

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Ronald Nepia and Sonny Morunga (Applicants)

AND AFFCO New Zealand Limited (Respondent)

REPRESENTATIVES Simon Mitchell for the Applicants
Graeme Malone for the Respondent

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Napier, 28 November 2006

TELEPHONE CONFERENCE 20 February & 5 March 2007
& FURTHER INFORMATION By 26 March and 4 April 2007
AND SUBMISSIONS

DATE OF DETERMINATION 26 April 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a claim for unjustified dismissal. It involves allegations of unauthorised possession of company product and the unauthorised distribution of that product. The applicants' dismissals involved the use of unnamed informants in an investigation conducted by the respondent to justify its decisions to dismiss Ronald Nepia (also known as Ronald Waihape) and Sonny Morunga for serious misconduct. They were suspended and summarily dismissed. Mr Nepia is seeking reinstatement. Mr Morunga is not pursuing reinstatement. Both are seeking lost wages and compensation.

The facts

[2] This is a matter in which AFFCO identified significant theft occurring at its Wairoa freezing works. It engaged the services of a private investigator, Peter Archer, who was assisted by the company's project manager, Mark Patterson, to conduct an investigation. Interviews and site observations were conducted by them. Cameras were put in place near the freezers but not the boning room. Informants told Messrs Archer and Patterson that Ronald Nepia and Sonny Morunga, who worked in the carton area, were thieves and that they had possession and distributed the company's product.

[3] Preliminary interviews were conducted with Messrs Nepia and Morunga on 6 April 2006 to inform them of the investigation. They say they denied stealing meat. Mr Nepia says Mr Archer called him a liar when he denied stealing meat. Mr Archer denied that he called Mr Nepia a liar. AFFCO says that Messrs Nepia and Morunga never denied stealing meat during the investigation. However, prior to the 6th they did deny stealing meat according to Mr Archer's evidence (Archer: para13). Also, Mr Archer says that he asked each of them if they knew of any thieving would they tell him. He says Mr Morunga did not reply and just shrugged his shoulders and Mr Nepia replied "yes", meaning he would tell them.

[4] On 12 April 2006 the company held separate meetings with Messrs Nepia and Morunga, and a Union Official was present at each meeting. This was after Mr Archer had spoken to his informants. Present for the company were Darden King, the production manager, Mike Laurence, the Plant Manager, and Messrs Patterson and Archer. Mr Archer says the applicants were the "*main thieves in the boning room*" and threatened people, based on the confidential information he had received from the informants. Messrs Nepia and Morunga admit that these allegations were put to them. They say there was nothing more they could say but are adamant that they did deny stealing. The three AFFCO witnesses who were at the meetings say that Messrs Nepia and Morunga would

not make any comment on the allegations. There is a difference between deciding not to make any comment on allegations, and denying that they were stealing, given that AFFCO did not give them detailed and specific evidence for them to reply to the allegations of what, where and how they were involved, and when both Messrs Nepia and Morunga were told of a general allegation that they were thieves. I am supported by the evidence from Mr Archer that prior to the 6th they did deny stealing meat.

[5] Messrs Nepia and Morunga were handed suspension notices prepared on 11 April 2006. Apparently the Union had been given prior notice of the suspension notices. The notices included a letter of the allegations that both men had unauthorised possession of company product, namely meat, and that they had been distributing it.

[6] The next meetings were held on 19 April 2006, with Messrs Nepia and Morunga separately. The same people attended, except Mr Laurence was not present and there was a change of the Union officials. During an adjournment Mr King decided to believe he had enough information to dismiss both men, considering the information given to Mr Archer from the informants. After the adjournment and without any other comment from Messrs Nepia and Morunga, Mr King dismissed them.

The issues

[7] There is no issue about the right of the company to use informants in exceptional circumstances, so long as it acts fairly. The applicants say they were treated unfairly because the allegations were rumours and they were not provided with any evidence or details of what they were alleged to have done.

[8] AFFCO has relied upon being told by a number of informants that the applicants were thieves and had stolen meat from cartons and distributed company meat without authorisation. It also says it relied upon them not making any comment or denying the allegations.

- Was the information the company relied upon sufficient to justify its decisions?
- Did the company act fairly?
- Would a fair and reasonable employer make an adverse inference from employees who do not make any comment on the allegations put to them?

Discussion

[9] Unnamed informants were used because Wairoa is a small town with gang connections and there was the possibility, I am told, that people on the pay roll would be intimidated and threatened if they came forward. The informants insisted on confidentiality. Mr Archer, for the company, was prepared to give it to them. He has maintained that confidence.

[10] The company was also relying upon information from unnamed informants without giving particulars and details of any incidents to the applicants. Therefore the applicants could not test the veracity of any information despite the company gathering information from the informants prior to 6 April.

[11] It is my decision the two dismissals were unfair. Procedurally the applicants were not told of the employer's findings and the reasons for the findings before they were dismissed for the applicants to have an input into the penalty. A fair and reasonable employer would have given the applicants that opportunity, especially when no warning was given to the applicants that an adverse view would be taken of their not commenting further on the allegations.

[12] A fair and reasonable employer would have given the applicants notice that an adverse view would be taken if they did not comment on the allegations. That decision was not put to the applicants. The applicants say that the paucity of information meant they had nothing to comment on. I accept this.

[13] Mr King relied upon Mr Archer's investigation as it related to the information from the informants. He says he made a decision to dismiss the applicants because there was no other option, given the seriousness of their alleged behaviour. Given that he says he did not hear any denials from the applicants it is my decision that it was more than reasonable for him and Mr Archer to have warned them of the consequences of not commenting and not providing some response to the allegations, especially now that they are denying stealing and distributing meat. I note that they were represented at the time. Apparently the Union officials involved may have known of the informants' names and information. If this is so the officials were seriously compromised by the company and there is no evidence that they were able to test the veracity of the informants' information or that they did test it. As a consequence I have some real disquiet about this matter and whether or not the applicants' best interests were being properly represented if the Union officials knew things that the applicants did not know. It was not sufficient for the company to rest its decisions on the applicants not commenting. This is because no information has been given to me on how Mr King reached a conclusion not to believe the applicants and to rely on Mr Archer's informants.

[14] Furthermore the responsibility rested with AFFCO to produce evidence to match the seriousness of the allegations. I accept that Mr Archer spoke with various informants and gained information from them. However, because no one has been able to test the veracity of the informants' information, AFFCO has not been able to satisfy its responsibility to produce evidence of any wrong doing. The absence of any detail of any incidents supports this conclusion. Therefore

relying upon generalised allegations from unnamed informants and that the applicants decided not to make any comment was not enough to support dismissing the applicants for serious misconduct as the “*main thieves in the boning room*”, without at least producing the details and information relevant to the allegations concerning both applicants. Mr Morunga had shrugged his shoulders in response and Mr Nepia told Mr Archer that he would tell him if he knew anything. Both of them had told Mr Archer that they had not stolen meat from the plant. These were factors that should have been taken into account.

[15] Procedurally the applicants were not told of the employer’s findings before they were dismissed. They had no opportunity for any input into the penalty or into any other options, although Mr Nepia’s service was taken into account and consideration given to a support person’s reference about his honesty and integrity. There was also an absence of any information on what the findings involved that Mr King relied upon.

Conclusion

[16] Therefore, it is my decision that Messrs Nepia and Morunga have personal grievances for unjustified dismissal. I now turn to remedies and consider contribution (under s 124 of the Act).

The Remedies

[17] To recap, both applicants were dismissed immediately on 19 April 2006. There is no evidence of any wrongdoing by the applicants that give rise to a finding of contributory fault.

[18] Mr Sonny Morunga is not seeking reinstatement.

[19] Further any decision by Mr Morunga not to make a comment on an allegation could imply some guilt. However this has to be balanced by the seriousness of the allegations which were not

supported by detailed evidence or any instances being put in writing to test. As such that is not enough to make any finding that Mr Morunga was involved.

[20] Mr Morunga is entitled to lost wages and compensation. Mr Morunga mitigated his lost wages some time after his dismissal. He was employed in another job from 14 August 2006. He had no job for the first four months after his dismissal without an adequate explanation of mitigating his lost wages immediately. I have limited his claim to three months lost wages on his base wages. Leave is reserved to return to the Authority if this cannot be settled.

[21] Mr Morunga is also entitled to compensation. I award him \$8,000 compensation for humiliation, loss of dignity and injury to feelings.

[22] Mr Nepia is pursuing reinstatement. For the same reasons above I am not able to determine if Mr Nepia took company product and distributed it. Any suspicion that Mr Nepia was involved has been affected by him not being told what the detailed evidence in support of the allegations was. He is entitled to go back to work if he wishes. I will reinstate him to his previous position or a position not less advantageous. He is also entitled to receive lost wages and compensation. Mr Nepia mitigated his lost wages for the period 26 July 2006 to 20 August 2006: \$1,993.86; and the period 10 October 2006 until 28 November 2006: \$4,588.74. He is entitled to his lost wages for the period from 20 April 2006 to 20 July 2006 without any deduction. Leave is reserved to return to the Authority if this cannot be settled.

[23] Mr Nepia is also entitled to compensation. I award him \$8,000 compensation for humiliation, loss of dignity and injury to feelings.

Orders

[24] AFFCO New Zealand Limited is to pay:

- Sonny Morunga three months lost wages on his base wages without any deduction for any earnings, since there was no contribution found. The parties are to take into account any seasonal end to employment as a factor in the calculation if it is relevant.
- Sonny Morunga \$8,000 compensation for humiliation, loss of dignity and injury to feelings.
- Ronald Nepia lost wages for the period from 20 April 2006 to 20 July 2006 on his base wages without any deduction of earnings received by him after 26 July 2006 and since there was no contribution found. A further adjustment may need to be made in taking into account any seasonal end to Mr Nepia's seasonal employment as a factor in the calculation if it occurred in the same period of the award made.
- Ronald Nepia \$8,000 compensation for humiliation, loss of dignity and injury to feelings.

[25] AFFCO New Zealand Limited is to reinstate Ronald Nepia to his previous position or a position not less advantageous at the Wairoa plant as soon as is practicable.

[26] Costs are reserved.

[27] Leave is granted to return to the Authority on the calculation of lost wages if the matter cannot be settled.

P R Stapp
Member of the Authority