IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 550
5365804

	BETWEEN	NEW ZEALAND MEAT AND RELATED TRADES WORKERS UNION Applicant
	AND	AFFCO NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Mitchell, counsel for the Applicant Graeme Malone, counsel for the Respondent
Investigation Meeting:	19 December 2011
Determination:	22 December 2011

DETERMINATION OF THE AUTHORITY

A. An important question of law is likely to arise in this matter other than incidentally.

B. The Authority orders removal of this matter to the Employment Court under s178 of the Employment Relations Act 2000.

Employment relationship problem

[1] This matter concerns an application by the New Zealand Meat Workers and Related Trades Union (the union) for a compliance order and a penalty against AFFCO New Zealand Limited (AFFCO). The union said these remedies were needed because AFFCO breached its contractual obligations under the terms of an applicable collective employment agreement and its statutory obligations of good faith under the Employment Relations Act 2000 (the Act). The alleged breaches relate to changes to

the operation of its Moerewa plant which the union said were announced and implemented without prior consultation with the union and its members employed to work there. The change was a decision announced at the plant induction for the 2011/2012 season that the beef operation would begin with a "tally" of 210.

[2] The tally is a goal set for the number of beasts to be processed in a shift. Reaching the tally depends in turn on the speed of the chain on which the carcasses are moved and the number of workers doing each task or process along the chain.

[3] According to a witness statement lodged for the union's Moerewa shed secretary Lawrence Nankivell, agreed manning levels have operated for various tallies over the years. His evidence, yet to be tested, stated an AFFCO representative had told him the 210 tally was to be reached by working with the manning levels used in previous seasons for a tally of 188. In Mr Nankivell's view the 210 tally would have the effect of workers needing to work significantly harder and faster. On that basis the union considered AFFCO's decision about the tally, as advised to workers at the induction session, was a change affecting them and required prior consultation, under both AFFCO's contractual and statutory obligations to its workers.

[4] AFFCO, by its statement of reply, declared:

(i) changes to tally were an operational aspect of its business within management prerogative; and

(ii) consultation had occurred because no worker raised any issue when the new tally was announced; and

(iii) the union sought consultation on the incorrect basis that agreement was required before any change could be made; and

(iv) the union's demands sought to fix a new term of employment relating to operation of tallies and under s161(2) of the Act the Authority lacked jurisdiction to determine any matter relating to fixing new terms; and

(v) AFFCO was entitled to offer employment on different conditions at the start of a new season provided those terms were not inconsistent with the collective employment agreement; and

(vi) AFFCO had not breached its contractual or statutory good faith obligations.

[5] AFFCO sought removal to the Employment Court of the union's application on the grounds that an important question of law was likely to arise in the matter other than incidentally (that is under s178(2)(a) of the Act).

[6] There were some other grounds advanced for removal which I have not needed to consider further due to the conclusion reached on the first ground.

[7] In considering the removal application I reviewed the parties' statement of problem and reply; Mr Nankivell's as yet unsworn witness statement; affidavits from AFFCO general manager Rowan Ogg, Moerewa plant manager John McConnell, Moerewa production manager Christian Prime and Manawatu plant manager Ann Nuku; an affidavit from union secretary Graham Cooke; various background documents lodged by the parties; the parties' memoranda and correspondence to the Authority; and the representatives' submissions, written and oral.

Are there important questions of law?

[8] AFFCO advanced two interpretations of the circumstances in this matter which were said to give rise to two different sets of important and consequential questions of law best heard and decided in the Employment Court.

[9] The first related to the extent of the obligation to consult under the collective agreement. It was advanced on the basis that AFFCO had consulted workers about the new tally (and its resulting effect on chain speed) but that the union and its representatives had taken a view that consultation required the parties to then reach agreement before any change could be implemented.

[10] The second was based on an assumption that the change in tally was a new term of employment but not one inconsistent with terms set by the collective agreement. AFFCO asserted that case law confirmed its entitlement to fix different terms of that type when taking on workers for the new season. It said the union's claim regarding consultation about decisions made in the pre-season period, before the season's workers were even employed, raised an important question of law as to the ongoing application of that case law in the industry.

Consultation obligations

[11] I have no hesitation is dismissing AFFCO's first alleged question of law as not being an important one which would be decisive or influential in the present matter. Rather I accept the union's submission that AFFCO was asserting the union's claim was wider than the issue on which the union actually sought a determination and orders.

[12] Mr Ogg's affidavit indicates AFFCO senior management decided – in the week before the Moerewa plant opened for this year's season – to start the season with a tally of 210. Mr McConnell was told of the decision and he then told workers at the season induction session that the beef operation would begin on this tally and, as livestock numbers increased, move towards a tally of 300. Mr McConnell said no worker raised any issue with him about the tally after this announcement although Mr Prime later told him that Mr Nankivell has asked about consultation. The next day Mr McConnell instructed supervisors to reiterate the tally and to tell the workers that they could raise any concerns they had about it. That day Mr Nankivell told Mr McConnell he was concerned about what Mr McConnell called "the level of consultation".

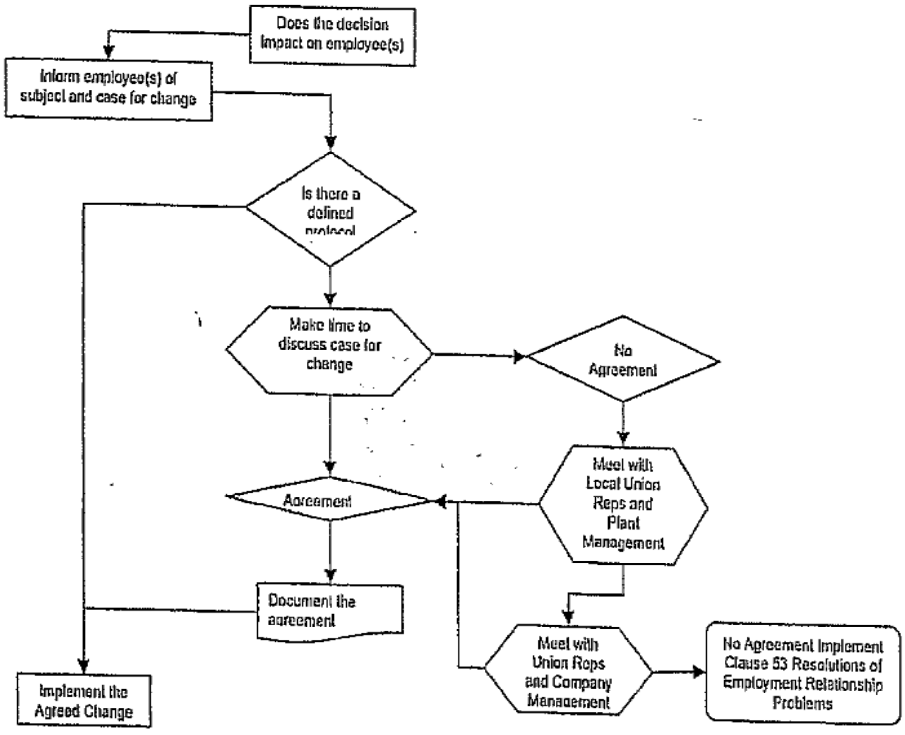
[13] AFFCO submitted that it was "implicit" in the proceedings that the union was claiming the company could not commence a new season with tallies unless they were first agreed with the union. There was, AFFCO said, an important question of law as to whether consultation, under the terms of its particular collective agreement, required agreement. However that question does not arise in the issue on which the union sought the Authority determination. Rather the union, as set out in its statement of problem, alleged that "*[p]rior* to the introduction of the tally, there was no discussion or consultation as to the operation of the plant at that tally" and "upon approaches from officials of the [union] to *discuss* the new tally, the management refused to consult" (*my emphasis*). The question on which the union sought an answer was whether, by the terms of its collective agreement, AFFCO must have discussions with the union and its members about a proposed tally rather than announcing it as a decided measure (and even if it calls for comment, concerns or feedback after the announcement, as it has done).

[14] The question of law identified by AFFCO on this point does not arise yet, if at all, in the factual situation the Authority was asked to investigate. Clause 37 of the collective agreement sets out consultation provisions which include the following sentences:

> *The objective of consultation is to ensure that decisions are made, or action taken, after all the affected people have all available information and have had their issues considered. Effective consultation will generally lead to agreement, however in some instances this may not happen.* *(my emphasis)*

[15] That wording plainly contemplates consultation before the decision is made but accepts agreement will not always result from consultation.

[16] A flow chart (copied below) included in clause 37 does identify what happens in situations where there is agreement and where there is not agreement. It does not change the fact that there is no absolute requirement for agreement as a result of consultation, either in the contractual provisions, case law or statute. In its submissions, the union accepted that was so, observing only that the practice over the years at Moerewa and many other AFFCO plants showed where consultation was conducted in good faith, agreement was often the result.



[17] AFFCO's obligation to consult its workers has been the subject of a determination of the Authority as recently as 7 November 2011,[1] in which the Chief of the Authority found the company failed to meet consultation requirements under a different term of its collective agreement. The breach concerned events at AFFCO's Wairoa plant. The Chief imposed a penalty of $4000 for the breach and stated that the consultation requirements were "not onerous", do not require agreement and involve "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."

Change or continuity between seasons

[18] The second question posited by the company, I accept, does raise matters of law which realistically could be decisive or strongly influential in how the present case should be resolved and, consequently, has the relative importance necessary for removal.[2]

[19] The company relied on this passage from the Employment Court decision in the *Richmond* case:[3]

> *It was lawfully competent, I conclude, for any employer, notwithstanding its necessary observance of the re-employment obligation imposed by clause 28(g)* [the seniority provisions] *… to offer re-employment to meat workers seeking re-employment at the commencement of the 1991/92 season, upon terms of a new collective employment contract or individual employment contracts which were significantly different from those contained in the expired award. Such offered terms could also — inasmuch as they incorporated departmental agreements actually applied in particular plants as part of the terms and conditions of employment of differing categories of meat workers which were not incorporated within the award — be significantly different to those previously agreed to. … To the extent that such second tier agreements had in practice comprised part of the terms and conditions of particular meat workers' contracts of employment with their particular industry employers, then they (the second tier agreements) comprised, I conclude, part of the employment contracts of affected workers which were terminated when the workers concerned were laid off in the 1991 off-season.*

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[1] *New Zealand Meat Workers and Related Trades Union v Affco New Zealand Limited* [2011] NZERA Auckland 480.
[2] *Hanlon v International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7 (EC).
[3] *New Zealand Meat Workers Union v Richmond* [1992] 3 ERNZ 643, 703 (per Palmer J).

[20] Two paragraphs that follow this extract in the judgment are also, in my view, relevant in considering the importance of the question of law on which removal is sought:[4]

> *It was, of course, equally competent for meat workers, who were unaccepting of new terms and conditions of employment offered to them by their industry employers at the commencement of the 1991/92 season, to decline to conclude contracts of employment incorporating those terms. However, if they or any of them did so, other available workers seeking work within the industry could be employed in their stead.*
>
> *It follows from my expressed views that industry employers who offered qualifying meat workers employment at the commencement of the 1991/92 season upon individual or collective contracts of employment which were materially different from their prior contracts of employment which had been terminated when the affected workers were laid off in the immediately preceding off-season, were not thereby making demands upon their employees …. The meat workers seeking re-employment were then job applicants, not employees of their prospective industry employers.*

[21] AFFCO maintains it did not employ workers for the new season on the basis of whatever may been agreed previously about tallies and manning levels. Instead the workers had signed an induction form with the following provision:

> *The line will operate at a number of different speeds dependent on livestock flows, livestock type and operational requirements. Manning, apart from any signed agreement in force, will be set in accordance with industry best practice and industry standards as determined by the employer. Employees in all departments are required to process the day's available kill, available carcasses, or process for 450 minutes, whichever comes first.*

[22] The collective agreement has no terms about chain speeds or manning. Accordingly, the company's argument appears to be that it was entitled to employ this season's workers (including those re-employed under seniority rights) on the basis of a variable line speed, starting at the rate necessary to achieve a tally of 210, and without whatever arrangements had previously been made about the level of manning for such a tally. Mr Nankivell's statement referred to site agreements, much unwritten, and a number of agreed tallies, each with agreed manning levels, which have operated over many previous years at the Moerewa plant.

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[4] Above, 703-704.

[23] The next step in AFFCO's argument is that it is not required to consult with this season's employees about its decision to change those terms because that decision was made during the off-season, that is at a time during which the *Richmond* case, and some subsequent decisions,[5] found to be a period where the employment relationship ceased to exist. It follows, on that argument, that if the present workers were not employed at the time of the decision, they did not have the rights to be consulted before it was made. In the same way, the statutory rights to be consulted about a business change or proposal affecting workers apply to parties in an employment relationship at the time.[6] For workers this is defined by the Act to mean "an employee employed by the employer". That definition refers to being employed at the actual time under consideration, not at a future time.

[24] The union, however, does appear to have a significant opposing argument based on the existence of an employment relationship.

[25] The collective agreement is between two parties – AFFCO and the union. Arguably any right to be consulted that is created by the particular terms of their agreement is able to exercised by the incorporated legal personality of the union (through its representatives, on behalf of its members). On that basis it would not matter whether any workers were actually employed by AFFCO at the time at which it had to carry out its contractual duty to consult about changes. That argument may not extend to the statutory rights to consultation. While the Act recognises employment relationships as including those between a union and an employer,[7] the s4(1A) and s4(4)(c) and (d) good faith provisions on consultation are expressed to apply to employers and employees, not unions.

[26] However those and related arguments might ultimately be resolved, I accept they involve questions of law that will be strongly influential or decisive of the case. Accordingly they are important questions of law which satisfy the s178(2)(a) requirement for removal. Paraphrased from AFFCO's submissions those questions are:

(i) Does the *Richmond* decision still reflect the law in New Zealand; and

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[5] See for example *New Zealand Meat Workers Union Inc v Alliance Group* [2006] ERNZ 664 at [107].
[6] Section 4(4)(c) and (d) of the Act.
[7] Section s4(2)(b) of the Act.

(ii) If so, do any terms of the collective agreement prevent AFFCO offering employment to meat workers seeking re-employment at the start of the season on terms significantly different from those agreed in previous seasons where such terms were not incorporated within the collective agreement; and

(iii) Is AFFCO required to consult the union before offering employment on terms (apart from those in the collective agreement) that may differ from those that applied in different seasons?

[27] AFFCO proposed a fourth question based on its allegations about the union requiring agreement from the consultation process. For reasons given earlier I have not accepted that as a question of law actually arising in this matter.

Discretion

[28] Having found at least one of the criteria for removal is satisfied, the Authority retains a residual discretion – to be exercised on a principled basis – on whether to order removal. Having considered a number of factors I am satisfied the matter should be removed. They include the following.

[29] The union has given notice of its intention to lodge an application regarding similar facts in AFFCO's Manawatu plant. The affidavit from its plant manager, Ms Nuku, confirmed the union's local shed secretary had advised her of planned proceedings about a lack of consultation over changes to chain speed introduced at the start of this season. That matter, which Mr Mitchell advised he expected to lodge soon, would now likely qualify for removal under the s178(2)(c) criteria concerning proceedings already being before the Court between the same parties on similar issues. The Manawatu case shows the issues for resolution by the Court will have wider application and ramifications for more than one workplace.

[30] The Authority determination referred to earlier regarding, amongst other issues, AFFCO's proven breach of consultation obligations at its Wairoa plant demonstrate that the parties' different understandings of the scope and application of consultation obligations are a significant problem in the employment relationship between AFFCO, the union and those of its workers who are union members. They

will be assisted in those employment relationships by the guidance of a Court decision on the relevant principles and how the contractual and statutory duties are to be observed in the particular circumstances of their business and industry.

[31] Another factor concerns AFFCO's conduct in responding to this particular application in the Authority and its conduct in response to Authority directions. This included refusing, for several days, to attend case management conferences by telephone with the Authority and refusing to comply with a direction to mediation (despite mediation being a measure required by the dispute resolution provisions in both AFFCO's collective agreement and the Act). There was also a somewhat bizarre attempt to usurp the Authority's powers to determine urgency, the adequacy of pleadings and whether it had jurisdiction. Standing back from those details, however, I do not consider that conduct warrants declining AFFCO's removal application because the overall merits favour removing the matter for the Court to hear and determine without prior investigation by the Authority. I order the removal.

[32] For clarity I record, as it will be of interest to the Court in relation to the obligations under s159 and s188(2) of the Act, that this matter has not been to mediation.

Robin Arthur
Member of the Employment Relations Authority