

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 25/07
WRC 14/07**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AFFCO NEW ZEALAND LIMITED Plaintiff
AND	RONALD NEPIA First Defendant
AND	SONNY MORUNGA Second Defendant

Hearing: 21 August 2007
(Heard at Gisborne)

Appearances: Graeme Malone, Counsel for the Plaintiff
S R Mitchell, Counsel for the first and second Defendants

Judgment: 28 September 2007

JUDGMENT OF JUDGE C M SHAW

[1] In early 2006, AFFCO New Zealand Limited (AFFCO) became concerned at substantial stock losses from its freezers at the Wairoa plant. It engaged a private investigator who commenced a covert surveillance operation at the Wairoa plant and then interviewed all the staff. The investigator received information from informants (who did not wish to be named) that some of the staff, including the two defendants, were involved in the theft of meat. Subsequently, the two defendants were dismissed.

[2] The defendants' personal grievances were investigated by the Employment Relations Authority. It determined that they had been unjustifiably dismissed and

awarded compensation and reinstated Mr Nepia. Mr Morunga did not seek reinstatement.

[3] AFFCO challenges this determination. It says that its actions in dismissing the defendants were what a fair and reasonable employer would have done in all the circumstances and it would not be practicable to reinstate Mr Nepia.

[4] If the dismissals are found to be unjustified, AFFCO does not dispute the quantum of the awards made by the Authority which were \$8,000 each for humiliation and \$9,021.88 gross in lost wages. It does submit that because of the contribution of the employees to the situation in which they found themselves, those awards should be reduced.

[5] Mr Mitchell, for the defendants, advised that no evidence was being called on monetary remedies as the defendants did not seek a ruling on that aspect of the case.

The issues

[6] This case centres on the following issues:

1. The obligation of an investigating employer to put the specific allegations to the employees being investigated.
2. The role of a decision-maker who does not conduct an investigation.
3. The obligation of an employee to be responsive at an investigation meeting.
4. Is it practicable for Mr Nepia to be reinstated?

The facts

[7] Mr Nepia and Mr Morunga were both employed as meat workers by AFFCO at its Wairoa plant and are members of the New Zealand Meat Workers Union. Peter Archer is the licensed private detective who was engaged by AFFCO in February 2006 to investigate the stock losses. He has over 15 years' experience in commercial investigations and 13 years as a detective with the New Zealand police force.

[8] This was the first time in 30 years that a private investigator had been brought into the Wairoa plant to conduct an investigation. In the past, when the company had evidence or allegations of theft, the details of the complaint or the case against the employee would be set out and given to the union. The union would do its own investigation and attend any disciplinary meetings. Its attitude was that if an employee hadn't adhered to the rules the union would agree with the company.

[9] This method of dealing with allegations against employees changed radically with the arrival of Mr Archer. Darden King, the production manager at Wairoa who has been at the plant for 30 years, was not told of the investigation until Mr Archer turned up. Mr King had concerns about the way the investigation was being done and felt as though he was under investigation as well.

[10] Before Mr Archer came on the scene, Mr King and other managers had been conducting their own investigation into meat thefts and one employee was dismissed at that time. He had acted on a list of 6 names of people who had allegedly taken meat. This list included Mr Nepia and Mr Morunga. Mr King shared that information with the union delegate Wayne Thompson. He is the secretary of the New Zealand Meat Workers Union at the AFFCO plant where he has worked for 27 years as a meat processing employee.

[11] In February 2006, following an unsuccessful attempt to catch people red-handed by covert camera surveillance, Mr Archer and an AFFCO project manager, Mark Patterson, began interviewing the approximately 90 staff at Wairoa.

[12] It became apparent to them that many staff were concerned at the thefts that were taking place but were too scared to give any specific information. Mr Archer gained the overall impression that the persons acting as ringleaders in the thefts had gang affiliations, that the town itself was a gang town, and that staff felt that their lives would be in danger if they spoke.

[13] Having been given assurances of confidentiality, 17 employees told him about incidents of theft and named four individuals including Mr Nepia and Mr Morunga as the main suspects.

[14] Mr Archer first conducted what he regarded as informal interviews with the staff. On 6 April 2006 he spoke separately to the two defendants. At that time Mr Thompson was away from the plant attending collective agreement negotiations and both men were unrepresented. Each interview followed the same format. Mr Archer explained that there had been an investigation into large scale thieving at the plant which had included the use of cameras. He said he had received a considerable amount of information from staff.

[15] Each defendant was asked three questions:

1. Did they know of any thieving occurring at the plant? Mr Nepia said that he had heard that people did steal and Mr Morunga shook his head.
2. If they knew of any thieving would they tell Mr Archer? Mr Nepia said yes, Mr Morunga did not reply and shrugged his shoulders.
3. Had they had stolen meat from the plant? They both replied “no”. The interview then concluded.

[16] In evidence, Mr Nepia said that when Mr Archer had told him his answer to the two questions were a lie he had replied that if he knew about the thieving of meat he would tell him. Mr Archer agreed this may have been said.

[17] Following these interviews, Mr Archer received information from a staff member that Mr Nepia and Mr Morunga were the main thieves in the boning room. He was told that they stole nearly every day and took part cartons as well.

[18] Over the next few days, Mr Archer spoke directly with two other informants and received a phone call from another. He told the Court that Mr Patterson had heard from another informant that heaps of people had been stealing but it was mainly three people including Mr Nepia and Mr Morunga. Mr Patterson did not give evidence.

[19] As a result of this information, it was decided that Mr Nepia and Mr Morunga and one other should be suspended pending a disciplinary hearing. On 11 April 2006 the Wairoa Plant Manager, Mike Laurence, sent each a letter which said:

In recent months management at AFFCO Wairoa, with the assistance of a Security Consultancy Company, (Risk Management Group) have been undertaken [sic] an investigation into the inexplicable losses of product.

I wish to meet with you to inform you of these matters.

I wish to advise that serious allegations have been made against you namely:

- 1. Unauthorised possession of product, namely meat.*
- 2. Aiding and being a party to the unauthorised disposal of AFFCO product, namely meat.*

You are welcome to have a support person or representative present at this meeting and are encouraged to do so. The person may be a work colleague, a relative, a union delegate, your lawyer or a friend.

At this meeting you will be given every opportunity to give your explanation. Full consideration will be given to your explanation before any decision is reached.

I must advise you that allegations of misconduct, namely theft, have been made and disciplinary action may be taken and your employment may be in jeopardy if found to be true.

Suspensions

[20] On 12 April 2006, Mr Morunga attended a meeting with Mr Archer, Mike Laurence, Mark Patterson, Darden King, who was to be the decision-maker, Steve Shelford, the deputy union delegate, and Manuel Smith, from the union.

[21] Mr Morunga was referred to the 11 April 2006 letter which had been sent to him and was asked if he understood that he had had an opportunity to talk to Mr Archer the previous week. Mr Morunga replied “yes”. Mr Laurence referred to Mr Morunga’s denial at that time that he was involved in thieving. He told him the investigation was ongoing, and that they believed he was involved. He was being suspended on full pay until the following Wednesday. A suspension letter was then passed to him. He was told he would be able to have his say at the meeting on 19 April 2006 as well as having the right to a support person. Mr Morunga signed an acknowledgment of the suspension letter.

[22] On the same day Mr Nepia attended a similar interview with the same people. The meeting took the same format as with Mr Morunga. He also signed a letter of acknowledgment of the suspension letter.

[23] Between 12 and 19 April 2006 Mr Archer continued with his investigations and received further information given by informants in confidence. He said that he was told that the big thieves were Mr Morunga and Mr Nepia, that they had been seen stealing cartons, and that they do it all the time.

[24] One of the informants told Mr Archer that he and their friends were worried for their safety. Another informant said the two were stealing meat from the tables by the exit door. Mr Archer said he was told that Mr Morunga was the worst. The day before the meeting another informant admitted to Mr Archer that he had taken sweetbreads from the plant which had been given to him by Mr Morunga and Mr Nepia.

[25] By this time Mr Thompson had returned to the plant and was trying to find out what was happening. He questioned Mr King but Mr King was not privy to any information from the investigators. Although on a number of occasions Mr Thompson asked him in general what was happening, he couldn't give him any information.

[26] Mr Thompson told the Court he had said to Mr King that before the disciplinary meeting was held on 19 April 2006 he expected details to be given to the workers before they could answer the allegations. In his evidence, Mr King could not recall the details of his conversations with Mr Thompson although he accepted that in the course of his usual business he had spoken to him several times about these matters.

[27] I find it is more probable than not that Mr Thompson did ask for information before the investigation meeting. This was in accord with his expectations based on the long-standing practice at the plant of keeping the union in touch with what was happening in the investigations. Mr Thompson said that if the union formed the

view that an employee was in breach of the code then it would not support him but that it needed the information beforehand to make that assessment.

Disciplinary meeting

[28] On 19 April 2006, Mr Archer and Mr Patterson conducted a disciplinary meeting with each of the men. They were represented by Mr Thompson.

[29] By the time he went to this meeting, Mr Archer had a very clear idea as to how the thieving was happening. He believed the defendants were taking product out of the boning room continuously on a daily basis. He believed that they were walking out to smoko taking plastic bags containing small parts of meat that had been processed. These were put in their bags and taken out at the end of the shift. He had heard that the other way the thefts were occurring was by full cartons being taken and distributed in the amenities block for other people to take out.

[30] At Mr Morunga's interview, he was asked if he had any questions before they started. He said "no". Mr Archer then read from the 11 April 2006 letter and said:

I wish to advise you that serious allegations have been made against you namely: 1. Unauthorised possession of product, namely meat and 2. Aiding and being a party to the Unauthorised disposal of AFFCO product namely meat.

[31] Mr Archer then told Mr Morunga that since he had been suspended he had statements from three persons stating that Mr Morunga had taken meat and one other person said that he had given meat to them to take off the plant. He was asked if he had anything to say and he replied "*No comment*". Mr Archer asked him if that comment was his explanation. Mr Morunga said "*No comment*".

[32] The meeting was then adjourned. During the adjournment Mr Thompson spoke to Mr Morunga and asked him to clarify. Mr Morunga said the allegations were "*bullshit*" and were someone else's words. Mr Archer spoke to Mr King and told him what had occurred at the meeting.

[33] The meeting was reconvened with Mr King present. Mr Archer told the Court he then referred to the evidence but accepted he gave no specifics of the

allegations. Mr King asked Mr Morunga whether he had any further explanations. Mr Morunga replied “*Nothing*”. Mr King then advised him that he was dismissed and asked him if he had anything to say. Mr Morunga said that he was being sacked on what other people said. Mr King said yes. Mr Morunga then requested a copy of the letter outlining why he was being dismissed.

[34] At Mr Nepia’s disciplinary meeting on 19 April 2006, Mr Archer asked him if he had any questions before they started. He answered no. The same allegations from the 11 April 2006 letter were read out to him. Mr Archer said to him that subsequent to his suspension he had three statements from persons stating that he had taken meat and one other person said that he had been given meat to take off the plant. When asked if he had anything to say Mr Nepia replied no. Mr Archer said are you sure and Mr Nepia said yes.

[35] The meeting was then adjourned. Mr Archer spoke to Mr King and told him what had occurred.

[36] The meeting was reconvened with Mr King present. Mr Archer said he referred to the same allegations he had given on 6 April about theft of meat. Mr King asked Mr Nepia whether he had any response to that. Mr Nepia said no explanation. Mr King then said that because he had not made any comment in relation to the allegations he had no option but to dismiss him.

Evidence to the Court

[37] In his evidence, Mr King said that he went to the meeting on 19 April 2006 with the information from his own earlier investigations in mind. He knew that each defendant had denied taking the meat at the very first interview with Mr Archer. He also believed on the basis of what Mr Archer had told him there was evidence that they were involved in taking meat off the plant.

[38] He said that the reason he dismissed the employees was because of their lack of response rather than because he believed they were guilty of stealing meat. He went on to say that he had made an assessment in terms of what had been presented

to him by Mr Archer and in the back of his mind was what had happened at the earlier investigation.

[39] Mr King accepted that he did not tell either man at the meetings that because they did not deny the theft they would be dismissed and at no time did he refer them to the evidence of the earlier investigation that he had undertaken.

[40] He agreed that the men were not given specific details in terms of a day, or a date, or a style of theft which they were alleged to have committed even though there was information that was quite specific that could have been given to them at the meeting.

[41] Mr King also said that he raised questions with Mr Archer about how reliable the witnesses were. Mr Archer had never asked Mr King about the allegations of gang involvement by the two men. However, one of the defendants (who was not identified) is Mr King's nephew. Mr King was very familiar with who was and who was not involved with gangs and told the Court that the defendants were not fully into gangs but were related to gang members. He agreed that his nephew was quite intimidating because of his size and people had complained about that but that was not put to his nephew at the meeting.

[42] Mr Nepia told the Court that at this first meeting with Mr Archer he denied stealing meat and told him he would tell him if he knew about it. He denied having a lot to do with Mr Morunga, denied stealing meat with him, or threatening people.

[43] Mr Nepia said that at the second meeting all he could do was deny the allegation that he had stolen meat. He was not told what, when, or how he had committed the thefts. The first time he had heard of allegations of dividing cartons in the amenities block and using plastic bags was during the Court hearing. Until the Employment Relations Authority investigation, he had not heard he was on the list of six people referred to by Mr King nor of the allegation that he had intimidated people. Mr Nepia believes he was judged on rumour.

[44] Mr Morunga confirmed to the Court that he had denied stealing meat at the first meeting with Mr Archer. He was amazed to be suspended on the basis of that. He said he made no comment at the second meeting because he did not believe there were proper allegations against him and it was not possible to properly deny allegations when they are general and vague. He said there was nothing more he could say.

[45] Mr Morunga had not heard the allegations about cartons and plastic bags or the list of the six people that Mr King had until the hearing in Court. He accepted that at the meeting he did not ask for more details or tell the meeting that he thought the informants were lying, or adamantly deny the allegations.

[46] Mr Thompson's evidence was that he had made it clear before the meetings that he expected details to be given to the workers before they could answer the allegations. After the dismissals he spoke to Mr Archer who told him that due to lack of comment from the employees they could justify dismissing them. Because they did not give him an explanation he had no choice.

[47] Mr Thompson told the Court that the union accepted that the company could maintain the confidentiality of the informants but until the Court hearing he was not aware that such people had given the information and was not aware that Mr King's earlier investigation was linked to Mr Archer's investigation.

[48] Mr Thompson thought it was reasonable, given the good relationship that there had been between the plant and the union, that they could have expected some information. In his opinion the defendants gave a reasonable answer to an unreasonable sort of accusation.

[49] Mr Archer described his investigation to the Court which included going to the plant to work out where the carton room was, and where the plastic bags had gone missing from. He agreed he had not asked his informants to name days or specify a product that they said was being stolen and was relying on general information. He took notes of his interviews with the defendants but did not record that he had told them the allegations were of theft on a daily basis. The allegations

he put at the first informal meeting were similar to those put to the defendants at the disciplinary meeting.

Legal principles

[50] In determining under s103A of the Employment Relations Act 2000 whether AFFCO acted as a fair and reasonable employer would have in all the circumstances, I have regard to the accepted standards which apply to all disciplinary investigations, as well as to the disciplinary policy in AFFCO's core employment agreement with the union.

[51] The minimum requirements of procedural fairness include giving an employee notice of the specific allegations of misconduct and the likely consequences if the allegations are established.¹ In *X v Auckland District Health Board*² Chief Judge Colgan elaborated on this principle. He held that an employee accused of serious misconduct which may potentially result in dismissal is entitled to know not only of the allegations but the evidence in support of them that the employer will consider. This means that significant conclusions including tentative ones are to be articulated to the employee. This is in accord with the requirement under s4(1A)(b) of the Employment Relations Act 2000 for an employer to be responsive and communicative.

[52] Particular problems arise about the extent of such communication when an employer is in receipt of information from witnesses who do not want to be identified. In *Dallas v Wellington Newspapers Ltd*³ it was held that in such circumstances an employee may not be able to answer the matters that had been advanced in confidence but that case did not go so far as to lay down an inflexible rule that an employer may not ever act on such information. However, an employer who wishes to rely on such information still has a responsibility to reveal as much detail as possible without compromising any promise of confidentiality so that an employee in jeopardy has an opportunity to answer the allegations.

¹ *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35 at 46

² Unreported, 23 February 2007, AC 10/07

³ [1998] 2 ERNZ 456 at 461

[53] In addition to these principles, the personal conduct code in the relevant core agreement which covers the employment of the defendants includes a commitment by AFFCO to:

Ensure that disciplinary measures, when necessary, are administered to a common set of rules in every area of the site, with due consideration to the fair and equitable treatment of all workers and supervisory staff.

[54] The code also states:

Circumstances may arise outside the specific terms of this code and these will be examined and dealt with individually. The principal of fair and democratic administration of discipline is the essence of the code.

[55] The dismissal procedure in clause 33 of the code provides:

... where an instant dismissal is intended, and the Union wishes to contest the dismissal, the worker concerned shall be stood down on full pay. The period of full payment shall be either to the end of the following day, or until negotiations are concluded, whichever is the sooner.

[56] I find that clause 33 contemplates the active involvement of the union in disciplinary matters. It recognises that the union may wish to contest the dismissal and that negotiations are a component of the process. Although not express, by necessary implication this clause requires that the union should know what the case is against the employee whose instant dismissal is imminent so that the union can properly contest the dismissal if it wishes.

[57] The role of the person who has responsibility for deciding to dismiss or not may vary depending on the circumstances of a particular investigation but a decision-maker always has the ultimate responsibility for making his or her own independent conclusions about the behaviour of the employee and the consequences of that behaviour. A decision-maker may delegate the preliminary aspects of an investigation but ultimately the right of the employee to be heard is the right to be heard by the decision-maker. In *Auckland Area Health Board v NZ Public Service Association (Inc)*⁴ Judge Finnigan said:

... it is well established in principle that a person exercising authority to dismiss a worker cannot avoid responsibility for doing so in a fair manner by relying on the recommendation of another person, even though that other may be the worker's immediate superior. The responsibility for having

⁴ [1990] 1 NZILR 674 at 680

sufficient reason and for following a fair procedure must rest with the person who is exercising the authority to dismiss.

[58] The statutory obligations of good faith to be active and constructive, responsive and communicative apply to both employer and employee. In a disciplinary setting it may be that a failure of an employee to answer or give an explanation would justify dismissal because the allegations remain unrefuted. However, dismissal for not responding to allegations requires that the allegations are properly and fairly put and, importantly, is subject to the employee being advised of the likely consequences of not responding. As was held in *X v ADHB* an employer cannot be a non-communicative observer and critic.

Submissions

[59] It is for the employer to justify the dismissal of the two employees. For AFFCO, Mr Malone submitted that the Court should apply a common sense approach to this matter. He submitted that the two defendants were named as thieves, they were accused by a number of people, when questioned they didn't ask for more information, and they didn't protest their innocence as any innocent person would do. He submitted that their actions were entirely consistent with the information provided to the company about their behaviour. It is AFFCO's case that the defendants believed that as no one would be prepared to stand forward with the allegations, the company had nothing on them.

[60] Mr Malone pointed to the thoroughness of the investigation. Some 90 staff were interviewed and seven or eight of those people gave direct information that they had seen the employees stealing. In those circumstances, he submitted that it was reasonable for the company to come to the view that the defendants were guilty of theft. If an employee does not at least deny or engage in some way in the disciplinary process, the employer is entitled to make a decision on what information it had before it. It was therefore reasonable for it to come to the conclusion that the employees had been involved in theft.

[61] For the defendants, Mr Mitchell submitted that Mr Archer could have put the allegations to the employees without compromising the confidentiality which he accepted could be maintained. It should have been put to the defendants that they

were said to be stealing every day or taking part cartons or were giving meat to others to take out.

[62] Mr Mitchell submitted that in effect Mr Archer has taken over the role of the Court and the defendant is asking the Court to rely on Mr Archer's assessment of the situation when it is the role of the Court objectively to assess the inquiry. Mr Mitchell submitted that the test in s103A means that the Court needs to determine what a fair and reasonable employer would have done in all the circumstances and the question is whether a fair and reasonable employer would take a failure by employees to provide comment or explanation as an admission of guilt.

Decision

[63] I find that the dismissals of Mr Morunga and Mr Nepia were unjustified in all the circumstances. The process by which the decision was reached was not fair in so many respects that it could not be substantively justified.

1. The usual procedure for disciplinary investigations based on the code of conduct in the collective agreement was not followed when Mr Archer was brought in to conduct the investigation. AFFCO may have had good reason for wishing to take a different approach given its concerns about loss of meat products from the plant, however it was bound by the code of conduct and the procedures in it which involved advising the union of the case against the individuals in order for the union to participate in the investigation procedure. There was no evidence that AFFCO had consulted with the union about this change of procedure.

It was clear from the evidence of Mr Thompson and Mr King that this practice was changed without notice to either of them. It is little wonder that the union representatives at the investigation meeting took a less than active role.

2. Mr Malone's submissions were predicated on the basis that the defendants did not deny the allegations and the absence of a denial was a factor in reaching the decision to dismiss. In fact, AFFCO's evidence was that at

the initial interview on 6 April both men denied stealing meat from the plant. Mr Nepia went further and said that he would tell Mr Archer if he knew about the thieving of the meat.

While Mr Archer may have treated that first interview as an informal meeting, that was not made apparent to the employees who regarded their initial denial as an important part of their response to the allegations. They took the position that they had denied the allegations and without further information were not going to comment.

3. The interviews were conducted by Mr Archer in a pre-planned formulaic manner. Each time he spoke to the defendants they were asked identical questions. Each of the written communications sent to them were identical and the allegations against each of them were identical. There is no sense in which the investigations were individualised to differentiate between the actions that either man might have been accused of.
4. The failure to give each of the defendants the specific details of the allegations against them is fatal to the investigation. This is not a new obligation, it is one which has been part of New Zealand's employment law for many years and indeed is an express part of the company's code of conduct. There can be no excuse for the failure even when the case was based on confidential sources. In those circumstances, the fact that neither of the employees nor the union were prepared to engage in the process is understandable.
5. The decision to dismiss was made by Mr King. I formed the strong impression that he was used by Mr Archer as a front man for a decision which had already been made. He had no knowledge of the investigation process before he was called on to make the decision. He was not present at the first interview on 6 April nor during the substantive part of the last investigation meeting. He was brought in only at the last moment having been told what happened earlier in the meeting by Mr Archer. He did not know about at least some of the allegations that had been made by the

confidential sources. For example, he did not know of the allegations of gang affiliation which was relied on by Mr Archer.

6. Mr King said that the reason for dismissal was the failure to respond to the plaintiff's allegations. The defendants were not advised that if they did not respond to the allegations they would be dismissed and this of itself is unfair. In addition, Mr King relied on other information that he had gleaned for his earlier investigation without disclosing that information to either of the defendants as well.

Conclusion

Issue 1

[64] Mr Archer's investigation revealed a lot of potentially damaging information against Mr Nepia and Mr Morunga but such information could only be of value to AFFCO in justifying their dismissal if it were fairly and properly put to them so that they had an opportunity to refute it.

[65] I accept that on the information received by Mr Archer it was entirely reasonable for AFFCO to come to the view that they had been involved in stealing meat. But it was entirely unreasonable for that information to be kept from the union and the defendants. In at least one respect there was an alternative interpretation of the information. For example, Mr King's evidence about the extent to which at least one of the defendants was involved with or had gang affiliations. There is no way of knowing what response the defendants would have given to the specific allegations against them. Until these are put, there must always be the possibility that they could have refuted them.

[66] The disciplinary procedure adopted in this case amounted to rough summary justice and in no way justifies the dismissal of the employees. A fair and reasonable employer in the circumstances would not have acted in this way. It did not follow its agreed processes. It had the resources to bring in a professional investigator and should have ensured that the investigation was properly conducted.

Issue 2

[67] Mr King was designated decision-maker by those carrying out the investigation. This is not appropriate. It is for a decision-maker to delegate the investigation part of the disciplinary process if he or she deems it to be appropriate. The decision-maker is responsible for the administration of a fair process. In the present case, this fundamentally important process was not followed. No fair and reasonable employer would have acted in this way. The decision to dismiss in these circumstances was unjustified because he was not able to act independently.

Issue 3

[68] The employee's obligation to be responsive and communicative in the course of an employment investigation is not necessarily absolute. An employee who finds himself or herself in a palpably unfair situation where they have, for example, been given insufficient information about the allegations made against them, has little to be responsive to or communicative about.

[69] Of course, maintaining silence in such circumstances has inherent dangers that such silence will be interpreted rightly or wrongly as an admission or acceptance of responsibility.

[70] In this case, denials were made by the defendants and information was sought but not given. The failure of the employees to be more forthcoming in the disciplinary meeting cannot be used to justify their dismissal particularly when they were not given warning that their failure to respond could be treated as a ground for dismissal. Nor can it be taken into account in assessing their contribution to the dismissal.

[71] In all the circumstances, I find that the dismissal of the defendants was unjustified.

Reinstatement

[72] Mr Morunga does not seek reinstatement.

[73] Mr King said that even if AFFCO is found to have acted unfairly or not in a proper manner he does not think that it should be required to reinstate Mr Nepia. The company believes that he was stealing meat from the plant, that he was encouraging others to do so, and was threatening other staff. For this reason, he thinks it is unreasonable to have to re-employ him as the company does not have any faith or trust in him.

[74] Mr Nepia says that he was making around \$550 a week net from AFFCO and worked as a bouncer at the local pub earning about \$100 each night two nights a week. Since he lost his job at AFFCO it was impossible to work as a bouncer as he had been sacked for theft. From October 2006 he has been working as a labourer for a carpenter taking home about \$250 for the week. He has two school-aged children and therefore finds it hard to be away from Wairoa at night. He said it is rubbish that he is a significant thief and that no evidence has been provided. He is keen to work for the company and does not see why he should not be reinstated given no evidence has been provided to prove the allegations against him.

[75] Mr Malone submits that if Mr Nepia were to be reinstated the company would be placed in an intolerable situation because it would be forced to reinstate a person that it truly believed was guilty of stealing from the plant. He says that it would pose an unacceptable risk to staff based on the information that was provided to it.

[76] Section 125 provides that the Court must provide for reinstatement wherever practicable. AFFCO has not established that reinstatement is not practicable. As Mr Mitchell pointed out there was no evidence that Mr Nepia is incapable of performing his duties or that he could not productively contribute to the workforce. There are at least 90 positions at Wairoa and no evidence was given that there was no vacancy available for him to fill.

[77] The company cannot rely on its belief that Mr Nepia was stealing meat because this allegation has not in any way been proven even on the balance of probabilities. This is because the general allegations that were put to him were denied by him and no other specifics were given to him to refute. At the most, the

company has suspicions based on information given to them by people whose motives for giving the information have been untested. In all the circumstances, it cannot be said that the reinstatement of Mr Nepia would be impracticable.

[78] I therefore order that Mr Nepia be reinstated as soon as practicable to a position no less favourable than the one he held at the time of his dismissal. The parties have leave to refer the matter of reinstatement to the Court if necessary.

Other Remedies

[79] Apart from contribution, the remedies awarded by the Authority were not in dispute. I have found that the employees did not contribute to their dismissal. The awards of the Authority are confirmed.

Costs

[80] These are reserved. If they cannot be agreed counsel for the defendants is to file a memorandum within 28 days of this judgment. The plaintiff has 14 days after that to file a memorandum in reply.

**C M Shaw
JUDGE**

Judgment signed at 11am on 28 September 2007