

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 75  
5332951

BETWEEN NZ MEAT WORKERS UNION  
OF AOTEAROA INC  
applicant

AND AFFCO NEW ZEALAND LTD  
respondent

Member of Authority: James Wilson

Representatives: Simon Mitchell for the applicant  
Graeme Malone for the respondent

Investigation Meeting: 18 February 2011 in Whangarei

Submissions received: At the investigation meeting from both parties

Determination: 28 February 2011

---

**DETERMINATION OF THE AUTHORITY  
AND ORDER FOR REMOVAL**

---

**The employment relationship problem**

[1] The New Zealand Meat Workers Union of Aotearoa (“the Union”) in a statement of problem lodged with the Authority on 25 January 2011 alleged that AFFCO New Zealand Ltd (“AFFCO”) was

*(a)...failing to meet its obligations of good faith to (the Union) and in particular is taking actions intended to undermine the Collective Agreement in place between the parties;*

*(b) (AFFCO) is failing to comply with the seniority provisions of the Collective Agreement*

[2] The Union is seeking

- (a) A compliance order requiring AFFCO to lay off staff in accordance with the seniority provisions of the collective agreement and in particular based on site seniority, and not to enable those employed pursuant to the provisions of individual employment agreements to gain a benefit in terms of lay off;
- (b) A compliance order requiring AFFCO to comply with the provisions of the collective agreement by re-engaging on the basis of seniority, and not requiring employees to apply for the positions, or to accept alternative conditions at the time of re-engagement, or making engagement subject to a drug test.
- (c) A compliance order requiring AFFCO to provide access to its plants by organisers of the Union;
- (d) An order requiring AFFCO to comply with its obligations of good faith and in particular not to provide inducements intended to undermine the provisions of the Collective Agreement;
- (e) An order that AFFCO pay the Union's costs.

[3] AFFCO in its statement in reply says that it is not failing to comply with its good faith obligations and is complying with the seniority provisions of the collective agreement.

## **The issues for determination**

[4] In its statement of problem the Union has listed a number of actions by AFFCO which it says breach AFFCO's obligations of good faith and the provisions of the collective employment agreement. However the parties agree that the first issue for determination is in respect to the dispute between the parties as to the correct application and interpretation of the "seniority" clause of the relevant Collective Employment Agreement and in particular whether:

- a. that clause requires seniority to be afforded to all employees or only to Union members;

- b. that clause is complied with by AFFCO if it lays off and re-engages union members in accordance with the seniority of such members as between themselves; and
- c. employees on individual employment agreements (IEA's) may be laid off and re-engaged in accordance with the different criteria applying to them under their employment agreements.

### **The employment agreements**

[5] The Union and AFFCO are parties to the *AFFCO New Zealand Core Collective Agreement*, (“the CEA”) which covers the work of meat process employees employed by AFFCO at its meat processing plants. The CEA expires on 31 December 2011. It provides, at clause 30:

#### **30 Seniority**

- a) All workers shall acquire and retain, as agreed at the site, seniority according to the date of commencement of their employment.*
- b) Seniority will operate on a departmental and/or site basis except where otherwise agreed.*
- c) Consistent with departmental needs and the individual's competency, lay off and re-employment shall be based on departmental and/or site seniority.*
- d) A seniority list shall be prepared for each department and/or site and be made available to the delegate each season prior to the commencement of seasonal layoff.*
- e) At the commencement of each season a list of new workers shall be made available to the delegate.*
- f) ... ..*

In addition to those employees who are members of the Union, and covered by the CEA, AFFCO employs a number of non-union members on individual employment agreements (IEA's). These IEA's do not include a seniority clause. Under the heading “Employment” they say:

*5.1 Your employment will be for the (years) season and you shall be given seven (7) calendar days notice of seasonal layoff.*

*5.2...*

*5.3 Where demand drops off before the close down for the season such that not all employees are required the employer may terminate employment of staff on a progressive basis. In selecting employees to be terminated, the employer shall take into consideration the skills*

*required to operate a balanced workforce as well as the aptitude and attendance record of the employee.*

*5.4 Upon termination at the end of the season you are responsible for keeping the company advised of your current address and phone number if you wish to be contacted for potential employment at the commencement of the next season.*

## **The respective arguments**

### ***AFFCO's position***

[6] In his submissions on behalf of AFFCO Mr Malone says:

*9. (AFFCO) does not dispute that that at Moerewa it has laid off longer serving members while retaining newer employees employed under IEAs. It states however, that such actions do not breach the (CEA), both because:*

*9.1 the CEA provisions do not apply to employees employed on the IEA's, who have their own provisions relating to lay off and re-employment, with different considerations applying; and*

*9.2 (AFFCO's) actions were permitted anyway pursuant to clause 30(c). which permits the company to retain out of seniority to meet its needs and so in this case it was entitled to keep such staff on; it also offered to keep three new members of the Union on but the Union would not agree.*

### ***The Union's position***

[7] Mr Mitchell, for the Union, on the other hand says:

*(AFFCO) has determined to change the practice in relation to re-engagement and lay-off of staff, by having the ability to favour those on IEA's by not applying the seniority provisions in relation to their employment.*

*This has significant impact on members of the Union employed pursuant to the provisions of the Collective Agreement, as seniority no longer determines whether they will be laid off or re-engaged. Instead, employees with service on IEA's can be preferred if the respondent is correct.*

*This is entirely inconsistent with the provisions of seniority contained in the Collective Agreement, which are long-standing provisions used throughout the meat industry based on the provisions of the former Award.*

*Members of the Union are being seriously disadvantaged by seniority no longer being the basis of selection for lay-off and re-engagement.*

*The effect of the action of (AFFCO) is that seniority is no longer the basis of lay-off and re-engagement. Instead it is only the basis of re-engagement and layoff of members of the Union covered by the CEA. This means that seniority no longer is determinative, and long service does not guarantee ongoing employment.*

*While the Union recognises that there are circumstances where seniority is not strictly applied, this is recognized in the CEA and provided for.*

*The importance of seniority on the meat industry has been recognized over the decades by the Labour Court and Employment Court. Indeed there is no right to manage in relation to the lay-off and re-engagement of meat workers. Seniority is recognized as determinative, unless there are specific needs for particular skills which can be provided for outside the norm. This is accepted by the Union.*

### **Application for removal to the Employment Court**

[8] In terms of section 178 of the Employment Relations Act (the Act) the Union have requested that I remove the first part of this dispute (regarding the application and interpretation of the seniority clause) to the Employment Court. The Union says that *an important issue of law is likely to arise in relation to the matter* [s. 178(2)(a)] including relating to the obligations of employers in the meat industry as to lay off and re-engagement when seniority is provided for in the Employment Agreement and in relation to the undermining of collective agreements. The Union also says this matter should be removed because *the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court* [s.178(2)(b)]

[9] AFFCO have indicated that it is not opposed to the removal of part this matter to the Court.

### **Discussion**

[10] I have carefully considered the parties submissions in respect to the central question in this matter. Mr Mitchell drew my attention to, and I have reviewed, the Employment Court's decisions in *NZ Meatworkers Union v Richmond* [1992] 3 ERNZ 643; *NZ Meatworkers Union v Alliance Group* [2006] ERNZ 664 and *NZ Meatworkers and Related Trades Union v AFFCO NZ Ltd* [2010] NZEMPC 62. Unfortunately these cases address the application of "seniority" clauses to those who

are members of the Union and are covered by the CEA. They do not address the question of whether (or how) a “seniority” provision in a CEA can effect the laying off or re-engagement of employees on IEA’s (who, if they were members of the Union would have been covered by that CEA) as compared to the employee’s covered by the CEA.

[11] I accept that *an important issue of law is likely to arise in relation to this matter*. That question relates to the correct application and interpretation of the “seniority” clause of the CEA in the light s.9 (**prohibition on preference**), s.56 (**application of collective agreement**) and s.65 (**terms and conditions of employment where no collective agreement applies**) of the Act. That question will not simply *arise* but the answer to it will fundamentally affect the determination of several aspects of the matters before the Authority.

**Determination: Order for removal**

[12] **In terms of section 178(2)(a) of the Act I order the removal of part of the matter before the Authority. The part to be removed being the dispute between the parties as to the to the application and interpretation of the “seniority” clause, clause 30, of the *AFFCO New Zealand Core Collective Agreement* and whether**

- a. **that clause requires seniority to be afforded to all employees or only to Union members;**
- b. **that clause is complied with by AFFCO if it lays off and re-engages union members in accordance with the seniority of such members as between themselves; and**
- c. **employees on individual employment agreements (IEA’s) may be laid off and re-engaged in accordance with the different criteria applying to them under their employment agreements.**

[13] To facilitate the removal the parties have agreed that the statement of problem, statement in reply, statements of evidence and submissions filed in the Authority should be forwarded to the Court and I make an order accordingly.

For completeness I record that the Authority is holding dates in the week commencing 21 March 2011 to hear evidence regarding the balance of the claims filed by the Union, pending the release of Court's judgement regarding those parts of the matter removed to it.

### **Costs**

[14] Costs are reserved pending the final disposal of all aspects of this matter.

James Wilson

Member of the Employment Relations Authority