**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

WA 155/10
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| | BETWEEN | MOETU LONGTIME<br>Applicant |
| | AND | AFFCO NEW ZEALAND LIMITED<br>Respondent |

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| Member of Authority: | P R Stapp |
| Representatives: | Simon Mitchell Counsel for Applicant<br>Graeme Malone Counsel for Respondent |
| Investigation Meeting: | 26 August 2010 at Napier |
| Determination: | 1 October 2010 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Moetu Longtime was employed by AFFCO New Zealand Limited at its Napier tannery. He was covered by the AFFCO New Zealand Core Employment Agreement 1 January 2008 until 31 December 2009) and a site agreement called the AFFCO New Zealand Limited Napier (Hawkes Bay Hide Processors) Plant Collective Employment Agreement, in force at the time. Under the latter collective agreement Mr Longtime was a named seasonal employee (Schedule B). During his employment he had health issues to do with an operation on his finger between December 2005 and June 2006 and a sore back. He also had time off due to seasonal layoffs and attended his father's funeral in Samoa.

[2] AFFCO obtained medical reports, which were available to Mr Longtime and union officials, that Mr Longtime was troubled by residual lower back pain and that he was suffering considerable pain. A decision was made not to re-employ Mr Longtime because of this advice.

[3] Mr Longtime has claimed that he was dismissed on 29 April 2010, and he has relied on a letter of the same date to support his claim. AFFCO says it never offered Mr Longtime further seasonal employment with the Company based on advice that re-employing him would be putting him to further risk and harm, and exposed the Company to a breach of the Health and Safety in Employment Act.

[4] Mr Longtime has claimed that this was an unjustified dismissal because he was entitled to be rehabilitated back into the workplace. He has claimed reinstatement, lost wages and compensation. Both parties are seeking costs.

[5] The respondent has denied the claims. It has contended that Mr Longtime was not employed at the time, and thus, can not claim a personal grievance for unjustified dismissal. It accepted that it has on-going obligations with seasonal employees but that its action in deciding not to offer Mr Longtime employment for a new season was justified.

**Issues**

[6] Does Mr Longtime have a personal grievance? What is the nature of any such personal grievance?

[7] Would a fair and reasonable employer have decided not to offer Mr Longtime further seasonal employment, having regard to the medical evidence? Put another way was AFFCO obligated to provide re-employment and rehabilitation to a seasonal worker? A further way of viewing the problem is was Mr Longtime denied the opportunity to complete a rehabilitation plan, and thus, disadvantaged by being denied the chance to return to work by AFFCO?

**The facts**

[8] AFFCO has accepted that it employed Mr Longtime as a seasonal employee under the terms of the core collective agreement and the plant collective agreement. He was seasonally laid off, while he was on ACC, on 7 October 2009. Up until that time he had had problems with his back. Medical certificates produced show that he

was unfit for any work for a period of 60 days from 10 July 2009 when he was on alternative duties and in receipt of ACC earnings compensation, and then for a further 50 days he was unfit for work from 31 August 2009, during the seasonal layoff. While he was on ACC there was an alternative work plan provided by the company and Mr Longtime has accepted that prior to the seasonal layoff his work would have been make up work.

[9] The work in the tannery is physically demanding. Mr Longtime does not have an injury that causes his back pain but has a "mechanical back pain" the causes of which are not known. The pain arises when he is required to do heavy lifting and demanding physical work.

[10] It is common ground that Mr Longtime desires to recover and be able to fully work. He has an individual rehabilitation plan dated 26 May 2009 that supports this aim. Likewise the company wants him to be able to work and to undertake the full range of his duties, but cannot take the risk of him injuring himself and thus putting the company at any risk.

[11] Under the terms of the collective employment agreement and the plant agreement AFFCO required Mr Longtime to obtain medical evidence that he was fit to resume work to undertake normal duties. There was a workplace assessment undertaken on 8 February 2010 that recommended light duties if there was any recurrence of pain, and a medical review dated 10 March 2010 which indicated that Mr Longtime was likely to be at increased personal risk of suffering mechanical back pain requiring more time off work.

[12] The medical report dated 10 March 2010 was provided to Mr Longtime and he was informed that the next step towards re-employment would require him to have an occupational therapist do a work place assessment and a rehabilitation plan. He was assessed on 8 April 2010. The conclusion of that was a return to work for certain hours and duties. It fell short of providing normal full time duties. The parties met on 29 April 2010 where AFFCO announced its decision not to re-employ Mr Longtime. That decision was made by Brian Scully the tannery services manager, and Kevin McGrath, the plant manger. The Company wrote to Mr Longtime on 29 April 2010. That letter reads as follows:

*Dear Moetu*

***RE: Termination of Employment***

*Thank you for being able to attend today's meeting to discuss your ability to resume production employment with AFFCO NZ Ltd Napier Plant.*

*Since your medical clearance from ACC and the Seasonal Layoff termination, and as per that memorandum/letter dated 7 October 2009 we required that you undergo full medical examination, that required a medical certificate to state you are fit to undertake the work required by the company, you have undergone several medical assessment paid for by the Company.*

*Based on the advice received it is clear that re-employing you we would be putting you at further risk to harm yourself, and this in turn could see us in breach of the current Health and Safety Act and its amendments.*

*It is with regret that we have decided that we will not be offering you further seasonal employment with the Company…*

**Determination**

[13] Mr Longtime has had problems with his back.

[14] AFFCO's obligation to re-employ Mr Longtime is contained in clause 28 of the core AFFCO collective employment agreement that makes provision for:

> *a.* ***SECURITY OF EMPLOYMENT***
>
> *a) The Company acknowledges the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required.*
> *b) When engaging workers at the commencement of each season priority shall be given to the employment of those workers who have been*

*competent and satisfactory workers at that particular site during the previous season and who are ready, willing and able to commence work when required. Incompetent and unsatisfactory workers shall be dealt with through the disciplinary procedures laid down in clauses 32, 33 and 34.*

c) *The parties acknowledge the difficulties of accurately predicting livestock flow through out the season and the consequent effects on production planning. Notwithstanding this, the Company shall provide seven-calendar days notice of any seasonal lay-off. Such notice to be given no later than 10.am on the first day of the period.*

[15] Clause 28 is supported by clause 29 which makes provision for "seniority". It is not necessary to repeat that clause, except that it reinforces the obligation to re-employ seasonal workers. The company had no disciplinary issues with Mr Longtime and it considered he was a satisfactory employee. It never informed Mr Longtime that he was not a satisfactory employee if that was the case. Mr Longtime is a named seasonal employee, thus he had a genuine and reasonable expectation to be re-employed by AFFCO. Therefore, the security of employment clause would apply to him, I hold.

[16] The right to be re-employed in rehabilitation would relate to workers who suffer work injuries. The Company has taken from the information that is available that Mr Longtime does not suffer from any work injury, but rather an inability to carry out normal work without suffering episodes of back pain. It was open to AFFCO to come to that conclusion on the basis of the information available to it at the time, I hold.

[17] However, the decision was made before Mr Longtime and the union officials were informed of the decision at a meeting held on 29 April. This was done without Mr Longtime and his union officials being given any advance notice that his continued employment was seriously at risk for the reasons being relied upon. A fair and reasonable employer would have enabled them to have some further comment and opportunity for input, I hold. Moreover, they had no opportunity to comment and have any input on AFFCO's conclusion that he was a risk to himself and that the company would be at any risk of breaching the Health and Safety in Employment Act.

Mr Scully could not recall what AFFCO's risk assessment was to reach these two conclusions during the Authority's investigation meeting, except to rely on the medical conclusion used for the decision not to re-employ Mr Longtime.

[18] Mr Longtime requested that I consider the circumstances of another employee who was off work for a considerable period of time and taken back on in rehabilitation. That worker was a permanent employee. As such I have not given this any weight. Secondly Mr Longtime referred to yet another worker who obtained work on a forklift. I learnt during the Authority's investigation meeting that that worker applied for the job. For that reason I have not given that evidence any weight.

[19] I accept that the company says that there are no alternative duties for Mr Longtime, except for make up work. Indeed it is common ground that any alternative work would have to be made up work. However, the workplace assessment report dated 8 April 2010 provided for a return to work. It stated that the employer was happy to assist with a return to work programme with a gradual increase in work hours and tasks. It seems to provide for tasks within the range of normal duties and some alternative duties. This means that a fair and reasonable employer would have implemented the plan.

[20] AFFCO was obligated at the time to provide Mr Longtime with the security of employment that he enjoyed as a seasonal employee. Any rehabilitation can not mean that it must include work where there are no alternative duties and other rehabilitation plans put in place, such as the development and implementation of unscheduled leave management or total absentee management programme (The ACC Partnership Programme). The latter arrangements may give rise to ACC involvement and implications for any entitlement to any compensation if Mr Longtime had been re-employed, but needed rehabilitation. Mr Longtime had been cleared for duties, but AFFCO was entitled to be satisfied that an employee will be fit to undertake normal duties. This information was requested and it took some time through no fault of either party for Mr Longtime to get to a specialist. This explains the delay between the start of the season and all the information being gathered and AFFCO making the decision which was conveyed on 29 April.

[21] AFFCO's decision conflicts with information it had from one of the doctors in the medical case review dated 10 March 2010 where it states in the summary at page 5 that:

> …
> *Both [name withheld] and [name withheld], Orthopaedic Surgeons have advised that in their opinion, Moetu would be fit to trial a return to work and I would concur with this opinion. The diagnosis is of mechanical back pain and this is often of unknown genesis and is felt best dealt with by ensuring that the patient has good core strength, is not overweight and in addition is not subject to work activities which involve a lot of heavy lifting and repetitive bending and twisting.*
> *It is not possible to be able to predict whether if Moetu returns to work, whether he will continue to get recurrences of low back pain but this is entirely possible and in view of his history to date, he is certainly likely to be at an increased risk of this happening. However, it is unlikely that returning to even the heavy nature of his work, which I am familiar with, that he is likely to do any further permanent long term anatomical damage to his thoracic or lumber sacral spine compared to any one else.*
>
> *It would therefore be fair to say that Moetu is not at an increased risk of doing further long term serious harm to his back, but would appear to be at an increased risk of getting further reoccurrences of mechanical back pain and it is likely this requires him to take further time off work.*

[22] AFFCO has not adequately explained why the workplace assessment report would not be workable. Indeed it never relied on any such grounds not to reemploy Mr Longtime even although that report and the 10 March 2010 assessment did provide a clearance for him to return to work. AFFCO has relied on a perception of risk that it has not been able to specify. Finally, there is no distinction between work related injuries and other injuries. Thus, AFFCO, I hold, did not meet its obligation to Mr Longtime and reemploy him at the earliest opportunity, which would have been 8 April 2010.

[23] I now turn to the nature of the personal grievance. This is not a dismissal, although the letter dated 29 April 2010 refers to a termination of employment, I hold that letter was to convey a decision by AFFCO not to re-employ Mr Longtime as a seasonal worker. Given the ongoing obligations AFFCO had for security of employment for Mr Longtime as a seasonal worker the nature of the personal grievance is different to that claimed. AFFCO's action amounts to an unjustified disadvantage action in regard to provisions that survive the ending of employment because Mr Longtime was a named seasonal employee entitled to the benefit of the obligations provided in clause 28 of the collective agreement. I accept that Mr Scully and Mr McGrath genuinely reached their conclusion about what they considered would be the risk, but on the information available and because Mr Scully could not recall what the factors were in making their assessment of what the reasons for the risks were, it must follow that their decision was not what a fair and reasonable employer would have decided in all the circumstances. Also the decision has disadvantaged Mr Longtime because it deprived him of the opportunity to work.

[24] It is now the end of the season that Mr Longtime has missed. It is common ground that the season effectively ended on 7 August with the last seasonal worker being laid off. The employer cannot be held responsible for the delays in Mr Longtime getting to a specialist and receiving the information the company was entitled to request. Lost wages would be due from 8 April 2010. They would have to take into account the work plan: 4 hours per day for 5 days for week 1; 6 hours per day for 5 days for week 2; 6 hours per day for 5 days in week 3; 8 hours per days for 5 days in week 4 and thereafter would have been subject to review on the basis of normal hours for 5 days per week. Mr Longtime worked for 9 weeks in alternative employment earning about $300-$400 per week. This is an average of $350 per week, totalling $3,150 over nine weeks.

[25] His hourly rate was $12.88 per hour. The schedule of payments on the basis of a the base hourly rate from 10 April 2010 is:

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| (i) | The First week | 4 hours per day | $257.60 |
| (ii) | The Second week | 6 hours per day | $386.40 |
| (iii) | The Third week | 6 hours per day | $386.40 |
| (iv) | The Fourth week | 8 hours per day | $515.20 |

[26] I have used the workplace assessment for the above calculation in regard to Mr Longtime's likely hours.

[27] Next I have taken the average earnings per week from details provided by AFFCO from 15 May 2010 (after the 5 weeks above) until the end of the season, which is $853.93 for the remaining 14 weeks. In total this amounts to $11,955.02. The total lost wages would be $13,500.62. He has attempted to mitigate his lost wages, I hold. Less his estimated earnings received during the period the amount of lost wages would be $10,350.62.

[28] Mr Longtime has applied for compensation for humiliation loss of dignity and injury to feelings. I accept that his feelings have been affected by the employer's actions. I assess his claim to be in the value of $5,000.

[29] There has been no contribution in that Mr Longtime cannot be blamed for his condition. He did what he was asked by the company to get medically assessed, he visited a specialist and co-operated with the work place assessment.

[30] Mr Longtime requested reinstatement. I can not order that because the season has ended. The personal grievance does not involve a dismissal. Other remedies would have to be considered for any enforcement once AFFCO has had an opportunity to comply with any surviving terms.

**Orders of the Authority**

[31] The applicant is entitled to lost wages of $10,350.62 and compensation for hurt feelings in the sum of $5,000.

[32] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority