

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 51
5605232

BETWEEN ROBERTA RATU
 Applicant

A N D AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Mitchell, Counsel for Applicant
 Christine Pidduck, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 05 February 2016 from Applicant
 11 February 2016 from Respondent
 12 February 2016 from Applicant

Date of Determination: 19 February 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] This determination resolves Ms Ratu's urgent application for interim reinstatement pending the outcome of her personal grievance claims.

[2] Ms Ratu was employed by AFFCO New Zealand Limited (AFFCO) as a meat process worker at its meat processing plant situated at Rangiruru (the Plant). Ms Ratu is a union delegate and the Secretary at the Plant for the New Zealand Meat Workers Union (the Union).

[3] Ms Ratu was employed for approximately 15 years before she was dismissed for serious misconduct on 22 December 2015. Ms Ratu claims her dismissal was

unjustified. Ms Ratu also claims AFFCO unjustifiably disadvantaged her when it placed her on unpaid suspension on 01 December 2015.

[4] The terms and conditions of Ms Ratu's employment are contained in an individual agreement which is based on the AFFCO New Zealand Core Employment Agreement in force between 01 May 2012 to 31 December 2013, but continuing in force until 31 December 2014 (the expired CA) pursuant to s.53 of the Employment Relations Act 2000 (the Act).

[5] At the beginning of the 2015/2016 season AFFCO declined to allow Union members to return to work unless they signed new individual employment agreements. The legality of this was challenged by the Union and as a result of these legal proceedings the Employment Court held that workers were entitled to the terms of individual employment agreements based on the expired CA.¹

[6] The Employment Court's decision was issued on 18 November 2015. Ms Ratu says that AFFCO began implementing the return to Union conditions the week commencing 30 November. Ms Ratu says that the following day (01 December) she received a phone call from a delegate saying union members felt that the supervisors were harassing them and that tempers were at boiling point.

[7] Ms Ratu says she decided to go to the Plant to calm and reassure members, discuss matters and to reassure workers. Ms Ratu says she decided to take a co-worker, Charmaine Takai (who was a Union delegate in the lamb cuts section), with her so that she (Ms Takai) could talk to the Union members who Ms Ratu did not know very well.

[8] Ms Ratu and Ms Takai were rostered to work the Afternoon shift on 01 December but went to the Plant during the course of the Dayshift. They both entered the Slaughter Floor without notifying management or seeking consent to do so and then began speaking to workers who were working on the Slaughter Line.

[9] They were approached by the Supervisor who called in the Production Manager Mr David (Ike) Tapsell who wanted to know what they were doing. Ms Ratu says she told Mr Tapsell that she was talking to members and he told her to go and see the Plant Manager Mr Kevin Casey.

¹ [2015] NZEmpC 204.

[10] Mr Tapsell then raised an issue with Ms Ratu involving a member in the Offal Room and Ms Ratu says she told him she would contact the Offal Supervisor about it. Ms Ratu also says she told Mr Tapsell she would go and see Mr Casey.

[11] Ms Ratu then went to the Offal Department which is below the Slaughter Floor and spoke to members and the Supervisor. From there Ms Ratu and Ms Takai went to see Mr Casey who was occupied with visitors, so they left him a note then left the site.

[12] When Ms Ratu and Ms Takai arrived at work later that same day to start work for their Afternoon shift, they were asked to attend a meeting with Mr Casey. Mr Tapsell was present as a note taker. Mr Casey advised them that he was suspending them without pay while AFFCO investigated their alleged breaches of health and safety rules.

[13] AFFCO says that Ms Ratu's and Ms Takai's actions put the workers at risk. AFFCO also says that Ms Ratu and Ms Takai failed to comply with a reasonable instruction to go and see the Plant Manager Mr Kevin Casey because they visited another production department then left the site without speaking to Mr Casey.

[14] AFFCO denies that Ms Ratu and/or Ms Takai were acting as delegates on 01 December and it says that there were other delegates on site and working at the material time for workers to speak to. AFFCO also says the custom is for delegates to seek permission from the Plant Manager to speak to workers during production but that did not occur in this case.

[15] Ms Ratu received a letter dated 04 December 2015 inviting her to an "Investigation meeting" on 9 December 2015. The letter identified the following "allegations of serious misconduct":

- a. She had endangered the health and safety of herself and others and had affected production and quality;
- b. Breached Plant Safety Rules;
- c. Failed to follow "a reasonable instruction" to see Mr Casey.

[16] Ms Ratu attended that meeting on 09 December with her lawyer, Mr Simon Mitchell. Also present were Mr Casey, Mr Scott Fry - Industrial Relations Manager and Mr Tapsell.

[17] Ms Ratu says that at the outset of the meeting Mr Mitchell asked for clarification of the status of the meeting because while the letter of 04 December is headed "*Investigation Meeting*", it also referred to "*Allegations of serious misconduct*" and stated that the purpose of the meeting was to provide Ms Ratu with "*an opportunity to put forward your explanation*" and that if found guilty of serious misconduct she could be dismissed.

[18] There is no dispute that Mr Fry advised that the meeting was "*an investigation meeting*" and that the reference to "*disciplinary*" was a "*typo*". Ms Ratu claims that Mr Mitchell then stated he would not make submissions about the allegations of misconduct as the meeting was still at the investigative stage. Neither Mr Fry nor Mr Tapsell responded to that claim in their affidavits.

[19] Ms Ratu says she responded to AFFCO's questions and that Mr Mitchell raised a personal grievance regarding her unpaid suspension which was confirmed in a letter he sent to AFFCO the following day.

[20] Mr Mitchell's letter dated 10 December also refers to AFFCO's "*advice that it was an investigation meeting*". A subsequent letter sent by Mr Mitchell on 17 December again refers to "*the investigation meeting*" on 09 December. A letter from Ms Pidduck to Mr Mitchell dated 18 December refers to "*the investigation meeting*" to a "*preliminary view [having] been formed*" and to the "*outcome of the investigation process*" being expected by 22 December.

[21] Ms Ratu then received a dismissal letter dated 22 December informing her she had been summarily dismissed for serious misconduct and that AFFCO would not be reimbursing her for her unpaid suspension.

[22] Ms Ratu says she was expecting the outcome of the investigation to be communicated to her and if the matter was to go further then she believed that a disciplinary process would have been undertaken before any disciplinary action would be taken against her.

[23] AFFCO says Ms Ratu's unpaid suspension and dismissal were both procedurally and substantively justified. AFFCO opposes Ms Ratu's application for reinstatement. It says that reinstatement poses an unacceptable safety risk.

Relevant law

[24] Section 127 of the Act allows the Authority to exercise its discretion to order interim reinstatement of an employee pending the substantive determination of the employee's dismissal grievance claim against their employer.

[25] When determining whether or not to exercise its discretion to order interim reinstatement, the Authority is required to act judicially by applying the law relating to interim injunctions having regard to the objects of the Act. I consider that the principles relating to interim injunction proceedings before the Authority are so well established I do not need to set them out here.

[26] This interim reinstatement application has been determined based on untested affidavit evidence only. Therefore conflicts in the evidence cannot be resolved from the affidavit evidence only.

[27] It is therefore necessary to keep in mind that any findings of, or discussions about, the facts at this interim stage are provisional only and the Authority's view on these matters may change after the claims have been fully investigated and the witnesses properly examined during the course of the Authority's substantive investigation meeting.

Issues

[28] The following issues are to be determined:

- (a) Does Ms Ratu have an arguable case that her dismissal was unjustified?
- (b) If so, does Ms Ratu have an arguable case for reinstatement?
- (c) Where does the balance of convenience lie until the substantive matter can be determined?
- (d) Where does the overall justice of the case lie until the substantive matter has been determined?

Does Ms Ratu have an arguable case that her dismissal was unjustified?

[29] Whether there is an arguable case is to be determined in light of the justification test in s.103A(2) of the Act. This requires the Authority to assess whether AFFCO's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Ms Ratu.²

[30] A fair and reasonable employer is expected to comply with its statutory obligations which includes the four procedural fairness tests in s.103A(3) of the Act and the good faith obligations in s.4(1A) of the Act. Failure to do so is likely to fundamentally undermine an employer's ability to justify its actions and/or dismissal.

[31] Ms Ratu argues that her dismissal was unjustified because AFFCO breached its obligations under:

- a. s.103A(3)(c) of the Act because she was never given an opportunity to respond to AFFCO's specific concerns before she was dismissed; and
- b. s.103A(3)(d) of the Act because the failure to provide her with an opportunity to respond to AFFCO's specific disciplinary concerns meant that AFFCO was not in a position to, and therefore failed to, genuinely consider her explanations.

[32] Ms Ratu says she believed that at the meeting on 09 December she was only required her to give a factual account of the matters that had occurred on 01 December so AFFCO could decide whether or not it was appropriate to pursue disciplinary action against her.

[33] Ms Ratu claims that she therefore did not provide the comprehensive sort of substantive explanations she would have about why her actions could not amount to serious misconduct.

[34] Ms Ratu's evidence is that her lawyer made that clear and that she would have provided more comprehensive explanations if she knew that a disciplinary outcome was going to be imposed (as opposed to a disciplinary process being entered into) as a result of the 09 December meeting.

² Section 103A(2) of the Act

[35] Ms Ratu also says that she was denied any opportunity to raise mitigating factors with AFFCO for it to consider before she was dismissed because she was unaware AFFCO had already concluded that she had engaged in serious misconduct.

[36] I accept Mr Mitchell's submissions that there is a significant difference between an employee answering an employer's questions during a non-disciplinary (essentially fact finding) investigation process compared to responding to specific allegations during a formal disciplinary process on notice that a disciplinary sanction is likely to be imposed if the explanation is considered to be unsatisfactory.

[37] Ms Ratu also challenges AFFCO's substantive justification of her dismissal. Her affidavit sets out in detail why her actions could not be viewed as serious misconduct by a fair and reasonable employer.

[38] For interim reinstatement purposes and on the basis of as yet untested evidence I consider that there is a properly arguable case that Ms Ratu's dismissal was unjustified.

Does Ms Ratu have an arguable case for reinstatement?

[39] It is also necessary for Ms Ratu to establish that she has an arguable case for reinstatement should her dismissal grievance succeed.

[40] Section 125 of the Act provides that reinstatement is no longer the primary remedy; it is just one of a range of remedies that may be awarded. Reinstatement may be awarded if it is "*practicable and reasonable to do so*".

[41] AFFCO claims that the Plant may greatly reduce its capacity around the end of March which it says may put Ms Ratu's employment in jeopardy if she were to be reinstated. It therefore says that reinstatement is not reasonable or practicable so Ms Ratu does not have an arguable case for reinstatement.

[42] Mr Fry's second affidavit deposes that if interim reinstatement is granted, there is no guarantee that by the time the substantive matter is heard in April that Ms Ratu will still have work available to do.

[43] I consider that this evidence is somewhat speculative at this stage. Mr Mitchell submits that seniority is the primary consideration in relation to layoffs and

that Ms Ratu is a long serving worker with nearly 15 years' service so it is not a forgone conclusion that she will not have work to do if layoffs are required.

[44] Mr Mitchell also identifies that even if Ms Ratu were to be laid off there is Employment Court authority which provides that she will remain an employee during the period in which she is not working prior to the Plant commencing operations again.

[45] I accept Ms Ratu's evidence that there are limited employment opportunities available for her. Ms Ratu's employment by AFFCO is important to her because her family relies on her income to cover their expenses. Ms Ratu's husband is also employed at the Plant which means that her options of moving to a different town to obtain employment are more limited than someone without such close family ties to the area.

[46] I am satisfied that if Ms Ratu's dismissal grievance succeeds then she has an arguable case for reinstatement.

Where does the balance of convenience lie until the substantive matter can be determined?

[47] The balance of the convenience requires the Authority to balance and assess the respective injustices to the parties for the period until the substantive merits of Ms Ratu's claims can be determined. One aspect of this involves consideration of whether or not damages would be an adequate remedy for any injustice that may occur.

[48] The Authority is required to weigh the potential injustice to Ms Ratu of not being reinstated before a substantive determination is issued by the Authority, assuming she is entitled to the remedy of reinstatement should her grievance succeed, against the potential injustice to AFFCO related to the burdens of having her back in the workplace on an interim basis if she is either found to have been justifiably dismissed or, if the dismissal is unjustified, the Authority declines to award reinstatement as a remedy.

[49] The timing of the substantive investigation meeting scheduled for 18 and 19 April 2016 is a significant factor. It is unlikely that a substantive determination will be available much before the end of April 2016.

[50] I consider this delay is a factor in favour of Ms Ratu's interim reinstatement because her employment ended on 22 December 2015. I consider that the potential injustice of no or reduced income for Ms Ratu for another two months outweighs the potential injustice to AFFCO of her being reinstated on an interim basis.

[51] I do not accept AFFCO's submissions that Ms Ratu is likely to engage in activities which pose a significant risk to herself and/or other workers pending the determination of her substantive claims.

[52] There was no evidence of Ms Ratu breaching health and safety in her previous 15 years of employment. I do not consider there is a significant risk she will do so in the next two months if she returns to work.

[53] I consider that AFFCO's concerns about Ms Ratu acting in an unsafe manner and not following instructions from her managers if she was to be reinstated on an interim basis can be addressed by a thorough safety briefing to be held at the beginning of her shift on the day she returns to work.

[54] In terms of the strength of the parties' respective cases based on the untested affidavit evidence before me I consider that at this initial stage her case is marginally stronger than AFFCO's.

[55] I consider that it is arguable that AFFCO did not properly put its concerns to Ms Ratu to respond to and that she was deprived of an opportunity to provide her explanation as to whether or not the allegations were capable of amounting to serious misconduct and, if so, to raise matters in mitigation.

[56] I do not accept AFFCO's submission that any financial losses faced by Ms Ratu can be remedied by the payment of damages. I have preferred Mr Mitchell's submissions that Ms Ratu is an essential member of the Union. On that basis I consider that there are additional benefits to interested and affected third parties (the Union and its members) associated with Ms Ratu returning to work.

[57] I am not satisfied that these benefits could be adequately compensated by damages should Ms Ratu's claims be unsuccessful. However if Ms Ratu returns to work on an interim basis then AFFCO will get the benefit of her services over that period.

[58] After careful consideration of all relevant circumstances, I consider that the balance of convenience marginally favours Ms Ratu.

Where does the overall justice lie until the substantive matter is determined?

[59] The overall justice of the case requires the Authority to stand back and assess where the overall justice of the case lies for the interim period until the substantive claim has been determined. This involves an exercise of the Authority's discretion.

[60] Although the evidence is as yet untested the Authority must adopt a robust assessment of the relative strengths of each party's case.

[61] Ms Ratu is currently the Union Secretary at the Plant and the Union is involved in ongoing proceedings with AFFCO. The position of the Union president is currently vacant so Ms Ratu as Secretary is the only senior plant official at Rangiruru. I therefore consider it appropriate when assessing the overall justice to consider the position of the Union as an interested third party.

[62] I also consider that the context of the matters in issue needs to be considered. This arose after the Employment Court made specific findings that AFFCO had acted unlawfully in relation to its treatment of Union members at Rangiruru. Ms Ratu says she was engaging with those members who had reached out to her for support and it was in the course of doing so that she engaged in actions which AFFCO categorised as serious misconduct.

[63] The Authority has been provided with evidence from the Union suggesting that its position may be damaged by Ms Ratu not being reinstated. I accept Mr Mitchell's submission that such damage is unlikely to be able to remedied by an award of damages.

[64] For these reasons, I consider that the overall justice weighs in favour of Ms Ratu being reinstated.

Orders

[65] I am satisfied that it is appropriate to exercise the Authority's discretion to order AFFCO to reinstate Ms Ratu until further order of the Authority. This leaves it open to the parties to return to the Authority should the Plant close and there is no work for Ms Ratu to do before the substantive matter has been determined.

[66] Accordingly, within seven days of the date of this determination AFFCO is ordered to reinstate Ms Ratu on an interim basis only until her substantive claims have been determined or until further order of the Authority.

Costs

[67] Costs are reserved pending the outcome of the substantive matter.

Rachel Larmer
Member of the Employment Relations Authority