Determination Number: AA 371/05
File Number: AEA 925/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Asure New Zealand Limited (Applicant)
AND	New Zealand Public Service Association (First Respondent) **AND** Bryan Max Sanderson and Others (Second Respondents)
REPRESENTATIVES	Jane Pearson, Counsel for the Applicant Tanya Kennedy and Bernard Banks, Counsel for the Respondents
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION	9, 19, 20 September 2005
DATE OF DETERMINATION	21 September 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant seeks a declaration as to whether 15 meat inspectors it employs at AFFCO's Horotiu site can be required to work in a rebuilt plant where they will have to share facilities with AFFCO staff, including lockers, showers and break rooms.

[2] ASURE New Zealand Limited ("ASURE") wants the matter investigated urgently. ASURE is a state-owned enterprise providing regulatory meat inspection services to around 80 plants throughout the country.

[3] The application and urgency are declined on the basis that the matter is outside the jurisdiction of the Authority, for reasons set out below. In short, the issue is a matter relating to bargaining and the fixing of new terms and conditions of employment. Section 161(2) of the Employment Relations Act 2000 prohibits the Authority from making a determination on such a matter.

The application

[4] The application was filed on 6 September 2005. At that time there was also a second issue regarding the viscera handling facilities.

[5] By teleconference with counsel for the parties on 9 September, it was agreed that the PSA would file its statement of reply by Friday, 16 September and ASURE would amend its application to identify each of the 15 meat inspectors as second respondents. The inspectors are PSA members.

[6] Representatives of the parties attended mediation on 13 September, which had been arranged before the application was filed. Progress was made on the viscera handling issue but the shared facilities issue remains. An amended application, limited to the shared facilities issue, was filed on 14 September along with a statement from ASURE's chief executive Terry Pierson.

[7] Following the filing of the PSA's statement in reply on 16 September (with a covering letter), ASURE filed on 19 September a further statement from Mr Pierson attaching additional documents (with a covering letter). I postponed a teleconference with counsel for the parties scheduled for 19 September in order to consider these papers closely. On the basis of the additional information provided, particularly in Mr Pierson's statement, I considered the position regarding jurisdiction was clear and should be conveyed to the parties promptly by way of a determination. A teleconference was held on 20 September where counsel were advised of the Authority's determination regarding the issue of jurisdiction.

Background facts

[8] From the parties' respective statements, attached documents and correspondence to the Authority, the following details emerge.

[9] By no later than May ASURE representatives became aware AFFCO's plans to rebuild its Horotiu plant included shared facilities. This was discussed with a PSA representative who advised that this was not acceptable to the meat inspectors. ASURE raised the inspectors concerns with AFFCO. According to an ASURE memo dated 4 August, AFFCO representatives "*were equally adamant they would not alter their philosophical approach that has all staff and contractors sharing facilities*" and wanted "*all staff integrated both in the physical work environment and at breaks*" in order to "*alter the culture and change the mind set*". Shared facilities at Horotiu would be a model for changes at other AFFCO plants in the future.

[10] AFFCO also relies on the view of the New Zealand Food Safety Authority ("NZFSA") set out in an email dated 15 July 2005. The email states that the Meat Regulations 1969, which governs the work of the inspectors, do not require separate facilities for inspectors. The PSA riposte is that the email also notes that amenities need to be fit for their purpose and meet reasonable requirements specified by ASURE.

[11] The PSA position is that the inspectors need separate facilities in order to carry out their work safely and free from interference by meat company workers and managers. The inspectors say that they are at risk of intimidation because their work, carried out under statutory powers, can interfere with meat company production and meat workers' bonuses.

[12] The PSA claims that "*separate chain/wash, locker and smoko/lunch facilities ("separate facilities")*" have been provided for meat inspectors at Horotiu "*for a number of decades*". It claims this constitutes an implied term in the inspectors' employment agreements, and also relies on safety and savings provisions in the collective agreement between ASURE and the PSA.

[13] Mr Pierson states that he understands from direct discussions on 9 and 26 August with the inspectors that "*they will not work with shared facilities when the rebuilt plant opens*". He says that Mr Baldick has confirmed on 9 August that this was the "*likely*" position of the inspectors.

[14] The two-year collective agreement is due to expire on 1 October 2005.

[15] On 29 August the PSA added separate facilities for the inspectors as one of its claims for terms it seeks to be included in any renewal of the collective agreement.

[16] The parties have advised the Authority that bargaining for renewal of the collective agreement occurred on 14 and 15 September. The bargaining has not resulted in a concluded agreement.

[17] Rather, according to the second statement filed by Mr Pierson, the PSA national organiser Ian Baldick has told him that separate facilities "*was now their number one claim and all other claims were subordinated to it*" and "*they would never resile from their position*". Mr Pierson says the PSA has deferred any further bargaining meetings with ASURE in order to commit its resources to the Authority proceedings on this issue..

[18] The present season is due to close on 23 September for the night shift and 29 or 30 September for the day shift. The inspectors will be on leave until the plant – that is the rebuilt plant with shared facilties – opens between 1 and 14 November.

The parties' respective positions

[19] ASURE says it is entitled to a declaration under s129 and s161(1)(a) and (r) of the Employment Relations Act 2000 ("the Act"). There is a dispute over whether the terms and conditions of the inspectors may be interpreted, applied or operated so as to allow ASURE to direct them to work in the shared facilities of AFFCO's rebuilt plant. It says it is not in a position to be able to require AFFCO to provide shared facilities and is concerned about the commercial consequences if ASURE staff do not provide inspection services. It raises the prospect of competition from another state-owned enterprise seeing authorisation to offer meat inspection services. It also fears a damages claim from AFFCO. It raises the spectre of lost earnings and redundancies.

[20] ASURE says seeking a declaration is "*less heavy handed*" than waiting until the rebuilt plant opens and "*simply instructing staff to work with shared facilities knowing that they will refuse … and then applying to the ERA to seek enforcement after the instruction has been refused*".

[21] The PSA consider the application is premature. It says the Authority cannot determine a hypothetical dispute. No dispute exists because the inspectors have not yet been required by ASURE to work in shared facilities and have been given "*no clear instruction at all*". However it does assert that ASURE has responsibilities as the employer to do more to persuade AFFCO to include separate facilities in the rebuilt plant and to challenge the NZFSA interpretation of what is required to comply with the Meat Regulations 1969.

[22] The PSA outlines alternatives that could be put to AFFCO and notes that Ministry of Agriculture and Fisheries veterinarians on site will have separate facilities on site.

Determination

[23] The statements of problem and reply filed respectively by the parties have not, in my determination, properly addressed the restriction on the Authority's jurisdiction at s161(2) of the Act. That sub-section provides that the Authority does not have jurisdiction to make a determination about any matter relating to –

(a) bargaining; or
(b) the fixing of new terms and conditions of employment.

[24] The scope of this restriction was considered by the Court of Appeal in *Canterbury Spinners Ltd v Vaughan* [2002] 1 ERNZ 255.

[25] The Court's guidance on the operation of s161(2) confirms that the Act recognises the concept of bargaining over or for a single term:

> *The process of trying to achieve the formation or variation of a contract does not cease to be an attempt to strike a legally binding bargain merely because only one term is or remains in issue. Similarly, although s 161(2) refers to the fixing of new terms and conditions, its limitation on the powers of the Authority would apply even if only one new term were involved in the process.* (at [40])

[26] It confirms that the word "bargaining" bears its ordinary meaning in the section and is synonymous with "negotiating". It applies to negotiating variations to existing terms:

> *[41] … what s161(2) prohibits the Authority … from doing is being involved in the process of creating a new contractual term or terms — either when the parties are starting from scratch and constructing an entirely new agreement or when they are working towards supplementing or varying an existing contract. The Authority may not become involved in the bargaining which precedes the formation or variation of a contract. It may not, for example, intervene in the negotiations and order a party to conduct itself, perhaps by making an offer, in a certain way. Nor may it act as arbiter and, where the bargaining does not lead the parties to agreement, settle for them the outstanding issues and thus complete the new term or terms for them.* (my emphasis)
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> *[42] But that process of the parties bargaining for and endeavouring to settle new terms and conditions is quite different in its legal significance from the process of trying to reach a consensus over the meaning and effect of an existing contractual term (or terms) already binding upon the employer and employee. This latter process may involve an attempt to reach accord through negotiation on what the existing contract actually requires a party to do in order that the respective rights of the parties can be determined.*

[27] I find that the parties – and particularly ASURE by way of its application for a declaration – would not merely be having their respective rights determined by the Authority if the application was considered further. Rather, the Authority would be acting as arbiter in settling new terms for them.

[28] ASURE does not accept the PSA position that there is an extant implied term requiring the inspectors to be provided separate facilities. If ASURE did accept that position, the prospect of ASURE instructing inspectors to work in a plant with shared facilities would arguably amount to a unilateral variation of a term. Logically it cannot accept this to be the case. The PSA's bargaining claim on this issue is then for a new term, at least on ASURE's analysis.

[29] The PSA states that its claim for separate facilities to be included as an express term of any renewed collective agreement is "*merely to confirm expressly what [the PSA] consider[s] is already an implied term of the [inspectors'] employment agreement*". While, on the PSA's analysis, this may not be a new term, it does relate to bargaining.

[30] From either party's account then, I find, the issue of separate or shared facilities is caught by the provisions of s161(2).

[31] A bargaining claim was raised on 29 August, several days before ASURE filed its application for a declaration. No more bargaining dates are scheduled because, effectively, the parties are attempting to bring their bargaining to the Authority's table. Parliament has clearly put that beyond the Authority's jurisdiction, except for the provisions of last year's amendments to the Act regarding facilitation of bargaining where parties are having serious difficulties in concluding a collective agreement. No information before the Authority suggests this matter has reached the level of difficulty contemplated in those provisions.

[32] The Act does provide that the Authority may determine matters according to the substantial merits of the case, without regard to technicalities. However exceeding its jurisdiction – as I am satisfied the Authority would do if it determined the substance of this application, in the circumstances in which it has been made – is more than a technicality. The Authority cannot assist further with this application. The matter is in the parties' hands.

[33] There is no order as to costs. I consider costs, if any, should lie where they fall.

Robin Arthur
Member of Employment Relations Authority