

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Trevor Waikawa and Lionel Mathieson (Applicants)

**AND** AFFCO New Zealand Limited (Respondent)

**REPRESENTATIVES** Simon Mitchell for the Applicants  
Graeme Malone for the Respondent

**MEMBER OF AUTHORITY** P R Stapp

**INVESTIGATION MEETING** Napier 29 November 2006

**TELEPHONE CONFERENCE** 20 February & 5 March 2007  
**& FURTHER INFORMATION** By 26 March and 4 April 2007  
**AND SUBMISSIONS**

**DATE OF DETERMINATION** 26 April 2007

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Mr Waikawa was dismissed and Mr Mathieson resigned after allegations were raised with them by AFFCO New Zealand Limited (AFFCO) that they had unauthorised possession of company product and were distributing it. During interviews they both admitted taking meat for their own use. The company relied upon Mr Waikawa's admission for dismissing him. Mr Waikawa is seeking reinstatement. Mr Mathieson decided to withdraw his claim for reinstatement. Both are seeking lost wages and compensation.

**The facts**

[2] This is a matter in which AFFCO identified significant theft occurring at its Wairoa freezing works. It engaged the services of a private investigator, Peter Archer who was assisted by the

company's project manager Mark Patterson. Interviews and site observations were conducted by them. Cameras were put in place near the freezers. One informant identified Mr Waikawa as a "major thief". There was no information that he was a party to distributing the meat. A preliminary interview was conducted with him on 6 April 2006 to inform him of the investigation. Mr Waikawa says that he was told by Mr Archer that the company was not after people who had taken a little bit of meat. Mr Archer denied saying anything that could have been construed by Mr Waikawa to mean he would not lose his job.

[3] On 12 April 2006 Darden King, the production manager, Mike Laurence, the Plant Manager and Messrs Patterson and Archer met with Mr Waikawa and a Union official. Mr Waikawa was handed a suspension notice that was prepared on 11 April 2006. Apparently the Union was given prior notice of it by AFFCO. The notice included the allegations that Mr Waikawa had unauthorised possession of company product, namely meat, and that he had been distributing it.

[4] Also, later on 12 April 2006 Mr Waikawa telephoned Mr Archer to inform him he had taken chops, which he had put in his gum boots, for a feed. He also said that he took them home and his family ate them. Mr Waikawa says that he admitted taking the chops on the understanding that Mr Archer told him "they were after the big thieves and not the little thieves". Mr Archer denied giving any such undertaking.

[5] The next meeting was held on 19 April 2006. During an adjournment Mr King decided to believe he had enough information from Mr Archer on Mr Waikawa considering the information Mr Archer obtained from two informants and Mr Waikawa's admission. After the adjournment Mr King dismissed him, although he did consider his length of service because Mr Waikawa had worked for 23 years at the works.

[6] On 18 April 2006 Mr Archer spoke to Mr Mathieson and a Union official about the investigation being conducted and informed Mr Mathieson that cameras had been put in place to obtain information about theft in the workplace. He told Mr Mathieson that he had information that Mr Mathieson and another named person had been stealing shoulders with another person from a special export order a few months earlier. Mr Mathieson denied this. But he said that he had taken some lamb racks in response so that the company could get its information correct from the sources. In other words the company's information from its sources was not correct, in his case. But he admitted taking lamb racks.

[7] Another meeting was held on 19 April 2006 when Mr Mathieson was suspended. The Union was given prior notice of the decision. Mr Mathieson was never re-interviewed because he resigned. He claimed the situation was too stressful for him.

### **The parties' positions**

[8] AFFCO has relied upon admissions given by the two applicants. In Mr Waikawa's case the decision was made to dismiss him. AFFCO says his admission was made voluntarily. Mr Waikawa says that he admitted taking the chops on the understanding that Mr Archer told him "they were after big thieves and not the little thieves". Mr Waikawa denied taking meat to sell. It was submitted by his representative the admission was obtained under false pretences or by entrapment. Mr Archer denied any entrapment and any undertaking that would protect Mr Waikawa given it was someone else's responsibility.

[9] Mr Mathieson resigned. His representative says his admission was also obtained under false pretences and entrapment. AFFCO says it did not have to pursue its investigation with Mr Mathieson any further because he resigned.

**The issues**

[10] The first issue is what reason did the employer rely upon when it came to dismiss Mr Waikawa? Did Mr Archer entrap or give any undertaking to Mr Waikawa, and if there was any undertaking, did Mr Archer have any responsibility to give any undertaking? What was the reason relied upon by the company to justify its decision to dismiss Mr Waikawa?

[11] Secondly was there cause for Mr Mathieson to resign and claim that the employer breached its duty of trust and confidence to deal fairly with him that made it foreseeable he would resign?

**Determination**

[12] AFFCO relied upon the original charges of unauthorised possession and distribution of meat to dismiss the applicants. The reasoning derives from the suspension details put in writing and the company's witnesses' evidence of the reasoning for the dismissals. However, to justify its actions AFFCO's reliance upon unnamed informants without producing details of the allegations was inadequate.

[13] The admission made by Mr Waikawa of taking meat for his own personal use falls short of meeting the allegation relied upon by AFFCO. AFFCO has not satisfied me that the admission necessarily meant that Mr Waikawa was involved in any activities of being in unauthorised possession and distribution of company product on the grounds alleged. Therefore AFFCO has left itself open to be seen to rely upon another reason that related to the personal possession of the chops to dismiss Mr Waikawa without properly pursuing it separately as a fair and reasonable employer would have done.

[14] Without the admissions from Messrs Waikawa and Mathieson the company's investigation would have been wholly inadequate as it related to them. There were no details provided of the scale alleged except that the company has relied upon information conveyed by Mr Archer from a number of secret informants who made generalised allegations and comments about them being thieves. Thus when Mr Waikawa admitted taking chops home for personal use he left himself open to personal scrutiny.

[15] He says he relied upon Mr Archer saying to him that "they were after big thieves and not the little ones" to keep his job. Mr Waikawa's explanation was that he was being honest and believed that the company was looking for "big thieves".

[16] Mr Archer's role did not involve him being a decision maker or to have the authority to give any protection to Mr Waikawa's job in exchange for information. Certainly the company has not condoned or approved any job protection for information. Mr Archer says that Mr Waikawa asked him if he could keep his job and he replied that it was not up to him. Mr Archer's inclusion in the employment meetings and his role of being an investigator could easily have become blurred in Mr Waikawa's mind to explain what Mr Waikawa thought at the time. It makes no sense that Mr Archer would have given any undertaking when he did not have the authority to do so. Others had responsibility for the employment concerns. In any event Mr Waikawa would not have been able to rely on any undertaking about his job without his employer's say so. If, however, he was entrapped Mr Archer would have been exposing the employer to an unfair investigation unless AFFCO was to test the evidence it obtained from Mr Archer independently. It did not do that because it relied later on Mr Archer's information he had gathered. Mr Waikawa was not able to support his position with any corroborating evidence that he would be able to keep his job.

[17] I therefore conclude that there was no immunity given to Mr Waikawa although Mr Waikawa might have made that conclusion as a thought, albeit without any foundation, with his honest admission. It makes no sense that he made an admission except to be honest given the gravity of the allegations. I cannot conclude there was any entrapment when Mr Waikawa asked to keep his job and Mr Archer's evidence was that he told Mr Waikawa that to keep his job would be up to someone else, and indeed others made that decision. Also, Mr Waikawa's evidence about him taking the chops for a feed and that he took them home and the family ate them was confusing when his partner said that she did the shopping and would have known if he had been stealing. I conclude that Mr Waikawa has not established that he was entrapped except to make his own honest admission.

[18] Further to this Mr Archer says Mr Waikawa implicated other employees, which Mr Waikawa denied in the Authority's investigation. First, such evidence was not directly put to anybody else at the time with any details that a fair and reasonable employer would rely on. Second, Mr Waikawa now denies informing on others. It would be unsafe for me to rely upon this allegation or to give it much reliance because there is a lack of any details, Mr Waikawa has denied it and Mr Waikawa was a suspect.

[19] Mr Mathieson's resignation was caused clearly by the circumstances he found himself in. That he was very upset and that the matter had a profound impact on him was not challenged. His response upon admitting taking lamb racks was as he says so that the company could get its information correct from its sources it was relying on. Such an admission was given by him voluntarily as a response that I conclude was honest about his role to highlight the inadequacy of the company's informants' information. AFFCO did lead Mr Mathieson into his response by referring him to graver allegations with apparently incorrect information from its sources without providing him with details of the times, places and incidents being relied upon to establish if there

was greater offending. However, his admission was sufficient that a fair and reasonable employer would take it into account even as a separate offence and it could have dealt with it separately. Mr Archer's credibility and role was not questioned at the time as it is now by him. I conclude that Mr Mathieson was not entrapped into making his admission.

[20] Mr Mathieson resigned of his own accord during a process when he was represented. The investigation had not been completed and there would have been another meeting that Mr Mathieson would have had an opportunity to attend. There has been no criticism made of that process. Therefore, I conclude that it would not have been foreseeable by AFFCO that Mr Mathieson would have resigned before it had made any decision to rely upon Mr Mathieson's admission.

## **Conclusion**

[21] Mr Waikawa has a personal grievance but only because AFFCO could not justify dismissing Mr Waikawa on the basis of untested information from unnamed informants provided by Mr Archer. Mr Waikawa's admission of taking chops home in his gum boots without authority was an entirely separate matter that he was not put on any notice of that it could lead to his dismissal without having an opportunity to properly mitigate. Instead AFFCO relied upon the admission to reach the conclusion that Mr Waikawa was a thief involved in much graver allegations of organised theft, which was implied by AFFCO when it relied upon Mr Archer's investigation, anonymous informants and references to organised theft involving others. A fair and reasonable employer would not have reached a conclusion on that allegation on the basis of one single admission that appeared to have been made honestly. In this regard AFFCO has subtly shifted its reasoning unfairly in my opinion to justify its actions. Mr Waikawa was unjustifiably dismissed. However, I am satisfied that it was open to AFFCO to treat Mr Waikawa's admission of taking the chops home in his gum boots in the range of options for serious misconduct as a separate matter and that is an

issue for contribution. I have to conclude that his possession of company product without authority for personal use would not have been condoned by a fair and reasonable employer if it was treated as a separate matter.

[22] Mr Mathieson's claim for constructive dismissal must be dismissed.

### **Remedies**

[23] Mr Waikawa has a personal grievance but taking home some chops for personal use does amount to contributory conduct because the admission was linked to the dismissal. He has been punished with the loss of his job that was within the range of penalties that a fair and reasonable employer would have relied upon if it had conducted its enquiry process and reasoning properly. I have decided not to reinstate Mr Waikawa because of his contribution. Also, his lost wages must be severely discounted for his admission of taking the chops. He was out of work for three weeks. He mitigated his lost wages from 8 May 2006 until 8 September 2006. He also obtained employment full time from 11 September 2006. I have decided not to compensate him for his lost earnings.

[24] Mr Waikawa would be entitled to compensation for hurt and humiliation, loss of dignity and injury to feelings. Instead of proving its allegations the company has wrongly impugned him with a much graver allegation than what emerged, and I am satisfied this has had some impact on his feelings. His partner gave evidence in support of the impact on him of his dismissal. Weighing this I would have awarded him a small sum of compensation for wrongly being impugned but this has to be entirely discounted for his contribution because he took home chops belonging to AFFCO for a feed without authorisation that is linked to his dismissal. AFFCO was entitled to rely upon the admission to impact on remedies. Thus, there will be no award made.

**Orders**

[25] Trevor Waikawa was unjustifiably dismissed. There are no remedies ordered.

[26] Mr Mathieson's claims are dismissed.

[27] Costs are reserved.

P R Stapp  
Member of the Authority