IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 197/10
5291481

	BETWEEN	NEW ZEALAND MEAT WORKERS AND RELATED TRADE WORKERS' UNION 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:	25 November 2010 at Napier
Submissions Received:	Due by 8 December 2010
Determination:	13 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a dispute over terms and conditions of employment of beef boning and beef slaughter department meat workers at the respondent AFFCO's Wairoa plant, although it is framed as an application for compliance order. In essence, the applicant union relies on a trial period found by a Full Court of the Employment Court in *NZ Meatworkers and Related Trades Union Inc v. AFFCO (NZ) Ltd* [2009] ERNZ 68 to have continued beyond its expiry date. This was because, whether or not it was a collective agreement, the agreement for a trial method of working continued in force beyond its term and remained effective to the extent that it had not since been amended by agreement or superseded.

[2] AFFCO claims that the union and the meat workers agreed to new arrangements at the start of the 2008/2009 season, not based on the trial but on the

basis of a tally of 300, payment as per AFFCO's proposed site agreement and a memorandum of understanding between the parties, all of which operated without question until the aforementioned judgment of the Full Court was issued.

The Facts

[3] Many of the relevant facts can be extracted from the Full Court's judgment, which was heard in 2008 but not issued until 2009, after the parties had had an opportunity to negotiate a solution to their problems. In particular, the Court stated at para.[2]ff:

> *[2] When the hearing of evidence concluded in late August 2008, it seemed to us that whatever we might decide on the legal issues, new terms and conditions of employment would have to be negotiated between the parties.*
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> …
>
> *[4] The core agreement specifies the terms and conditions of employment common to all process workers employed by the company at its various works. It also provides that a Site Employment Agreement (a 'site agreement') should be negotiated for each of the AFFCO sites covering rates of pay and conditions of employment specific to that site. These site agreements are to be negotiated and administered at site level. Local managers and union officials have the discretion to negotiate any variations to the site agreements during their currency. Some site agreements are in writing; others, including the site agreement at the Wairoa site with which this case is concerned, are not.*
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> …
>
> *[9] The practice is that AFFCO's site agreements provided for in the core agreement were settled through informal processes and as necessary and were often not in writing. Such agreements were not the subject of the collective bargaining process provided for in Part 5 of the Employment Relations Act 2000 ('the Act').*
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> *[10] The site agreement at Wairoa which preceded the trial agreement was informal and not recorded in writing. It provided for flexible manning levels depending on the circumstances. Issues that arose under the site agreement were dealt with on an issue-by-issue arrangement through negotiation or as disputes.*
>
> *[11] The beef room trial agreement was born out of conflict about AFFCO's decision to rebuild the beef room at the end of the 2007 season. This resulted in a very different beef operation with new equipment and, in turn, reductions in manning levels from 90 to 50 employees in the boning department and a reduction of 3 in beef slaughter.*

[4] The written trial agreement was reached in mediation, and constituted a compromise to resolve issues of remuneration and *manning* levels. The Court held that the trial agreement was a collective agreement. It was held that the result of that was:

> *[43] … [On expiry] terms of the trial agreement became terms of the individual employment agreements of the employees who were bound by it. Those individual employment agreements can only be varied by mutual agreement and not unilaterally as AFFCO has purported to do. They remain effective and enforceable unless and until they are specifically varied by agreement or superseded by inconsistent provisions of a new applicable collective agreement.*

[5] The Full Court also found that because terms of employment of an employee may comprise provisions derived from several sources, including the trial agreement, as long as they were not inconsistent with the core collective agreement, which the trial agreement was not. The Full Court therefore concluded:

> *[51] … On either analysis, the terms of the trial agreement continued in effect beyond its stated expiry date as terms of the individual employment agreements of the employees to whom it applied. Subject to any further decision of the Court, those employees are entitled to compliance with its provisions to the extent they have not since been amended by agreement or superseded.*
>
> …
>
> *[53] Although conscious that the parties were previously unable to negotiate and settle long term arrangements for employment in the beef processing operations, at the Wairoa plant, it remains highly desirable that they do so. The changed nature of the beef operation at Wairoa dictates that there can be no return to old working practices. New terms of employment for the employees engaged in that operation must be decided and that is best done by negotiation.*

[6] The effect of that judgment is clear, but the parties did not know that when they entered into arrangements for the re-employment of staff for the 2008/2009 season. The parties had also entered into a new core collective agreement, which again provided for seniority. In particular, *consistent with departmental needs and the individual's competency, lay-off and re-employment shall be based on departmental and/or site seniority*.

[7] During the plant's seasonal closure in 2008, the parties continued to negotiate unsuccessfully for a site collective agreement. In October the parties were negotiating around version 10 of AFFCO's proposed Wairoa Beef Processing Agreement, on

which incidentally agreement was never reached. Both parties were keen to return to work, the workers as they had been out of work for a long period and AFFCO because it had sufficient stock numbers to commence slaughter. The key negotiators were Mr Graham Cox, the Employee Relations Manager for AFFCO and Mr Eric Mischefski, an organiser of the union. Both Mr Mischefski and Mr Cox led bargaining teams that were involved in the negotiations.

[8] AFFCO had made it clear throughout that it would not reopen the plant without a written site agreement, because of the Court action over the continuation of the trial period - hence the focus on negotiating the beef processing agreement.

[9] On 17 October, the parties agreed on what was later described as a memorandum of understanding, which dealt with *make up* pay for a bedding in period of up to four weeks, departmental cleaners, previous arrangements and *manning*, the latter three all being of a reasonably general nature.

[10] I accept that delegates had given Mr Mischefski authority to negotiate a return to work on the basis of the memorandum of understanding. Mr Mischefski considers that he later agreed with Mr Cox that the season would begin on the basis of a trial of four weeks, under the company's arrangements as per the memorandum of understanding, a tally of 300 and *manning* and payment arrangements as per AFFCO's beef processing agreement No 10, but also on the basis that the parties expected to negotiate the new site agreement within a month. No specific agreement was reached on what would happen if no site agreement was reached within the four weeks. Mr Cox did not believe the agreement was any sort of trial, but was an agreement on the key points that needed to be applied while the formal agreement was negotiated.

[11] Mr Cox therefore emailed Mr Mischefski on 30 October stating the following:

> *This is to confirm our conversation this morning re the start up of the beef at Wairoa with a target tally of 300 per day.*
>
> *Inductions to be carried out Monday morning with actual kill commencing as soon as practical (depending on staff availability).*
>
> *Payments and mannings to be as per draft agreement, with the operation being in accordance with the memorandum of understanding.*

> *The parties agree to work together to have signed final agreement in place within a month.*
>
> *Please confirm your agreement.*

[12] Mr Mischefski responded later that morning stating:

> *Thank you for this confirmation of your intention to restart the Wairoa beef operation on Monday the 3rd of November despite your previous position of not starting until a signed CEA is in place. We regard this as a progressive step that will enable the parties to accurately assess the true potential of the operation prior to signing off on an agreed final document. I can confirm that, as per the memorandum of understanding, the first four weeks of the operation will be deemed to be a bedding in period with a daily target tally of 300 bodies. During this time we will be keen to try and conclude a final document for the beef operation. I can confirm my availability on plant on Monday to meet with our members and discuss the expectations of the parties during the bedding in period. We will also be available on Monday to meet with company representatives regarding the beef operations.*

[13] The beef operation did return to work the next Monday. At their induction, I accept that the plant manager, Mr Dan Tucker, told the employees, albeit in general terms, that the start up was on terms that had been agreed with the union, i.e. the memorandum of understanding and manning and payment under AFFCO's beef operation document.

[14] The differences from the terms of the written trial appeared to include different *manning* levels, different pay rates and a 2-4 week period of *make up* pay if tally was not achieved. The operation was, as planned, staffed in accordance with the new *manning* levels taken from draft 10 and the meat workers were paid according to it.

[15] The parties continued to negotiate for a site agreement for the beef operation, but were unable to do so. Payments continued to be made at the rates provided for under the No 10 document and no objection was taken to those arrangements until after the Full Court's decision was given on 10 June 2009.

[16] On 18 June 2009, Mr Tucker provided the site delegates with a document noting AFFCO's intention to reduce the tally to 200, which had implications for *manning* and pay for the staff. I accept that the delegates (who are able to negotiate on site matters) accepted this proposal because the only alternative was shutting down of the whole operation for the season. This was, however, challenged by

Mr Mischefski a week later, who considered that it was inconsistent with the written trial agreement.

[17] The beef plant operation continued on the same arrangements with a tally of 300 for the 2009/2010 season. The union objected and filed an employment relationship problem with the Authority just prior to Christmas. The Authority went to investigate the matter with urgency. An investigation meeting was set for 11 March 2010. During that investigation meeting, the parties took the opportunity to attempt to resolve matters between themselves. In the meantime, the parties carried on working through the 2009/2010 season. Unfortunately, the parties were unable to resolve their issues and asked for the matter to be re-investigated by the Authority in October 2010. An investigation meeting was convened accordingly on 25 November 2010. Unfortunately, the matter remains unresolved and therefore the Authority must determine it.

Determination

[18] I conclude that the Full Court's advice that new terms and conditions of employment would have to be negotiated between the parties was likely given because of the implication of a long string of cases from the Employment Court and the Court of Appeal, and most recently the Full Court's judgment in *NZ Meat Workers' Union v Alliance Group Ltd* [2006] ERNZ 664, which have consistently held that under the terms of employment agreements in the meat industry, involving as this case does, lay offs and re-employment on a seniority basis, employment ceases when employees are laid off, even though they are re-employed year after year. This means that (outside of the core agreement referred to below) new terms may have to be negotiated each season if any party wishes to do so.

[19] By the time negotiations for a beef agreement had commenced, the parties were covered by a new written collective employment agreement for 2008/2009 (the core agreement), which had been signed on behalf of the union on 6 June 2008. The core collective provides that site agreements are to be negotiated for each site, including Wairoa. Such a site agreement is to cover rates of pay and conditions of employment specific to that site, but is not to cover any of the matters contained in the core agreement unless expressly provided for in the site agreement. The site agreement is to be negotiated and administered at the site level, although AFFCO and the union retain the ability to be represented at a more senior level.

[20] As the Full Court noted in *AFFCO*, site agreements at Wairoa have almost always not been in writing. Indeed it was clear from the evidence that apart from the trial agreement, later found to continue as a collective agreement, no such site agreement had been committed to writing for at least the last 20 years. The parties must now accept that a site agreement that is not in writing is not a collective agreement, as per the Full Court in *AFFCO*.

[21] The impost of all this is that, outside of the terms of the core collective agreement, new employment terms had to be agreed at the commencement of the 2008/2009 season. It therefore follows that what must have occurred before the new season commenced for beef workers in 2008/2009 was that they either agreed on new terms, or there was an agreed recommencement of employment on the old terms, which we now know to be the terms of the written trial agreement. What is important to record about this time was that the judgment of the Full Court had not been delivered. Neither party could be at all sure whether or not the terms of the written trial had continued on until the end of the 2007/2008 season.

[22] AFFCO had been negotiating to reopen the beef plant on the basis that it would not hire workers for the season until a signed collective employment agreement, presumably a site agreement, was in place. The Court-initiated negotiations had not resolved matters.

[23] The parties entered into a memorandum of understanding and were negotiating on draft No 10 of AFFCO's beef processing agreement. I accept that the union delegates agreed to go back to work on the terms of that draft with respect to *manning* and staff remuneration, together with the matters covered by the memorandum of understanding, and that Mr Mischefski indicated so to Mr Cox. No doubt both parties expected, after this compromise, that a new agreement could be formalised within four weeks.

[24] This led to the email which Mr Cox sent, as an agreed compromise, setting out those provisions, together with an agreement to work together to have a signed final agreement in place within a month. If Mr Mischefski, on behalf of the union, had genuinely opposed this he could have said so. Instead he stated that the parties could accurately assess the potential of the operation prior to signing off on an agreed final document. However, he did not specifically state what would happen at the end of the four weeks. I do not accept his evidence that what was agreed to was a trial within a

trial (i.e. that at the end of this four week trial the parties would revert to working under the previous season's terms, which he believed were the terms of the trial agreement). I do so for a number of reasons.

(a) Mr Mischefski did not say so in the memo;

(b) I accept Mr Cox's evidence, which was unchallenged, that he would never again agree to a trial agreement with the union and had told Mr Mischefski so;

(c) The staff were paid on the basis of the No 10 draft agreement from the outset (which appears to be different to both the written trial and the conditions imposed by AFFCO later in the 2007/2008 season) and no objection was made to this until the Employment Court judgment was delivered the next year;

(d) The union has not been able to provide any documentation to explain what its formal position by way of internal union resolution(s) was;

(e) I accept that AFFCO would not have knowingly agreed to return to the trial system, and the parties must be assumed to know (given the lengthy history of this issue in the meat industry) that there are no agreements, other than those in the collective agreements such as seniority, that survive the end of the season, because the seasonal workers' employment have been terminated and they have to be re-hired; and

(f) I accept that Mr Tucker informed the employees on induction that new conditions would apply.

[25] No submissions were made on the union's behalf about the reduction in tally to 200, which I accept was agreed to by the union at site level, albeit that the only alternative was the shutting down of the plant. Nor do the union's submissions that it is significant that no employees signed or ratified AFFCO's terms take its case any further, given the tradition of a lack of written site agreements and the fact that the union's members were already covered by a written collective employment agreement in the form of the core collective. Furthermore, even if the only agreement in place was the so-called trial agreement for four weeks, as evidenced by the e-mail exchange

between Messrs Cox and Mischefski, it flows from the Full Court's judgment in *AFFCO*, in its acceptance of the union's alternative argument in that case, that at the expiry of that trial, even if it was one, that the trial arrangements would continue.

[26] There is no reason to return to the terms of the written trial, as they had been superseded by the terms of the agreement between Messrs Cox and Mischefski and it was within the contemplation of the parties (or reasonably should have been) that, unless there was a new agreement, after four weeks the agreement would stay the same except for *make up* pay. While agreements to work to agree on new terms are common, they have always been unenforceable when such new terms are not in fact agreed (e.g. the parties can not be subject to determination of the outstanding terms by the Authority – see for example *Canterbury Spinners Ltd v Vaughan* [2002] 1 ERNZ 255 (CA)).

[27] There is no doubt that the contents of the agreement, even if as a trial, are not inconsistent with the core agreement. Nor do those terms have to be agreed in writing before they become terms of the parties' employment agreements. For the same reasons again as set out in the union's alternative argument in *AFFCO*, namely that the terms of any such agreement (even if expressed as a trial) are incorporated on their expiry into the terms of the employment of the individual employees to whom they apply, and can not be altered or amended other than by agreement or otherwise being superseded, the terms outlined by Mr Cox continued to bind the parties after the first four weeks' work. It therefore follows that the union's claim must be dismissed

Costs

[28] Costs are reserved.

Final Comment

[29] At the time of time of writing the beef operation had again failed to open for the 2010/2011 season when expected, because the parties have been unable to negotiate a new site agreement. The Act promotes collective agreements, and as they must be in writing, and it is also good union practice to have collective agreements in place for its members, then it follows that the union should promote a written site agreement for Wairoa. It is in fact an indictment on both parties that at least for the duration of this Act (over ten years) no such written agreement (other than the trial) has ever been negotiated. The parties' failure to do so smacks of behaviour of a long

past era in industrial relations. Unless and until the parties conclude a written collective site agreement, or terms not inconsistent with the core agreement are agreed with staff on an individual basis (a scenario that would significantly dilute the union's influence and thus one I would expect it to do all it could to avoid) then everyone will continue to be the worse off. In particular, the meat workers will remain off work, and AFFCO will lose production and thus potentially long term custom, all towards the peak of the season.

[30] As has also been noted by the Full Court, litigation can not resolve, for the future, issues at Wairoa over meat workers' terms and conditions of employment. It is for the parties to determine the employment arrangements for beef workers who are to be re-employed by AFFCO each season. The short and long term impact on the community of Wairoa can only get worse the longer this overall situation remains unresolved. It is thus a time for cool heads and the consideration by the parties of obtaining additional outside assistance, rather than an ongoing barrage of legal claims, as has existed between the parties for many years now.

G J Wood
Member of the Employment Relations Authority