**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2011] NZERA Auckland 397
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| BETWEEN | NEW ZEALAND MEAT WORKERS' UNION OF AOTEAROA INC<br>Applicant |
| AND | AFFCO NEW ZEALAND LIMITED<br>Respondent |

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| Member of Authority: | James Crichton |
| Representatives: | Simon Mitchell, Counsel for Applicant<br>Graeme Malone, Counsel for Respondent |
| Investigation Meeting: | 22 March 2011 at Te Puke<br>23 March 2011 at Hamilton<br>24 March 2011 at Auckland |
| Submissions Received: | 29 April 2011 and 15 August 2011 from Applicant<br>2 June 2011 from Respondent |
| Determination: | 22 September 2011 |

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**SECOND DETERMINATION OF THE AUTHORITY**

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## History

[1] This matter came before the Authority by way of a statement of problem filed by the applicant union (the Union) on 25 January 2011 alleging that the respondent employer (AFFCO) was in breach of its statutory obligations of good faith and certain provisions of the core collective employment agreement (the Agreement) which document was in force until 31 December 2011 and covered the terms and conditions of employment of all process workers employed by AFFCO. For its part, AFFCO denied the Union's allegations.

[2] During the course of the initial consideration of the matter by the Authority, the question of whether there might be an important preliminary issue to be resolved came into focus. The Union requested that the Authority remove that preliminary issue to the Employment Court and AFFCO acquiesced. The preliminary issue related to the correct interpretation and application of clause 30 of the Agreement which was referred to by the parties as the *seniority clause*.

[3] The Authority accepted that the interpretation of the seniority clause involved an important issue of law and pursuant to s.178 of the Employment Relations Act 2000 (the Act) removed the issue to the Court by determination dated 28 February 2011[1].

[4] The matter came before His Honour Judge Ford in the Employment Court at Auckland, the judgment issuing on 12 April 2011[2].

[5] It is of assistance to the Authority to refer briefly to the conclusions the Employment Court came to. The first general conclusion was that seniority had been a feature of the meat industry as a whole for many years and, more than that, it was regarded, perhaps particularly by employees in the industry, as being a *significant feature* of meat industry employment.

[6] His Honour then proceeded to describe what AFFCO's group employee relations manager described as *a generic individual employment agreement* which was introduced by AFFCO in the second half of 2010. Mr Cox, the group employee relations manager of AFFCO, told both the Court and the Authority that the purpose of the introduction of the new generic individual agreement was simply to provide a base document for those process workers in AFFCO's meat plants who did not wish to become members of the Union. The Court's judgment goes on to make this observation:

> *... AFFCO claims that the seniority provisions in the collective agreement do not apply to employees employed under individual employment agreements (IEAs) and this is the essence of the dispute between the parties.*

[7] Conversely, the Union's position is that, while it does not dispute the assertion that the collective agreement applies only to union members, it is asserted that the

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1 [2011] NZERA Auckland 75

2 *New Zealand Meat Workers' Union of Aotearoa Inc v. AFFCO New Zealand Ltd* NZEMPC Auckland [2011] NZEMPC 32 [12 April 2011]

effect of the seniority clause is to guarantee that union members covered by the collective agreement have their right to seniority determined by the commencement date of all employees on the site or in the relevant department, whatever the basis of their employment.

[8] In coming to a decision on the matter, the Court was clearly influenced by the fact that it was common ground that there had always been process workers at AFFCO's plants who were not members of the Union, but notwithstanding that, historically it had always been the practice for all workers (however employed) to have their names recorded on the seniority list in the order of their employment.

[9] In the result, the Court found for the Union. The Court considered that the Union's:

> *... concern is with employees covered by the collective agreement and it is simply seeking to uphold the contractual rights those workers have to be laid off and re-engaged in accordance with their particular seniority position in relation to the rest of the workforce. I uphold the plaintiff's claim in this regard.*

**Process**

[10] It was agreed between the parties that once the preliminary issue had been referred to the Court, and while the Court was seised of it and in the process of hearing and deciding the issue, the parties would themselves, together with their witnesses, make themselves available to the Authority such that the Authority could hear the evidence it needed to hear and conduct what other investigations it deemed necessary and appropriate, so that the balance of the matters requiring determination could be expeditiously dealt with.

[11] To that end, the Authority heard three days of evidence at three different North Island venues which had been identified by counsel as being the most convenient points at which various witnesses could be gathered and heard from. The Authority pays tribute to both counsel for their assistance in arranging the practical disposition of this matter in such a commonsense way.

[12] The Authority heard evidence from meat workers at a number of AFFCO plants together with evidence from AFFCO management, both at plant operational level and at head office human resources level. Accordingly, the conclusions that the Authority has been able to reach are based on an assessment of the evidence heard

from a wide variety of sources over a representative number of AFFCO's plants throughout the North Island.

**Issues**

[13] In the statement of problem filed in the Authority on 25 January 2011, the Union identified two fundamental problems that it sought the assistance of the Authority to resolve. The first was an allegation that AFFCO had failed to meet its good faith obligations to the Union by taking actions which undermined the agreement between the parties.

[14] The second allegation was that AFFCO failed to comply with the seniority provisions of the collective agreement in place between the parties.

[15] Compliance orders are sought by the Union by way of remedy for the defaults identified.

[16] In its statement in reply lodged with the Authority on 11 February 2011, AFFCO denies the allegations made against it, denies breaches of good faith, denies failing to comply with the seniority provisions in the agreement and resists the issuing of compliance orders as requested by the Union.

[17] It will be useful if the Authority considers the following questions:

(a) Has AFFCO failed to meet its good faith obligations to the Union; and

(b) Has AFFCO failed to comply with the seniority provisions of the agreement?

**Has AFFCO failed to meet its good faith obligations to the Union?**

[18] The Union contends that by various actions taken by AFFCO, it deliberately sought to undermine the agreement between itself and the Union, thus breaching the good faith obligations required by the statute.

[19] It is axiomatic that an employer may generate different terms and conditions of employment for workers to be employed on individual agreements from those that might apply in respect of the collective agreement. However, the Union submits that it is not available to an employer to make the terms and conditions of the employment on an individual agreement so attractive as to make it unlikely that a worker will

choose to be engaged under the collective agreement. This is because, as a party to the collective agreement, the employer has obligations of good faith to its negotiating party (the Union) as well as specific statutory obligations such as those provided for in s.3 of the Act.

[20] Dealing with the first of those points, s.4 of the Act requires that parties in an employment relationship *must deal with each other in good faith*. Plainly, AFFCO and the Union are in an employment relationship so the provision is, in principle, relevant. Pursuant to subclause (1A) of s.4 and by subpara.(b) of that subsection, the parties to an employment relationship are required to be ... *active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative ....*

[21] Furthermore, s.4(4)(b) makes clear that the duty of good faith applies to ... *any matter arising under or in relation to a collective agreement while the agreement is in force ....* The present collective agreement came into force on 1 January 2011 and continues to be operative.

[22] It seems to me to follow that in terms of s.4 of the Act, both AFFCO and the Union have an obligation to deal with each other in good faith being parties to an operative collective employment agreement and that that obligation includes the requirement that the parties be *active and constructive in establishing and maintaining a productive employment relationship ....* It is difficult to see how AFFCO's behaviour, as demonstrated in the evidence before the Authority and the Court, is consistent with that statutory obligation. On the face of it, the evidence supports the conclusion that, while AFFCO may have set out to create a *choice* for workers between an individual employment agreement with certain benefits and a collective employment agreement with certain different benefits, the practical reality was that the benefits in fact were one sided and the individual agreement was significantly more beneficial to workers than the collective agreement.

[23] I accept that it may have been AFFCO's intention simply to provide a choice of agreements, but I do not accept that that was the result. It seems to the Authority that the evidence discloses that on two key determinates anyway the comparison between the individual agreement and the collective agreement was, in truth, a one sided one. Those two key determinates were respectively the rate of remuneration on the one hand and the duration of the employment on the other.

[24] AFFCO says that the remuneration difference is more apparent than real and that when provisions in the collective agreement relating to redundancy, long service leave and the like are taken into account, the levels of remuneration are similar. That may be so, but the factual reality is that existing members of the Union who were covered by the collective agreement chose to move over to the individual agreement (thus foregoing any benefits from the collective agreement) and it seems the vast majority of new employees coming into the employment chose individual agreements, having made the assessment that the benefits of the collective agreement relating to long service leave, redundancy and the like would not accrue for a decade or more and thus, the immediate benefits of the individual benefit were to be preferred. Certainly, the evidence supports the Union's contention that from the point at which the individual agreement began to be offered by AFFCO, the take up of the individual agreement was dramatic indeed.

[25] It follows from the foregoing brief analysis that the argument around remuneration rates may not be straightforward. As I have noted, it depends on which provisions in each agreement are taken into effect. However, on balance, I prefer the Union's conclusion that, in reality, the remuneration basis under the individual agreement is more attractive to most workers in most circumstances than the equivalent provisions in the collective agreement and that, in respect of new workers, the provisions of the individual agreement are overwhelmingly more attractive than the provisions of the collective agreement.

[26] However, if the differences between the two agreements in respect of remuneration are not clear cut, I conclude that the differences between the two agreements in respect of the period of the employment is very straightforward indeed. The collective agreement provides a significantly less satisfactory period of employment than the individual agreement. On the basis of the evidence the Authority heard, I am satisfied that the Union's submission that the difference is a factor of about 100% is probably accurate. Put another way, workers covered by the individual agreement could expect to work for 10 months of the year while workers covered by the collective agreement could expect, on average, to work for only five months of the year. It was plain from the evidence of AFFCO's witnesses that the intention was to put to as many workers as possible the option of working on the individual agreement rather than on the collective agreement and a particular facet of the alleged attractiveness of the individual agreement was AFFCO's insistence that

the individual agreement did not have a seniority provision. The immediate consequence of that supposed benefit was that workers covered by the individual agreement could be employed for longer, thus giving rise to the conclusion that I have just reached that the practical consequence of this arrangement was that workers covered by the individual agreement could expect to work about twice as long in each season as workers covered by the collective agreement. Indeed it seems to have been accepted in evidence given to the Employment Court by AFFCO that it would be theoretically possible to staff a plant without using workers covered by the collective agreement at all. Certainly, I am satisfied that a proper inference to be drawn from AFFCO's evidence before the Authority was that the company's intention was to maximise the number of workers covered by individual agreements and, as a consequence, minimise the number of employees covered by the collective agreement.

[27] I have no hesitation in concluding that the behaviour I have described by AFFCO is a breach of s.4 of the Act in that, by its behaviour, AFFCO is not acting in good faith in relation to its employment relationship with the Union with whom it has a collective agreement and, in particular, seems to be acting in a way which, far from being *active and constructive* in the establishing and maintaining of a productive employment relationship, is actually being destructive of that very relationship by undermining the efficacy of the collective agreement by promoting an alternative which is significantly more attractive to the vast majority of workers. If the difference between the two documents had been less graphic, I might well have reached a different conclusion; choice of itself is no bad thing especially when it is mandated by the statute itself in s.3(a)(iv). However, the choice must be a viable one and not create an option which really casts one of the alternatives as the ugly sister.

[28] Turning now to the Union's subsidiary submissions on the issue of the alleged breach of good faith, it is alleged that AFFCO has also breached good faith with reference to breaches of s.4(6)(b) of the Act and that that contention is supported by the provisions in s.3(a)(ii), (iii) and (iv). Given my factual findings referred to above, it follows that I hold that there has indeed been a breach by AFFCO of s.4(6)(b) of the Act. Whether deliberate or an inadvertent consequence of the decision to offer choice to workers, it seems to me that on the evidence before the Authority, the factual reality is clear that a number of individual employees who gave evidence at the investigation meeting disclosed that they had effectively been solicited by their

employer with the object of inducing that worker or workers not to be covered by the collective agreement. By the very process of talking to workers about the $1,000 bonus which AFFCO offered as part of the individual agreement package, I am satisfied that AFFCO was, in practical terms, inducing workers to cease their coverage by the collective agreement.

[29] It is true also that the statute identifies the objects as including the *inherent inequality of power* in employment relationships, the promotion of collective bargaining and the protecting of individual choice. Those aims are, to some extent, self-explanatory; I have already noted that the promoting of individual choice as a statutory object requires that there is a genuine choice for workers to make and that in the present situation, it seems to me to follow from the evidence before the Authority that because of the huge disparity between the benefits of each of the contracts offered, there was in truth no choice at all for the vast majority of employees and so on that basis anyway it must be held that that object of the statute was not met by AFFCO.

**Did AFFCO fail to comply with the seniority provisions of the collective agreement?**

[30] The Employment Court has dealt with the central issue in relation to this part of the application, namely the question of which workers are covered by the seniority provisions in the collective agreement. As I have already noted, the Court has determined that the effect of the seniority provisions in the collective agreement requires that AFFCO treat all staff, whether covered by the collective agreement or not, as covered by the seniority rule. It will immediately be apparent that the effect of the judgment is to remove from AFFCO the right to *market* its individual employment agreement as not being subject to the seniority rules spelt out in the collective agreement.

[31] However, notwithstanding the assistance the Court has given to the Authority, and the parties, in determining that matter, there remain subsidiary issues for determination by the Authority. In particular, the Authority needs to consider whether the laying off of employees at the end of the season and the re-engagement of employees at the beginning of a new season are processes that are being implemented by AFFCO in accordance with its obligations under the collective agreement.

[32] It is common ground that the subject industry is seasonal in nature. It follows that for all process workers employed by AFFCO there will be periods of the year in which they are engaged in productive effort for AFFCO for which they will be remunerated, and periods of the year in which they are not so engaged and therefore not remunerated. It is the way in which AFFCO has chosen to reintroduce workers to its employ after the seasonal lay off which continues to produce disputation between the parties. AFFCO says that it is entitled to have process workers *re-apply* for their employment at the beginning of each new season and to require those workers to take a drug test as a prerequisite of re-engagement. The Union says that the application process is a nonsense because the effect of the seniority provisions in the collective agreement is to create an environment where there is an automatic right for previously engaged process workers to rejoin at the commencement of the new season. Similarly, AFFCO's contention that it is appropriate for it to be able to make a satisfactory drug test a prerequisite of re-engagement is also contested by the Union on the footing that that arrangement is not in conformity with the collective agreement which provides clear protocols for drug testing during the course of the employment but not as a prerequisite to re-engagement.

[33] Perhaps more importantly, the Union argues that process workers during the seasonal lay off have rights analogous to those of an employee because they are workers intending to work. Section 6 of the Act defines *employee* as including *a person intending to work*, s.6(1)(b)(ii). But, as counsel for the respondent correctly asserts, this submission ignores the definition of *"a person intending to work"* in s.5. That definition requires that the person **be offered and accept** work. In the absence of either offer or acceptance, the determinants of employment are missing.

[34] Notwithstanding that, I am satisfied that the effect of the decision of the Employment Court in the instant matter is that the seniority rule is to be applied strictly and AFFCO is not to use the seasonal re-engagement process as a means of *weeding out* unsatisfactory or incompetent workers. As His Honour Judge Ford noted in the Court's judgment, clause 29 of the collective agreement contains a specific provision dealing with incompetent and unsatisfactory workers and requiring AFFCO to address those issues during the course of the employment.

[35] I am satisfied that the logic applied by the Employment Court to the issue of workers who are allegedly incompetent or unsatisfactory ought also to be applied to

the issue of drug testing as a prerequisite to re-employment. It follows that it is not appropriate for AFFCO to maintain its stance that a clean drug test is a prerequisite of re-engagement after a seasonal lay off. There is no right in the collective agreement to make that a requirement now and if AFFCO requires that to be a prerequisite of re-engagement, then the appropriate course for it is to negotiate that into the collective agreement at a future date.

**The application for compliance**

[36] The Union seeks a compliance order in a number of parts. Each is resisted by AFFCO on both general and specific grounds. The general ground is the contention that AFFCO ought to be given the opportunity, and the time, to implement the Court's orders without the draconian remedy of the compliance order hanging over its head.

[37] Specifically, in regard to the first claim for compliance, under which the Union seeks an order requiring AFFCO to lay off and re-engage all employees strictly in relation to seniority, AFFCO contends that the dispute was a "genuine" argument about the application of the seniority provision and, as that dispute has now been resolved by the judgment of the Court, no compliance order is required. AFFCO relies on a line of authority from cases such as *NZ Airline Pilots' Association Inc v. Bilmans Management Ltd (t/a Ansett NZ)* 1 ERNZ 670 to support its submission that now the dispute has been resolved by the Court, it would not be appropriate to grant compliance orders.

[38] In that case, His Honour Judge Colgan (as he then was) discusses the terms of s.207, the provision in the Labour Relations Act 1987 giving the Court power to order compliance. That earlier provision is in substantially similar terms to the equivalent provision in the present statute. The learned Judge said:

> *... s.207 requires ... findings by the Court that there has not only been a non-observance of or non-compliance with ... an award but that the making of an order for compliance is necessary for the purpose of preventing further non-observance of or non-compliance with that provision.*

[39] The application of the provision in the present case turns on whether a compliance order is required **in addition to** the judgment of the Court to enforce the "correct" position. Clearly the statute requires both a finding of non-compliance **and** a need to take action to prevent continued default.

[40] AFFCO says it now knows the answer (per medium of the judgment of the Court) and therefore can be relied upon to implement that answer. Conversely, the Union says that AFFCO's bona fides are to be doubted. In its submissions in reply, the Union says that AFFCO instituted ... *a deliberate strategy designed to benefit the employer, by shifting employees from the provisions of the collective agreement onto individual employment agreements*. The effect of this argument from the Union is to put motive into the equation. Put simply, as it is alleged that AFFCO has not come to this matter with clean hands, it ought not to be expected to fulfil its obligations into the future.

[41] I do not accept that proposition. The statute is concerned with mechanics, not motive. A compliance order may be made if it is necessary for the prevention of further non-performance. The Authority is not satisfied that that purpose is made out. However, in case that conclusion is misplaced, leave is reserved for the Union to reapply in the future should it consider AFFCO is in default.

[42] However, the Authority removed to the Court only part of the complex of issues between the parties, that relating to the so-called seniority provisions in the collective employment agreement. The statement of problem advanced two claims, the first relating to breaches of good faith and the second concerning the seniority provisions. Subject to the residual right of the Union to revert to the Authority for compliance in the future, I am satisfied the second ground is dealt with by the judgment of the Court, save for the subsidiary issues concerning the laying off and re-engaging of staff at the conclusion and beginning of each season. This matter is, in effect, the second claim for compliance sought by the Union.

[43] I have already dealt with the Union's submission that meatworkers between seasons are, as a matter of law, *persons intending to work*. As I have already noted, that submission is inconsistent with the definition of that class of person in s.5 of the Act.

[44] I agree then with AFFCO that the starting point is that workers who previously were employed by AFFCO are, in the off season, legally unemployed, at least by AFFCO. They may well be employed by someone else in the off season but are not employed by AFFCO.

[45] AFFCO says that it may offer different terms and conditions of employment to staff at plant start-up from the ones that were offered in the previous season, and that staff may not wish to make themselves available again. But, of course, fresh terms and conditions can only be on offer insofar as they are consistent with the prevailing provisions in the relevant employment agreement.

[46] AFFCO says that in seeking compliance to prevent it from affirming alternative conditions of employment, the Union is in breach of s.3(a)(iv) of the Act which seeks to emphasise the right of individual choice. Conversely, AFFCO relies on the dictum in *NZ Meat Workers' Union v. Richmond Ltd* [1992] 3 ERNZ 643 where the Court held that an employee could offer different terms and conditions of employment to workers at restart, provided they were not inconsistent with the prevailing coverage document.

[47] The Union submits that AFFCO has an ongoing obligation to abide by the terms of the agreement between the parties and that that agreement, amongst other things, mandates that workers are to be laid off and re-engaged pursuant to clause 30(d) of the agreement **and nothing more**. The Union says any additional requirements of the employer, such as a drug test before engagement, is not mandated by the agreement and therefore cannot be a condition of employment.

[48] Further, the Union relies on dicta in case law to justify its view that the application of the seniority rule is the "be all and end all" of the re-engagement to disengagement process. In *NZ Meat Workers' Union v. AFFCO NZ Ltd* [2000] NZEMPC 62, the Court accepted that competency and satisfaction of workers was to be dealt with during the season and not by selecting out affected staff on re-engagement.

[49] That said, the effect of the drafting of the relevant clause in the agreement is rather to try to have a dollar each way. On the one hand, clause 29(b) states that *"... priority is to be given to ... competent and satisfactory workers"* which suggests it is available to the employer not to re-hire those workers it judges neither competent nor satisfactory. On the other hand. the very next sentence of the subclause says:

> *Incompetent and unsatisfactory workers shall be dealt with through the disciplinary processes laid down (elsewhere in the agreement).*

[50] I am bound to rely on the decision of the Court referred to in para.[48] above and I do so. Despite the difficulties with the wording of clause 29(b), which I have highlighted, the Court has determined the matter. The interpretation adopted by the Union is to be preferred. It follows that the Union is entitled to the second compliance order it seeks, precluding AFFCO from taking any selecting steps on re-engagement to mitigate the straightforward operation of the seniority rule.

[51] The final ground on which compliance is sought concerns the Union's fundamental contention that, by acting as it did, AFFCO breached its good faith obligations to the Union. Reliance is placed particularly on s.4(6)(b) of the Act which creates a breach of good faith for an employer to *"induce"* an employee not to be covered by a collective agreement. More generally, the same section requires parties to a collective employment agreement to be *"communicative"* and *"open"* with each other.

[52] Section 3 of the Act sets out the objects of the Act which include the promotion of collective bargaining and the right of individuals to choose.

[53] I have already analysed the evidence on good faith in an earlier section of this determination and concluded that there had been breaches of its good faith obligations by AFFCO.

**Determination**

[54] I am satisfied that the Union has made out some of its claim and is entitled to some of the remedies it seeks. I have concluded that the Union ought not to be granted compliance in regard to the issue of seniority dealt with by the Court. This is because I accepted the argument advanced for AFFCO that it was entitled to be given the chance to implement the Court's judgment and that the risk of continued default was slight. However, leave is reserved for the Union to seek compliance subsequent to the issue of this determination, if necessary.

[55] The Authority has granted the two compliance orders because it has concluded that, not only is there an evident breach of statute law (s.4) in one case and the collective agreement in the second, but also it is necessary to prevent further non-compliance in each case.

[56] The Authority therefore issues a compliance order in the following terms:

(a) AFFCO is to provide process workers, however employed, with accurate and balanced information about the various types of employment conditions on offer, particularly identifying fairly and properly the real differences between alternative terms and conditions of employment and ceasing and desisting from misleading or deceiving conduct relative to the provision of information to employees; and

(b) AFFCO is to re-engage process workers strictly in accordance with the provisions of the collective agreement and, in particular, not require an application form from process workers returning after a seasonal lay off and not require a drug test as a prerequisite to re-engagement either.

[57] In the event that the effect of this order is in any way problematic in terms of its implementation, leave is reserved for counsel to seek further engagement from the Authority.

**Costs**

[58] Costs are reserved.

James Crichton
Member of the Employment Relations Authority