IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 70
5303363

	BETWEEN	JOSEPH RICHARDS Applicant
	AND	AFFCO LTD Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Simon Mitchell, Counsel for Applicant Graeme Malone, Counsel for Respondent
Investigation Meeting:	20 January 2011 at Whangarei
Submissions received:	16 February 2011 from Applicant 1 February 2011 from Respondent
Determination:	22 February 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Joseph Richards, claims that he was unjustifiably dismissed by the Respondent, AFFCO New Zealand Limited ("AFFCO").

[2] Further Mr Richards says there was disparity of treatment, in that another employee on a final written warning received a further final warning after failing a boot check, whereas Mr Richards was dismissed.

[3] AFFCO deny that Mr Richards was unjustifiably dismissed and claim the dismissal of Mr Richards was substantively and procedurally justifiable, and that the dismissal decision was a decision which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

Issues

[4] The issues for determination are:

a. Was the decision to dismiss Mr Richards a justifiable decision in accordance with the test as set out in s103A of the Employment Relations Act 2000 ("the Act").

b. Was there disparity in the treatment of Mr Richards such as to render the decision to dismiss Mr Richards one which was not available to AFFCO as a fair and reasonable employer?

Background Facts

[5] Mr Richards commenced employment with AFFCO in 2002 as a meat worker at the Moerewa processing plant ("the Plant").

[6] AFFCO operates a meat export business with 10 plants nationwide, including the Moerewa plant. All plants have to meet the required standards in hygiene. There are regular audits from external agencies including the New Zealand Ministry of Agriculture and Fisheries, AgResearch, AUSMET, and cultural groups. Failure by a plant to meet and maintain the required standards has the potential to result in the loss of AFFCO's export licence and the consequent loss of employment for all employees working at the Plant.

[7] All employees are made aware of the stringent hygiene standards, and the consequences of failing the standards, initially through an induction process, and subsequently via an on-going process of reinforcement by means of regular meetings and equipment checks.

[8] On 21 January 2009 Mr Richards had been issued with a final written warning for failing to follow safe working practices and procedures.

[9] During mid-July 2009 AFFCO carried out a boot check at which Mr Richards boots were deemed to be non-compliant, and Mr Richards was requested to attend a disciplinary meeting, to be held on 17 July 2009.

[10] The meeting was conducted by Mr Christian Prime, AFFCO Production Manager, and Mr Trevor Ashby, AFFCO Slaughter Supervisor. Mr Richards was represented by Mr Laurie Nankivell, the Plant Union Secretary.

[11] At the meeting Mr Prime reminded Mr Richards that he was subject to a final written warning and stated that at the time of the boot check Mr Richards's boots had blood and protein on them.

[12] Clause 32 of the Collective Agreement between AFFCO and the New Zealand Meat Workers and Related Trades Union Inc and which covered Mr Richard's employment, details the rules relating to personal conduct and provides at clause 32 b) examples of offences which would normally warrant dismissal.

[13] Mr Prime read out clause 32 b) to Mr Richards at the meeting. Clause 32 b) iv) states:

> *All parties to this Agreement are involved in New Zealand's export food industry, which is dependent on overseas markets for its continued existence. Therefore it is vital that the highest possible standards of work hygiene, personal cleanliness and general tidiness of site, grounds, and amenities are consistently maintained. The deliberate refusal to comply with safety and hygiene standards of the Company is unacceptable.*

[14] Mr Ashby reminded Mr Richards that he had been advised at the time he received the final written warning, of all the issues that could result in dismissal, and further that there had been numerous meetings with all employees, including Mr Richards, about compliance issues.

[15] Mr Richards pointed out that he had not been the subject of complaints about the state of his boots previously, and that he had not been given an opportunity to remedy the problem prior to the boot check being carried out, as had been the practice when pouch checks were conducted.

[16] Mr Prime confirmed that not only was Mr Richards on a final written warning which could render this matter of non-compliance with hygiene standards a dismissible offence, but that in accordance with clause 32 b) iv) of the Collective Agreement, it was a dismissible offence of itself.

[17] Mr Richards was informed that he was suspended pending the outcome of the meeting which was then adjourned. The meeting was reconvened approximately one hour later and Mr Prime informed Mr Richards that he and Mr Ashby had considered the matter fully, and that their decision was to terminate Mr Richard's employment.

Determination

Was the decision to dismiss Mr Richards a justifiable decision?

[18] Section 103A of the Act sets out the test of justification:

> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 or action occurred"*

[19] The induction booklet issued to, and signed by, Mr Richards on 17 November 2008 states on:

- page 6, that the consequences of sub-standard workmanship might be a warning on the basis that it "… *places unnecessary burdens on others and can place an export licence at risk*";

- page 13, that employees are expected to clean protective gear;

- page 17, that "*AFFCO is a food processing company that is regulated by NZ legislation and overseas government and customer requirements. We need to meet these standards to stay in business and keep our jobs.*";

- page 20, that the consequences of breaking the hygiene rules include the employee receiving a warning or losing their job; and

- page 21, that the consequences of the MAF vets finding standards were too low in the Plant included the employee losing their job, the Plant being closed down, and the export licence being removed.

[20] Mr Prime explained at the Investigation Meeting that as an export company AFFCO had to adhere to strict hygiene standards. Not only did the company conduct its own internal checks, but that regular external audits took place. The regularity of these was determined according to a scale of 1 to 6, with companies on a scale rating of 6 having external audits 3 monthly. At the time of Mr Richard's dismissal, the plant was rated between 2/3 on the scale and was subject to 2 weekly checks. Compliance with the hygiene standards was therefore of great importance if the export licence was to be retained.

[21] As a consequence, a meeting was held with the slaughter board operatives on 18 December 2008 to discuss the seriousness of the compliance issue. Mr Prime stated that the seriousness of the issue was reiterated to the slaughter board operatives, and that the implications for the Plant and the employees' jobs if there was no improvement in performance were outlined. Mr Richards agreed that he was present at this meeting.

[22] On 21 January 2009 Mr Richards was issued with a final written warning. At the meeting Mr Prime said he had read out to Mr Richards a list of the type of offences which could render Mr Richards liable for dismissal. The list included: "*Failing to conform with current personal hygiene requirements. In particular these include covering of facial hair, clean boots, aprons and pouches.*"

[23] On 22 April 2009 and 13 May 2009 there were Pre-Operative Hygiene Beef Slaughter Gear checks at both of which Mr Richards's pouch was found to be non-complaint. It was accepted that blood could accidently be splashed onto protective clothing not being worn by the employee at the time, and therefore Mr Richards

received no disciplinary sanction, although he was expected to take the appropriate action on each occasion to ensure the pouch was complaint.

[24] On 21 and 22 May 2009 meetings were held with both beef team shifts. The purpose of the meetings was to cover compliance issues, in particular regarding Gear Bag separation and basic compliance issues. Mr Richards agreed he had attended one of these meetings.

[25] On 26 May 2009 there was a further meeting with all slaughter board operatives at which the employees were informed that all further non-compliance issues would result in termination. Mr Richards agreed he was present at this meeting.

[26] On 1 July 2009 the Plant Compliance Manager had requested that Mr Richards be removed from the 'bunging' task due to serious non-compliance in relation to this task.

[27] On 2 July 2009 there was a Pre-Operative Hygiene Beef Slaughter Gear check at which Mr Richards pouch was found to be non-compliant with the hygiene standards. Mr Richards again received no disciplinary sanction, but was expected to take the appropriate action to ensure the pouch was complainant.

[28] Mr Richards stated that he was aware of the hygiene requirements as the importance of these were reinforced to everyone and that he knew that hygiene was a top priority for the plant due to the stringent rules in the export meat industry. Mr Nankivell agreed that AFFCO took all non-compliance issues seriously.

[29] I find that Mr Richards had a clear understanding of the hygiene requirements of the Plant, initially from the induction process he had undergone and subsequently by these being constantly reinforced by the Plant management at regular meetings which Mr Richards attended and at gear checks, at some of which Mr Richard's gear had been found to be non-compliant and which situation he had been required to rectify. Further the Collective Agreement enforced the expectations as regards hygiene standards compliance and included the deliberate refusal to comply with the standards under the list of offences which warranted summary dismissal under clause

32 b). Finally Mr Richards had been specifically reminded at the time he received the final warning on 21 January 2009 that failure to have clean boots could result in his dismissal.

[30] In his submissions and at the Investigation Meeting Mr Richards said that there was no blood or protein on his boots. I find it significant that, at the disciplinary meeting with Mr Prime and Mr Ashby held on 17 July 2009, neither he nor Mr Nankivell disputed the fact of blood and protein being on Mr Richard's boots In fact Mr Richards had accepted at that meeting that his boots were dirty and he should have cleaned them.

[31] I note also Mr Richards explanation that AFFCO had previously provided the employees with advance notice of when there would be equipment hygiene checks, and that had this happened on this occasion he would have cleaned his boots, which infers his awareness that his boots were non-compliant at the time of the boot check.

[32] I find that the expectation as to the requirement for the highest standards in the cleanliness of gear was well known to all employees, including Mr Richards. Whilst AFFCO might have on previous occasions pre-warned employees that there would be a gear check in advance of it taking place, I find that there was no requirement for them to do so. I further find that the lack of such a warning did not justify Mr Richards's failure to comply with hygiene standards of which he was adequately informed.

[33] Mr Richards and Mr Nankivell said that they considered the boot incident was not sufficient to justify dismissal. In the situation where an employee was on a final written warning, as was Mr Richards, dismissal was the next stage under the disciplinary process as set out in the Collective Agreement. The final written warning was for a breach of the safety procedures and the failure to follow the safety instructions had been such that Mr Richards had sustained a serious injury. The dismissal resulted from a breach of the hygiene standards. In each case Mr Richards had not complied with the company safety and hygiene standards, and thus both may be held to be offences arising from the same root course.

[34] However I also note that the deliberate refusal to comply with the hygiene standards was a dismissible offence in its own right. Mr Richards had accepted at the meeting with Mr Prime and Mr Ashby that his boots were dirty and he should have cleaned them. He had chosen not to do so, despite being aware of the potential outcome. Mr Richards was also aware that failure to meet the strict hygiene standards could result in the potential loss of the Plant export licence and all employee jobs.

[35] I find that in all the circumstances at the time the dismissal occurred, there was substantive justification for Mr Richard's dismissal.

[36] The decision to dismiss must also be justifiable on a procedural basis. The basic requirements as outlined in *NZ Food Processing Union v Unilever NZ Ltd*[1] are notice informing the employee of the allegations, a real opportunity for the employee to respond to the allegations, and a decision not tainted by bias or pre-determination.

[37] I find that Mr Richards was fully informed of the consequences of non-compliance with the Plant hygiene standards, and that dismissal could be the outcome of failing to maintain these standards. Mr Richards had been represented by Mr Nankivell at the meeting on 17 July 2009 and was given an opportunity to explain. I have found no evidence of bias or pre-determination.

[38] I determine that the decision to dismiss Mr Richards was a justifiable decision in terms of s103A of the Act.

Was there disparity of treatment such as to render the dismissal of Mr Richards a decision which was not available to AFFCO as a fair and reasonable employer?

[39] Mr Richards and Mr Nankivell claimed that another employee, Mr Lee Anderson, had been disciplined for having dirty boots, but that although he had been on a final written warning at the time, he had not been dismissed. On this basis, Mr Richards should have been accorded similar treatment.

[40] Mr Prime explained that the two cases were not comparable in that, as a consequence of a procedural error which had been pointed out by the union

[1] [1990] 1 NZILR 35

representative for Mr Anderson, Mr Anderson was not held to be on a final written warning at the time his boots were found to be non-compliant. As a result, he received a final written warning. Mr Prime emphasised to the Authority that had Mr Anderson been on a valid final written warning at the time his boots were found to be non-compliant, he would have been dismissed.

[41] Mr Nankivell by means of a late amended witness statement claimed that warnings which had not been signed by Union officials did not result in the warnings being held to be invalid by AFFCO. Mr Prime agreed that it was not uncommon for union officials not to sign warnings if they held them to be unjustified and that AFFCO's policy was to advise the employee that the warning was nonetheless valid.

[42] However in Mr Anderson's case the issue was not merely the non-signature of the final written warning, but the wider issue raised by the union president, Mrs Davis, of the meeting not having been conducted properly. It was this issue which AFFCO had investigated and which, following the investigation, was accepted by AFFCO, and which had the effect of nullifying the final written warning.

[43] Mr Nankivell gave evidence to the effect that dismissal was not invariably the outcome when employees who were already in receipt of a final written warning were being disciplined.

[44] The Employment Court[2] has confirmed that, even where grounds for dismissal have been established, it is the prerogative of the employer to decide whether to dismiss or not. However this right must be exercised in accordance with the principles of fairness and reasonableness.

[45] The Court of Appeal decision in *Chief Executive of the Dept of Inland Revenue v Buchanan*[3] outlines three separate issues to be considered in relation to the question of disparity of treatment:

i. Is there disparity of treatment?

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[2] *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610
[3] [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

ii. If so, is there an adequate explanation for the disparity?

iii. If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?[4]

[46] The first issue is the establishment of disparity of treatment. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[47] In *Samu v Air New Zealand*[5] the Court of Appeal stated:

> *Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.*

[48] Mr Prime agreed that not every employee being disciplined, who was in receipt of a final written warning, would be dismissed. Mr Prime stated that the reason for this was that each case was treated individually and consideration would be given to more lenient outcomes than dismissal if the later offence was considered to be very minor or some reasonable explanation was offered. This approach is consistent with that expected of a fair and reasonable employer pursuant to s103A of the Act.

[49] Even if I were minded to accept that Mr Anderson was on a valid final written warning at the time he was found to have dirty boots, which I am not, I find that AFFCO was not bound by what might be considered to be its mistaken or over-generous treatment of Mr Anderson to have acted differently in the case of Mr Richards.

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[4] Ibid at para [45]
[5] [1995] 1 ERNZ 636 (CA)

[50] Moreover, a dismissal may also be held to be justifiable in all the circumstances even where disparity of treatment is found and there is no adequate explanation for the disparity.

[51] Considering all the circumstances, I find the following to be of prime significance:

- Mr Richards's statement by way of explanation that other employees were similarly non-compliant, and that consequently his own non-compliance should be excused. Mr Richards appeared to have no awareness that the non-compliance of others was equally unacceptable and not a valid explanation for his own non-compliance.

- Mr Richards's statement by way of explanation that had he been warned in advance that a boot check was imminent, he would have cleaned his boots. Mr Richards appeared to have no awareness of the fact that, irrespective of any such check, his boots should have been clean to prevent contamination in the Plant.

[52] In these circumstances I find that Mr Richards had scant regard, bordering on reckless disregard, for the hygiene standards which AFFCO constantly reinforced to him and to all employees, and of which he was fully cognizant The consequence of this resulted in the loss of Mr Richard's own job, and had the potential to seriously damage the future employment of all AFFCO's employees at the Plant.

[53] I determine that in all the circumstances, the dismissal of Mr Richards was a decision which was available to AFFCO as a fair and reasonable employer.

[54] I am unable to assist Mr Richards further.

Costs

[55] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The

Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority