

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 164/10

File Number: 5303927

BETWEEN Matiu Scott
 Applicant

AND AFFCO NZ Limited
 Respondent

Member of Authority: Denis Asher

Representatives: Simon Mitchell for Mr Scott
 Graeme Malone for the Company

Investigation Meeting Napier, 29 September 2010

Submissions Received 12 October 2010

Determination: 14 October 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Scott unjustifiably dismissed by the respondent (the Company)? If he was, what remedies if any – including reinstatement – are appropriate?

[2] Each party seeks costs.

The Investigation

[3] During a telephone conference call on 26 May 2010 the parties agreed to a one day investigation in Napier on Wednesday, 29 September. Agreement was also reached on timelines for witness statements.

[4] Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful. A timetable was agreed for filing final, written submissions.

Background

[5] The relevant facts are not in dispute.

[6] Mr Scott was employed by the Company as a meat processing employee at its Wairoa plant.

[7] On or around 7 December 2009 alterations were made to Mr Scott's work station resulting in changed procedures. The applicant says the changes were made without consultation in breach of his terms and conditions of employment and caused him back pain and other health and safety issues; he says his efforts and those of others, to raise these concerns with the Company were ignored. The Company says Mr Scott was on a final warning, that the changes were made after consultation and Mr Scott did not refer to back pain during the disciplinary process culminating in his dismissal.

[8] During a meeting on 9 December 2009 attended by union representatives the applicant was dismissed.

[9] The background and basis for the Company's decision to dismiss Mr Scott is set out in a memorandum dated the same day. They are:

- a. A warning dated 25 November 2008 for repeatedly being late to work and at breaks.

- b. A second written warning on 28 January 2009 for being 30 minutes late back from lunch on high and low trim stand.
- c. At a meeting on 14 May 2009 Mr Scott was put on a final warning in respect of his bad attitude and not doing his job properly on the high and low trim stand (i.e. high proportion of fat still left in carcasses, pushing carcasses onto the detain rail so he did not have to trim them and repeatedly coming in to work late).
- d. Similar issues occurred again on 1 & 7 December. And,
- e. On 9 December Mr Scott failed to complete his job task properly, i.e. carry out the low trim. The chain was stopped and he was requested to trim the carcass properly: initially Mr Scott refused, became agitated and started to question his supervisor's authority. While Mr Scott eventually completed the task properly he continued to debate with his supervisor on job tasks and said he was not going to carry out the low trim. The disciplinary meeting was then convened. The decision to dismiss was reached on the grounds of repetitive disciplinary issues, the applicant challenging authority, product being put at risk and Mr Scott's responses having no bearing on the repetitive issues.

Findings

[10] I am satisfied Mr Scott was unjustifiably dismissed for the following reasons:

[11] Mr Scott's terms and conditions of employment were contained in a collective agreement in force from 1 January 2008 until 31 December 2009.

[12] Clause 32 (pages 23 & 24) of that agreement sets out provisions in respect of warnings. They include the following:

- a) *For offences outside those that would result in summary dismissal workers shall be subject to a warning procedure prior to being dismissed.*

- b) *Warnings recognised as official **shall** be given in the presence of the delegate ... and the worker concerned, and the time, date, reason and nature of the warning recorded by the supervisor.*
- c) *Warning **shall** be issued in three stages and shall lapse after one year from the date of recording, with the exception that final warnings shall lapse after two years from the date of recording.*
- Stage 1: An official written warning*
- State 2: An official written warning*
- Stage 3: An official final **written** warning*

(emphasis added)

[13] There provisions are clear and certain.

[14] Mr Scott says he received only two written warnings, the first for lateness in returning from smoko breaks on 25 November 2008. A copy of that warning was provided to the Authority: Mr Scott agreed one of the three signatures on it was his. The second was received on 28 January 2009 when it was alleged he was late back from lunch. A copy of that warning was also provided to the Authority and, again, Mr Scott agreed one of the three signatures on it was his.

[15] Mr Scott disputes meeting with the Company on 14 May 2009 in respect of an alleged bad attitude. In particular, he says he never received any written warning. The union representatives present at the meeting could only “*vaguely*” recall attending the meeting (oral evidence, Dale Robinson).

[16] The Company is unable to produce a written warning (signed or not) in respect of the alleged final warning on 14 May 2009 but is adamant a meeting took place and Mr Scott was given a final warning.

[17] The Company accepts it did not issue formal warnings in respect of alleged performance issues involving the applicant on 1 & 7 December.

[18] The Company dispute Mr Scott’s claims he told them during the disciplinary process that he was experiencing back pain because of the height of his changed work station. The parties are also at odds as to the respondent’s claims Mr Scott was noisy

or abusive and/or failed to recognise the supervisors' authority. Mr Scott accepts he may have spoken loudly but says that was due to the background level of noise.

[19] The Company says – consistent with the provisions in the applicant's employment agreement (e.g. clause 44) – that it consulted with Mr Scott and his union in respect of alterations in work methods, in particular the changes to the applicant's work station that he says resulted in the problems culminating in Mr Scott's dismissal. The applicant denies that claim and union representatives present at the Authority's investigation said that, while there was some talk about change, actual details were not spelt out and they could not recall any consultation; the Company was unable to produce any minutes or correspondence confirming their claim consultation had occurred.

[20] Mr Scott was unable to locate his work colleague who, he says, raised similar concerns to himself about changes to work procedures on or around 7 December.

[21] Mr King, the Wairoa plant production manager, dismissed Mr Scott. Mr King confirmed to the Authority that, as set out in his witness statement at par 21, he relied on the claimed final warning given to the applicant on 14 May to dismiss the applicant, i.e. clause 32 of his employment agreement.

[22] In determining this matter, and in respect of s. 103 A of the Employment Relations Act 2000 (the Act), I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[23] I am satisfied a fair and reasonable employer, objectively measured, would rely on, and fully implement, the contractual terms between the parties – terms freely entered into with its employees – before, in this case, dismissing Mr Scott; the Company would rely on the parties' employment agreement requiring a third, particularised, written warning. Consistent with the provisions of the applicant's employment agreement, it would also consult with Mr Scott or his representatives about changes to his work station and procedures.

[24] In the absence of a third written warning, and consistent with its agreed system, a fair and reasonable employer, objectively measured, would (indeed, could) not proceed to dismiss a worker. In this instance the Company therefore unfairly and unreasonably dismissed the applicant. I accept the submission advanced on Mr Scott's behalf (par 13 of Mr Mitchell's submissions received on 6 October) that the Company saw the issue simply as a matter of instruction, and the applicant's refusal to accept his supervisor's directives quickly escalated in a disciplinary process culminating in his unjustified dismissal on the same day. The disagreement between the parties as to the reasons Mr Scott gave for the problems on the day can be attributed to the speed with which the respondent investigated the matter and proceeded to dismiss the applicant.

[25] Notwithstanding the dispute as to the reasons given by Mr Scott for his actions on 9 December, I similarly accept the applicability of the Court of Appeal judgement in *Sky Network Television v Duncan* [1998] 3 ERNZ 917, that this was – in the absence of consultation – not a situation in which the respondent could reasonably conclude Mr Scott was refusing a lawful and reasonable instruction.

Remedies

[26] Notwithstanding the passage of time, Mr Scott seeks reinstatement. It is the primary remedy: s. 125 of the Employment Relations Act 2000 (the Act). The applicant says his considerable efforts to find equally well paid employment in Wairoa and the broader region have been unsuccessful, and – having been obliged to move out of the town to take up lesser paid work elsewhere – he very much misses his home town.

[27] Through Mr King, the Company says it would be impracticable to reinstate the applicant as *“he has shown he cannot work as required ... (and) (e)ven now, rather than accepting any fault, he seeks to excuse his behaviour by referring to matters that ... did not ... prevent him from doing his job and tries to discount the warnings he has had and efforts made to get him to improve”* (par 22 of Mr King's statement).

[28] I do not accept that reasoning: the Company's breach of its contracted disciplinary steps is not evidence of any impracticality other than its own lack of adherence to its own obligations. It is also reasonable to expect – in light of this experience – that Mr Scott will be better informed as to how to meet his obligations to be active and constructive, and responsive and communicative, in maintaining the employment relationship: s. 4 (1A) of the Act. In particular, it can be expected the applicant will ensure his concerns are clearly articulated, preferably in writing and through his union.

[29] Having regard to the above I am satisfied it is practicable to order Mr Scott's reinstatement. Applying s. 126 of the Act, Mr Scott is to be reinstated within 4-weeks of the date of this determination so as to allow both parties to make suitable arrangements including inducting the applicant if necessary, having regard to the seasonal nature of the plant's operations and to resolve any issues as to seniority as provided by the applicant's terms and conditions of employment (clause 29).

[30] The applicant seeks \$5,000 for hurt and humiliation. That is a relatively modest sum, appropriately so as the damage to Mr Scott will largely be repaired by being reinstated. Having regard to his unchallenged evidence, including the effect of the dismissal on him and his relationships, I accept this claim.

[31] At the request of the parties, the issue and calculation of lost wages is reserved.

Contributory Fault

[32] Narrowly applied, there is no evidence of actions by Mr Scott that caused his employer, on 9 December 2009, to breach its contracted obligations to him by ignoring its contractual obligation to provide a final written warning, and which thereby contributed towards the situation that gave rise to his personal grievance. However, the broader context clearly requires consideration. That is because the record is clear that Mr Scott has a history of bad attitude and not doing his job properly, and has been warned accordingly.

[33] That conduct is too egregious to ignore. While not a practical barrier to reinstatement, I am satisfied it amounts to contributory fault such that no compensation for hurt and humiliation is warranted.

Determination

[34] The Company is to reinstate Mr Scott.

[35] As requested, lost wages and costs are reserved.

Denis Asher

Member of the Employment Relations Authority