IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 480
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	BETWEEN	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INC Applicant/Respondent
	AND	AFFCO NEW ZEALAND LIMITED Respondent/Applicant

Member of Authority:	Alastair Dumbleton
Representatives:	Simon Mitchell, counsel for NZ Meat Workers Union Graeme Malone, counsel for AFFCO NZ Ltd
Investigation Meeting:	19 October 2011
Submissions Received:	25 and 26 October, and 1 November 2011
Determination:	7 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problems

[1] The New Zealand Meat Workers and Related Trades Union Inc (the Union) and AFFCO New Zealand Ltd (AFFCO) have each brought an employment relationship problem to the Authority for investigation and determination.

[2] The Union's application was lodged on 5 August 2011. Alleged in it are breaches of AFFCO's obligations under the Employment Relations Act 2000 to act in good faith and obligations under a collective employment agreement to consult with members of the Union. The allegations are made in relation to the commencement in July 2011 of a split shift at AFFCO's Wairoa meat processing plant.

[3] Also alleged is an unreasonable refusal by AFFCO to allow an official of the Union entry into the Wairoa plant on 19 July, the first day of the split shift. Statutory and contractual provisions apply.

[4] The Union seeks remedies by way of compliance order and penalties in relation to the alleged failures to consult and allow a union official to have reasonable access to the workplace. A compliance order is also sought requiring AFFCO to observe the collective agreement's provisions by employing staff on the split shift according to their seniority.

[5] AFFCO's application was lodged a few days after the Union's, on 10 August 2011. AFFCO alleges that in the volume of applications the Union has made recently to the Authority it is engaging in an "orchestrated campaign" to undermine the relationship between AFFCO and its employees. The Union's actions are claimed by AFFCO to be an abuse of process and breach of the Employment Relations Act.

[6] AFFCO seeks an order requiring the Union to comply with obligations under the Act and the collective employment agreement, in respect of the process to be followed for resolving employment relationship problems at an early stage without need for Authority intervention.

[7] An investigation meeting was held at which six witnesses gave evidence:

Graham Cooke, Secretary of the Aotearoa Branch of the Union

Eric Mischefski, Organiser of the Union

Dale Robinson, Wairoa Branch Secretary of the Union

Rowan Ogg, AFFCO Director of Operations

Dean Tucker, AFFCO Plant Manager Wairoa

Graeme Cox, AFFCO Industrial Relations Manager

[8] I find from their evidence that AFFCO in about March 2011 gave consideration to extending the season at its Wairoa plant by running a split shift. This is a shift that processes beef on some days of the week and lamb on other days.

[9] Previously when there had been insufficient livestock numbers to run a second lamb chain and a second beef chain, those second chains had been closed down and the workers on them laid off until the next season, leaving only one lamb chain and one beef chain operating.

[10] The proposed split shift was discussed at team briefings of affected workers. They included Union members and the plant Secretary, Mr Robinson. The evidence of the Plant manager Mr Tucker is that at the briefings no-one had raised any issues or concerns and that the workers had seemed pleased with the proposal, as it would extend the season for some of them.

[11] Nevertheless Mr Robinson found it necessary to send an email to Mr Tucker on 15 April, advising as follows:

> *I notice the company intend operating a multi-species shift arrangement at the Wairoa plant next week. This is a major change in work practice. As you are well aware, clause 44 "Alterations in Methods and Introduction of Technology" of the AFFCO Core Agreement requires the company to consult with the Union prior to any changes being commenced.*
>
> *AFFCO have breached Part 44 of the Core Collective Agreement.*
>
> *We request you comply with the Agreement and consult with us prior to the changes being commenced. This would be beneficial so as to iron any potential problems.*
>
> *Until we have had talks on this issue we cannot agree to such changes.*
>
> *I look forward to your urgent response.*

[12] AFFCO agrees it did not consult about the split shift that commenced on 19 July. Mr Tucker's evidence was that workers' terms of employment were not affected by the operation of the split shift, as it did not require technological or other change and the workers performed tasks and were paid as required under the existing agreement.

[13] Mr Tucker told the Authority that as the work involved processing both beef and lamb, some workers had needed training in multi-specie processing and AFFCO had offered the training to all workers on the second lamb chain and beef chain. They were workers who would otherwise have been seasonally laid off without the split shift.

[14] Mr Tucker's evidence was that although the proposal to run the split shift was not considered by him to be a matter requiring consultation under, to avoid conflict AFFCO had allowed Union members to elect whether or not to work on the multi-species shift. He said that all workers able to do the cross-species processing were retained in accordance with their seniority and that he had compiled a seniority list showing those employees who would be working on the split shift and those who would be laid off. Mr Tucker said that Mr Robinson was given the list on Tuesday 19 July 2011, the day the split shift commenced.

Access to work premises

[15] On Monday 18 July 2011 Mr Tucker received an email from Mr Mischefski who advised of his intention to visit the Wairoa plant the following day. He advised that he wished to visit during lunch breaks on the day shift in the lamb cuts and ovine slaughter departments and speak with Union members in their respective smoko rooms. He also advised that he wished to visit members working in the night shift beef departments during their evening meal break. He asked Mr Tucker for guidance as to the exact timing of the night shift, which he described as a "new shift configuration."

[16] Mr Tucker replied on the same day to Mr Mischefski by email, with the following advice:

> *In regards to your request to visit tomorrow, we are not in a position to grant you permission to visit as we feel it would be too much of a disruption to the first night's processing as the employees settle into their new routine.*

[17] Mr Tucker advised Mr Mischefski that he would be permitted to visit on Thursday 21 July and that this would be in the canteens during the 15 minute smoko breaks. He advised Mr Mischefski that he would be permitted to introduce himself but not to address the employees and that meetings with them over the lunch break were unwanted as they were regarded as being too much of an invasion on the personal time of non-Union employees. He added that a high number of employees were unhappy with the Union for attempting to shorten their season at the Wairoa plant.

[18] Mr Mischefski replied to Mr Tucker on 19 July, declining to attend the plant as permitted by Mr Tucker during smoko breaks only. He asked for reconsideration

of his request to visit that day. He referred to Mr Tucker's comment that workers were unhappy that the Union was attempting to shorten their season and called this a ridiculous proposition.

[19] Mr Mischefski also advised Mr Tucker that the Union was not opposed to a split shift at Wairoa and that one had operated several years earlier, before Mr Tucker had become Plant Manager. He further advised:

> *Our objection to the way that you are structuring the split shift centres around your lack of consultation with the Union on the matter and your propensity to ignore seniority provisions in the current AFFCO Core Collective Agreement.*

[20] He advised that if access was refused him the Union would consider this to be a breach of the Employment Relations Act and would file proceedings accordingly.

Consultation

[21] The relevant provision of the collective employment agreement requires certain change in the work at the plant to be preceded by consultation between AFFCO and the Union, as follows:

> ***44. ALTERATION IN METHODS & INTRODUCTION OF TECHNOLOGY***
>
> *The parties acknowledge that development in technology and market requirements may result in major changes to work practice and installation of new machinery and equipment, with the potential to require major reorganisation at a site.*
>
> *It is also acknowledged that a considerable degree of flexibility in minor processing details is required on some operations to allow a quick response to varying market requirements.*
>
> *Whenever such changes are contemplated the company will consult the workers and the Union prior to such changes being commenced.*

[22] The importance of consultation generally is referred to at clause 7(e);

> *The Company and the Workers and their Unions agree it is in their mutual interests to operate an efficient, competitive and profitable site and that consultation and worker involvement are vital to the success of the operation.*

[23] In its statement in reply AFFCO has accepted that there was no consultation with the Union prior to commencement of the multi-specie shift on 19 July. AFFCO

claims that consultation was not necessary as the Union had been aware of the intention to run split shifts and the terms of employment were not going to be affected by the shift in operation, as there was no technological or other changes required and workers were performing tasks and being paid as required under the existing agreement.

[24] Whether the introduction of the multi-specie shift resulted in major change to work process or was a minor processing detail, I find that consultation was required before change to that shift sought by AFFCO was introduced. Clause 44 requires the employer to consult with both the workers and the Union, in the case of the latter through its officials such as Mr Robinson and Mr Mischefski.

[25] AFFCO considered that consultation with the Union was unnecessary. It is not claimed that the "discussion" which took place with workers at team briefings amounted to consultation. It is also not the test under clause 44 of the Core Agreement whether terms of employment are affected by the operation of the multi-specie shift, and neither is it a requirement that there is technological or other change under clause 44. "Such changes" in the third paragraph refers to the circumstances described in the two preceding paragraphs.

[26] In any event I find as a matter of degree there was "major change" involved in the introduction of the split shift in July 2011. AFFCO acknowledged that the introduction of the multi-specie shift was a change of some significance when it refused to allow Mr Mischefski to visit on the first day of that change. This refusal according to Mr Tucker had been necessary because the visit would have created too much of a disruption to the first night's processing and he had wanted to give the new shift an opportunity to bed down.

[27] What amounts to consultation in an employment context has been long established in law and ought to be well known to the Union and AFFCO. The requirements are not onerous at all, as is evident from just two features of consultation;

- consultation does not require that there be agreement,

- consulting involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.

From *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671, Court of Appeal.

Right of access to workplace

[28] Under s 20 of the Employment Relations Act 2000 a union representative is entitled to enter a workplace for any purpose related to the employment of the union's members or any purpose related to its business, or both. Any discussion that takes place in the workplace during such entry must not exceed a reasonable duration and is not to be treated as a union meeting.

[29] Under s 21 of the Act a representative of a union exercising the right to enter a workplace may do so only at reasonable times during a period when any employee is employed to work in the workplace.

[30] Under s 20A of the Act, before entering the workplace the union representative must request and obtain the employer's consent, which is not to be unreasonably withheld. The employer's decision on the request must be given no later than the working day after it was made and if consent is declined reasons must be given by the employer.

[31] The AFFCO New Zealand Core Employment Agreement also makes provision for entry to the workplace, as follows:

> *An authorised Union official shall be entitled to enter the premises and interview any employees, but not so as to interfere unreasonably with AFFCO's business.*

[32] From an operational point of view I find that the withholding of consent by AFFCO to the request to enter the workplace on 19 July was reasonable. It was important to AFFCO to keep the first day of the split shift free from distraction, so that workers could concentrate on the changes to their work and allow the shift to bed down. Reasonableness was also present in the offering by Mr Tucker of an alternative entry date only two days later.

[33] From an employment relations point of view, in the workplace the Union wished to enter the multi-specie shift had not been the subject of consultation with the Union and therefore the work being carried on was accompanied by that breach of the employment agreement.

[34] There had been avenues other than entry to the workplace available to the Union for addressing the breach. They included invocation of the Disputes procedure at clause 53 of the Core Employment Agreement and, as a last resort, an urgent application to the Authority for compliance. The Union had known for some time of AFFCO's intention to commence the split shift.

[35] I do not find that the effect of the breach was to make an otherwise reasonable refusal of entry unreasonable. AFFCO did not contravene s 20A of the Act by unreasonably withholding consent in relation to a request by the Union to enter a workplace.

Bad faith in process

[36] This is the claim made by AFFCO against the Union. Mr Cox gave evidence of a large increase in the number of grievances and disputes filed in the Authority by the Union without adequate information having been provided to the company, or without a proper opportunity having been given first to enable the matter to be resolved at an early stage.

[37] Mr Cox said that the failure to give proper information or follow any form of process had frustrated AFFCO's ability to deal with grievances and disputes. He said this situation had required excessive time and money to be spent, including executive time, and had caused unnecessary friction between AFFCO and its employees who were members of the Union. Mr Cox gave examples of recent claims brought by the Union to the Authority and he referred to the obligations agreed to by the parties under the collective employment agreement.

[38] Clause 53(4) of the parties' collective agreement requires that when an employment relationship problem arises the matter should be discussed with the relevant AFFCO manager as soon as possible and, if it is not resolved in that way, the parties may attend mediation. If mediation has not resolved the problem a third step may be taken by referring the matter to the Authority.

[39] In his evidence Mr Ogg too referred to a large increase in the number of grievances and disputes filed this year by the Union in the Authority, without adequate information being provided to AFFCO or without a proper opportunity being given to enable the matters to be resolved at an early stage.

[40] To try and deal with the problem he said that AFFCO had in July employed an in-house solicitor to be the first contact point for the Union if issues that had been discussed at Plant level remained unresolved. It was hoped this would lead to a quicker disputes resolution process and ensure that issues were addressed. Mr Ogg viewed the Union as having repeatedly failed to follow the disputes procedure of the collective agreement.

[41] To remedy this problem AFFCO has sought a compliance order requiring the Union to follow the procedure in the collective agreement and to comply with the Act, in the following terms:

> *(a)* *Prior to mediation it* [the Union] *provide the company with proper and sufficient detail of any employment relationship problem to allow the company to properly investigate and respond to the same, including, where the problem is alleged to affect only some workers, the names of employees allegedly affected, and*
>
> *(b)* [The Union] *attend mediation on any employment relationship problem prior to filing proceedings in the Employment Relations Authority.*

[42] I do not find that AFFCO's complaint about misuse of process is justified in the circumstances of the particular claims arising from the Wairoa Plant and the introduction of the split shift without consultation. There was communication at the base level contemplated by the collective agreement, when Mr Robinson wrote to Mr Tucker by email in April about the proposal to introduce the split shift. AFFCO did not consult the Union, so it can hardly complain that the Union acted unreasonably or prematurely by bringing the matter to the Authority.

[43] Once a matter is lodged with the Authority, before an investigation is commenced there is an obligation under the Act at s 159 for the Authority to consider whether the parties have undertaken mediation. Clearly that is a responsibility the Authority has and in meeting it parties may be required by the Authority to attend mediation, unless the matter is within one of the several exceptional situations provided for in s 159.

[44] What is being sought by AFFCO is effectively an injunction preventing a party to an employment relationship from making an application to an institution that has been provided by the Employment Relations Act to resolve problems in employment relationships. I do not consider that such an injunction could be granted

as a matter of principle. It is also being sought in the form of a compliance order under s 137 of the Act, but directed at future applications to the Authority in relation to matters or problems that have not yet arisen. In that form an order would amount to a general restraining order but made without reference to any particular instance of non-observance of the dispute resolution provisions of the employment agreement. The Authority has no discretion to make such an order outside or in anticipation of a particular employment relationship problem.

[45] In that situation there is no ability for the Authority to provide, as it must under s 137, a time limit for the performance of the orders sought for compliance. There are also difficulties with supervising compliance. The Authority cannot be the overseer of the parties' efforts to comply with an order as drafted in a) above, as its role is intended usually to start after mediation, not before, except in the limited circumstances where application is made on an urgent basis as when interim reinstatement has been sought.

[46] It can be stated generally that parties to any employment relationship who apply prematurely to the Authority for an investigation are likely to be directed to undertake mediation if they have not done so, and any investigation will be suspended while that takes place.

[47] In a particular matter where it is plain that an application has been made before the dispute resolution provisions of the agreement have been complied with, the Authority may order compliance on the application of one of the parties or of its own motion. The risk of making application to the Authority prematurely is therefore the usual one that the application will be ineffective and likely to lead to costs being awarded against the applicant party, or lead to further delay while obligations under the collective agreement are performed.

Seniority

[48] I am not satisfied from the evidence that seniority rights or entitlements in employment were breached by AFFCO in manning the split shifts. A seniority list was provided to Mr Robinson who was invited to discuss it with Mr Tucker but did not do so. There was no evidence that any worker was engaged or disengaged out of seniority.

Good faith under s 4 of the Act

[49] In the course of hearing evidence from AFFCO and Union witnesses, reference was made to the provisions of s 4 of the Act. Under s 4(1A) in particular there is the duty of good faith requiring:

> *(c) … the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

[50] It is plain from the several recent cases there have been between the parties and which are associated with this one or have been referred to in it, that communication and relations generally between AFFCO and the Union have been bad. I consider that both parties will benefit from self examination as to whether they have been meeting the standards of good faith in s 4, and also whether they have been sufficiently complying with the disputes resolution procedures of the collective agreement they are both bound by. It will be useful for the parties to now reflect on the meaning and spirit of what they agreed was their intent under the Collective Agreement, expressed as follows at clause 7;

> *Therefore, the wish of the parties is to create a cooperative and participatory climate of industrial relations based on mutual respect and trust between all levels of management, the workers and their union organisation and which recognises their interdependence.*

Compliance orders sought by the Union

[51] As to the compliance orders sought against AFFCO, it seems to me there are similar problems which go to the discretion the Authority has to make the order. In principle compliance orders cannot be made on the basis of a threatened future breach (*quia timet*) before any breach has occurred. The purpose of compliance is to prevent further non-compliance, but the works season has now ended and a multi-specie chain is no longer operating. A penalty is appropriate for the failure to consult.

[52] In a new season if split shifts are to be re-introduced, then in my finding AFFCO will be required to consult the Union before that occurs. If there is no consultation, at that point the Union can apply for a compliance order (assuming the dispute resolution procedures have been invoked) and a time limit applied to an order made requiring consultation to take place. Also, the Union may then advise of its

wish to enter the premises. Again, a compliance order may be obtained if it is successfully claimed that the request has been denied unreasonably.

Determination

[53] I consider that the problem in this matter has stemmed from the failure by AFFCO to consult and that a penalty pursuant to s 135 of the Act is appropriate for the breach of clause 44 of the collective employment agreement. It is not a question of whether consultation was only procedural or whether anyone was prejudiced by the lack of consultation. The point is that the failure was a breach of a fundamental substantive right of a party to an employment agreement. I fix that penalty at $4,000, or 20% of the maximum penalty able to be imposed since 1 April 2011. AFFCO is to pay half the penalty to the Crown and half to the Union.

Costs

[54] An award of costs in favour of the Union is justified and application may be made by it in writing within 14 days of the date of this determination. AFFCO may reply within a further 14 days after that time.

A Dumbleton
Member of the Employment Relations Authority