IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 86/08
5124136

	BETWEEN	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INC. Applicant
	AND	AFFCO NEW ZEALAND LTD Respondent

Member of Authority:	James Wilson
Representatives:	Simon Mitchell for the applicant Gillian Spry for the respondent
Investigation Meeting:	12 June 2008 at Napier
Determination:	20 June 2008

DETERMINATION OF THE AUTHORITY

Application for removal to the Employment Court

[1] During the course of my investigation of an employment relationship problem filed by the NZ Meat Workers and Related Trades Union (the Union), the parties jointly requested that I remove this matter to the Employment Court in terms of Section 178 of the Employment Relations Act (the Act).

The employment relationship problem

[2] In a statement of problem filed on 19 May 2008, the Union asked the Authority to make *a compliance order, requiring* [*AFFCO NZ Limited (*AFFCO/the Company)] *to comply with the pay rates specified in the beef boning and beef slaughter agreement.*

[3] In their statement in reply AFFCO said that the agreement referred to by the Union was the *AFFCO Wairoa agreement re: beef boning and beef slaughter departmental trials November 2007 (the trail agreement)* which came to an end on 1 February 2008. The Company also said that it had recently discovered that the hourly rates in this trial agreement were incorrect and did not reflect the intention of the parties when they concluded the agreement. The company requested that either:

> (1) The Authority determine that the employment relationship between the parties to the trial agreement is now governed by the *Core Collective* and the *Plant Agreement;* or in the alternative:
>
> (2) The Authority order rectification of the trial agreement so that it correctly records the common intention and agreement of the parties in relation to pay rates; or in the alternative
>
> (3) The Authority provide relief to AFFCO under the Contractual Mistakes 1977 on the grounds that the parties to the trial agreement were influenced in their respective decisions to enter into the contract by the same mistake; or in the alternative
>
> (4) If the Authority determines that the trial agreement is still in operation and the Authority declined rectification or relief on the basis of common mistake, that the Authority provide relief under the Contractual Mistakes Act 1977 on the grounds that AFFCO entered into the trial agreement influenced by a mistake that was material to them and was known to the applicant.

Background

[4] During 2007 the Company refurbished the beef boning department and reconfigured the beef slaughter department at the Wairoa plant. Before the new department came into use the Company and the Union negotiated an agreement to cover the trial period of the new boning department and reconfigured slaughter department i.e. *the Beef Boning and Beef Slaughter departmental trials November 2007* agreement. (*the trail agreement*). Among other things this agreement stated:

The parties acknowledge and understand that the employer has altered the beef boning department so as to provide for a different method of processing the same or similar product as that processed on the 2006-2007 season. As a consequence of this the employer party to this agreement has requested and the Union has agreed that a trial be entered into commencing on Monday the 26th of November 2007 and ending on the 1st of February 2008.

Such trial shall be relevant to the beef boning and beef slaughter departments at AFFCO Wairoa.

Both parties acknowledge and agree that the duration of this trial may be extended by written agreement between the parties.

Should either party believe it is necessary to extend or vary the trial the parties agreed to meet and discuss the matter with a view to reaching agreement before going forward.

[5] The trial agreement also provided for an *initial manning level* and set out specific hourly rates of pay and hours of work for staff in the various departments. The agreement was signed by representatives of both the Union and the Company.

[6] It is generally accepted by the parties that when the Company upgrades or reconfigures a meat processing plant there is likely to be a settling in period during which new equipment and processes will result in lower production levels. It is therefore usual practice to negotiate a trial period agreement to ensure that the take-home pay for workers employed on the new equipment will not suffer financial loss as a result of the reconfiguration or upgrade. While there is a difference of opinion between the parties about what they intended to achieve with the rates set out in this document, it is agreed that the rates were to be paid in substitution for the piece rate system of payment usually applicable.

[7] On 3 February 2008 the Company advised the Union by e-mail that the trial agreement had ended and setting out changes that would occur in terms of the operation of the agreement. However despite the reference in the agreement to the agreement *ending on the 1st of February 2008* the Company continued to pay the specified rates. The parties met on 28th of February 2008 to discuss various issues to do with the new beef slaughter and boning arrangements. At this meeting it seems (although there is some disagreement between the parties on this point) that the Company agreed to

continue the trial agreement (for an unspecified time) subject to the incorporation of yield targets into a new agreement. On 27 March 2008 the Company forwarded a new draft agreement for the Union's consideration.

[8] On 24 April the parties met again to discuss the draft agreement but no new agreement was reached. Also at this meeting the Company advised the Union that, due to the use of an incorrect devisor, an error had been made in calculating the hourly rates set out in the original agreement, resulting in an overpayment of approximately $50 per employee per week.

[9] On 8 May 2008 the Company advised its employees at the Wairoa plant, via the union delegates, that as from Monday 12 May the hourly rates paid would be adjusted to reflect what the Company saw as a genuine error in the calculation of the pay rates in the trial period agreement. The Company also advised that they would not be pursuing any reimbursement of what they considered to be overpayments made as a result of this error.

The issues

[10] While there are some issues of fact which will need to be determined in resolving the employment relationship problem between the parties there are several questions of law which will first need to be decided.

The Union's position

[11] The Union argues that the trial agreement is either a collective agreement in its own right or **additional terms and conditions of employment** in terms of section 61 of the Act. In either event the Union argues that the trial agreement or additional terms continue in force in terms of section 53 of the Act. For the Union Mr Mitchell argues that the purported expiry of the trial agreement is illegal in terms of section 66 of the Act. Mr Mitchell also argues that section 163 of the Act precludes the Authority providing relief as requested by the Company in terms of the Contractual Mistakes Act 1977 or by way of rectification.

The Company's position

[12] The Company on the other hand, argue that the trial agreement came to an end on 1 February 2008 and they are therefore under no obligation to continue to pay their employees in accordance with that agreement. They also argue that the continuation of the payments amounts to a series of individual employment agreements (iea's) between the company and the individual employees and that the rates in these iea's were the result of a genuine mistake rectifiable by the Authority in terms of the Contractual Mistakes Act.

The core collective employment agreement

[13] A further complication in respect to the status of the trial agreement is a clause within the applicable collective employment agreement (cea) which provides for variations to that "core" cea. Clause 5 of the Core Collective provides:

> *Any of the provisions of this agreement, or subsequent Site Agreements may be varied by written agreement according to the following procedure.*

Despite the fact that the trial agreement at the centre of this dispute appears to have been negotiated in terms of the process set out in the core cea variation clause, neither party accepts appears to accept that the trial agreement forms part of the core collective.

Questions of law

[14] Resolution of this matter will require consideration of the status of the *trial agreement*, its relationship with the core cea, the legality or otherwise of the expiry of the trail agreement in terms of section 53 and section 66 of the Act and, depending on the status of the *trial agreement*, whether the provisions of the Contractual Mistakes Act 1977 may be applied (in terms of section 162 and section 190 of the Act) or whether this is prohibited by the provisions of section 163 and section 192.

Grounds for removal

[15] The Employment Relations Act at section 178 provides that the Authority may order the removal of a matter to the Court if:

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and such urgency that it is in the public interest that it be removed immediately to the Court; or

(c) the Court already has before it proceedings which are between the same parties and which will involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[16] I am strongly of the opinion that there are important questions of law which arise in this matter which are central to its resolution. I am also of the opinion that it is important that the parties receive a relatively speedy final resolution of this matter. I understand that the Company has reduced the hourly rate paid to the employees concerned and this has caused some level of anger amongst the employees. I also understand that the killing season at the Wairoa plants is likely to end within the next few weeks and it would be advantageous if this matter could be clarified prior to the plant closure.

Determination

[17] **In terms of section 178(2) of the Employment Relations Act I order that this matter be removed in its entirety to the Employment Court.**

Costs

[18] Neither party has raised the question of costs. Should costs be an issue this will no doubt be a matter the Court will deal with in due course.

James Wilson
Member of the Employment Relations Authority