IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 48
5413267

	BETWEEN	CURTIS WEBBER Applicant
	AND	AFFCO NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Mitchell, counsel for the Applicant Rachel Webster, counsel for the Respondent
Investigation Meeting:	1 and 2 October 2014
Submissions:	15 October 2014 from the Applicant, 17 October 2014 from the Respondent and 23 October 2014 in reply from the Applicant
Determination:	16 February 2015

DETERMINATION OF THE AUTHORITY

A. Curtis Webber was not treated unfairly by his manager on 2 and 9 August 2012.

B. Mr Webber was unjustifiably dismissed by AFFCO New Zealand Limited (AFFCO) on 18 February 2013.

C. In settlement of his personal grievance for unjustified dismissal, and within 28 days of the date of this determination, AFFCO must pay Mr Webber the following remedies (that have been reduced by ten percent due to actions by Mr Webber that contributed to the situation giving rise to his grievance):

(i) Three weeks' wages as lost wages; and

(ii) $5400 as compensation under s123(1)(c)(i) of the

Employment Relations Act 2000 (the Act).

D. AFFCO was liable to pay Mr Webber for overtime by applying the overtime clause formula in its collective agreement to that standard hourly rate, not the lower 'base rate' that it used.

E. Leave is reserved for the parties to revert to the Authority for further orders, if necessary, for the quantification of the three weeks lost wages owed to Mr Webber, reimbursement (if any) for the lost benefit of an employer contribution to his superannuation account, and the amount owed as wage arrears for overtime hours worked.

F. Costs are reserved.

Employment relationship problem

[1] AFFCO New Zealand Limited (AFFCO) dismissed Curtis Webber on 18 February 2013. He worked at AFFCO's Rangiuru plant for 25 years. In his application to the Authority lodged on 11 February 2014 Mr Webber sought investigation and determination of three claims against AFFCO. Mr Webber alleged:

(i) AFFCO's Rangiuru production manager Ike Tapsell treated him unfairly during the course of his work on 2 and 9 August 2012 in a way that amounted to harassment and bullying.

(ii) AFFCO's industrial relations manager Graeme Cox acted unjustifiably in how he carried out an investigation of an allegation that Mr Webber had threatened and intimidated AFFCO's Rangiuru plant manager Kevin Casey on 16 January 2013 and in then deciding to dismiss Mr Webber for serious misconduct.

(iii) AFFCO underpaid Mr Webber for overtime hours he had worked.

[2] Mr Webber sought orders for payment of lost wages, lost superannuation, compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act), and wage arrears under s131 of the Act.

[3] A preliminary issue about representation of Mr Webber in pursuing his claims was resolved by a determination issued on 30 July 2014.[1]

[4] In reply to Mr Webber's substantive claims AFFCO denied he was unfairly treated, unjustifiably dismissed or underpaid for overtime hours worked.

The Authority investigation

[5] For the purposes of the Authority's investigation written witness statements were lodged by Mr Webber, Mr Tapsell, Mr Casey, Mr Cox and the following people:

- Richard White, a drug dog handler employed by Risk Management Group (RMG) who carried out a search of Mr Webber's car on 16 January 2013 and who provided a report which supported Mr Casey's complaint that Mr Webber had said threatening words to Mr Casey following that search.
- Kaipara McGarvey, the Rangiuru branch president of the New Zealand Meat Workers Union, who was also part of the discussion with Mr Casey on 16 January 2013 during which Mr Webber was said to have use threatening or intimidating words, was involved in some subsequent meetings with Mr Cox about that incident, and in August 2012 had raised Mr Webber's personal grievance about Mr Tapsell's alleged unfair treatment of him.
- Megan Leaf, a Te Puke barrister who had represented Mr Webber in raising various issues with AFFCO from March 2012 about wages and leave and who attended one of the disciplinary meetings held with Mr Webber about the 16 January 2013 incident.
- Steve Chalmers and Connie Paparoa, both AFFCO employees, who gave evidence about their observations of interactions between Mr Webber and Mr Tapsell and between Mr Tapsell and other employees.
- Hami Henare, an AFFCO supervisor, who was at a meeting with Mr Webber, Mr Tapsell and Labourers Union delegate Mark Kingham on 9 August 2012 and who also met with Mr Casey on a later date when Mr Casey was looking into Mr Webber's complaint about what was said to him by Mr Tapsell in the 9 August meeting.
- Mr Kingham, who was present at the 9 August meeting and, along with Mr Henare, later talked with Mr Casey about that earlier meeting.

[1] *Webber v AFFCO New Zealand Limited* [2014] NZERA Auckland 324.

[6] The 11 witnesses attended at various times during the course of the two-day investigation meeting to confirm, under oath or affirmation, their written statements and then answer questions from me and the parties' representatives. An exclusion arrangement was made so that, apart from Mr Webber and Mr Cox, witnesses who had not already given evidence were not present during the questioning of others. The arrangement allowed for some testing of the reliability and consistency of their recall of various discussions and events.

[7] The parties' representatives provided some oral submissions on the wage arrears issue and later provided written submissions on all issues for determination. While I closely considered the written and oral evidence of the witnesses, relevant background documents lodged by the parties, and the representatives' submissions, this determination has not recorded all that material. Rather, as permitted by s174 of the Act I have stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[8] However I considered the following point about the evidence available for my investigation should be noted in this determination. One issue about the adequacy of the inquiry conducted by Mr Cox concerned the possible use and availability of closed circuit television (CCTV) images of the incident on 16 January 2013. It has formed a part of the conclusions reached in this determination about the justifiability of Mr Cox's actions on AFFCO's behalf. I have not seen the CCTV material that was available to him because it was not among evidence lodged by the parties in accordance with the Authority's timetable directions for the investigation. It only became apparent to me late on the first day on the investigation meeting, as a result of a question asked by Mr Mitchell, that the parties had some CCTV material for 16 January 2013. I was advised by AFFCO counsel that the CCTV material was previously thought lost but a copy had been located by AFFCO after the deadline for lodging evidence. A copy had been provided to Mr Mitchell but neither counsel had considered it necessary to provide the Authority with that material. I decided, with the concurrence of both parties, to proceed to investigate and determine the matter without seeking to see whatever images that material might show (which was not immediately or readily available to view and may have required the recall of at least one witness). In that respect my focus was on what had been available to the parties

at the time at which Mr Cox carried out his investigation and made his decision, rather than what the Authority might now see (and which I considered was consistent with the temporal emphasis of s103A(2) of the Act).

The unfair treatment claim about events of 2 and 9 August 2012

[9] Mr Webber's claim that Mr Tapsell treated him unfairly arose from two incidents. He said that on 2 August 2012 Mr Tapsell had watched him working on the viscera table ('the guts table'), had patted his shoulder as he walked past, and had then moved down the table and cut off some hearts without sterilising his knife. Mr Webber said he felt "*extremely intimidated*" by Mr Tapsell's actions of watching his work and patting his shoulder.

[10] On 9 August Mr Webber complained to Mr Casey, in a discussion with Mr Tapsell present, that Mr Tapsell had not followed correct procedure for sterilising his knife between cuts. After returning to work Mr Webber said that Mr Tapsell had again watched him at his work and twice told him that he had not sterilised his knife properly. Mr Tapsell then, during a work changeover period, called Mr Webber to his office for a discussion with Mr Henare and Mr Kingham present. Mr Tapsell told Mr Webber he wanted to make sure Mr Webber was aware of the hygiene requirements. Mr Webber then told Mr Tapper he thought the meeting was in retaliation for him complaining about Mr Tapsell not following sterilising procedure. In the course of responding to that comment Mr Tapsell used the phrase "*for fuck's sake*". Mr Webber took exception to Mr Tapsell swearing and Mr Tapsell said he was not swearing at Mr Webber but apologised for swearing. Mr Webber repeated his comment about retaliation and said to Mr Kingham, "*come on let's go*". Mr Tapsell's account was that he told Mr Webber to stay until the end of the meeting while Mr Webber's account was that he was told to sit down and that Mr Tapsell said he would tell him when he could leave.

[11] Mr Webber's evidence to the Authority was that Mr Tapsell's behaviour towards him were instances of bullying that made him feel intimidated and that Mr Tapsell was setting out to get rid of him.

[12] However I concluded Mr Webber's own evidence, along with that of other witnesses, did not support the conclusion he drew about those interactions.

[13] Mr Tapsell's role as production manager included watching work practices. He had a cogent explanation for paying close attention to work on the guts table at the time. He was concerned one position on the table had a greater workload than others and he wanted to see if how the work was done could be changed to improve that situation. It was also within the legitimate scope of his role to raise concerns about compliance with procedure, to meet with a worker to talk about it, and to expect a worker to remain for the course of such a meeting. I concluded his use of a slang phrase in the 9 August meeting was not inconsistent with the recognised robust environment at a meatworks and was not abuse directed at Mr Webber.[2] Mr Tapsell used the phrase in a sentence where he was trying to emphasise that he had a high rather low opinion of Mr Webber, and referred to having earlier arranged for Mr Webber to meet with Mr Casey because Mr Webber had some good ideas about improvements that could be made at the plant.

[14] Mr Webber's evidence disclosed other reasons for his reaction and attitude towards Mr Tapsell in that discussion. The discussion occurred not long after Mr Webber, along with other union members, had returned to work after an extended lockout imposed by AFFCO (March to June 2012) and about which Mr Webber had a number of reasons to be dissatisfied. He had earlier felt himself to be under unwelcome pressure to sign an individual employment agreement. On the day that the lockout notice was given to him, a long service leave application that he had made was denied. During the lockout a supervisor's position in the rendering department (that Mr Webber's experience as a leading hand in that area would have made him very suitable for) was advertised and given to someone else. On the return to work after the lockout, Mr Webber was put to work in another area of the plant. His job on the guts table was, as suggested in the evidence of Mr Chalmers, seen as one more typically given to someone starting in the industry rather than a worker with Mr Webber's many years of experience.

[15] In that context Mr Webber's evidence was that, when Mr Tapsell had patted his shoulder as he walked past him on 2 August, he felt the gesture meant "*we have you where we want you now*". While Mr Webber may genuinely have felt so, the totality of the evidence from him and other witnesses did not support ascribing any such intention to Mr Tapsell's action. The evidence of Mr Chalmers and Ms Paparoa

[2] *Morrell v AFFCO New Zealand Limited* [2004] 1 ERNZ 437 at [64].

established that Mr Tapsell would sometimes greet workers or acknowledge their work as he passed by making such a gesture. At my request Mr Webber also demonstrated the gesture as he experienced it on 2 August – re-enacting it by patting his counsel's shoulder. Accepting Mr Webber's re-enactment was fairly done and without over-dramatisation, it showed Mr Tapsell's gesture was a light touch, without physical force and demonstrated an easy familiarity that was not inappropriate or intimidating among colleagues who have worked for decades in the same plant. Mr Tapsell had worked for AFFCO for more than 40 years and Mr Webber had 25 years' service.

[16] While Mr Webber had his own feelings and resentments about his situation at work at the time – and in which the possibly lingering effects of an intense and sometime bitter industrial dispute that had concluded only weeks before should not be underestimated – Mr Tapsell's actions on 2 and 9 August 2012, I concluded, were simply part of everyday work interactions (albeit with occasional tensions) rather than of a level that could fairly be described as unreasonable treatment or bullying.

[17] Mr McGarvey had raised a grievance about Mr Webber's concerns at the time. Mr Casey made inquiries as a result. He met with Mr Henare and Mr Kingham to ask about what had happened in the meeting with Mr Webber on 9 August. He also questioned Mr Tapsell about it. Although Mr Kingham did not recall the details of his discussion with Mr Casey, I have preferred the account of Mr Casey and Mr Henare about that discussion and have concluded Mr Casey could reasonably have come to the conclusion that Mr Webber's complaint of intimidation lacked sufficient foundation to require further action. AFFCO, in closing submissions, acknowledged that "*parts of Mr Casey's investigation could have been better*". Mr Casey believed, as best he could recall some two years later, that he had verbally advised Mr McGarvey of the outcome of his investigation but Mr Casey did not talk directly to Mr Webber about it or provide any written follow-up or response. He also probably received and passed on a letter from Mr McGarvey on 29 August 2012 that referred to "*taking the matter further*" but nothing more was done about it by either AFFCO or union representatives until after Mr Webber's dismissal in February 2013.

[18] On the basis of the evidence available to me I concluded no different outcome would have resulted from any further inquiry by Mr Casey in August 2012, so that no defects in the process followed by Mr Casey at that time resulted in Mr Webber being

treated unfairly in respect of his complaint about events on 2 and 9 August.[3] Mr Webber's unjustified disadvantage grievance was not established.

The unjustified dismissal claim about 16 January incident

[19] Mr Webber's unjustified dismissal claim required a deeper level of analysis because the evidence, as it emerged in the Authority's investigation, showed significant flaws in the inquiries had Mr Cox carried out and on which he based his conclusion that Mr Webber had threatened or intimidated Mr Casey on 16 January.

The 16 January incident and the subsequent investigation by Mr Cox

[20] On 16 January Mr Casey authorised a search of workers' vehicles as they left the plant car park. RMG had a contract to provide occasional drug searches at AFFCO sites and Mr White had called into the Rangiuru plant earlier on 16 January to offer to conduct a search that day.

[21] In the late morning Mr Webber noticed Mr Casey and a drug dog handler – who was Mr White – checking vehicles in the plant car park. Mr Webber then rang Mr McGarvey to ask why a union official was not with them, as Mr Webber understood that was usual practice. Mr McGarvey then contacted Mr Casey. Mr Casey did not agree a union official should be present and told Mr McGarvey that the drug dog had made 'indications' on three vehicles.

[22] From mid-afternoon two dog handlers (including Mr White), accompanied by Mr Tapsell and Mr Casey, conducted searches of vehicles leaving the car park. Sixty-three vehicles leaving or entering the car park were said to have been searched between 3.30pm and 6pm. The searches were carried out on a private roadway leading out of the car park that was accepted to be AFFCO property. The end of that roadway connected with a public road – State Highway 2 – about 6 kilometres east of Te Puke.

[23] As Mr McGarvey left the site that afternoon his car was searched and, according to his evidence, he told Mr Casey and Mr Tapsell that the searches being conducted were "*bullshit*" and that they should have arranged for a union official to

[3] Section 103A(5) of the Employment Relations Act 2000 (the Act).

be present during them. Mr McGarvey said he had to leave to get to the bank in town but told the managers he would return later.

[24] Mr Webber left the car park in his truck some time later. Mr White stopped him in the AFFCO roadway and carried out a search of the vehicle. Their evidence differed on whether or not Mr White sought and got Mr Webber's approval before putting the dog into his truck. However Mr Webber's evidence was that when Mr White asked if he could have a closer look at a seatbelt area where the dog had 'indicated' and in the glove box, Mr Webber had said to "*go ahead*" and that he could "*rip the seats to bits if you want to*".

[25] Mr White's evidence was that Mr Webber was compliant and friendly throughout the search of his vehicle but that things "*went pear shaped*" after Mr McGarvey returned to the site and spoke to Mr Webber. It was clear – from Mr White's answer to a question from me about it – that his search of Mr Webber's truck was clear and complete at the time Mr McGarvey arrived and that the argument that followed about the rights or wrongs of such a search were not – in a phrase that were my words not Mr White's – a 'smoke screen' to divert or prevent any further searching of Mr Webber's vehicle.

[26] When Mr McGarvey returned he parked his car on the opposite side of the roadway and walked over to Mr Webber. Mr McGarvey asked Mr Webber if he knew he had the right to refuse the search.

[27] Mr Casey's evidence was that, at that point, Mr Webber "*started getting aggressive*" and asked why Mr Casey had not told him his rights. Mr Casey insisted the company had the right to search vehicles. What Mr Casey described as "*a heated conversation*" followed. During that conversation Mr Casey also made a brief call on his mobile telephone to AFFCO's operations manager Rowan Ogg to check if he was correct in his assertions about the company's search rights.

[28] Mr Webber accepted in his evidence that, during this conversation involving Mr McGarvey, Mr Casey and Mr White, he made the following comment: "*How do we know you cunts didn't plant stuff in it?*". Mr White said he "*took offence*" to the comment and told Mr Webber that his integrity had never been questioned over 25 years in this area of work.

[29] Around this time Mr White also covertly signalled for the other dog handler to take his dog as he thought the heated conversation might become "*hands on*". Mr White and Mr Casey gave different evidence from Mr Webber and Mr McGarvey about whether Mr White had moved away – either when handing over his dog or at some other time – and whether he was close enough to have clearly heard everything Mr Webber said to Mr Casey.

[30] Mr Casey said that Mr Webber had said to him: "*Come out on the fucking road and I'll sort you out*". The road referred to was State Highway 2, off AFFCO property.

[31] Later that evening or on the following day Mr White wrote his drug dog inspection report. In his summary notes in that report he wrote that he had heard raised voices in which Mr Webber told Mr Casey "*to go outside the gate and we can sort it out*". His account also included the following two sentences:

> *Mr Webber was very argumentative at this stage and appeared very angry and in my observation he wanted to step Mr Casey out and give him a hiding. Mr Casey did not enter into that conversation and appeared visibly upset with the confrontational behaviour and threat towards him made by Mr Webber. Mr Webber left the plant.*

[32] Mr Webber later told Mr Cox, through his lawyer, that the words he used were: "*Why didn't you let me know my rights Kevin? You wouldn't get away with this out on the main highway*". Mr McGarvey said he recalled Mr Webber had said: "*This wouldn't happen out on the main highway, this illegal search*".

[33] Mr Cox's evidence was that Mr Casey had phoned him on 16 January to report an incident during which Mr Webber threatened him. At the request of Mr Cox Mr Casey sent an account of events to him by email on 17 January.

[34] In his 16-line email Mr Casey wrote that he felt threatened and walked away after Mr Webber said to him "*come out on the fucking road and I'll sort you out*". Mr Casey did not refer to saying anything to Mr Webber in response but subsequent information from Mr Webber and Mr McGarvey suggested Mr Casey had asked "*are you threatening me*" before he walked away.[4] Mr Casey's account was only that he had walked away and Mr Webber then got in his truck and drove off.

---

[4] Mr McGarvey's written statement of 21 January and interview of Mr Webber on 11 February 2014.

[35] On 18 January Mr Cox sent Mr Webber a letter calling him to a disciplinary meeting to consider an allegation of serious misconduct that he had "*threatened/intimidated Kevin Casey by aggressively stating "come out on the fucking road and I'll sort you out" (or words similar).*" He sent Mr Webber a copy of Mr Casey's complaint and what he called Mr White's statement (which was probably the RMG inspection report prepared by Mr White).

[36] The investigation subsequently conducted by Mr Cox comprised:

(i) Asking, via email, for Mr White's comments on Mr Casey's statement that Mr White had taken offence when Mr Webber suggested drugs could be planted, and reading Mr White's reply, dated 17 January, confirming that he had taken offence at a challenge to his integrity.

(ii) Seeing Mr White's inspection report for the search conducted on 16 January, including the sentences describing the interaction between Mr Webber and Mr Casey.

(iii) Interviewing Mr McGarvey on 21 January and receiving a written statement also provided by Mr McGarvey that day.

(iv) Interviewing Mr Casey on 21 January.

(v) Holding a meeting with Mr Webber on 29 January (who was accompanied by Mr McGarvey) at which Mr McGarvey asked for CCTV footage for the AFFCO car park and at which Mr Webber made no statement because his lawyer, Ms Leaf, was not available to attend the meeting.

(vi) Receiving an email on 6 February from another lawyer acting for Mr Webber that denied Mr Webber had threatened Mr Casey, gave Mr Webber's account of words used about the 'main highway' and suggested Mr White was around 20-30 metres away when Mr Webber spoke to Mr Casey so that Mr White could not have heard the words used.

(vii) Interviewing Mr Webber on 11 February (accompanied by Ms Leaf and Mr McGarvey).

(viii) Arranging for Mr Casey to check and provide him with CCTV footage for the AFFCO car park on 16 January, and looking at that material (but finding it indistinct and of little use).

(ix) Asking Mr Casey and Mr White to each provide a diagram of where they and others were standing during their conversation with Mr Webber and Mr McGarvey on 16 January, and looking at the diagrams provided by both men.

(x) Sending a letter on 15 February to Mr Webber, via Ms Leaf, advising that he had completed his investigation and had decided Mr Webber did threaten Mr Casey "*by aggressively stating 'come out on the fucking road and I'll sort you out' (or words similar).*" Mr Cox advised he was seriously considering dismissal and wanted to hear from Mr Webber before making a decision.

(xi) Meeting with Mr Webber and Mr McGarvey on 18 February and asking whether they had anything to say in relation to a lesser penalty, or anything else, before a final disciplinary decision was made.

[37] In the meeting on 18 February Mr Cox referred to clause 35(d) of the AFFCO core collective agreement which states:

> *In all cases involving possible dismissal or suspension, a lesser penalty may be imposed by mutual agreement between the Union, the Company and the worker concerned.*

[38] After Mr McGarvey told Mr Cox that he and Mr Webber believed what they had to say would not change Mr Cox's mind, Mr Cox told Mr Webber he was dismissed.

The legal standard for AFFCO's inquiry and decision

[39] Under s103A of the Act the disciplinary inquiry conducted and the decision made by Mr Cox on behalf of AFFCO was justified if it was what a fair and reasonable employer could have done in all the circumstances at the time he conducted the inquiry and decided to dismiss Mr Webber.

[40] In applying this test of justification the Authority must, among other factors, consider whether Mr Cox gave Mr Webber a reasonable opportunity to respond and genuinely considered his explanation before dismissing him. The dismissal could not be determined to be unjustified if defects in the process Mr Cox followed were minor and did not result in Mr Webber being treated unfairly.

[41] The Authority was not required to determine whether Mr Webber did make a threatening or intimidating comment to Mr Webber but whether Mr Cox's investigation into the allegation was fair. The onus was on AFFCO to show it had conducted a full and fair inquiry, in which Mr Cox was demonstrably open-minded,

thorough with his investigation and dealt properly with all the relevant information. It was open for Mr Cox to disbelieve an explanation but there must have been a proper basis and reasonable grounds for him to do so. The evidence to support the allegation that Mr Webber had committed serious misconduct needed to be as compelling at the charge was serious.[5]

Flaws in the investigation and decision

[42] I concluded the following factors amounted to defects – in how Mr Cox investigated the allegation about Mr Webber's conduct and the decision he made to dismiss him – that were more than minor and resulted in Mr Webber being treated unfairly:

(i) Inadequate inquiry into information from Mr White.

(ii) Inadequate inquiry of Mr Casey about his complaint and too much involvement by him in the investigation of his complaint.

(iii) Failure to provide all relevant material to Mr Webber for comment or response before a decision was made.

(iv) Inadequate consideration of Mr McGarvey's contribution to the situation about which Mr Casey complained.

(v) Inadequate consideration of alternatives to dismissal.

[43] In light of those conclusions I found AFFCO's dismissal of Mr Webber was unjustified for the reasons given in relation to each factor outlined below.

(i) Inadequate inquiry into information from Mr White.

[44] Information from Mr White was important for the extent to which it did, or did not, corroborate Mr Casey's account of events – particularly the words used by Mr Webber, the context in which they were said, and the apparent effect of them on Mr Casey.

[45] Elements of Mr Cox's investigation indicated he was alive to two concerns about the quality and reliability of that information. He asked for Mr White's comment on a suggestion that Mr White was offended by a remark by Mr Webber that

[5] *Morrell v AFFCO New Zealand Limited* [2004] 1 ERNZ 437 at [31]-[32], [34], [44]-[45] and [65]; *Honda NZ Ltd v NZ Shipwrights Union* ERNZ Sel Cas 855 at 858 (CA); and *NZ Shipwrights Union v Honda NZ Ltd* [1989] 3 NZILR 82, 85 (LC).

he considered a slur on his work and his integrity. Mr Cox also asked Mr White to provide a diagram showing where he was standing at the time Mr Webber's allegedly threatening words were uttered – a request that addressed the issue of whether Mr White was likely to have heard the words his written report said he did hear.

[46] However Mr Cox conducted no formal interview of Mr White to test and check his information. He recalled that when he rang Mr White to ask him to provide a diagram, he also got "*a brief rundown of his view of the overall incident*" but had no notes of that discussion and provided no information about that telephone conversation to Mr Webber as part of the disciplinary inquiry.

[47] There were quite significant differences in what Mr White said he heard and what Mr Casey reported – yet both had written their accounts of the supposedly 'aggressively stated' words used only hours after the event.[6] The phrase 'we can sort it out' had a potentially different meaning, for example, from 'I'll sort you out'. Mr Casey reported the phrase 'the fucking road' was used while Mr White said the phrase used was 'go outside the gate' and did not refer to any swearing.

[48] Mr White's inspection report included a note of his observation of Mr Webber's demeanour. That was relevant to whether or not Mr Webber's behaviour was threatening or intimidating and warranted further inquiry of Mr White about both Mr Webber's tone of voice and his physical stance.

[49] Mr Cox could also have reasonably asked why Mr White's report made no reference to the arrival of Mr McGarvey during the search and what effect that arrival had on Mr Webber's behaviour. He could also, in conducting a thorough and open-minded inquiry, have asked about what discussion Mr White and Mr Casey had after Mr Webber left the scene on 16 January. The importance of that was disclosed in the different accounts Mr Casey and Mr White gave in answer to questions on that point during the Authority investigation. Mr White initially said he did not talk with Mr Casey after Mr Webber left as they carried on searching other vehicles but he then said he could not remember whether Mr Casey had asked him to mention the incident when he wrote up his search report. Mr Casey's evidence was different. He recalled telling Mr White that Mr Webber's behaviour was not acceptable and that Mr White

[6] *Timu v Waitemata District Health Board* [2007] ERNZ 419 at [93].

had said he would support Mr Casey if Mr Casey made a complaint. Mr Casey also said he asked Mr White to make sure the event was covered in his report.

[50] Mr Cox had sought confirmation from Mr White that he was offended by the earlier slur from Mr Webber about his integrity but Mr Cox did nothing more (including by not directly interviewing Mr White) to test the extent or otherwise to which that may have coloured Mr White's take on the subsequent heated discussion with Mr Webber. Even by the time of the Authority investigation meeting, more than 18 months later than the January 2013 incident, it was clear from Mr White's demeanour and comments in giving his evidence on that point that he was then (and remained) deeply offended by Mr Webber's suggestion he might "*plant stuff*".

[51] Instead of making inquiries about those matters at the time of his inquiry, and testing the influence it may have had on the content and reliability of the information given, Mr Cox appeared to have largely and uncritically adopted Mr White's account.

[52] Given the standard of compelling evidence required to support an allegation of serious misconduct – and the nature of Mr White's information as the sole corroboration of Mr Casey's complaint – failure to take any further steps to test that information was more than a minor defect in the process Mr Cox followed. It was unfair to critically assess what Mr Webber had to say about what happened without subjecting Mr White's account to similar scrutiny.

(ii) Inadequate inquiry of Mr Casey about his complaint and too much involvement by him in the investigation of his complaint.

[53] A similarly light-handed approach was taken to the contents of Mr Casey's complaint. Mr Cox did hold and record a formal interview with Mr Casey. Notes of the interview, which Mr Casey confirmed reflected the complete content of the interview, showed Mr Cox asked Mr Casey one question: "*can you tell me how you felt at the time of the incident*?". Mr Casey's answer was that he took what Mr Webber had said to him "*in a very aggressive manner*" as a threat. He also expressed his view that the incident was serious misconduct and "*was a dismissible offence*" under the collective agreement.

[54] While Mr Casey was later asked to provide a diagram showing where various people were standing, Mr Cox provided no other evidence of any rigour in his analysis of what Mr Casey had said about the incident.

[55] Even if Mr Cox reasonably believed Mr Casey's account of the words used by Mr Webber, more was needed to establish they were threatening or intimidating. The necessary assessment was to an objective standard – that is what a reasonable person aware of the situation and context would conclude – rather than simply what Mr Casey, subjectively, felt about it.[7] That objective standard, of course, as a matter of fairness in employment law, applies not only to a situation, as here, where a manager says he was threatened by a worker but also to situations where a worker alleges she or he has been threatened or intimidated by what a manager has said to her or him.

[56] Mr White's report, written at Mr Casey's request, had suggested Mr White thought Mr Webber wanted to "*step Mr Casey out*" but the comment may have been coloured by Mr Webber's earlier slur to Mr White's integrity and was not tested by any thorough questioning of Mr White by Mr Cox during his inquiry. There was not sufficient, I concluded, to establish that Mr Cox had properly explored, at the time, whether Mr Webber's conduct met an objective standard of being threatening or intimidating.

[57] Another significant procedural flaw was Mr Casey's apparent involvement in looking into whether or not CCTV footage revealed any important or useful information. Given that he was the complainant, it was not a decision he should have made or influenced.

[58] Meeting notes for 29 January show Mr Webber asked about the "*video surveillance*" and Mr Cox replied that Mr Casey had looked at it and "*it only shows people standing around*". Mr McGarvey later asked if Mr Casey had "*looked at the footage and found nothing*" to which Mr Cox was noted as replying: "*As far as I know*". Although it became clear from Mr Cox's evidence to the Authority investigation that he had, at least later, looked at the video footage (as outlined further on in this determination), he also appeared to have relied on Mr Casey's assessment of its utility in identifying people involved or what had happened. Given AFFCO's resources to investigate the allegation made (which included Mr Cox in his national

[7] *Harris v The Warehouse Limited* [2014] NZEmpC 188 at [118].

role and at least one human resources advisor to assist him), it was not appropriate to have Mr Casey as the complainant make that assessment, even on an initial basis and even if – as a matter of operational procedure at the plant – Mr Casey may have been the person who had to make arrangements for the video footage to be copied and viewed elsewhere.[8]

(iii) Failure to provide all relevant material to Mr Webber for comment or response before a decision was made.

[59] There were at least two items of relevant material that Mr Cox had access to and referred to in reaching his decisions that Mr Webber was neither provided nor given the opportunity to comment on – the CCTV footage and the diagrams prepared by Mr White and Mr Casey showing where they said they were standing at the time of the heated conversation.

[60] Although Mr Cox's comments to Mr Webber and Mr McGarvey on 29 January, as recorded in the meeting notes, suggested he relied on what Mr Casey told him about the CCTV footage, the evidence of Mr Cox at the Authority investigation meeting was that he had (at least by 18 February) attempted to watch the CCTV footage. He said Mr Casey had sent him a "*huge [digital] file*" that he needed assistance from AFFCO's IT manager to get running. He described what he had then seen as "*vague*" so he had asked if the images could be improved but it appeared that was not possible. He said the camera "*was quite a way from [where] the action took place*". He said he "*could see people standing there [but] could not tell who they were*".

[61] Failing to provide Mr Webber with the opportunity to look at that CCTV footage was more than a minor defect because it unfairly denied him the prospect of identifying the people that Mr Cox said he was not able to (from the position they were standing in relation to one another, for example, or from the time that they arrived and left). Mr McGarvey's presence, for example, may have been identified (even if faintly or distantly shown) from the later arrival of his car. Most importantly it may have been possible to discern whether Mr White (even if only a faint figure) had or had walked off some distance as Mr Webber and Mr McGarvey alleged. The

[8] Section 103A(3)(a) of the Act.

point, as Mr Cox acknowledged in his oral evidence, was crucial to establish if Mr White was within hearing distance and to substantiate what Mr White was likely to have heard.

[62] Similarly Mr Webber was not given the opportunity to comment on the accuracy or otherwise of the diagrams Mr White and Mr Casey provided yet that was information that confirmed for Mr Cox, on the crucial question of whether Mr White's evidence reliably corroborated the account of Mr Casey, that Mr White was in close proximity and heard what Mr Webber said and saw Mr Casey's reaction to it. Neither were Mr Webber and Mr McGarvey asked to provide their own diagrams for the purpose of Mr Cox comparing them with those of Mr White and Mr Casey for similarity or consistency. Seeking an item of information from one witness and the complainant but not the equivalent item from another witness and the accused worker was more than a minor defect because the diagrams provided by Mr White and Mr Casey added greater weight or credibility to their accounts. The denial of the opportunity to comment or to provide his own comparative diagram resulted in Mr Webber being treated unfairly.

(iv) Inadequate consideration of Mr McGarvey's contribution to the situation

[63] Mr Casey's 17 January email clearly identified the role of Mr McGarvey in contributing to the incident about what Mr Casey complained. He identified Mr Webber's aggression as being sparked by what Mr McGarvey had said when he arrived back on the scene of the search – being a search Mr McGarvey had earlier told Mr Casey was "*bullshit*" – yet the evidence of Mr Cox about his inquiry disclosed no proper or fair assessment of how Mr McGarvey's conduct had contributed to the incident Mr Casey about which complained. Instead the responsibility for, and consequences of, the incident were visited entirely on Mr Webber.

[64] The point was important because Mr McGarvey's comment that Mr Webber had the 'right' to refuse the search was – from the company's point of view – quite wrong. Mr Cox and Mr Casey were both unequivocally of the view that AFFCO had clear contractual authority to carry out the search because of a "*Search Consent*" provision Mr Webber (and other Rangiuru workers) had signed in a "*Returning Workers Seasonal Induction Form*" for the 2012/3 season. The provision stated:

> *I understand that if I am employed by AFFCO, I may be subject to a search of my bag, vehicle, clothing or any other property of mine that enters the factory site, in accordance with Company rules; in order to detect the possession of unauthorised company property, unauthorized alcohol or drugs.*

[65] Other parts of the induction form included a declaration that the worker agreed to all terms set out in it, would comply with all policies and reasonable instructions and that AFFCO's agreement to engage the worker for the season was based on those terms.

[66] For the purposes of this determination it was not necessary to reach any firm conclusion as to whether AFFCO's view on its search rights was correct. What was important was that Mr Cox clearly understood and believed that to be the case and that Mr McGarvey was wrong to say otherwise. It was in that light that his actions on AFFCO's behalf had to be assessed.

[67] In questions put to them during the Authority investigation both Mr Casey and Mr Cox accepted that Mr Webber was (in my words) "*rarked up*" by Mr McGarvey. Mr Cox said that it was incorrect to say he had that view during his investigation but "*sitting here today and listening to what [has been] said, I could accept it did go some way to incite the incident*". He said he did not know Mr Webber well or "*what pushed his buttons*" but he could accept that Mr McGarvey's actions had contributed to Mr Webber's behaviour.

[68] There was clear information available to Mr Cox at the time of his disciplinary inquiry that Mr Webber's alleged misconduct followed being given – from the company's perspective at least – plainly incorrect information about his supposed rights. It was a circumstance that a fair and reasonable employer could not – as a matter of proportionality – have taken so little account of or have considered only the mistaken worker should answer for.

(v) Inadequate consideration of alternatives to dismissal.

[69] At the 18 February meeting, according to AFFCO notes, Mr Cox confirmed he was considering dismissal but under clause 35(d) of the collective agreement a lesser penalty could be applied by mutual agreement so he was interested in hearing what

Mr Webber and Mr McGarvey had to say in relation to a lesser penalty or anything else before making his final decision.

[70] After an adjournment in that meeting Mr McGarvey told Mr Cox that he and Mr Webber believed nothing they said would change Mr Cox's view. Mr McGarvey also said he had never been involved with the 35(d) clause and had nothing much to add. Mr Cox then advised that Mr Webber's employment was terminated that day.

[71] AFFCO submitted the response on Mr Webber's behalf that day was "*a significant error*" by him and his representatives. Mr Cox's oral evidence at the Authority investigation was that he felt he had no option to choose between a warning and a dismissal (giving his finding that Mr Webber had committed serious misconduct). AFFCO submitted that if Mr Webber and Mr McGarvey had returned from the adjournment in the 18 February meeting and put forward a 'plea in mitigation' and suggested a lesser penalty (such as a final warning), the matter may not have been before the Authority at all.

[72] It was surprising Mr McGarvey and Mr Webber had not said more to attempt to dissuade Mr Cox from dismissing Mr Webber in light of his finding of serious misconduct. However Mr Cox had acted on what I have concluded was a false premise – that it was only up to Mr Webber (and his representative) to identify the grounds for imposing a lesser penalty than dismissal. It was not the interpretation and application of relevant clauses of the collective agreement that a fair and reasonable employer could have taken in all the circumstances at the time – for two reasons.

[73] Firstly, clause 35(d) allows for a lesser penalty by mutual agreement but its wording does not put the sole onus on the union or the worker concerned to instigate such a proposal.

[74] Secondly, Mr Cox had an obligation, in acting fairly and reasonably, to consider alternatives to dismissal that was apparent from another clause. Clause 33 of the collective agreement, headed Personal Conduct, stated "*examples of offences which would normally warrant dismissal*" and included threatening or intimidating people as one example of such an offence. The key words were "*normally warrant*". Having reached a decision that Mr Webber had committed the offence of threatening or intimidating someone, Mr Cox should have specifically considered whether the

situation warranted a response within or outside the norm (being the usual or standard thing). This included considering the factors of the kind expected in what AFFCO's submissions referred to as a 'plea in mitigation'.

[75] Failure by Mr Webber or his representative to advocate consideration of those factors did not excuse Mr Cox from his own responsibility to turn his mind to that question before exercising the power to impose the most serious disciplinary consequence. Relevant factors may have been Mr Webber's long service, no prior disciplinary sanctions, the relative seriousness of the incident and its consequences, the likelihood of repetition, the contribution of others, and the existence of a mistaken belief about the company's rights to conduct searches.

[76] The point here was not that Mr Cox should have reached a different conclusion but that, before making a decision to dismiss, he should have carried out his own assessment of whether the sanction for serious misconduct should be mitigated and have be able to provide evidence of having done so. Put another way, a fair and reasonable employer could not have made the decision to dismiss without having made such an assessment.

[77] Rather, Mr Cox's oral evidence was that it was the union's job to put forward factors that could be considered for imposing a lesser penalty. Because neither Mr Webber nor Mr McGarvey did so, Mr Cox took the view that dismissal was the automatic outcome. It was a defect in how he reached his decision that was more than minor and resulted in Mr Webber being treated unfairly.

Remedies for Mr Webber's grievance for unjustified dismissal

Lost wages

[78] Mr Webber was entitled to an order for three weeks' lost wages he claimed as a remedy for his unjustified dismissal. He made reasonable endeavours to get another job although this involved having to move from his home district of Te Puke to the North Waikato with considerable disruption to his family arrangements.

[79] The relevant weekly wage figure was not specifically identified in the evidence. If the parties are not able to resolve the exact amount, they have leave to revert to the Authority for a further order on that question.

[80] Mr Webber had also sought an order for the reimbursement of a lost benefit – under s123(1)(c)(ii) of the Act – for the value of the employer contribution that he would have received for his account in the Meat Industry Superannuation Scheme. During the Authority investigation he said he thought the AFFCO contribution was about $35 a week (matching his own) and quantified the extent of his claim for that contribution as being from the date of dismissal to the date of the investigation meeting (that is around 84 weeks). Mr Webber had not joined Kiwisaver or any other superannuation scheme when he started his new job in March 2014. There were some technical details about the scheme that witnesses at the investigation meeting could not sufficiently confirm and I have left that as an aspect for the parties to resolve by agreement if possible but with leave to apply for a further order from the Authority if necessary. My preliminary view, if I had been able to resolve the matter, was the likely order would have been for the value of one year's employer contribution (less what Mr Webber would have received as an employer contribution if he had joined Kiwisaver at his new job – as a measure of a reasonable endeavour to mitigate that claimed loss).

Compensation under s123(1)(c)(i) of the Act

[81] Mr Webber sought an order for compensation due to the distress caused to him by the loss of his job at Rangiuru and how it happened. He said he had found the allegation he threatened Mr Casey "*devastating*" and suffered from low feelings and low self-esteem following his dismissal. His evidence about the injury to his feelings conflated his earlier experience with Mr Tapsell in August 2012 – after which he took stress leave and sought counselling – and said he saw the January 2013 allegation as "*the culmination of a whole lot of unfair treatment by AFFCO and a move to get rid of me*".

[82] In light of the conclusions reached in this determination distress compensation was not appropriate for the extended period identified by Mr Webber. Rather it had to be assessed in relation to the dismissal and its after-effects on him. Mr Webber referred to resulting strains in his relationship with his partner and her children, caused in part by having to move districts for his new job as a result of his dismissal. He also referred to medical certificates that he provided his counsel and AFFCO (at unidentified times) but only one medical certificate – for the week after Mr Webber

was advised of the allegation – was among the evidence provided to the Authority investigation. There no other medical evidence about any effects on him.

[83] Accepting Mr Webber's limited evidence about the loss of dignity and injury to feeling caused to him by the unfair manner of his dismissal from a workplace where he had given 25 years' service, and considering the range of remedies awarded in similar cases, I concluded $6000 was the appropriate level of compensation under s123(1)(c)(i) of the Act.

Reduction of remedies required under s124 of the Act

[84] In deciding remedies the Authority must consider the extent to which Mr Webber's actions contributed towards the situation that gave rise to his grievance and, if those actions require, reduce remedies that would otherwise be awarded. Mr Webber questioned how his upset at having his vehicle search contributed to the basis of his grievance (which was about how AFFCO had acted unjustifiably when looking into the events on that day) but AFFCO submitted Mr Webber's angry behaviour was blameworthy conduct that contributed to the outcome and required a reduction of remedies.

[85] The evidence of Mr Cox's inquiry and in the Authority's subsequent investigation did not establish sufficiently conclusively that Mr Webber had used the threatening words ascribed to him by Mr Casey and Mr White, but there was no dispute about his "*you cunts*" comment to them. He accepted, in answer to a question during the Authority investigation, he said that to them and I have concluded, for the purposes of the s124 assessment, that was blameworthy conduct.

[86] The Employment Court has described blameworthiness, in this context, as:[9]

> *involving an identifiable misdeed or course of conduct which can be said to be faulty when set against the employee's duties to his or her employer and the instincts of self-preservation that the employee should have at his command."*

[87] Mr Webber's query to Mr White and Mr Casey about the integrity of their search activities (the "*you cunts*" comment) was, as a matter of common sense in that context, not just 'robust' language but rather was an unnecessarily provocative and intemperate course of conduct lacking in the instinct of self-preservation. Given that

[9] *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31 at 53

another part of his claim to the Authority included what Mr Webber saw as the inappropriateness of Mr Tapsell's use of the phrase 'for fuck's sake' in a conversation with him, Mr Webber must accept the crude epithet he directly addressed at his plant manager (Mr Casey) and a contractor working for AFFCO (Mr White) that day was blameworthy behaviour and, to a reasonably high degree of probability, contributed to the situation in which his grievance arose.

[88] As a result I concluded a ten per cent reduction of the remedies for Mr Webber's personal grievance was required under s124 of the Act.

The wage arrears claim for overtime

[89] Mr Webber sought an order requiring AFFCO to pay him wage arrears under s131 of the Act because he said he was not paid at the correct rate for overtime hours he worked from March 2007. He said a term in the collective agreement meant he should have been paid for overtime at a rate based on his individually agreed hourly rate, not a lower 'base rate' on which AFFCO based its calculations.

[90] AFFCO denied Mr Webber was short paid. It said Mr Webber and the company had agreed on 15 March 2007 that he would be paid an ordinary time hourly rate of $27, with a loading of 7.5 per cent when he was working as a leading hand. It said overtime was calculated on his earlier base rate as there was no intention that his increased hourly rate would have the effect of increasing the rate he was to be paid for working overtime.

[91] The parties agreed that the Authority's determination should consider only the question of liability, and if liability were established, they should be left to quantify the amount due.

[92] Mr Webber had initially raised the issue of whether he was short paid on his overtime by talking to his manager in early 2012 but raised the issue formally with AFFCO through a letter from his lawyer, Ms Leaf, in July 2012. Under the operation of a statutory limitation period, however, Mr Webber's arrears claim could only apply to the six years prior to the date on which he lodged his claim in the Authority – that is from 11 February 2008 to 11 February 2014.[10]

[10] Section 142 of the Act.

The hourly rate in question

[93] In March 2007 Mr Webber had asked to be paid an hourly rate of $30 an hour for his leading hand role in the rendering department. After discussion with the Rangiuru plant manager at the time, Greg Myers, Mr Webber agreed to a $27 hourly rate. Mr Myers recorded the agreement in a signed, handwritten note that read:

> *"Curtis agreed to $27 +%7½ and will drop all claims – 15/3/07".*

[94] It was clear that the $27 referred to an hourly rate because above that note was another handwritten line that read" "*27/hr+%7½ = $29.02*". As I understood their evidence the parties agreed the 7½ figure referred to an extra payment Mr Webber was to receive when carrying out leading hand duties in the rendering department and was not at issue or a factor in the assessment of the appropriate rate for use in calculating overtime pay.

[95] Wage records confirm that Mr Curtis was paid the $27 hourly rate for ordinary time worked from then on and that this hourly rate was increased in subsequent years by the percentage increases agreed in union wage bargaining. However overtime that he worked was not paid at time-and-a-half of the agreed hourly rate (about $45 an hour by 2012) but at a lessor rate of around $34.52 (by 2012) that was calculated by using a 'base rate' that AFFCO said applied. (The 'base rate' applied by AFFCO had also been increased by the standard percentage increases agreed in union wage bargaining over the years from 2007).

[96] AFFCO's view – expressed in the evidence of Mr Cox and Mr Casey – was that the agreed intention in March 2007 was for any overtime due to Mr Webber to continue to be paid on the basis of a 'base rate' as that was consistent with how the overtime rate was always calculated for him and other workers at Rangiuru. It said this view was supported by Mr Webber's conduct after March 2007 – where (in his supervisory leading hand role) he signed off timesheets for himself and others in the rendering department that showed his overtime rate was paid on that basis and he had not queried that amount for almost five years.

[97] There was however nothing specific in the arrangement made (as recorded) between Mr Webber and Mr Myers in March 2007 that expressly addressed how

overtime was to be calculated – on the basis of a previous and notionally-continuing base rate (as AFFCO argued) or on the basis of a literal interpretation and application of the term about overtime in the collective agreement (as Mr Webber argued). Effectively the parties asked the Authority to resolve a dispute about construction of terms by interpreting what that silence (that is an absence of express words) meant at the time the agreement was made. In doing so the Authority had to consider what a reasonable person, well informed as to the background and context, would consider the arrangement was agreed to be, that is an objective assessment rather than one based on any subjective statement by either party of what they intended it to be. In making that assessment, how the parties acted after the agreement was made (that is their subsequent conduct) may indicate their true intention at the time but in the absence of ambiguity, the plain words of any agreement (which in this case included the terms of the collective agreement) should apply.

The practice and the collective agreement

[98] The practice on which AFFCO relied could be identified – in an example given in its submissions – from Mr Webber's pay details for 10 February 2007 (that is shortly before the March agreement). His ordinary hours were paid at the rate of $23.29. His overtime hours were paid at the rate of $31.44 – which is not one-and-a-half times the rate of $23.29. Instead, by reverse calculation, the 'base rate' used to calculate that overtime rate must have been $20.96 (that is $31.44 divided by three and then multiplied by two). The difference between that 'base rate' of $20.96 and his ordinary hourly rate of $23.29 was around 11 per cent – an extra element representing a production payment. So, like other Rangiuru workers, Mr Webber's ordinary hours at the time were paid on the basis of a base rate plus a production or productivity percentage that, added together, was referred to as the 'production rate' or the 'ordinary rate'. The rate on which his overtime hours were paid, however, excluded the production percentage and was calculated by only using the 'base rate'. That overtime rate was one-and-a-half times the base rate.

[99] The collective agreement – at clause 10g) – made this provision for the payment of overtime hours:

> *Except where otherwise specified, all time worked outside or in excess of the hours mentioned in clause 11 shall be classified as overtime and shall be paid*

for at time (or rate) and a half for the first three hours and double time (or rate) thereafter.

[100] There was only one other clause identified in the evidence in which the arrangement about payment of overtime was "*otherwise specified*". Clause 10g) said overtime for workers designated as A, B or C in the plant agreement "*shall have their overtime calculated on the following base rates*" and then stated the three different hourly base rates for each such category of worker.

[101] There was not, I was told, a document that set out which workers were in which category but workers knew their category or designation from the pay rate on which they employed. However Mr Webber was not, by that process or in any other way, designated as an A, B or C category worker. And that was the central point of his argument – the collective agreement at 10a) said a worker "*shall be*" paid for overtime at "*rate*" unless otherwise specified. He was not one of the otherwise specified A, B or C category workers, so must be paid on the basis of his "*rate*" for all overtime worked – and from March 2007 that "*rate*" was his agreed hourly rate of $27 (so worth $40.50 for time-and-a-half overtime hours then) not his previous base rate (on my calculations) of $20.95 (which gave a rate of $31.44 for overtime hours).

[102] The submissions of both parties accepted that an individual term – such as Mr Webber's hourly rate of $27 – could be agreed under the collective agreement provided it was not inconsistent with the agreement.[11] In saying so they were guided by an earlier Employment Court's decision on an AFFCO matter that found an individual term more favourable to the worker than the collective agreement was usually not inconsistent, although if there was true inconsistency, the collective agreement must prevail.[12] However, in the present case, that did not resolve the issue between the parties because an agreement to pay the higher hourly rate only for ordinary time and leaving overtime to be calculated from the base rate – as AFFCO believed the arrangement should be construed – was not (of itself) inconsistent with the collective agreement. Rather AFFCO considered such a view would be in keeping with the spirit of the collective that anticipated overtime being calculated on base rates, not full rates of pay. The side agreement in Mr Webber's case (for a higher ordinary hourly rate) was, AFFCO said, still more advantageous to him then what the

[11] Section 61(1) of the Act.
[12] *New Zealand Meat Workers Union v AFFCO NZ Limited* [2010] NZEmpC 62 at [23].

collective agreement provided for ordinary time and overtime. The issue of favourability consequently did not resolve the interpretation dispute.

AFFCO's critique

[103] Having closely considered AFFCO's full submissions about the wage arrears claim and its evidence in support of its argument, there were two points on which I concluded AFFCO's rebuttal of Mr Webber's claim could not overcome the strength of his argument.

[104] Firstly, Mr Webber's supposed acquiescence from 2007 to his overtime rate being calculated from his earlier base rate was, at best, equivocal rather than conduct showing that the arrangement was consistent with the intent of the parties. It was not clear from the evidence that Mr Webber was, in fact, fully cognisant of the rate calculations and how they were done. He accepted he had signed off timesheets showing the hours but not that he saw, understood and accepted the accompanying wage rates (if they were shown on such sheets) were correct. There may also have been other reasons – including seasonal job insecurity – that he did not question that arrangement earlier and I have not accepted his conduct amounted to a waiver to pursue his rights to be paid in accordance with the full terms between the parties.

[105] For a similar reason I did not accept AFFCO's submission that "*if he did not have a base rate, then his overtime rate in the timesheets would reflect that*". If AFFCO's practice of calculating an overtime rate on such a base rate was faulty in respect of his individual term, the evidence of having done did not legitimise the fault. It only showed it happened, not that it was right to do so.

[106] Some indirect evidence from AFFCO about intention at the time – to the extent that it could be taken into account in any event – was not conclusive on this point either. Mr Cox's witness statement reported inquiries he had made of the former plant manager Mr Myers. He reported Mr Myers was "*a bit vague*" about whether the hourly rate agreed with Mr Webber in 2007 was meant to be used for calculating overtime but "*as far as he could remember*", Mr Myers did not think it should apply. It was not sufficient evidence, I concluded, of AFFCO's intention (in the mind of Mr Myers at least) for an arrangement different from that which Mr Webber asserted.

[107] The second main point concerned AFFCO's argument regarding custom and practice. Its evidence about the long understood practice at the Rangiuru site of using a base rate to calculate overtime did not negate Mr Webber's argument (essentially) that he had agreed a new standard hourly rate to be used for all purposes. AFFCO accepted that the Rangiuru site agreement had not previously (until a written site agreement was concluded in April 2012) recorded a base rate for some positions outside those designated A, B or C but said the current and historic accepted practice was that rendering department workers (including Mr Webber) were paid time-and-a-half for overtime on just the base rate portion of their flat hourly rate. It argued that term was implied into the arrangement made with Mr Webber because – to paraphrase its argument – that was what was done at the plant at the time and he knew or should have known that was what was intended to continue for any overtime paid to him.

[108] However I have not accepted that a reasonable person informed of the background and context – that is the objective observer – would necessarily have understood that at the time or on looking at the matter now. As I have understood the parties' evidence, the standard hourly rate agreed with Mr Webber in March 2007 did not have or state a portion or percentage for productivity, unlike the 'production rate' (of base rate plus productivity percentage) that he was on up until then. As a result there was no longer a production portion in his hourly rate to *remove* in order to identify a supposed 'base rate' for use in calculating the overtime rate. It was not a production hourly rate. Instead the standard hourly rate agreed with him was effectively the equivalent of a base rate and was the only rate that could be used to calculate the rate at which his overtime hours should be paid. It was (to put it in plain or colloquial terms) a new deal that he agreed for a higher flat rate and he had no reason to necessarily assume his new standard hourly rate would have implied into it some element for productivity that would then be deducted to identify a base rate on which to calculate his overtime pay.

[109] In that respect I have agreed with and accepted Mr Webber's submission that he and AFFCO agreed he would be paid a more favourable hourly rate – as the Act and the case law allowed – and that there was no legitimate basis for AFFCO to calculate overtime pay for him other than by using that standard hourly rate.

[110] In that light, there was no "*otherwise specified*" exception to Mr Webber being paid at rate-and-a-half as referred to in the overtime clause in the collective agreement. The relevant rate was his standard hourly rate agreed in March 2007 (and as adjusted by various percentage pay rises applied in subsequent years).

[111] As a result I concluded AFFCO was liable to pay Mr Webber for overtime by applying the overtime clause formula to that standard hourly rate, not the lower 'base rate' that it used from March 2007 until his dismissal in February 2013. The parties have leave to revert to the Authority for further orders should they have an irresolvable difficulty in calculating the amount due.

Costs

[112] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Webber may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum AFFCO would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so has been sought and granted.

[113] The parties could expect the Authority to determine costs, if asked to do so, on its usual daily tariff rate unless particular circumstances or factors required an adjustment upwards or downwards.[13] In this case I expect the tariff would be applied to two-and-a half days – being a half-day for the preliminary issue (decided on the papers) and two days for the investigation meeting (which adjourned shortly before mid-afternoon on the second day after counsel had made an arrangement for lodging written submissions but which would otherwise have continued for the rest of the second day if oral closing submissions were made).

Robin Arthur
Member of the Employment Relations Authority

[13] *PBO v Da Cruz* [2005] ERNZ 808, 819-820.