

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

Determination number: AA 246/07  
File number: 5049124

BETWEEN            NZ MEAT WORKERS &  
                              RELATED TRADES UNION  
                              Applicant

AND                    AFFCO NEW ZEALAND LTD  
                              Respondent

Member of Authority:     James Wilson

Representatives:         Simon Mitchell for the applicant  
                                  Graeme Malone for the respondent

Investigation Meeting:    1 May 2007 at Hamilton

Submissions received:    21 June 2007 from the applicant  
                                  17 July 2007 from the respondent

Determination:            14 August 2007

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**DETERMINATION OF THE AUTHORITY**

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Employment Relationship Problem

[1]     In 2005 AFFCO New Zealand Limited (AFFCO) undertook a major rebuild of its meat processing plant at Horotiu. Following this rebuild the plant recommenced operations in January 2006. From the commencement of the operation of the new plant until 29<sup>th</sup> of May 2006 the Company “made up” the wages of employees despite the fact that the production at the plant was below its expected theoretical full production (“tally”). The New Zealand Meat Workers and Related Trades Union (NZMWU/the Union) say that AFFCO had agreed to continue to make up the employee’s pay *until the end of the commissioning period*, being, in the Union’s view, until the new plant reached tally. The Union says that tally was not consistently achieved until several months after May 2006 (November 2006?) and that the company should therefore have continued to have make up employee’s pay for that additional period.

[2]     The Company says there was no agreement to make up the pay of the employees and that, in any event, the commissioning period finished on 17 May 2006. They say that the Company had no

obligation to pay the employees above the rates required by the relevant employment agreements and it was therefore entitled to terminate make up payments on 29 May 2006.

### **The issues for determination**

[3] In determining whether or not the employees at Horotiu are entitled to additional payments it is necessary to consider:

- Was there an enforceable agreement between AFFCO and the NZMWU in respect to the make up of employee's wages?
- If there was a binding agreement what was that agreement?
- If there was an agreement what, if any, additional payments are the employees entitled to.

### **Background**

[4] **The parties began discussing the rebuilding of the Horotiu plant as early as October 2004.**

**A series of meetings was held during which items such as proposed staffing levels, redundancies and voluntary redundancy and the question of the makeup of employees pay following the recommencement of production at the plant, were discussed. The parties agree that in early 2005 AFFCO offered to make up workers pay for a period of six weeks but that the Union rejected this suggestion. The Union says that subsequently the Company agreed that there would be no set time for "make up" of wages but that payments would be based on "good faith". As will become clear later in this determination, the Union argues that the make up should have continued during the "commissioning period" which, in the Union's submission, was until the plant reached full tally**

[5] **The parties also agree that there was never an agreement as to the specific time during which wages would be made up. The president of the Horotiu branch of the Union, Mr Donald Arnold, says that the matter was discussed at meetings with the Company in September 2005 and January and February 2006. In his evidence he says that at the September meeting:**

*The Company stated that they would make up 100% of workers earnings for a period of time. They said if problems persisted, the Company would talk further with the union.*

*No agreement was reached.*

**The Company's Employment Relations Manager, Graeme Cox, says:**

*I do not accept Mr Arnold's evidence..... in so far as it suggests that there was some sort of agreement that make up pay might continue until the employees reached tally. That was never agreed; the agreement being that we would only pay it during commissioning and that even then it was discretionary and we could bring it to an end but would first discuss it with the union. ...*

[6] As already stated the new plant began operation in January 2006. On 17 May 2006 the engineering company responsible for building the plant withdrew and the plant was handed over to AFFCO. AFFCO says that while this date was later than they had originally expected they had continued to make up the employee's pay. In early May the Company advised the Union that they would stop the makeup of pay the following week. The Union suggested that they should continue the payment and, after further discussion, the additional payment was continued until 29 May 2006.

## **Discussion**

*Was there an enforceable agreement?*

[7] The Collective Employment Agreement (CEA) covering the effected employees does not specifically address the circumstances pertaining to the make up of pay following the rebuilding of a plant. However the Union argue that a verbal agreement made between the Company and the Union would still be enforceable in terms of section 5 of the Employment Relations Act which defines an employment agreement, as including a CEA *together with any additional terms and conditions of employment*. The Company has not disputed this argument and I accept that, if there was an agreement, such an agreement would be enforceable.

[8] Despite the protestations of AFFCO to the contrary it is clear that there was an agreement of some sort between the Company and the Union to make up the wages of the employees. Mr Cox, for the Company said:

*...the agreement being that we would only pay it during commissioning...*

And Mr Arnold for the Union said:

*...it was agreed that the payment would be made up during the commissioning period...*

However it is equally clear that there was no agreement as to the period of time during which the makeup would be continued. In the absence of any specificity as to time, interpretation and enforcement of any agreement is problematic.

*What was the agreement?*

[9] The terms of the agreement between AFFCO and the Union are not in writing. However piecing together the evidence of the witnesses it is possible to define the terms of that agreement. The parties agreed that there should be a period of time during which the wages of employees would be made up. Both parties have used the words *during the period of commissioning*. I find that there was an agreement between AFFCO and the Union and that this agreement was that:

*Following the recommencement of operations the wages of employees employed at Horotiu shall be “made up” to tally during the period of commissioning.*

*What, if any, additional payments are the workers entitled to?*

[10] In terms of the parties' agreement the employees at Horotiu were entitled to be paid a makeup of the wages during the commissioning period of the new plant. Unfortunately the parties have a different understanding of what this term, *period of commissioning*, means. The Union are of the opinion that *commissioning period* means that period of time during which (as set out in the Union's evidence):

*... the plant is run in and during which production is significantly reduced due to the need to repair adjust or alter equipment; and*

*...whenever a new plant is introduced, there is a commissioning period, during which arrangements are made for various pieces of equipment to be trialled, for the new*

*equipment to settle down and become fully operational, and for any remaining issues to be dealt with; and*

*... understand the commissioning period to be that period during which the plant is getting up and running, and able to operate at full tally*

The Company on the other hand argue that the term *commissioning period* covers the period from the day the new plant commenced operation (mid-January 2006) to the day that the “builders” handed over the new plant to the Company i.e. the date on which the Company took over the day-to-day operation and maintenance of the plant and equipment. The Company say that this date was 17 May 2006.

[11] During the course of my investigation I suggested to the parties that the term *commissioning period* may have specific meaning when used in relation to construction projects. During the investigation meeting I put forward the proposition that the *commissioning period* would, in the usually accepted understanding of the term, finish when the building contractor handed the completed plant over to the purchasing company. I also suggested that this date would also mark the commencement of any warranty withholding period. I suggested that the parties may wish to address their submissions to this definition and that the Company may wish to make specific reference to the terms of the construction contract between itself and the builders of the new plant. Unfortunately neither party has taken up my suggestion.

[12] Regrettably a search of dictionaries has failed to provide any directly relevant definitions, with the closest being:

*Bring (a machine, equipment, etc) into operation.*

[“Commission”. *The NZ Oxford Dictionary* Oxford Press 2005

And

*To put (a ship) into active service.*

[“Commission”. *Dictionary.com Unabridged (v1.1)*. Random House Inc 8 Aug. 2007. Dictionary.com <http://dictionary.com/browse/Commission>]

[13] In their evidence the Company’s witnesses advised me that the new plant was formally handed over to the Company on 17 May 2006 and on that day the building company finally left the

works. While the Union do not dispute this date they say that the new plant was taken over by AFFCO on that date *so they could employ other contractors to fix some of the outstanding problems* and that AFFCO *had to spend \$500,000 ....to rectify some of the design and mechanical flaws which prevented us getting tally.* AFFCO reject this proposition and in his evidence Mr Tony Miles, the Operations Manager for AFFCO says:

*The engineering company ... had completed their work under the contract including that required during the commissioning period.*

*What was the period of commissioning?*

[14] It is usual, for those involved in the building of new buildings, plant and equipment, to include in those contracts specific dates and definitions regarding progress, completion, handover and warranty/withholding periods and payments. In the absence of a specific agreement to redefine the terms in a specific context, it must be assumed that the parties intended to rely on the usually accepted definitions. Having considered the parties proposed definitions of what is meant by the term *commissioning period* I find that the correct interpretation of this term is that put forward by the Company. This is the definition in commonly accepted use. To adopt the suggested definition proposed by the Union would be to accept that this period could be indefinite. Regrettably the Union representatives involved in the discussions with AFFCO appear to have had a different understanding of the terminology used. This misunderstanding does not negate the agreement nor does it require the Company make payments based on the Unions misunderstanding. The Company's first offer was for a six week period of "make up" and the "agreement" subsequently made resulted in payments being maintained for almost 3 times that period. In fact the Company continued the additional payments for almost 2 weeks beyond the period, in my finding, they had agreed to and were obliged to do.

### **Determination**

[15] The Company agreed to pay the employees at the Horotiu plant a make up payment until the completion of the commissioning period. That period ended on 17 May 2006. The Company has already made payments to the employees concerned until 29 May 2006. The employees are not entitled to any further payments

### **Costs**

[16] Costs are reserved. If the parties are unable to settle this issue between them, and the Company wishes to seek a contribution towards its costs, they should file and serve submissions within 28 days of the date of this determination. The Union will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority