

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 80
5527554

BETWEEN HILTON ROHE
 Applicant

AND AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

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

Investigation Meeting: 14 May 2015 at Napier

Submissions Received: 18 May & 20 May 2015, from the Applicant
 25 May 2015, from the Respondent

Determination: 24 August 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Hilton Rohe has been a meat processing employee at AFFCO's Wairoa site since 2000. On 21 March 2014 AFFCO laid off 149 workers. Mr Rohe was one of them. He claims he was unjustifiably disadvantaged by his employer's action in laying him off and says he raised a personal grievance in April 2014.

[2] AFFCO New Zealand Limited (AFFCO) denies it unjustifiably disadvantaged Mr Rohe and says he did not raise a personal grievance within the statutory time frame.

[3] An investigation meeting was held to determine the preliminary issue of whether a personal grievance had been raised in accordance with the requirements of the Employment Relations Act 2000 (the Act).

Statutory requirements for raising a personal grievance

[4] The relevant part of s.114 of the Act provides that:

1. *Every employee who wishes to raise a personal grievance must, subject to sub-sections 3 and 4, raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*
2. *For the purposes of sub-section 1, a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

Evidence of the parties

[5] Evidence was given to the Authority by Mr Rohe, Mr Tom Heta, Union Secretary at the Wairoa Works, Mr Darden King, a production manager at the Wairoa Plant, and Mr Trevor Shaskey, a Human Resources and Health and Safety Coordinator employed by AFFCO at its Wairoa Plant. In accordance with s.174(e) of the Act I will not set out a record of all the evidence heard in the course of the meeting but will refer to those parts of the evidence which I found particularly relevant.

[6] Mr Rohe gave evidence of being surprised by his inclusion in the layoff on 21 March 2014. He referred to the AFFCO New Zealand Core Employment Agreement, which had expired but the conditions of which remained in place in accordance with s.53 of the Act. The collective agreement provided at clause 29.3 for layoffs to be based on seniority subject to experience, employment record, competency and skills of individuals. He said AFFCO uses a matrix points-based system to determine layoff and that he was marked critically due to his absences from work.

[7] Mr Rohe had issues with this because his absences were all legitimate. They included attendance at his brother's tangi, and six days absence had been shown for six occasions on which he had taken only the last hour of each working day to attend physiotherapy in relation to a workplace injury.

[8] Mr Rohe says he discussed his absences with Mr Heta and told him he was unhappy at being selected to be laid off. Mr Heta organised a meeting, which Mr Rohe says took place on 15 April 2014, with Mr King and Mr Shaskey. It was Mr Rohe's evidence that each day of his absence was looked at and that, at the end of the meeting, Mr King could not give an explanation for why he had been laid off on the basis of the matrix.

[9] Mr Rohe says Mr King assured him that he would look into the matter and come back to the Union Secretary and him.

[10] When nothing further was heard from Mr King, Mr Rohe says he contacted Eric Mischefski, who is the Union organiser, and asked him to bring a grievance on his behalf. Mr Mischefski wrote to the Plant Manager at Affco by letter dated "3.6.2014", emailed on 6 July 2014. I shall return to that letter later.

[11] Mr Heta's evidence was also that the meeting with Mr King and Mr Shaskey took place on 15 April 2014. He produced his diary notes for 15 April which referred to the meeting. Mr Heta said the purpose of the meeting was to discuss Mr Rohe's absenteeism and his being wrongfully laid off. He said leave records were produced in the course of the meeting and these were considered in some detail. Some leave had been recorded that Mr Rohe had not taken.

[12] Mr Heta said he wanted a response from Mr King about Mr Rohe's absences. He said he told Messrs King and Shaskey he did not think Mr Rohe should have been laid off on the basis of ACC approved leave which had resulted from a work place injury. Mr Heta was adamant Mr King had said he would get back to him and Mr Rohe on that matter.

[13] Mr Heta said he had had an earlier meeting on 3 April with Mr Shaskey and Mr Vaughan McNabb, a supervisor at the AFFCO plant. Mr Rohe had not attended that meeting and nor had Mr King. Mr Heta said the meeting of 15 April was a continuation of the 3 April meeting.

[14] It was Mr King's evidence that the meeting that had been referred to by Mr Rohe and Mr Heta had taken place on 3 April 2014. He acknowledged, however, he had not made notes of the meeting and that he relied on a file note taken by Mr Shaskey for his recollection of the meeting date. Mr King said the meeting had been called by Mr Heta on Mr Rohe's behalf because of their concern over three days of

absenteeism of which they were uncertain. He said they went through all the attendance reports and made changes to Mr Rohe's employment record based on that.

[15] Mr King said there was a discussion around the counting of approved leave and ACC leave for purposes of compiling the matrix on which decisions regarding who would be laid off were based. Mr King said this had been a particular concern of Mr Heta's since 2012 when the criteria for lay off in the core collective ceased to be based solely on seniority.

[16] By the end of the meeting Mr King said he believed Mr Rohe's concerns about time taken off for visiting the doctor and physiotherapist's visits had been addressed. There was nothing further for the employer to investigate and there was no reason for him to go back to Mr Heta or Mr Rohe with any further information. After the adjustments to his leave record Mr Rohe remained over the threshold.

[17] When Mr King was asked whether, at the end of the April meeting, he knew Mr Rohe to be unhappy about the ACC leave being included in the calculation for purposes of the matrix, Mr King reiterated that this was a hobby horse of Mr Heta's. He did not understand specifically Mr Rohe to be upset over this issue but he certainly understood that Mr Heta disagreed with the change that had been made in 2012.

[18] Mr King said the first he knew that Mr Rohe wanted to raise a personal grievance was on 6 July 2014 when he was informed of the letter emailed by Mr Mischefski that day.

[19] It was Mr Shaskey's evidence that he took part in the meeting which he was certain took place on 3 April 2014. He said he came in and out of the meeting on several occasions to print out attendance records for Mr Rohe from the computer in his own office. Mr Shaskey said he made a file note of the meeting immediately after it had finished and that was how he knew it took place on 3 April.

[20] When asked about another meeting Mr Heta said had taken place on 3 April between himself, Mr Shaskey and Mr McNabb, Mr Shaskey agreed he had met with Mr Heta that day. He said that meeting had not been in connection with Mr Rohe.

[21] Mr Shaskey also provided copies of his diary entries for 3 April and 15 April. His diary entry for 3 April refers to a meeting with Mr Rohe. The entry appears to have been written in anticipation of the meeting. Mr Shaskey confirmed Mr King's

recollection of the meeting which was that Mr Rohe's attendance records were examined at length and changes were made to his employment record on the basis of the discussion. He said his understanding at the end of the meeting was that matters had been clarified for Mr Rohe and that all Mr Heta's questions had been answered.

[22] When asked whether Mr Rohe was unhappy at the end of the meeting Mr Shaskey's response was that *like the other 148 workers who had been laid off he would not have been happy*. However, Mr Shaskey said Mr Rohe did not make it clear that he was unhappy or that he wished to raise a personal grievance. Although he did not think either Mr Rohe or Mr Heta was happy with the clarifications that had been provided, nor did he think they expected to receive any further information from him or from Mr King at the conclusion of the meeting.

Mr Mischefski's letter

[23] The letter that Mr Mischefski emailed to AFFCO on 6 July was headed "*Personal Grievance Hilton Rohe*" and began:

"Please be advised that a personal grievance exists between Hilton Rohe and AFFCO NZ (Wairoa). The nature of the grievance is disadvantage brought about as a result of him being seasonally laid off prematurely.

Facts giving rise to this grievance relate to the employer's application of clause 31 of the Affco Core Collective Agreement (the CEA).

Mr Rohe has been continuously employed at the Wairoa plant for 13 seasons.

On the 21st of March 2014 Hilton was laid off from his seasonal employment."

[24] The letter referred to the selection criteria used by the employer to determine selection for seasonal layoff, which was known as "the Matrix". It said that before his layoff, Mr Rohe's supervisor had advised him he had scored a "7" but that, at a meeting Mr Rohe had attended on 15 April 2014 with Mr Heta, Mr King, and Mr Shaskey, he had been advised that his ranking was "11" and that this was largely determined by the amount of work time that he was absent.

[25] Mr Mischefski's letter also referred to being informed by Mr King during the 15 April meeting that he had been unavailable for normal/usual work for 20 or 22 days. Mr Mischefski said the meeting had ended:

"with Mr King advising Hilton that he (Darden) would get back to him with a breakdown of his time off work. At this time Hilton was of the opinion that he would have a chance to assess the company records regarding his time off and would be able to put his case. Unfortunately as at 3.7.2014 he has not heard back from Mr King regarding this matter".

[26] The letter also noted:

"Hilton has now got to the point that he believes that he will not get an audience with Mr King to further discuss this matter and has no choice but to file this grievance."

[27] Mr Mischefski ended his letter by asking the Plant Manager to *"contact the writer as soon as practicable so as to try and remedy this grievance as close to its source and as soon as possible"*.

Submissions and discussion

[28] Mr Mitchell submits Mr Rohe's grievance was raised at the meeting between himself, Mr Hete, Mr King and Mr Shaskey that he says occurred on 15 April 2014 and that Mr Mischefski's letter confirmed the grievance. He submits the date of the meeting is not critical to determining whether or not a grievance was raised within the 90 day period, although it is a matter about which the Authority will need to make factual findings.

[29] Ms Webster disagrees and submits Mr Rohe's counsel had acknowledged, in October 2014 that his personal grievance was raised more than 90 days after he had left his employment. She referred to a letter from Mr Mitchell dated 17 October 2014 and attached to the AFFCO's amended statement in reply of 12 May 2015 (in response to an amended statement of problem filed by Mr Rohe).

[30] In that letter Mr Mitchell stated:

"It is accepted that the personal grievance was raised more than ninety days after Mr Rohe had left his employment, following the seasonal layoff on 21 March 2014.

However, it is not accepted that the grievance was raised outside the ninety day period set out in Section 114(1) of the Employment Relations Act.

It is Mr Rohe's view that he only became aware that he had been treated unfairly and had a personal grievance at a meeting with

Darden King held on 15 April 2014. This was the time that Mr Rohe became aware of the reason he had been laid off."

Discussion

The event giving rise to the grievance

[31] I find the date of the meeting between Mr Rohe, Mr Heta, Mr King and Mr Shaskey is not critical to determining whether Mr Rohe's personal grievance was raised within the statutory time frame. The critical issue is whether Mr Rohe (or Mr Heta on behalf of Mr Rohe) raised a personal grievance at that meeting.

[32] For the purposes of s. 114, the event that triggered the commencement of the 90 day period for raising a grievance was Mr Rohe's being laid off on 21 March 2014. The fact that he had questions and concerns over the way in which his employer had applied selection criteria in including him in the seasonal lay off did not alter that. Nor did his understanding, whether correct or incorrect, that Mr King would get back to him following their April meeting affect the date the "*action alleged to amount to a personal grievance occurred or came to (his) notice*".¹

[33] Mr Rohe no doubt hoped that the intervention of his union would persuade his employer to amend his ranking on the Matrix assessment system and result in the reversal of the decision to lay him off. However, the basis for his grievance was the fact of being laid off on 21 March, not the methodology used by his employer to include add his name to those of the other 148 workers who were also laid off. Mr Mischefski's letter of 3 July 2014 makes that clear in its opening paragraph which I have cited above.

[34] Mr Rohe's meeting in April 2014 to discuss the application of the selection criteria that had led to his inclusion in that group of workers was not the date his personal grievance arose or came to his attention. As I have already noted, that had occurred on 21 March 2014.

Was Mr Rohe's personal grievance raised at the April meeting?

[35] Mr Heta's evidence during the investigation was that his role in the meeting with Mr King and Mr Shaskey was to collect information. In his reply brief of evidence he said, at paragraph 11:

¹ Section 114(1) of the Act.

"I was waiting for information from the company, and for that reason did not raise a grievance."

[36] In answer to my question about who had raised Mr Rohe's personal grievance, Mr Heta said Mr Mischefski had done that in accordance with the Union's process. He reiterated that his part was "*collecting information*".

[37] In support of his assertion to have been awaiting information, Mr Heta referred to emails he had sent to Mr King on 25 June and 3 July 2014. I have considered those emails, the first of which referred to the April meeting and requested information regarding seven days absence by Mr Rohe that had been taken into account in the assessment for lay off. The second email was a reminder from Mr Heta that he was still awaiting a response.

[38] It is clear from the emails that Mr Heta anticipated receiving clarification over the status of the seven days. However, neither email refers to a grievance raised in the April meeting, or suggests anything other than a request for information. I find Mr Heta did not raise a personal grievance on Mr Rohe's behalf in April or at any later date.

[39] Mr Rohe's evidence was that Mr Heta and Mr King did most of the talking at the April meeting. There had been a discussion over the number of days of leave taken by Mr Rohe. Mr Heta had told Mr King that he (Mr Rohe) should not have been laid off on the basis of seniority. Mr Rohe said Mr King and Mr Shaskey told them they would look into the issue of the seven days and get back to Mr Heta.

[40] Mr Rohe said he waited to hear from Mr King and, when he did not hear back either directly, or through the union, he contacted Mr Mischefski and asked him to bring a grievance on his behalf.

[41] From the evidence of both Mr Heta and Mr Rohe I am satisfied neither of them raised a personal grievance in the course of the meeting in April 2015. While they raised issues over the days of absence taken into account in the decision to include Mr Rohe in the lay off, that did not constitute the raising of a personal grievance. Both men acknowledged that it was Mr Mischefski who had done that.

[42] It is clear from the tenor of Mr Mischefski's letter of 3 July 2014, wrongly dated 3.6.2014 and emailed to AFFCO on 6 July 2014, that he was raising Mr Rohe's personal grievance. He was not simply confirming a grievance that had already been

raised. The extracts of the letter I have quoted above support that finding. Had Mr Mischefski been confirming an existing grievance he is unlikely to have written "*Please be advised that a personal grievance exists*" or "*Hilton has now got to the point that he believes he...has no choice but to file this grievance*".

Determination

[43] Mr Rohe's personal grievance was not raised within 90 days as required by s. 114 of the Act.

Costs

[44] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority