

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 210/09
5288884

BETWEEN NEW ZEALAND MEAT
 WORKERS AND RELATED
 TRADES UNION INC
 Applicant

AND AFFCO NZ LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Simon Mitchell, for the Applicant
 Graeme Malone, for the Respondent

Investigation Meeting: 16 December 2009 at Napier

Submissions Received: 16 December 2009

Determination: 24 December 2009

DETERMINATION OF THE AUTHORITY

[1] This is a dispute about the lawfulness of individual employment agreements entered into between the respondent, AFFCO, and some new employees, described as *trial employment agreements*, but argued by AFFCO to be probationary arrangements available under s.67 of the Act. AFFCO does not rely on s.67A, which provides for trial periods without recourse to the personal grievance procedures for smaller employers, because it is one of New Zealand's larger employers.

[2] The applicant union claims that because the new employees are by law, for the first 30 days of their employment, covered by the parties' collective agreement, and the individual agreements are inconsistent with that collective, they are unlawful. The union also claims that the trial employment agreements are in breach of the

probationary arrangements section of the Act and therefore can not be allowed to stand.

[3] The issues for determination are whether or not the *trial employment agreements* are inconsistent with the collective agreement, in which case they can not be relied on by AFFCO and, in the alternative, whether the *trial employment agreements* are in breach of the requirements of the Act for probationary periods of employment.

The Facts

[4] This is a matter that has come to the Authority under great urgency. While both parties' representatives have produced comprehensive submissions in a short space of time, both would no doubt accept, as does the Authority, that the matter could have been better argued and determined had more time been available to deal with the matter. However, it is an important issue for all parties at AFFCO's Wairoa plant, and therefore at the request of the parties the Authority agreed to issue a determination before Christmas.

[5] The facts are pretty much undisputed. Employees of AFFCO at its Wairoa processing plant are initially employed pursuant to provisions of the collective employment agreement currently in force between the parties. New employees have, however, recently been engaged on different terms under individual employment agreements, containing what is described as a *trial employment agreement*. The terms of that agreement state:

This is to advise that the Employee's first thirty (30) days of employment is deemed to be a trial period. This trial period is to allow the Employee a settling-in time during which their suitability to work in the Meat Industry, their ability to fit in with other staff and their ability to perform the role that they have been engaged for can be assessed, so that the Employer can be satisfied that the Employee is suitable for appointment as a seasonal employee.

During the 30 day trial period further terms of employment will be according to the AFFCO/Meat Workers Collective Agreement.

In assessing whether the Employee is likely to be a satisfactory appointment to the seasonal staff the Employer may take into account such matters as the Employer sees fit, irrespective of whether or not any such matters amount to misconduct on the part of the Employee.

Notwithstanding this trial period, the Employee is subject to the normal disciplinary process and any outcome thereof.

Any outstanding matters regarding the Employee's suitability for seasonal or casual employment that are not resolved by the completion of the trial period may become grounds for termination at the Employer's discretion.

The Employee acknowledges that during the trial period the availability and configuration of work may alter and necessitate a review of the possibility to continue employment at the Employer's sole discretion.

[6] The collective agreement does not provide for trial periods. It does provide for seasonal employment and casual employment and for the continuation of seniority from season to season.

[7] The collective also contains what is argued by the union to be a code on misconduct in clauses 32, 33 and 34, which relate to personal conduct and provision for warnings and dismissals. It is this code for misconduct, and therefore the way in which employees' employment can be terminated for misconduct, that provides the sole provisions relied on by the union in its claim that the *trial employment agreements* are inconsistent with the collective employment agreement.

[8] The parties have attended mediation over the issue of whether the *trial employment agreements* are inconsistent with the collective employment agreement, but have been unable to resolve matters. It therefore falls to the Authority to make a determination.

The Law

[9] The issue of inconsistency was dealt with by the Court of Appeal in *NZ Meat Processors' etc IUOW v. Alliance Freezing Company (Southland) Ltd* [1992] 2 NZILR 1071, where it was held at 1077:

Whether a contractual provision is inconsistent with an award provision involves comparing the two. The Oxford English Dictionary (2nd ed) definition of "inconsistent" is: "not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous". In short, it is whether the two provisions can live together as terms of the contract of employment ...

...where there is a true inconsistency, where the contractual provision and the award cannot stand together, the award must prevail whether the result received is favourable or unfavourable to the particular worker.

[10] In relation to probationary arrangements, but before there were statutory provisions for such, the Court of Appeal held in *Nelson Air v. NZALPA* [1994] 2 ERNZ 665 at 669:

The whole purpose of a probationary period is to enable the employer to assess the suitability of the employee. That will normally be in terms of skills, diligence and personality ... if he proved unsatisfactory ... the airline was entitled not to confirm his appointment. It could either dismiss him or offer to extend the probationary period. But it had to act fairly and was under no less obligation to act as a good employer.

The requirements of that obligation will vary from case to case. Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings to advise about necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment.

Determination

[11] Mr Mitchell accepted that the types of employment provided for under the collective employment agreement (basically casual and seasonal) did not preclude the use of probationary periods under s.67. It therefore follows that employment under a probationary period was equally open to AFFCO as had fixed term employment agreements been found to be open to employers in similar circumstances in the cases highlighted by Mr Malone, such as *NZ Food Processors etc IUOW v. ICI (NZ) Ltd* [1989] 3 NZILR 24 and *Smith v. Radio I Ltd* [1995] 1 ERNZ 281.

[12] The sole issue for determination therefore is whether or not the provisions for misconduct warranting dismissal are provisions with which the *trial employment agreements* are inconsistent.

[13] The collective employment agreement does not say that dismissal for serious misconduct or a series of warnings is the only way in which the employment may be terminated. It simply provides how employment may be terminated following misconduct or serious misconduct.

[14] The purpose of a probationary or trial period, however, is quite different, as the passage from the *Nelson Air* case makes quite clear. It is a method by which employers can, in the early stages of employment, before either party has committed

extensive time or resources to it, assess the suitability of employees, rather than assessing whether or not they have committed misconduct that puts their employment at risk. The purpose of the two provisions is therefore quite separate and thus the concept of a trial period is not inconsistent with misconduct under the collective employment agreement. The two can live together, with the trial period only existing where agreed and for a limited period, as opposed to the ongoing obligations in relation to misconduct.

[15] This conclusion is further reinforced by the fact that the collective agreement does not provide a code for the ways in which employment may terminate at the initiative of the employer as, for example, incapacity (where no misconduct may be involved) is not dealt with. AFFCO would be entitled to dismiss an employee for incapacity even although it is not misconduct and is not provided for in the collective agreement, because of an employer's right to manage its business and to dismiss an employee for incapacity under common law powers. The same principles apply to probationary arrangements, I hold, and thus the *trial employment agreements* are not inconsistent with the provisions of the collective employment agreement.

[16] I turn now to the issue of whether or not the *trial employment agreements* can not stand because they are in breach of s.67 of the Act. Section 67, *Probationary arrangements*, provides in subsection (1) that:

Where the parties to an employment agreement agree as part of the agreement that the employee will serve a period of probation after the commencement of the employment, -

- (a) the fact of the probation period must be specified in writing in the employment agreement; and*
- (b) neither the fact that the probation period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustified dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period.*

[17] While the probation period is described as a trial period, that is not a material difference that affects adherence to s.67. Rather, consistent with *Norske Skog Tasman Ltd v. Manufacturing Construction Workers' Union Inc & Brian Boylen* (unreported, Full Court, AC49/09, 9 December 2009), which dealt with employment protection provisions under s.69OJ, I conclude that it is content rather than form that is important. In the ordinary sense of the words there is no difference between a probationary period and a trial period, but under an amendment to the Act on 1 March 2009 separate provisions were made for trial periods for workers employed in

workplaces of less than 20 employees, whereas probationary arrangements may apply in any workplace. Therefore the wording is relevant for differentiation to assist parties dealing with the similar yet quite separate provisions of the Act, rather than the situation that arises here.

[18] The only provision that has to be complied with, otherwise the employer may not rely on it, is that the fact that the probation period must be specified in writing in the employment agreement. AFFCO has met that provision. It therefore follows that the trial employment agreements entered into by AFFCO and some of its new staff are not ineffective in terms of s.67.

[19] It is a different matter as to whether or not AFFCO may be able to rely on all the matters contained in the *trial employment agreements*. The fundamental issue with probationary arrangements, however described in an employment agreement, is that nothing specified in respect of it affects the application of the law relating to unjustifiable dismissal, where someone is dismissed in reliance on the agreement or at the end of the probation period. The law relating to unjustifiable dismissal here is as set out in the *Nelson Air* case, as amended by necessity by the test in s.103A of the Act, namely whether on an objective basis 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 dismissal occurred.

[20] AFFCO and those parties who enter into the *trial employment agreements* may need to closely consider whether or not the content of the agreements are consistent with the requirements set out above, but any contested dismissal would be assessed on the standards set out in statute and by precedent, and not by whatever specific provisions are provided for in the trial employment agreement.

[21] It follows from the above that the union's claims must fail and I therefore dismiss its claims against AFFCO.

Costs

[22] Costs are reserved.

G J Wood
Member of the Employment Relations Authority