

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC 114
WRC 3/11**

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

BETWEEN LISA MARIE TUAPAWA
Plaintiff

AND AFFCO NEW ZEALAND LIMITED
Defendant

Hearing: 12 May 2011
(with some evidence taken on 10 and 11 May 2011)
(Heard at Wairoa)

Appearances: Simon Mitchell, Counsel for Plaintiff
Graeme Malone, Counsel for Defendant

Judgment: 8 September 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff, Ms Lisa Tuapawa, is a meat worker employed by the defendant (AFFCO) at its Wairoa meat processing plant. From all accounts she is a conscientious and reliable worker. Her complaint is that she received unjustified written warnings for not working overtime on 30 March 2010 and 1 April 2010.

[2] Ms Tuapawa commenced proceedings before the Employment Relations Authority (the Authority) claiming that AFFCO had unjustifiably disadvantaged her in issuing the two written warnings. In a determination¹ dated 26 January 2011, the Authority found against Ms Tuapawa and dismissed her claims. She subsequently challenged the whole of the Authority's determination in this Court by way of

¹ [2011] NZERA Wellington 8.

hearing de novo. The written warnings had expired at the time of the hearing but the case proceeded, presumably as a matter of principle.

Background

[3] The incidents giving rise to the warning letters occurred in the week leading up to Easter 2010 which, for ease of reference, I will refer to as “Easter week”. Good Friday in 2010 fell on 2 April. The plant does not operate on Good Fridays. There are two aspects to the factual background which assumed some significance at the hearing. First, the requirement for unusual hours of overtime to be worked at the beef plant during Easter week and, secondly, Ms Tuapawa’s family commitments in having to look after her terminally ill mother. I will deal with each in turn.

The requirement for overtime

[4] The month of March is apparently a busy time in the meat processing industry. The ordinary hours of work at Wairoa are eight hours a day for five days of the week. The evidence was that in the weeks leading up to Easter week, the plant had been operating nine-hour days during the week and four hours on Saturday mornings, making a total of nine hours of overtime a week.

[5] Mr Darden King, the production manager at Wairoa, told the Court that as they had “abundant stock” to be slaughtered and they were leading into a short week, the company decided to work 10-hour days during Easter week, i.e. two hours overtime per day instead of one. The evidence was that the beef plant had never worked 10-hour days before. Mr King accepted in cross-examination that the beef workers were being required to work “an unprecedented level of overtime”.

[6] The terms and conditions of employment at the Wairoa plant were covered by a collective employment agreement. Clause 10 of the collective provided for overtime and, relevantly, cl 10(e) stated:

It is acknowledged that under this Agreement workers may be requested to work reasonable overtime and shall meet the Company’s requirements in this regard.

[7] On the Thursday prior to Easter week, staff were notified at a team briefing that they would be required to work 10-hour days during Easter week. Supervisors

were advised that if employees wanted permission not to work the two hours overtime then it would be necessary for them to see either Mr Dean Tucker, the manager of the Wairoa plant, or Mr King, the production manager. Normally, if workers required time off for any reason they would simply ask the supervisor of their respective departments. In this instance the supervisor was Mr Shane Hubbard. It was only if there was a problem in obtaining leave from the supervisor that Mr King would become involved and the evidence was that in such cases the worker and the union delegate, Mr Harry Te Rangi, would both go and see Mr King. Ms Tuapawa told the Court that she had never previously had any reason to go and see the production manager, Mr King.

The plaintiff's family commitments

[8] Ms Tuapawa explained in her evidence how she normally finished her eight-hour shifts between 3.30 pm and 3.45 pm and then she would go home to look after her elderly mother. She said:

4. The background to this matter is that at the time I was living in Wairoa with my sister, along with our sick mother who was 82 years old. My mother had been in very good health until shortly before the events of March and April 2010. Approximately a year before, my mother had suffered a fall. Her health had gone into decline. I **produce** a copy of a letter dated 25 June 2010 from Dr Witham of the Wairoa Health Care Centre. It sets out that my mother's condition had deteriorated. As a result of my mother's condition, somebody needed to be home with her. She has since passed away.
5. My sister Senga was also employed at the Wairoa works. We worked out an arrangement whereby I worked on the dayshift, and my sister worked on the nightshift. This means that we were able to care for our Mum.
6. My niece had also come back to live in Wairoa to be with us at this difficult time. She was able to care for my mother in the time between the dayshift ending and the nightshift starting when both my sister and I needed to be away from my Mum. However on Tuesdays and Thursdays, due to rugby practice, in April of last year my niece was unable to cover all of this time.
7. I knew that I would have difficulties at the peak of the season working the overtime. At the beginning of the season, I spoke to both my supervisors, Gay and Dave Kelsen, and told them that I did not think I would be able to work the overtime. I explained the situation about my mother. Nobody raised any concern or said that this could not be accommodated.

8. Whanau is important to me. I expected that the Company would appreciate this, and recognise that I am a hard worker, who has always been willing to work as much overtime as possible. I was willing and able to do nine hour shifts. However due to the particular circumstances at the time, I could not do ten hour shifts. I have always picked up all the available overtime.

[9] Against that background, I turn now to consider the relevant facts. The overall evidence presented to the Court was hopelessly confusing and it was quite impossible to reconcile the cases presented by the respective parties.

The evidence for the plaintiff

[10] According to the evidence of Mr Shane Hubbard, the senior supervisor in the beef boning room, everyone, including Ms Tuapawa, was aware that if they were not able to work the overtime during Easter week it would be necessary for them to obtain permission from Mr King or Mr Tucker, the Wairoa plant manager. Ms Tuapawa was not asked however, whether that was her understanding. She accepted in cross-examination that as soon as she heard at the team briefing on Thursday, 25 March 2010 about the 10-hour shifts to be worked during Easter week, she realised that they were going to be a problem for her and she was immediately concerned.

[11] Ms Tuapawa's evidence was that on Saturday, 27 March 2010 she spoke to the beef production manager, Mr Dave Kelsen, about the problem. She told the Court that she reminded him of what she had told him at the beginning of the season about not being able to work the 10-hour shifts because of her mother. She said that Mr Kelsen gave her no reason to think that there was a problem and she was expecting to hear back from the company on Monday, 29 March 2010. She said that she did not hear back and so she approached her union delegate, Mr Te Rangi, to discuss the matter with him. Ms Tuapawa's evidence continued:

12. On the Tuesday, I mentioned to another supervisor Shane Hubbard that I was leaving early after I had worked nine hours. I mentioned this to him a couple of hours before I was due to go home. He told me that I needed to speak to Darden King who is the Production Manager.
13. I went across to Darden's office, along with my Union representative, Harry Te Rangi.

14. Darden was very unsympathetic to my plight, and stated that I had to decide about my priorities. I admit that he made it clear to me that if I left work that day, that I would suffer the consequences, and that this could be a warning. I was absolutely gob-smacked. I had told the Company about my circumstances. I have always worked overtime including in other departments if necessary. I stated I was willing to work nine hours, but would not be working ten hours.

...

17. As a result, on Tuesday, 30 March 2010, after I had worked nine hours, I left work to care for my mother, an hour before other people finished their duties. I am aware that this meant that my Supervisor Shane Hubbard needed to cover for me for the last hour of production... .
18. When I returned to work on Wednesday 31 March 2010, Dave Kelsen told me that I would be receiving a warning. I did not receive the documentation on that day.
19. The issue arose again on Thursday 1 April 2010. Again, I left work after I had worked a nine hour day, as I needed to be with my mother.

[12] In his evidence, Mr Te Rangi confirmed that Ms Tuapawa had approached him about the matter on Monday, 29 March 2010 because she had not heard back from Mr Kelsen and she was “frantic”. He said that when he raised the matter with Mr Kelsen, Mr Kelsen said that he “wouldn’t be able to give her time off because he could not supply a replacement for her”. Mr Te Rangi said that on Tuesday, 30 March 2010 he discussed the matter with Mr Hubbard, the supervisor, and Mr Hubbard told him that he and Ms Tuapawa needed to go and see the production manager, Mr King. Mr Te Rangi said that Mr King asked Ms Tuapawa what the problem was and why she was unable to work and Ms Tuapawa explained the situation. Mr Te Rangi was not asked, however, about Mr King’s reaction to the plaintiff’s request. He simply said:

8. After the meeting with Darden, Lisa was very distressed. I told her that I thought she should go home and care for her mother. I believe that she had asked the Company with good time. They had failed to make a proper arrangement.

The evidence for the defendant

[13] Mr Kelsen acknowledged in evidence that Ms Tuapawa had spoken to him about her sick mother at the start of the season but he had no recollection of her

mentioning any particular problem over 10-hour days. I accept Mr Kelsen's evidence in this regard. Ten-hour days had never been worked before and so they would not have been an issue. Mr Kelsen said that his recollection about the discussion at the start of the season was that she had told him that she might not always be able to work overtime and may need time off to care for her mother depending on family arrangements. Mr Kelsen strongly denied that Ms Tuapawa had approached him about the overtime problem on Saturday, 27 March 2010 as she had claimed in evidence. He said that if she had made such an approach then he would have had time to make other arrangements and he would not have issued her with the written warning. Mr Kelsen also had no recollection of Mr Te Rangi approaching him about Ms Tuapawa's situation on Monday, 29 March 2010 as Mr Te Rangi claims.

[14] Mr Hubbard, the senior supervisor in the beef department, confirmed that Ms Tuapawa had approached him on Tuesday, 30 March 2010 about leaving early. He told the Court:

3. Lisa did speak to me on 30 March about leaving early. I told her that I thought such late notice was unacceptable as it allowed me no time to make other arrangements and that she would have to go and see Darden [King] and get permission if she wanted to leave early. I did not hear from her or Darden and she simply left the line early. As a result I had to go on the line myself as I had no one else to cover her, which meant I couldn't supervise the room properly over that last hour. I later asked Darden about it and he said she hadn't come to see him and he hadn't given her permission.
4. On Thursday 1 April Lisa again left early without seeking permission or advising us.

[15] In his evidence, Mr King spoke about having had a meeting with Ms Tuapawa on Friday, 26 March 2010. He said:

8. Lisa saw me on Friday 26 March and told me that she could not work 10 hour days the following week and would only be able to work 9 hours on the 30th and 1st as she needed to look after her sick mother.
9. I explained that it would be disruptive and she should try and arrange family to cover for her if she could. She said that it would depend on if her partner was working dayshift as if he was he would be able to look after her. I said she needed to let me know on Monday whether she would be unable to work which she agreed to do. I **produce** my

diary note of that meeting. I also produce my diary note for the following Tuesday 30 March.

10. Despite her agreeing to tell me, she did not and instead left her shift on both 30 March and 1 April without informing me. In fact I note that on the day she spoke to Shane she was specifically told by him to come and see me but she did not.

[16] Although nothing hinges on the point, I record that while Mr King makes reference to Ms Tuapawa's "partner", Ms Tuapawa spoke only about her sister and she was not challenged on that evidence. Mr King acknowledged that Ms Tuapawa had a sister, Senga, who worked on the night shift. The two diary entries Mr King referred to were included in the agreed bundle of documents. The entry for Friday, 26 March 2001 read as follows:

MEETING WITH LISA TUAPAWA RE CAN NOT WORK 10 HRS NEXT WEEK CAN ONLY WORK 9 HRS TUESDAY AND THURSDAY HAVING TO LOOK AFTER MOTHER. ASKED TO FIND ONE OF THE FAMILY TO COVER FOR HER AND CONFIRM ON MONDAY.

The diary entry for Tuesday, 30 March 2010 contained no reference to any meeting with Ms Tuapawa.

[17] When the diary entries were referred to Ms Tuapawa she denied having met with Mr King on the Friday. She said, "The only day I discussed the matter with Darden was when I met with him on the Tuesday". The following exchange is recorded in Ms Tuapawa's examination-in-chief:

- Q.** Where he has notes of a meeting – *Lisa Tuapawa cannot work 10 hours next week and asked to her to find cover and confirm on Monday. Can you comment on that evidence?*
- A.** Well if I did go to see him on the Friday 26 March he had himself a couple of days to find a worker before that Tuesday of 30 March.
- Q.** But is it your evidence that you saw him on 26th?
- A.** No I did not.

[18] When the diary entries were referred to Mr Te Rangi he said "I do not believe that Darden became involved in the matter until Monday 29 March 2010."

Discussion

[19] As indicated above, it is impossible to reconcile these conflicting versions of events. Mr Mitchell, counsel for the plaintiff, dealt with the matter in his submissions in this way:

35. It is accepted that there are considerable factual differences between the parties as to the events of the days in question. Credibility findings will need to be made as to whether or not the Plaintiff provided notice to the Defendant of her position, and her inability to work overtime.

[20] Mr Malone, counsel for the defendant, suggested that the plaintiff and Mr Te Rangi were confused about dates and he noted that they had been confused about a particular date at the Authority hearing. Mr Malone submitted that Mr King's diary note confirmed that his meeting with Ms Tuapawa occurred on the Friday and not the Tuesday.

[21] At the conclusion of Mr King's evidence, the Court referred to the photocopies of the two diary entries the witness had produced for 26 and 30 March 2010 and requested counsel to produce the original diary from which the extracts had been taken. The original diary, when produced a short time later on the same day, revealed another significant entry on Monday, 29 March 2010 which had not been referred to in evidence. Nor was it picked up by counsel in their written closing submissions which were filed on 1 and 24 June 2011 respectively. To appreciate the significance of the diary entry for 29 March 2010, it is necessary to refer back to the entries for Friday, 26 March 2010. In addition to the entry relating to Ms Tuapawa (see [16] above). Mr King had recorded a meeting with Mr James Morrell Junior. The entry read:

MEETING WITH JAMES MORRELL JNR CAN NOT WORK OT NEXT WEEK HAVING TO PICK CHILDREN UP FROM SCHOOL. ASKED IF HE COULD FIND A FAMILY MEMBER TO PICK THE CHILDREN UP. WILL CONFIRM ON MONDAY WITH HIS SUPERVISOR.

[22] Mr King was asked in cross-examination by Mr Mitchell about the entry relating to Mr Morrell:

- Q. In your diary of 26 March there is a note there about James Morrell Junior who had to pick children up. Can you tell what happened to him?
- A. James Morrell came in to me on a Friday as well and explained to me that he had issues working overtime the following week and explained to me what his issues were. I asked him the same question if he was able to get family members to pick his children up from school and to confirm with me on the Monday. He came back to me and confirmed on the Monday.

[23] In Mr King's diary for Monday, 29 March 2010 the following entry appears:

JAMES MORRELL JUNIOR – 9 HRS – TO 3.45 pm. EVERY DAY.

It appeared from the evidence that Mr King duly made arrangements to cover for Mr Morrell.

[24] What is of concern, however, because it was not referred to anywhere in the evidence, is another entry in Mr King's diary for Monday, 29 March 2010 which reads:

LISA TUAPAWA – 9 HRS – 3.45 pm – TUESDAYS – THURSDAYS.

[25] On the face of it, the entries for the Friday and Monday relating to both Mr Morrell and Ms Tuapawa appear to follow an almost identical pattern. Given Mr King's explanation that Mr Morrell had called back to see him on the Monday and had been given permission and the similarity between the two diary entries for the Monday it would appear that Ms Tuapawa had, likewise, called back to see Mr King on the Monday and had been given permission not to work 10-hour days on Tuesdays and Thursdays.

[26] After giving the matter careful consideration, however, I am not prepared to conclude that the diary entry for the Monday confirms that Ms Tuapawa did, in fact, return and see Mr King that day. The reason for my reaching that conclusion is quite simply that it was not Ms Tuapawa's evidence, nor was it Mr King's evidence. Although Mr King was not asked about the entry, I suspect the most likely explanation for what is stated about Ms Tuapawa is that Mr King made the Monday entry on the Friday when Ms Tuapawa came to see him simply to remind himself that she was to call back and see him on the Monday.

[27] For the record, I have no reason to doubt the veracity of Mr King's evidence or his diary records. I also accept Mr Kelsen's evidence that Ms Tuapawa did not approach him about the overtime problem on Saturday, 27 March 2010 nor did Mr Te Rangi approach him about Ms Tuapawa's situation on Monday, 29 March 2010. For completeness, I also accept Mr Hubbard's evidence.

[28] Having rejected the evidence given by and on behalf of the plaintiff in relation to the events leading up to her failure to work the 10-hour shifts on 30 March 2010 and 1 April 2010, this does not mean that the Court should then automatically make a finding in favour of the defendant. The plaintiff, having established a prima facie case of a disadvantage grievance in having been issued with the formal written warnings, the proper course is to then set her unreliable evidence completely to one side and ask whether the defendant has established on the balance of probabilities that it was justified in issuing the written warning notices. The onus of proof for that part of the case rests upon the defendant. The test at the relevant time for determining justification under s 103A of the Employment Relations Act 2000 (the Act) was, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the alleged personal grievance occurred.

[29] In his submissions, Mr Mitchell approached the issue of justification in two stages. First, he submitted that AFFCO's actions in issuing the warning letters were substantively unjustified because the company had failed to consider "the highly mitigating factors of the circumstances of the Plaintiff". Secondly, counsel criticised the disciplinary process followed by the defendant on the grounds that it was rushed. It was submitted that the plaintiff was given no proper opportunity to answer the allegations made against her and the defendant failed to establish that it had considered her circumstances and all the mitigating factors.

[30] In relation to the substance of the grievance, Mr Mitchell stressed that the issue of what was reasonable overtime was a matter for the Court taking an objective approach to the circumstances of the parties. Counsel submitted:

11. This is not a situation where the Plaintiff was unwilling to co-operate and assist her employer to the best of her ability. Rather, it is

submitted it is a case where the Defendant simply considers that it has the right to demand overtime as it sees fit. No weight is given to the obligation to ensure that any request for overtime is a reasonable one.

[31] Mr Mitchell further submitted that the defendant had unreasonably treated the matter as one of disobedience whereas, in fact, it was a case where the plaintiff had exercised her right to decline to work the extra overtime required of her. Counsel described the events as being “of very significant importance to the Plaintiff, who was torn between her obligations to her employer and to her dying mother.”

[32] In his submissions, Mr Malone contended that the warnings were justified because the plaintiff had been advised to get back to Mr King on the Monday but she did not do so.

[33] It was entirely appropriate for Mr Mitchell to stress the fact that the relevant provision in the collective agreement provided that, “workers may be requested to work reasonable overtime”. By implication, the corollary to that proposition might be that an employee has a right to refuse to work unreasonable overtime. What is reasonable in any given situation is a question of fact to be decided according to all the circumstances of the case. I would accept, however, that the wording of the overtime provision would leave it open to an employee to contend that he or she had the right to refuse to work overtime in circumstances where it would result in the employee working hours which were unreasonable having regard to his or her personal circumstances including family responsibilities.

[34] In the present case, the plaintiff was going through a very traumatic period in her life. Her mother was dying and she needed care 24 hours a day. Although I have rejected the plaintiff’s account of her meetings and other contacts with her supervisors over the overtime issue, I accept the rest of her evidence regarding her mother’s ordeal and the juggling efforts the family had to make in order to provide her mother with around-the-clock care.

[35] The plaintiff had told Mr Kelsen, the beef production manager, at the start of the season about her mother’s condition and had given the company clear warning that she may not be able to work all the required overtime. When the workers were

told on Thursday, 25 March 2010 that they would be expected to work 10-hour shifts during Easter week, Ms Tuapawa acted responsibly. She went to see the production manager, Mr King, the following day explaining why she would only be able to work nine hours on the Tuesday and Thursday. In other words, she was giving her employer ample opportunity to organise a replacement. The reasons why she was unable to work the extra hours were genuine and compelling.

[36] In my view, a fair and reasonable employer would have accepted Ms Tuapawa's explanation and agreed to her request. Instead, Mr King was unsympathetic to her situation. He told her that if she could not work the extra hour it would be "disruptive" and he asked her to try to arrange family cover. Admittedly, he also asked her to come back and tell him the situation on the Monday and she failed to do so. Nor did she go and see Mr King on the Tuesday as Mr Hubard had instructed. The Court did not hear from Ms Tuapawa as to why she failed to go and see Mr King. Mr Malone quite reasonably suggested that her failures in this regard were the real cause of the problem.

[37] Against that, it was open on the evidence for the Court to conclude that, perhaps unwittingly, Mr King had forced Ms Tuapawa into a corner. In other words, when Ms Tuapawa went to see Mr King on the Friday, she already knew that there were no other family arrangements she could make to look after her mother for the additional hour on Tuesdays and Thursdays. I suspect that, even though he invited her back to see him on the Monday, Mr King's negative reaction to her request at the meeting on the Friday would have conveyed to Ms Tuapawa the impression that the company was expecting her to work the 10-hour shifts on both days.

[38] I also consider it relevant and significant that the company had made it clear on the Thursday that any request from a worker to be excused from working the 10-hour shifts during Easter week would have to be made, not to the beef room supervisor as was the normal practice, but to one or other of the two most senior managers at the Wairoa plant, the plant manager, Mr Tucker or the plant production manager, Mr King. That factor alone, of having, in colloquial terms, to see "the big boss" and explain her family situation would, in my view, have been quite an intimidating experience for a person like Ms Tuapawa who appeared to me to be a

conscientious and somewhat reserved worker in the middle of a family crisis. It must be borne in mind that she was not seeking time off work. She was prepared to work her regular hours plus one extra hour overtime per day. Her problem was that she could not work 10 hours a day on the Tuesday and Thursday.

[39] After going through her ordeal with Mr King on Friday, I have no doubt that Ms Tuapawa would have been quite distraught over his negative reaction to her very reasonable request. She would probably have seen little point in having a further meeting with Mr King on the Monday or Tuesday. At the same time, however, after listening to his evidence, I accept that if Ms Tuapawa had returned to see Mr King on the Monday and explained the situation then he would have granted her request. But that is knowledge with the benefit of hindsight and, I am prepared to accept, it is not how the situation would have appeared to Ms Tuapawa at the time.

Conclusions

[40] For the reasons stated, I accept Mr Mitchell's principal submission that the way in which Mr King reacted to Ms Tuapawa's request not to have to work the additional hour on the Tuesday and Thursday of Easter week was not the way in which a fair and reasonable employer would have responded. Accordingly, I uphold the plaintiff's claim and find that she was unjustifiably disadvantaged by the issuance of the two warning letters. There is no need for me to consider in detail the further submissions Mr Mitchell made in relation to defects in the procedural aspects of the investigation resulting in the warning letters. Suffice it to say, however, that I accept counsel's main submission under this head that the company supervisors charged with the investigation acted in haste in reaching their conclusions and failed to properly investigate all the relevant background circumstances and give appropriate consideration to the mitigating factors. That is not how a fair and reasonable employer would have handled the investigation.

[41] The plaintiff seeks compensation pursuant to s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. There was ample evidence to substantiate a claim under this head. Ms Tuapawa appeared to have an exemplary employment record both with the defendant and with her previous employer. I have

no doubt that she would have been quite bereft to have been the recipient of the two unjustified warning letters. The events in question occurred at a very stressful period in the plaintiff's life. I am satisfied that she is entitled to be compensated for the humiliation and injury to feelings which she described. I award a total sum of \$2,000 on account of both grievances.

[42] On the issue of contributory behaviour in terms of s 124 of the Act, I accept that the plaintiff's failure to meet with Mr King on Monday, 29 or Tuesday, 30 March 2010 (the Monday in particular) did contribute towards the situation that gave rise to her disadvantage grievances as did her failure to fully explain the true position to the company investigators. Although her failures in this regard may be explained away to a certain extent because of the undoubted pressure she was under at the time, there is no doubt that the course she followed contributed significantly to the situation giving rise to her grievances. Mr Malone submitted that the plaintiff's contribution should preclude any remedy. I am not prepared to go that far, but taking into account all the matters I have referred to, the reduction I make for the plaintiff's overall contribution is fixed at 60 per cent.

[43] The plaintiff is entitled to costs which I would expect counsel to be able to reach agreement on. Failing agreement, however, Mr Mitchell is to file submissions within 21 days and Mr Malone will have a like time in which to respond.

A D Ford
Judge

Judgment signed at 3.45 pm on 8 September 2011