting to analyse the writer’s personality. While his report states that he is a certified handwriting and document examiner he confirmed in evidence that he is “not certified as such”. Rather, he gained certification in handwriting and document examination in 2012 via a 26 lesson course conducted over the internet. By comparison, the expert witness called by the defendants, Ms Morrell, has extensive qualifications and experience in the subject matter that is relevant to these proceedings.

...

[15] Self evidently, an expert can only give evidence on matters on which he or she is an expert. I am not satisfied, on the basis of the material before the Court, that Mr Maran had the requisite knowledge and skill to give the evidence he gave or that his evidence was within his area of competence or expertise. Further, the limitations relating to the sample size, which he accepted in cross-examination, were not identified in his report and his conclusion was unqualified in this regard. While Ms Morrell had additional samples available to her (namely eight), she was not able to express anything more than a weak positive opinion that the receipt signature was Mr Tan’s. The conclusions she might otherwise have been able to reach were adversely affected by the paucity of specimen signature documents that were provided.

[136] Mr Maran stated in his written reports lodged with the Authority that he had “provided expert opinion in the NZ courts a few times”. In his oral evidence he stated he had given evidence in the District Court and High Court. He provided a decision to the Authority, which he said was from a matter heard by the District Court. Upon

¹⁵[2014] NZEmpC 65.



review and after discussion with Mr Maran, it became apparent this was actually a decision of the Tenancy Tribunal, which had sat at the District Court. In addition, in one of the High Court decisions referred to by AFFCO in support of its claim that Mr Maran was an expert, his qualifications and expertise were challenged.¹⁶

[137] At the commencement of his oral evidence, Mr Maran confirmed his understanding of the code of conduct for expert witnesses contained in the High Court Rules and he agreed he was, in effect, a witness for the Authority rather than AFFCO. In both his reports provided to the Authority he stated:

I have read the expert code of conduct on Schedule 4 of the High Court rules and present my evidence with the accepted code of conduct. I agree to act in a neutral and impartial manner.

[138] When asked why he had prepared two reports, he appeared confused and stated he had only submitted one report. He eventually agreed he had submitted two reports. This was far from a satisfactory conduct for a person holding himself out as an expert witness. There were really only two plausible explanations for this, either he did not recall submitting two reports or he was unaware that AFFCO had lodged two reports on his behalf.

[139] The changes between Mr Maran's first and second reports were not highlighted. However, it was apparent that since he had completed his first report, the door of Mr White's food locker had been sent to him. In his first report dated 8 September 2015 he stated:

7. The offensive word was written on a locker door. The evidence sent to me via clear colour photograph. All the other documents were the originals.
8. ... I have been informed that the offensive word has been removed and the photograph is now the only evidence.

[140] In his second report dated 18 November 2015, he stated

7. The offensive words were written on a locker door. The locker door was sent to me via courier. This enabled me to examine the "original" words.

¹⁶*NPNZ Investments Limited v Nelson* HC Hamilton CIV-2010-419-692, 15 June 2010 at [7].



[141] When Mr Miles was asked about this, he appeared unable to provide an explanation. Mr Maran said Ms Greenem had informed him the words had been removed from the locker door.

[142] When Mr Maran was asked about the criticism by the Court of his evidence in *Tan*, he said he had given evidence in those proceedings as “graphologist”. He then went on to say he was giving evidence in the present matter as an “expert document examiner”. When asked what had changed in terms of his qualification or expertise since his evidence in *Tan*, Mr Maran said he was making an effort to improve his qualifications and was completing advanced training in document examination.

[143] In response to further questioning, Mr Maran conceded expertise in documentary examination arises out of training in a forensic laboratory – as had been undertaken by Ms Morrell - and that he had not undertaken such training. He also accepted a proposition that his “hobby” as a graphologist had evolved over time into “expertise” as a document examiner. Ms Morrell in her evidence, both written and oral, said Mr Maran would not meet the criteria for membership of the internationally recognised American Society of Questioned Document Examiners, the Australian Society of Forensic Document Examiners or the New Zealand Independent Forensic Practitioner’s Institute.

[144] Mr Maran’s conclusion which did not differ materially between his first and second report about Mr Harris and the word “scab” on the locker was:

The circumstances of analysing anonymous printing can be challenging as it is always the authors intent to deny any connection or link to the offensive word. There were some limitations that restricted a positive identification. However I have detected some important traits and writing characteristics that are contained in both the offensive word and the submitted known documents. Therefore I have determined that is highly probable that the identifiable commons traits on the word ‘scab’ have been identified with the author of the submitted known documents.

...

[145] In contrast, Ms Morrell stated her conclusions as:

CONCLUSIONS

Based on my examination and comparisons and owing to the fact that a lot of the submitted REFERENCE writing supposedly completed by DENNIS HARRIS was not in fact completed by him, then it is not possible to determine authorship of the “SCAB” entries.



I find it astounding that M.MARAN failed to find that the reference material ascribed to DENNIS HARRIS was in fact contaminated and had been completed by him and also other others. In failing to discard any of these writing by others, he has then used this writings by others to form an opinion that DENNIS HARRIS is highly likely to be the writer of the SCAB entries. This examination he has conducted is flawed and the reliability he placed on this examination to form his opinion is also incorrect.

I consider M.MARAN methodologies, observations, opinion and the weight on which he relied on his findings wrong and in direct conflict with my own observations, findings and opinions. I consider that he cannot and should not have reached any conclusions based on only one letter form i.e 'B' as the other three letter forms in the writing of DENNIS HARRIS were not present on any of the reference material provided.

....

[146] Of the reference documents attributed to Mr Harris by AFFCO (and subsequently Mr Maran), Mr Harris confirmed he had written the word "Butcher" on one document and that it was his signature on another document. He said the remainder of the writing was not his. This was consistent with the findings of Ms Morrell.

Conclusions: hand writing evidence

[147] Contrary to the submissions of AFFCO, I find that Mr Maran was not an "expert" at the time he gave his evidence to the Authority. I further find, Mr Maran was not an "expert" within the meaning given to that term in s 4(1) of the Evidence Act 2006. The Authority has jurisdiction to make this finding under cl 2(1)(1)(b) of Schedule 2 to the Act.

[148] In contrast, Ms Morrell was clearly an expert. She provided a very considered report and gave credible oral evidence. I prefer her evidence to that of Mr Maran in all respects. The written and oral evidence of Ms Morrell that particularly assisted the Authority was:

- (i) she could not offer an expert opinion on authorship of the word "scab" based on the reference material provided to her;
- (ii) if she had access to the locker door her opinion would not have changed, as there would still have nothing apart from the letter "B" in the handwriting sample to compare;
- (iii) in an answer to a question from Counsel for AFFCO about whether she could rule out Mr Harris as the author, she said she could not "rule anyone out", and;



(iv) there was no evidence of deliberate disguise in the writing of the word “scab”.

[149] Given the resources deployed to obtain an “expert” on handwriting after Mr Harris was dismissed, this *could* reasonably have been obtained before the decision to dismiss was made and the fact it was done demonstrates this.¹⁷ If it was considered necessary to obtain a handwriting report at all, a procedurally fair approach, and one which a fair and reasonable employer could be reasonably expected to adopt, would have been for AFFCO to cause Talley’s to obtain the report (as it did in the current circumstances), put the report to Mr Harris for comment, review that comment and then confirm reliance on the report or, if criticised by Mr Harris, discount the report, seek a further report from the same person addressing the comment or cause an independent report to be commissioned (or allow Mr Harris do to). These things were not done.

[150] In addition, the effort put into the handwriting report process by AFFCO must be contrasted with its failure to provide Mr Harris and his representatives prior to his dismissal (or after), and subsequently also to the Authority, all the CCTV footage Mr Miles claimed was relevant to his decision-making process and any of the notes made by Mr Miles or Ms Strawbridge during the investigation.

Remedies

[151] Having found that AFFCO was not justified in dismissing Mr Harris, he was entitled to an assessment of remedies to settle his personal grievance.

Reinstatement

[152] As a remedy for his personal grievance, Mr Harris sought reinstatement.¹⁸ The Act provides that reinstatement must be practicable and reasonable.¹⁹ The Court has given guidance as to how to approach this question in *Angus v Ports of Auckland Limited (No 2)*.²⁰ In essence, a broad inquiry into the equities of the respective cases of the parties is required. The Court said:

¹⁷Employment Relations Act, s 103(A)(2) and s 103(A)(2)(a).

¹⁸Employment Relations Act, s 123(i)(c).

¹⁹Employment Relations Act, s 125(2).

²⁰[2011] ERNZ 466



[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

...

[68] ... The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[153] There are a number of factors weighing in Mr Harris' favour for an order of reinstatement. These are a desire to be reinstated; a significant length of service (approximately 35 years); a cultural association with the workplace deriving from his length of service and the fact several members of his immediate family continue to work there; an absence of skills and qualifications outside the meat industry; an inability to obtain alternative employment in Moerewa or surrounds with similar remuneration; no criticism of his work performance; a good disciplinary record; and the finding of the Authority that his dismissal was unjustified.

[154] AFFCO opposed Mr Harris' reinstatement. In the alternative, AFFCO said if Mr Harris was reinstated he should be denied all other remedies "due to the nature and extent of his contribution" relying on the decision of the Court in *De Bruin v Canterbury District Health Board*.²¹

[155] In opposing Mr Harris' reinstatement AFFCO relied on the evidence of Mr White and the assertions of Mr Miles about the impact of Mr Harris returning to the workplace. Unfortunately, Mr White's evidence on this point was tarnished and unsatisfactory. In his oral evidence he completely resiled from the concerns he expressed in his written evidence about reinstating Mr Harris. In that evidence, Mr White stated:

12. I am aware that Dennis has applied to be reinstated to his position with AFFCO. I am concerned that if Dennis were reinstated he could continue his behaviour towards me and that behaviour could be worse because of the locker incident.

²¹[2012] NZEmpC 110.



13 ... I am concerned that reinstating Dennis to his position could cause conflict and disruption in the workplace.

[156] However in his oral evidence, Mr White said that the possibility of Mr Harris' return to the workplace did not worry him and that he did not oppose it. When tested further about Mr Harris' potential reinstatement he said: "good on him, but I don't see what that has to do with me". He then confirmed his evidence had been prepared for him and while he had seen it before and signed it, he said, in response to a question in re-examination from Counsel for AFFCO, the only changes he requested be made were for the removal of some words he did not understand. Tellingly, Mr White also said in his oral evidence that all he wanted was for the "the person" who wrote scab in his locker to clean it off.

[157] Mr White also said he and Mr Harris had been good friends and they regularly socialised together. They also sat together at the same table in the smoko room.

[158] Mr Miles' assertions about the impact of reinstating Mr Harris were:

48. ... [w]e have approximately two hundred and fifty employees who elected to work instead of striking. I would not wish to expose these individuals to Dennis and his antagonistic unionism behaviours.
49. Reo Whyte would be at further risk of intimidation at hands of Dennis.
50. Reinstating Dennis ... would risk wider disruption to the workplace by causing conflict between workers, which would in turn have an impact on AFFCO's smooth operation. The risk of reinstatement of Dennis is significant.

[159] The concern about the further risk of intimidation of Mr White at the hands of Mr Harris was not supported by Mr White's own oral evidence or the consistent denial of Mr Harris that he had engaged in the conduct alleged by AFFCO. Mr Miles' other two assertions were unsupported by evidence and, accepting the submission of Counsel for the Applicant, are so general in nature that little weight must to be afforded to them.



[160] Mr Harris said while he was very upset about what happened and that it had affected his friendship with Mr White, the pair had interacted since his dismissal at a Christmas function and they had waved at each other in the street. I observed both men during the investigation meeting and I did not witness or detect any particular tension between them. On the basis of the evidence of Mr Harris and Mr White, I conclude the relationship between Mr Harris and Mr White does not pose an impediment to the reinstatement of Mr Harris.

[161] On the evidence before the Authority, the opposition of AFFCO to Mr Harris' reinstatement is not sustainable. However, as Mr Harris has been absent from the workplace for a reasonable period, a phased reintroduction may be appropriate and the order for reinstatement will attach conditions that reflect this.

[162] I am satisfied having assessed the relevant factors identified by the Court in *Angus* and the evidence before Authority that reinstatement of Mr Harris is both reasonable and practicable in all the circumstances.

Reimbursement for lost remuneration

[163] Mr Harris claimed reimbursement for lost wages of, at least, three months. Counsel for Mr Harris relying on s 128(3) of the Act and the Court's decision in *Trotter v Telecom Corporation of NZ Limited* [1993] 2 ERNZ 659 suggested that due to the length of time since his dismissal, his inability to find alternative work and his absence from the workplace during the peak of the season, seven months was an appropriate award.

[164] Mr Harris said he had looked hard to find alternative work. He looked in the paper, asked friends in the dairy industry for work and approached a local sawmill. However, prospective employers, including the sawmill, asked for references and he had none to give. During the investigation meeting, Mr Harris said he had recently become aware of some kiwifruit picking work and when asked if he was going to apply for this work, he confirmed he was.



[165] I find that an award of three months pay as reimbursement for lost wages under s 123(1)(b) of the Act is appropriate. In declining to exercise my discretion under s 128(3) of the Act to award Mr Harris reimbursement for seven months lost wages, I have taken into account the fact that Mr Harris has already been granted his primary remedy of reinstatement.

Compensation for humiliation, loss of dignity and injury to feelings

[166] Mr Harris sought \$15,000 compensation for humiliation, loss of dignity and injury to feelings. Mr Harris said he was totally humiliated by his dismissal. He said he had been active in the community, had been outgoing but now found it difficult to face people, could not go out to the shops and felt like he was living like a hermit. He said he was angry and upset about what had happened and that he had trouble sleeping due to worrying about money and paying his bills.

[167] Counsel for AFFCO submitted that there was minimal evidence of the effect of the grievance. However, in my view, Mr Harris did put sufficient evidence before the Authority to warrant an award of compensation under s 123(1) (c)(i) of the Act.

[168] I accept that Mr Harris suffered humiliation, loss of dignity and injury to feelings because of his dismissal. I also take into account the serious allegation made against him by AFFCO and the impact that had on him.

[169] Subject to a consideration of contribution under s 124 of the Act, which is outlined below, I find \$7500 as compensation for that humiliation, loss of dignity and injury to feelings is an appropriate amount to award under s 123(1)(c)(i) of the Act.

[170] The amount is consistent with recent awards by the Court and one made mindful of the Court's guidance on granting such remedies.²² The amount is also appropriate, in my view, having regard to the overall basket of remedies awarded to Mr Harris.

²²See, for example, *The Warehouse case*, prior to the 33.33% reduction for contribution and *Howard v Carter Holt Harvey Packaging Limited* [2014] NZEmpC 157, prior to the 70% reduction for contribution. See also, *Hall v Dionex Pty Limited* [2015] NZEmpC29 at [87]–[90] and *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34 at [133].



Contributory behaviour by Mr Harris?

[171] Having found that Mr Harris was entitled to remedies for a personal grievance for unjustified dismissal, I was required by s 124 of the Act to consider whether he contributed to the situation giving rise to his grievance.²³

[172] For Mr Harris, it was submitted that as he was involved in no wrongful action, remedies should not be reduced.

[173] AFFCO, relying on the Court's decision *De Bruin v Canterbury District Health Board*²⁴, submitted that if the Authority found that Mr Harris' dismissal was unjustified and ordered reinstatement, any other remedies available to him should be reduced by 100% on the basis he committed the serious misconduct for which he was dismissed.

[174] Having found AFFCO's decision to dismiss Mr Harris and the process adopted to reach that decision was not what a fair and reasonable employer could have done in all the circumstances at the time, I decline to do so.

[175] Accordingly, there is no deduction for contribution under s 124 of the Act.

Orders

[176] In summary, the orders made are for AFFCO to settle Mr Harris' personal grievance by:

- (i) Reinstating him to his previous position or one no less favourable to him at the Moerewa Plant under s 125 of the Act from the date of this determination (subject to particular conditions set out below); and
- (ii) Paying him 3 months pay as reimbursement for lost wages under s 123(1)(b) of the Act within 28 days; and
- (iii) Paying him \$7,500 as compensation for hurt, humiliation and injury to feelings under s 123(1)(c)(i) of the Act within 28 days.

The order for reinstatement is subject to the following conditions:

- (i) Mr Harris is to be reinstated to AFFCO's payroll from the date of this determination; and

²³*The Warehouse case* at [180].

²⁴[2012] NZEmpC 110



- (ii) AFFCO may, at its discretion, direct Mr Harris not to return to work for a period of up to 14 days; and
- (iii) During that period of up to 14 days, AFFCO may direct Mr Harris to undertake such retraining and reorientation activities it deems necessary for him to resume his duties at the Moerewa Plant;
- (iv) The parties are to seek mediation assistance to resolve any problems re-establishing the working relationship.

Costs

[177] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Mr Harris has 28 days from the date of this determination in which to file and serve a memorandum on costs. AFFCO has a further 14 days in which to file and serve a memorandum in reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[178] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.²⁵



Andrew Dallas
Member of the Employment Relations Authority



²⁵*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.