

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Roderick George Reid (Applicant)  
**AND** AFFCO New Zealand Ltd (Respondent)  
**REPRESENTATIVES** Simon Mitchell for Applicant  
Graeme Malone for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETINGS** 8 September 2006, 22 September 2006  
**SUBMISSIONS** 25 September 2006, 3 October 2006  
**DATE OF DETERMINATION** 13 November 2006

**DETERMINATION OF THE AUTHORITY**

Employment Relationship Problem

[1] On 7 August this year AFFCO's Rangiora freezing works was processing bobby calves. Because calves cannot be kept at the works for long before being killed, this work must be carried out according to a strict timetable. To ensure that it was met, overtime had been arranged for the day. However, when the morning shift arrived for their 6.00am start they were greeted at the gate by Mr Reid, Secretary of the local branch of the Meat Workers and Related Trades Union. He told them that there would be a meeting of delegates from 6.00am until 6.30am. He also told at least some of the workers that they should get changed into their whites and prepare for work but not start until the delegates' meeting had finished. At 5.55am Mr Reid advised production manager Mr Tapsell what was happening. Management did not consent to either the delegates' committee meeting or the delayed start to the day. Nonetheless the committee met as planned and work did not begin anywhere on the plant until 6.30. There is no dispute that this was an unlawful work stoppage.

[2] At this time, Mr Reid had been employed at Rangiora as a meat processing employee for twenty years. He had been Branch Secretary at Rangiora for the last ten of those years. On 10 August, after an inquiry into the incident by Plant Manager Kerry McCree, Mr Reid was dismissed for alleged serious misconduct. The reason given for the dismissal was:

*"Serious misconduct, contrary to employment law in insisting the plant take illegal action i.e. refuse to start work."*

[3] Mr Reid was 61 years of age. His adult children and their spouses are employed at the works. His employment at AFFCO was not just his livelihood, but a very big part of his life, and the loss of that employment has had a huge impact on him. He now says that his dismissal was not justified and seeks reinstatement, reimbursement of lost wages<sup>1</sup> and compensation for hurt and humiliation.

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<sup>1</sup> The plant has now shut for the season but Mr Reid has lost four weeks wages.

[4] The overall issue for determination is whether the dismissal meets the test for justification set out in s.103A of the Employment Relations Act 2000 as follows:

*"... the question of whether a dismissal...was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal...occurred."*

[5] On Mr Reid's behalf, Mr Mitchell argues that the dismissal was unjustified because:

- a. *"the actions for which he was dismissed were actions undertaken as Secretary of the Union, and not as an employee;*
- b. *The decision to dismiss was unduly unfair and harsh, considering all the circumstances;*
- c. *The decision fails to consider the action within the context of militant and deliberate action by the employer in breaking agreements and acting illegally;*
- d. *The decision fails to take into account that the decision was made to minimise losses to the company, not crack them."*

[6] Point (c) relates to the issues said to be causing unrest on the site in the lead up to the events of 7 August. Mr Mitchell has argued that the employer's conduct in this period was in breach of good faith, even unlawful, and provoked the action of 7 August. Point (d) relates to an argument that in organising the stoppage Mr Reid acted with the intention of minimising losses to the company, which mitigates his conduct. These matters, he says form part of the relevant circumstances of the dismissal, and must be taken into consideration in an assessment of its justification pursuant to s.103.

[7] Mr Mitchell has advised that the union is pursuing the background issues in relation to points (c) in separate proceedings in the Authority. It is not appropriate for me to investigate the merits of matters that are already the subject of other proceedings in the Authority. This determination will not therefore address the issue of whether the employer engaged in militant and deliberate action, broke agreements or acted illegally. However, it is relevant to the determination of this grievance to ask whether and to what extent there was unrest on site. My findings on this part of the factual background are recorded below.

[8] Employees who hold office as representatives of their fellow union members cannot use that status to shield themselves from disciplinary proceedings. Under the terms of their employment agreement they will be accountable for shortcomings in performance and conduct in the same way as any of their fellow employees. In this case, however, as Mr Mitchell identifies in his point (a), Mr Reid was dismissed for actions purportedly taken in his role as Branch Secretary. There are therefore two critical issues in determining whether the dismissal was justified. They are whether Mr Reid was acting in the performance of his office as an elected union representative (Branch Secretary) and if he was, whether he can be dismissed for that. (Mr Mitchell's points (b) and (d) form part of this question.) Should it be determined that the dismissal was unjustified the issue of remedies will also fall to be decided.

Was Mr Reid acting in a representative capacity?

[9] From Mr Reid's point of view, the events which led to his actions on 7 August had begun earlier. It was his perception that employment relations at Rangioru had been deteriorating for some time. He said that management no longer adopted the consultative approach that they once had, and had implemented changes<sup>2</sup> in a way which caused ill feeling amongst staff on the site. Mr Nahu, who is the union's full time paid official responsible for the Rangioru site told me that soon after he first heard of the changes at the site (in about mid June) he told Employee Relations Manager Graeme Cox that there was a risk that *"people would walk out."* (This is not without precedent: Mr Nahu told me that

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<sup>2</sup> Examples of issues of concern include the closure of the store, the reduction of manning levels in the chiller, the reconfiguration of boning work, and the removal of dogs from the stock yard.

members of this union have taken industrial action "*off their own bat*" three times this year, although not on this site.)

[10] To compound matters, from early July Mr Reid was required by the respondent to return to normal duties in the works. Prior to this he had been released on full pay to attend full-time to his role as representative of the Rangiora branch. It had been many years since he had worked on the floor of the works. Returning to it left him with much less time than before in which to address issues being raised by the union members.

[11] These and other issues were the subject of mediation in July 2006, but the members were not satisfied with the outcome, did not feel that the employer was honouring the agreement that had been reached, and were frustrated that, from their perspective, the problems remained unresolved. Graeme Cooke, National Secretary of the Union, told me that afterwards he continued to receive numerous calls from members at Rangiora voicing concerns about what was happening. By the end of July members were telling him that they were dissatisfied with what the union had done to address their concerns and some were talking of wildcat strike action.

[12] Mr Reid's view was that at this time 80% of members were ready to walk out. Because the bobby calves were being processed any such action would have had particularly damaging effects, besides of course being unlawful. Mr Reid told me and I accept, that he was anxious to contain the situation and avoid a mass walk out from the site. He approached Mr McCree to request permission to hold a "shed meeting" (a meeting of all members on the entire site) but this was declined.

[13] Mr Reid was now feeling the pressure on a personal level. By Friday 4 August he had decided to resign from his role as Branch Secretary. He telephoned Mr Cooke to tell him and explained that "*the guys are really getting into me*" and that they wanted to withdraw their labour. Over the weekend Mr Cooke asked him to reconsider his resignation. Mr Reid outlined how he saw the situation at the site. Mr Cooke acknowledged the difficulties. He stressed to Mr Reid the importance to the union of keeping the members united. Some sections of the workforce were more aggrieved than others and Mr Cooke did not want to risk them taking separate, unilateral action. Neither did he want matters to escalate to a walk out off the site by all members.

[14] Mr Reid suggested that he call a delegates' meeting for first thing on the Monday morning and stop all work on site for its duration. He felt this would provide a safety valve and allow the aggrieved members to let off steam and send a signal to management, thus preventing a more serious situation from developing. In response Mr Cooke told Mr Reid to do his best to contain the situation, but if there was some action on the site the union would be "*standing by him.*" Mr Reid took this as an endorsement to do what he felt best in the circumstances. I accept that this was a reasonable construction to place on what Mr Cooke had said, and it has subsequently been confirmed by Mr Cooke in his evidence to the Authority.

[15] On Saturday 5 August he asked Production Manager Ike Tapsell for permission to hold a delegates' committee meeting on the Monday morning<sup>3</sup>. When Mr Tapsell asked the reason, Mr Reid told him that it was "*to prevent the plant going on a wildcat strike.*" Mr Tapsell did not ask Mr Reid to elaborate further and declined the request, although he advised that Mr Reid could convene a delegates committee meeting later in the week.

[16] Mr Reid felt that things could not wait that long and replied that they would go ahead with the meeting anyway. Mr Tapsell told me that he took this as a "throw away" remark but as we have seen, it was not. Delegates on site met at 6.00am on the Monday morning and work started 30 minutes later.

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<sup>3</sup> Delegates meetings (also known as "Union Boards of Control") take place three or four times a year. The usual procedure is for Mr Reid to put a request for a meeting to Mr McCree or Mr Tapsell two or three days in advance of the proposed date and for it to be scheduled at the least disruptive time.

[17] Mr Nahu told me that if he personally had been asked to authorise an unlawful stop work he would have declined. However, he said that if he had been in Mr Reid's position he:

*"might have done the same thing...to release tension [and] let off steam rather than risk a big walk out."*

[18] Mr Nahu told me that *"in the minds of the strikers"* this was a union strike. He told me that Mr Reid's authority was *"from the bottom up"* that is from his members. He told me that he thought that if Mr Reid had waited for a proper meeting and put the question of a stop work to the vote, members would have walked off the job (that is, off the site.) He believes that Mr Reid wanted to avoid that hence the *"pressure release."*

[19] At 7.00 am, after Mr McCree had arrived at work, he and Mr Tapsell met with Mr Reid and the Branch President, Terry Waterman. Later in the morning Mr Reid and Mr Waterman were called to a further meeting with Operations Manager Tony Miles and Employee Relations Manager Graeme Cox, both of whom were by coincidence visiting Rangioru that day. Mr Reid accepted responsibility for the stoppage and conceded to them that he knew it was not lawful. In addition, although he was later to resile from this position, he said that the action had not been endorsed by Graeme Cooke. Mr McCree joined them at the end of this meeting and advised that the two men were suspended and that a disciplinary meeting would follow.

[20] Over the course of the next couple of days, Mr McCree met individually with each of the delegates who had attended the meeting at 6.00am on the Monday morning. He got confirmation from them that no vote had been taken in relation to the action. He also concluded from what he heard that staff generally had not been on the brink of striking and that the action was not something that had come from the staff as a whole. Rather he felt it had come about because Mr Reid, as an individual, had decided to cause disruption. Unfortunately, he did not keep notes of these meetings and could not recall specifics of what he asked or of what the individuals had replied.

[21] The disciplinary meeting took place on 10 August 2006. Mr Reid and Mr Waterman (both of whom were subject to the disciplinary proceedings) were accompanied by union organiser Mike Nahu, delegate Greg Pearson, and by Mr Mitchell. The company was represented by Mr Tapsell and Mr McCree. The meeting was not rushed and was interspersed with adjournments as needed. Mr McCree told Mr Reid of his meetings with the delegates and what he had concluded from these interviews, and Mr Reid responded by explaining his view of the mood on site. He told Mr McCree that he believed the decision to take half an hour for the stoppage would minimise downtime and was in the company's best interests.

[22] Mr Reid also took the opportunity to correct his earlier advice about acting without endorsement from the union's head office. He now confirmed that he had spoken with Mr Cooke before proceeding with the stop work. (He had withheld this information in order to shield the union from any potential reprisals such as damages claims.) Mr McCree told me that he accepted this but felt that Mr Reid had taken "the wrong advice from the wrong official." He felt that Mr Reid should have gone to Mr Nahu who would have counselled Mr Reid differently. (Mr Pearson also, as Mr McCree knew, had expressed reservations about the action.)

[23] On Mr Reid's behalf Mr Mitchell told Mr McCree that Mr Reid had been acting in his capacity as a union official and was answerable in that capacity to the union rather than his employer. He said that he had acted as he did in consultation with Mr Cooke. He said also that Mr Reid had been attempting to minimise the impact on the company.

[24] During the final adjournment Mr McCree talked over what he had heard with Operations Manager Tony Miles. Although he had generally found Mr Reid trustworthy, he did not accept that what Mr Reid said about the mood of the men was correct, or even that it was Mr Reid's genuinely held belief. He felt that Mr Reid took the action he did because

he was frustrated at being put back on normal duties. He felt there was no reason why the delegates meeting could not have waited until later in the week. He concluded that:

- Mr Reid had intentionally prevented work, by delegates and other staff, knowing this was not lawful;
- He did not accept that Mr Reid was accountable only to the union;
- He did not accept the assertion that Mr Reid was trying to avoid loss to the company;
- He did not accept that staff were considering a wildcat strike or overall action rather he felt Mr Reid decided on his own to cause disruption to the plant;
- There was no reason why the delegates committee meeting could not have been delayed until later in the week;
- Mr Reid's actions were "*similar in seriousness to intentional damage to company property and more serious than a simple disobedience of company instructions due to the encouragement of others and the intention to cause loss and disruption;*"
- Even taking into consideration Mr Reid's length of service, it was appropriate that Mr Reid be dismissed;
- Mr Reid's actions had destroyed his ability to have trust and confidence in them and he should take a firm stance so as to prevent other illegal strikes and stoppages.

[25] After the final adjournment Mr McCree told Mr Reid that he was dismissed, not for stopping work himself, but for advising others to do so. Apart from Mr Waterman, the company did not discipline any of the other participants in the stop work meeting and does not attempt to argue that 30 minutes away from one's own duties amounts to serious misconduct that would justify dismissal.

#### Determination

[26] Mr Reid held a genuine belief that unrest on the Rangiuru site had reached the point where at least some members had decided industrial action was appropriate. His assessment is confirmed by Mr Nahu and Mr Cooke.

[27] Mr McCree's contrary assessment was not made on a fair and reasonable basis. He conducted individual interviews with delegates about matters which had been the subject of mediation and were to be the subject of proceedings in the Authority. It was unwise for him to rely on delegates speaking openly and candidly in such circumstances. He was also unable to back up his perceptions with reference to any specific questions to or responses from the interviewees.

[28] Mr Malone, for the employer, has argued that "*the company does not believe, on the evidence available to it, that Mr Reid was acting for the Union.*" He argues that Mr Cooke's assurances to Mr Reid that the union would support him and the members in any action they took amounted to no more than an assurance that it would provide advocacy services for them as a normal incident of union membership.

[29] This assertion is not consistent with Mr Cooke's evidence and is rejected. As an ordinary member of the union, Mr Reid would no doubt have received support in relation to any personal employment issues he might have had with his employer. That is an entirely different matter to the type of support Mr Cooke was speaking of. Unlike any ordinary member of the union, Mr Reid was a duly elected Branch official who spoke and acted as the agent of the Branch. The subject of his conversation with Mr Cooke was how he was to carry out that role as agent. I conclude that Mr Cooke's comments to him confirmed Mr Reid's authority to act in this matter as he had outlined.

[30] The same answer can be put to a further argument from Mr Malone which is that pursuant to the Union Rules the Branch Secretary is answerable to his Branch Executive and to the members as a whole and in this case, did not obtain a formal mandate through the normal democratic procedures available in those Rules. It is correct that the stoppage of August was not put to the vote. However Mr Nahu and Mr Cooke have confirmed that both the union's officials and the members on site stood behind Mr Reid on the morning of

7 August. Given their evidence I must accept that Mr Reid was authorised to act, albeit not via a formal process.

[31] I conclude that the work stoppage of 7 August must be characterised as collective action taken by "the union." Mr Reid was acting in a representative capacity that day, as a democratically elected official, in accordance with what he understood to be the will of the members from whom he derived his authority, and with the endorsement of his National Secretary.

[32] The actions for which he was dismissed were therefore taken in his capacity as a union delegate and not as an employee.

Can Mr Reid be dismissed for actions taken in a representative capacity?

[33] The role of representative is not an incident of the employment relationship and is distinct from the position for which the representative may be employed. A separate employment relationship exists between union and representative (s. 4(2) (c) Employment Relations Act) and the management of that relationship must be a matter for the parties to it.

[34] Several provisions of the Employment Relations Act 2000 are relevant here. These include:

a. Section 3 which sets out the objects of the legislation including:

*"(b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and bargain collectively."*

b. Section 11 which provides:

*"Undue influence"*

*(1) A person must not exert undue influence, directly or indirectly, on another person with the intention of inducing the other person...*

*(d) in the case of an individual who is authorised to act on behalf of employees, not to act on their behalf or to cease to act on their behalf...*

c. Section 18 which provides;

*"Union entitled to represent members' interests"*

*(1) A union is entitled to represent its members in relation to any matter involving their collective interests as employees.*

d. Section 104 which provides:

*"(1)...an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of ...that employee's involvement in the activities of a union in terms of section 107...*

*(b) dismisses that employee...in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed..."*

e. Section 107, which for the purposes of section 104, provides:

*"involvement in the activities of a union means that, within 12 months before the action complained of, the employee-*

*(a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union; or...*

...

*(g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees."*

[35] It is clear from the provisions set out above that those who are authorised to represent other employees are entitled to do so (s.18) and to do so free from undue influence (s.11) or fear of discrimination (sections 104 and 107.)

[36] To hold Mr Reid individually responsible for the actions of the membership on site would be contrary to these principles. As Branch Secretary, Mr Reid was authorised by the members who elected him to represent them and their collective position. In this representative capacity he acted not as an individual but as spokesperson of the group. While he held the mandate of the membership he was entitled to represent the group's position and obliged to do so even if his personal views did not coincide with that of the majority. His only alternative was to resign his role. In this case, Mr Reid was prepared to take that step and had to be talked out of it by Mr Cooke on assurances that he had his backing. This further reinforces the conclusion that he was acting in a representative capacity.

[37] As Branch Secretary Mr Reid was answerable to his members. His performance and conduct in that capacity (unlike that of employee) are for the union to address. They cannot be matters over which an employer may take direct action for that would endanger the union independence which is enshrined in Conventions 87 (freedom of association) and 98 (the right to organise.)

[38] This does not leave an employer without recourse should a union representative conduct himself in breach of good faith obligations or should an organised group of workers participate in action which is unlawful in terms of the Employment Relations Act 2000. The union is responsible for the actions of its agents, as it is for collective action by the members on site. In such situations the matter can be taken up with the union and addressed formally or informally through the dispute resolution procedures of the Employment Relations Act 2000.

[39] For these reasons I am satisfied that there was no serious misconduct by Mr Reid. The broader context, in particular the issue of whether Mr Reid attempted to minimise disruption, is of marginal relevance in light of this finding. All that needs to be said is that while Mr Reid may have made poor judgement calls he was trying to manage what he saw as a crisis situation. I accept that even had there been serious misconduct, this dismissal was harsh in all the circumstances.

[40] I conclude that Mr Reid's dismissal was not substantively justified. Remedies now fall to be determined.

## Remedies

[41] Mr Reid has a long and satisfactory history of employment at Rangiora. I am satisfied that there is no impediment to his return there and order his immediate reinstatement, with reimbursement of his four weeks lost earnings. He has also suffered a great deal of distress as a result of this situation. In all the circumstances I consider an appropriate level of award to be \$2,500.00 compensation for hurt and humiliation.

[42] I have also taken into consideration the issue of contributory conduct, as I am obliged to do. For the same reasons that I have concluded that the dismissal was unjustified I conclude that Mr Reid's conduct (being part of his role as Branch Secretary) did not contribute to the personal grievance.

Costs

[43] I leave it to the parties to discuss this issue between themselves. If it cannot be resolved the parties have a period of 28 days in which to make submissions to the Authority.

Y S Oldfield  
Member of Employment Relations Authority