

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 17
ARC 104/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN LUCKY CLARKE
Plaintiff

AND AFFCO NZ LIMITED
Defendant

Hearing: 21 and 22 February 2011
(Heard at Hamilton)

Counsel: Simon Scott and Anamika Singh, counsel for plaintiff
Graeme Malone, counsel for defendant

Judgment: 25 February 2011

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This challenge to the Employment Relations Authority's determination¹ dismissing Lucky Clarke's proceedings decides whether he was suspended and dismissed unjustifiably and, if so, the remedies to which he may be entitled. Mr Clarke was first suspended and then dismissed following events at an early morning drug check point at the entry to AFFCO's Horotiu meatworks near Hamilton where he was an employee. There is no suggestion that Mr Clarke was involved with unlawful drugs and this judgment does not address questions of the lawfulness of drug searches of employees entering workplaces.

[2] The relevant facts are as follows. Mr Clarke, a slaughterman at the Horotiu plant for the previous 3 seasons (but on and off also for almost the past 40 years), arrived at the staff car park gate between 5.30 am and 5.45 am on 7 July 2009. He

¹ AA402/10, 7 September 2010.

was alone, driving his own car. Managerial staff were concerned about unlawful drugs coming on to the plant and were stopping vehicles entering its premises and searching them with trained dogs. What happened with Mr Clarke has always been in dispute and so must be determined as a matter of evidence.

[3] The company's case, which formed the basis of its finding of serious misconduct and Mr Clarke's dismissal, is that he refused to heed clear signals to stop and intimidated and endangered the safety of a supervisor engaged in the drug search exercise, Yvonne Lloyd.

[4] From the variety of accounts (including conflicting accounts given by the defendant's witnesses) I find most probably that the following events led to Mr Clarke's dismissal.

[5] Early on the morning of 7 July 2009 before he was due to begin his shift at 6 am, Mr Clarke drove to the entry to AFFCO's Horotiu plant in his SUV. Other employees' vehicles were stopped inexplicably in a queue outside the gate to the employee car park. Mr Clarke became irritated by the hold up and then more so when he was stopped by a supervisor, Manu Akapita, who told him that his vehicle was to be searched for illegal drugs. Mr Clarke responded by saying loudly and aggressively to Mr Akapita: "Fuck that, I don't do drugs." He then began to drive forward towards the staff car parking area within the plant grounds. As he did so, Ms Lloyd was standing about one and a half to two metres in front of Mr Clarke's vehicle indicating for him to stop by a combination of one raised open hand palm and the raising and lowering of an illuminated torch in his direction. Mr Clarke's response to Ms Lloyd's presence immediately in front of his vehicle was to shout through his open driver's window at her: "Get out of the fucking way." He then continued to drive towards her. Ms Lloyd moved rapidly out of the way and Mr Clarke continued to park his car in the staff car park but not before abusing a drug detection dog handler to whom he had been directed by Mr Akapita.

[6] At the conclusion of this experimental or training drug search operation, the participants engaged in a debriefing in which there was discussion of Mr Clarke's conduct. As a result, a manager was deputed to interview him and this took place at

approximately 8 am that morning. Mr Clarke had with him a union site delegate but it appears that the plaintiff and his representative concentrated more on objecting to the conduct of the interview by the contractor engaged by AFFCO to investigate drug possession at its site, rather than on the merits of what had occurred. Mr Clarke and his union representative shouted intemperately and criticised the contractor's entitlement to conduct the interview to such an extent that the manager decided both that it should conclude and that further investigation was warranted. From other evidence and from observing Mr Clarke give evidence in this case, I am satisfied that he can be impatient, even short-fused, and does not feel constrained from using abusive language to others in the work environment. That is consistent with his reported demeanour and conduct on the day in question. Mr Clarke was then suspended from his employment until a second meeting which took place two days later on 9 July 2009.

[7] Mr Clarke was again represented by the union (two officials this time) and the allegations against him were then outlined and his response sought. Mr Clarke's account of events was that he was neither asked to stop nor saw Ms Lloyd in front of his vehicle at any stage, although he acknowledged her presence and that of others in the vicinity. Mr Clarke says that he had tooted his horn and then called out abusively to the driver of a vehicle that had stopped in front of his, blocking access to the staff car park. He denied abusing or driving towards Ms Lloyd.

[8] Faced with a stark conflict of accounts of relevant events, AFFCO decided to undertake further investigations over the following week. This it did by interviewing, and taking short written statements from, three supervisors present at the time of the incident including Ms Lloyd.

[9] When there was a third and final meeting on 16 July 2009, those statements and other written information obtained by the employer were disclosed to Mr Clarke. He, largely through his union representatives but at times in person, continued to deny any wrongdoing and says that the witnesses from the company were attempting to "stitch him up." The plant manager responsible for the decision considered the position and that it was a matter of which of the accounts of the incident he believed. Although there were some discrepancies between the accounts of the supervisors,

they were unanimous that Ms Lloyd had been standing in front of Mr Clarke's vehicle, that he drove towards her shouting abusively that she should get out of the way, and that she had done so very promptly to avoid a collision.

[10] This was categorised as serious misconduct for which the consequence was to be summary dismissal and, at the conclusion of that meeting on 16 July 2009, Mr Clarke was so advised. Mr Clarke's union played no further part in these matters after his dismissal and the plaintiff raised a personal grievance through his solicitor less than a fortnight later.

[11] At the age now of almost 60 years, and following a lifetime of work at the Horotiu plant, albeit discontinuously having been made redundant on several occasions, Mr Clarke has not worked since his dismissal. This may have been contributed to by injuries that he suffered at work before his dismissal. Mr Clarke seeks reinstatement with AFFCO to his former role, albeit on light duties.

The Employment Relations Authority's determination

[12] The Authority concluded that Mr Clarke's suspension was not unjustified. It did so in reliance on the core collective agreement's provision that required the presence of a union delegate or deputy delegate and site official together with the employee concerned, if a suspension was to be carried out and the requirement for a supervisor to record the time, date and reason for the suspension. The Authority found that Mr Clarke was represented by a union official and no objection was taken about the appropriateness of his suspension. It concluded that a fair and reasonable employer would have suspended Mr Clarke in all the circumstances and, in particular, in view of the seriousness of the misconduct allegation made against him.

[13] Turning to the justification for dismissal, the Authority acknowledged some inconsistencies between the accounts of witnesses to the relevant events. It considered, more particularly however, the evidence before AFFCO management when it made its decision to dismiss Mr Clarke. The Authority found that the content of the three statements given by witnesses to the incident confirmed

substantially the original allegation that Mr Clarke had deliberately driven his car in such a manner as to put Ms Lloyd's safety at risk.

[14] Addressing the environmental factors at the time of the incident in relation to Mr Clarke's claim that he did not see Ms Lloyd in front of his vehicle, the Authority concluded, as had AFFCO, that it was more probable than not that Ms Lloyd was clearly visible to Mr Clarke despite the "inexplicable" fact that checkpoint staff were not wearing high visibility clothing.

[15] The Authority concluded that AFFCO conducted a reasonable investigation into the incident and:

... following a reasonable investigation ... AFFCO [was] entitled to conclude that the actions of Mr Clarke constituted serious misconduct, and that his suspension from employment and subsequent dismissal, were options available to a fair and reasonable employer in the circumstances. Mr Clarke does not have a personal grievance and his claims are dismissed.

[16] That was, however, not the correct test for justification under s 103A of the Employment Relations Act 2000 (the Act). It is not simply a matter of whether dismissal was an option available to a fair and reasonable employer in all the circumstances but, rather, whether, in all those circumstances, a fair and reasonable employer would have dismissed Mr Clarke. That said, however, I agree with the Authority's conclusion, although by applying the current and more exacting s 103A test.

Non-compliance with collective agreement before suspension and after dismissal

[17] The defendant did not comply precisely with the requirements of the collective agreement before suspending Mr Clarke. The agreement required the presence of two separate union officials, identified by their functions, before the suspension of an employee took place, and also the recording of certain details relating to a suspension once it had taken place. These requirements were not met by the employer. Only one union official was present with Mr Clarke when he was suspended. There was no written record created of the fact and reasons for

suspension as the collective agreement required. The collective agreement also contained a requirement for “negotiation” with the union after a contested dismissal, with the affected employee being on pay for that purpose.

[18] These omissions or failures should not, however, cause what might otherwise be justified disadvantageous action, to be unjustified. The spirit of the collective agreement’s requirements, if not its letter, was met by the employer’s process. These failures did not disadvantage Mr Clarke materially. Although parties should not be encouraged to breach their agreements by an absence of any sanction for such breaches, I consider that the fairest way of dealing with the defendant’s breach on this occasion is for it to affect any order for costs that might otherwise be made in its favour at the conclusion of the case.

[19] This is a good example of the Court’s longstanding practice of having regard to substantial procedural fairness and reasonableness as opposed to what has been described as examination by minute and pedantic scrutiny. In this case the employer failed to follow three distinct procedures specified in its collective agreement, two with regard to suspensions and one in relation to dismissals. It failed to ensure that two union representatives were present before it suspended Mr Clarke when he was only represented by one union official. It then failed to record the details of Mr Clarke’s suspension as it was obliged to do contractually. Finally, after intimating its intention to dismiss Mr Clarke “instantly” (I assume summarily), it failed to allow for a further period of paid suspension for the purpose of conducting negotiations with the union as it had agreed it would do in the collective agreement.

[20] Either individually or collectively, none of these failures or breaches caused Mr Clarke to be disadvantaged or prejudiced by unfairness such that his suspension and/or dismissal should be categorised as unjustified. There is no suggestion that Mr Clarke would have been better represented by two union officials than he was by one. There is no dispute about the detail of his suspension, even though this was not recorded. Although no opportunity was given to the union to negotiate a different outcome to dismissal after AFFCO indicated that it intended to do so, the evidence establishes that the union failed or refused to take its member’s case further after his dismissal. The plaintiff obtained the services of its solicitor promptly and raised a

grievance with the employer no later than the union could or would have done on his behalf.

[21] Immediately before suspending Mr Clarke, AFFCO management were faced with an angry and voluble employee and union official who declined or refused to address the serious complaint on its merits. The complaint warranted further investigation by the employer. Nothing would have been gained by conducting a separate investigation of possible suspension. Mr Clarke's suspension on pay also allowed him to both calm down and focus on responding to the allegations against him.

[22] For these reasons, I consider that the suspension and dismissal were, to apply the words of s 103A of the Act, how a fair and reasonable employer would have gone about taking its decision affecting Mr Clarke.

Decision

[23] To better understand the central disputed question whether Ms Lloyd was visible to Mr Clarke and, therefore, whether he intended to drive his vehicle towards her, the Court took a view of the scene of these events in darkness. It is necessary to make allowance for the generally acknowledged change in artificial lighting between mid 2009 and early 2011. Allowing for the absence of newly installed lights and even perhaps of more recently installed higher intensity lighting in the nearby staff car park, I doubt whether Ms Lloyd could have visually identified Mr Clarke as he drove in the plant gate as she claimed. However, more importantly, the absence or at least significantly reduced level of artificial light at the time of these events would have made Ms Lloyd much more easily visible to Mr Clarke in the beams of his vehicle's headlights, even without the high visibility clothing it was agreed she was not wearing.

[24] If, as I am satisfied, Ms Lloyd was standing in front of Mr Clarke's vehicle, a combination of his headlights and the absence of ambient artificial lighting would have increased her visibility to Mr Clarke. This, in turn, makes it more likely that he

saw Ms Lloyd both before and as he drove towards her as she and other witnesses claimed. I am satisfied, as was the Authority and as were the witnesses to these events who gave their account to their employer at the time, that Ms Lloyd was standing in the intended path of Mr Clarke's vehicle. She was gesticulating in the beams of the headlights including with a torch, and was, contrary to his assertion, visible to him in that position.

[25] To a large extent, I have not accepted Mr Clarke's account of relevant events. That is for a number of reasons including my preference for the evidence given by Mr Akapita which is the most credible of all accounts, including where it conflicted with those of the employer's other witnesses. Even on its own, Mr Clarke's evidence impresses me as being inherently unlikely. By his account, and at worst, he faced the prospect of being briefly delayed in entering the staff car park by a vehicle stopped inexplicably in his path. Yet Mr Clarke accepted that immediately after tooting his horn, he shouted abusively at the driver of this vehicle although even then he had not been delayed by it. That is an improbable response to a very minor or even non-existent impediment.

[26] Nor do I accept Mr Clarke's evidence that there was no queue of employees' vehicles leading to the plant gate as a result of delays in directing drivers to vehicle searches by one or other of two dog handlers inside the parking area. All other witnesses were unanimous in their confirmation of these traffic delays that I accept were a negative consequence of the search exercise undertaken at that time.

[27] Further to my doubts about the accuracy of Mr Clarke's account of events, I found Mr Akapita to be an objective and accurate witness and the findings set out above are a substantial acceptance of his account of events. Significantly, also, Mr Akapita concluded that in light of the background events, he did not consider that Mr Clarke intended to run Ms Lloyd down in his vehicle but rather, in his anger, tried to frighten or intimidate her and so avoid the delay and inconvenience of a check of his vehicle. That, too, is my assessment of Mr Clarke's motivation and intention. Mr Malone, counsel for AFFCO, accepted this, although categorising it as unacceptable intimidation of another employee.

[28] Although the incident that led to Mr Clarke's dismissal could have occurred at any workplace, I agree with Mr Malone that the nature of Mr Clarke's job is relevant to the incident and the way in which it was treated by the defendant. In a workplace where there is potentially dangerous machinery and, in particular, working access to tools such as very sharp knives, the defendant needs to be assured, as well as it may be, that employees will deal with conflict and anger safely and sensibly. Mr Clarke's intimidation of Ms Lloyd, using a motor vehicle, was contrary to that reasonable expectation by AFFCO of his conduct in these circumstances. That justified it treating the incident (and thereby Mr Clarke) not merely on its merits but as an indication of his response to workplace conflict. AFFCO was entitled, as a fair and reasonable employer in all the circumstances, to treat Mr Clarke's conduct as serious misconduct that justified his dismissal.

[29] I would not go so far as to conclude that Mr Clarke was intent on running down Ms Lloyd, and indeed Mr Malone for AFFCO conceded responsibly that he could not advance such an extreme position. However the plaintiff's conduct in driving towards her deliberately, in the sense that he was aware of her presence, was intimidatory. In all the circumstances it was serious misconduct in employment. It warranted the sanction of dismissal.

[30] So too was the way in which AFFCO came to its decision to dismiss, how a fair and reasonable employer would have done in all the circumstances at the time. There was compliance with the spirit, if not the letter of the collective agreement. Mr Clarke was represented by his union, knew of the detail of the allegations against him and had opportunities to respond. His account was considered but not accepted. AFFCO's process was fair and reasonable overall.

[31] While it is very unfortunate that his dismissal came late in an otherwise apparently unblemished working life and that Mr Clarke continues to find it very difficult, if not impossible, to find alternative employment, he was the author of his own misfortune. I agree with the Employment Relations Authority that Mr Clarke's dismissal was justified and his personal grievance must be and is rejected.

Comment

[32] The defendant's witness interviewing techniques, as illustrated by this case, were unfortunate. Its investigators asked closed and leading questions of a number of witnesses about significant disputed events and recorded selectively only some responses to questions which could have led to allegations of predetermination. The defendant is a substantial company with professional human resources staff and training programmes for relevant managers including in investigations that may lead to sanctions as serious as dismissal of employees. I recommend to the defendant that it take advice about its managerial training for disciplinary interviews and adopt modern, professional and scientifically sound evidence gathering techniques to ensure accurate and complete accounts of significant events are captured at an early stage and so will survive scrutiny and criticism in proceedings such as this.

Costs

[33] The defendant would normally be entitled to costs and may indeed apply for these by memorandum. However, Mr Clarke's financial circumstances following his dismissal are probably such that AFFCO may care to consider whether it wishes to pursue an application as a matter of practicality. I have already made the point, in relation to costs, of the defendant's breaches of the collective agreement.

GL Colgan
Chief Judge

Judgment signed at 9.30 am on Friday 25 February 2011