

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 14
5326420

BETWEEN NEW ZEALAND MEAT
 WORKERS UNION
 Applicant

AND AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Simon Mitchell for the Applicant
 Graeme Malone for the Respondent

Investigation Meeting: 17 December 2010

Determination: 31 January 2011

REASONS FOR DETERMINATION OF THE AUTHORITY

[1] Following the investigation of the claim for interim relief by the applicant, the New Zealand Meat Worker' Union (the union) against the respondent, AFFCO New Zealand Limited (AFFCO), I determined:

I make the following order of the Authority (pending resolution by the Authority of the substantive application of the NZ Meat Workers Union) requiring the respondent, AFFCO New Zealand Limited, to recognise the right of Mr Eric Mischefski, a duly elected official of the union, to attend bargaining and other meetings as the union's representative, pursuant to ss.18, 32 and 236 of the Act.

[2] My reasons for this determination follow.

Employment Relationship Problem

[3] Because of comments made and actions taken by the union's organiser at Wairoa, Mr Eric Mischefski, which were said to show his express hostility towards AFFCO and to demonstrate actions in breach of his good faith obligations to it, AFFCO decided on 22 October 2010 to write to the union stating that it would not

meet with him to discuss further issues. In particular, it relied on a number of public comments between July and October 2010 to justify its decision.

[4] In response, the union has applied to the Authority seeking a determination that the action of AFFCO in refusing to meet with Mr Mischefski was a breach of its obligation of good faith, and requiring AFFCO to meet with Mr Mischefski.

[5] Given the inability of the Authority and the parties to deal with the matter before March 2011 (because of its potential length and other commitments of all concerned), the union then sought an interim order, pending resolution of the substantive application, requiring AFFCO to enable Mr Mischefski to attend bargaining and other meetings and to recognise his role and authority. The union sought an interim compliance order or an interim injunction and has provided an undertaking as to damages. AFFCO opposes the application, both in the interim and on a substantive basis.

Factual Discussion

[6] AFFCO is a nationwide meat processing company with one of its plants being at Wairoa. The Wairoa site has a number of employees who are members of the applicant union. Mr Eric Mischefski is the local organiser for the union and has been for many years.

[7] There is a collective agreement currently in force between the parties. As envisaged by that agreement, site agreements are to be negotiated. No such written agreements for either the ovine or bovine plants have been negotiated as collective agreements, however. This is one matter, along with other disputes and personal grievances, over which the parties have been in dispute almost continuously over the past few years. The nature and level of disputation is so great that in a previous determination (*New Zealand Meat Workers' and Related Trade Workers' Union v. AFFCO (NZ) Ltd*, WA197/10, 13 December 2010) I held that it was:

... a time for cool heads and the consideration by the parties of obtaining additional outside assistance, rather than an ongoing barrage of legal claims, as has existed between the parties for many years now.

[8] The tenor of these comments can only be reinforced by this dispute.

[9] From the union's perspective, employment relationships with AFFCO have become significantly worse since a change of ownership. It believes that as a result it has been forced to defend the rights of its members, particularly at Wairoa, and a significant number of matters have been filed in the Authority. Affidavit evidence was given that this was the view of the union and not just Mr Mischefski.

[10] No doubt there is a history of bad blood between the parties, but the matters in dispute relate to the period July to October 2010. On 21 July, the parties entered into a process agreement for the negotiation of the ovine processing department's collective agreement. It was agreed that the parties would recognise and respect the role and authority of the persons representing the respective parties and that they would negotiate only with those representatives. Mr Mischefski was declared to be the union advocate on behalf of members. The agreement also required the parties not to do anything to mislead or deceive the other or undermine the bargaining, and to accurately represent the other party's position.

[11] Actions allegedly taken by Mr Mischefski since that date that were either wrong or otherwise in breach of his duties of good faith are said to be:

- Arranging the publication of a union news sheet that wrongly stated that AFFCO was encouraging employees to leave the core collective and was not negotiating in good faith;
- Tabling to union members a bargaining proposal from AFFCO that had been withdrawn;
- Wrongly telling the media that AFFCO was trying to *starve* workers into a new agreement;
- Wrongly telling the media that AFFCO was trying to introduce new conditions into a site agreement outside the core, and would not meet with the union on neutral ground;
- Wrongly telling the media that AFFCO had conceded a case that the union had brought, whereas AFFCO had settled the case;
- Restricting the scope of a meeting which should have been a part of the bargaining; and

- Encouraging workers to boycott products from AFFCO and other companies under similar ownership.

[12] On 22 October, Mr Hamish Simon, the Chief Executive Officer of AFFCO, wrote to the President of the union referring to the last remarks as a further incident of bad faith. He concluded by stating:

Given this last example, the company has now reached the point where it considers it impossible to deal with Mr Mischefski in good faith and accordingly will not meet with him to discuss further issues. It remains willing to meet and discuss necessary issues with site delegates and other officials from your branch; but not Mr Mischefski.

[13] As a result, these proceedings have been filed and a substantive investigation meeting set to commence on 8 March 2011.

The Law

[14] Section 12 sets out the objects of the part of the Act dealing with the recognition and operation of unions. One of the objects is to recognise the role of unions in promoting members' collective employment interests and to confer on registered unions the right to represent members in collective bargaining. Section 18 of the Act sets out that a union is entitled to represent its members in relation to any matter involving their collective interests as employees. Section 236 allows for any employee to choose any other person, including a union, to represent the employee in respect of his or her rights to do anything or take any action in respect of an employer.

[15] Section 4 provides that the parties must deal with each other in good faith, including when bargaining for collective agreements. More specifically, section 32 provides for good faith in bargaining for collective agreements. It states that the union and the employer must recognise the role and authority of any person chosen to be its representative or advocate, must not (whether directly or indirectly) bargain directly about matters relating to terms and conditions of employment with persons whom the representatives or advocate are acting for (unless the union and employer agree otherwise), and must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.

[16] In the United States, where the law provides for apparently unconstrained rights for unions and employers to appoint their own representatives, nevertheless

judgments have been made where one party has been found to be entitled to not accept a particular representative. In particular, the United States Court of Appeal (6th Circuit) found in 1950 in *National Labor Relations Board v. Kentucky Utilities Co* 132 Federal Reporter 2d 810 that the company did not breach its obligations to pursue collective bargaining by refusing to deal with a certain individual because (per paras 3/4):

Collective bargaining is a two sided proposition; it does not exist unless both parties enter the negotiations in a good faith effort to reach a satisfactory agreement ... With Braswell acting as one of the negotiators for the Union, any meeting with the negotiators would not have fulfilled the requirements of collective bargaining. His expressed hostility to the respondent and his purpose to destroy the respondent financially made any attempt at good faith collective bargaining a futility. Just as collective bargaining in form only and lacking in substance has been condemned, certainly collective bargaining in form only without good faith negotiating on the other side should not be required.

[17] In that case the union official had been found to have told the union that he had a grudge to settle with the company (who had previously *discharged* him), that some of the company's officials were liars, that it did not give a damn for the welfare of the employees and that he hoped it might go broke financially. Furthermore, in a previous case, the National Labour Relations Board had found that he had given testimony that was overstated, exaggerated and contrary to the truth.

[18] In the 1960 case of *National Labour Relations Board v. International Ladies' Garment Workers' Union AFLCIO* 274 Federal Reporter, 2d 376, the United States Court of Appeal (3rd Circuit) found that although each party to the collective bargaining process has the right to choose its representative and there is a correlative duty on the opposite party to negotiate with that appointed agent, those rules are not absolute or immutable. In that case, the employers' association was found to have displayed an absence of fair dealing in insisting upon a bargaining representative who had previously held highly confidential positions with the union and that its offer to bargain was thus not made in good faith. There the association employed the representative to perform the same functions for it as he had performed for the union previously, and he had been employed specifically because of his years of familiarity with the union over its strategy, thinking, working and operations. In addition, the association intimated that it had *put one over* on the union and had it *on the spot*.

[19] Finally, in *General Electric Company v. National Labour Relations Board*, 412 Federal Reporter, 2d 512, the United States Court of Appeal (2nd Circuit) upheld, in 1969, the submission that there have been exceptions to the general rule that either side can choose its bargaining representatives freely. It stated, however (in Part II):

...but they have been rare and confined to situations so infected with ill will, usually personal, or conflicts of interest as to make good faith bargaining impractical ... Thus, the freedom to select representatives is not absolute, but that does not detract from its significance. Rather the narrowness and infrequency of approved exceptions to the general rule emphasise its importance.

Determination

[20] Mr Mitchell claims an interim compliance order. However such a remedy is not within the Authority's jurisdiction, as was made clear in *Credit Consultants Debt Services v. Wilson (No 2)* [2007] ERNZ 205, where the Employment Court held, at para.[10]:

There is no power for the Authority to make an interlocutory compliance order in the same way that interlocutory injunctive relief may be granted by Courts having the jurisdiction to do so to preserve a position pending a substantive hearing.

[21] The Authority has the ability, however, to issue interim injunctions, as available to the High Court in relation to contracts. One such form of injunction (whether temporary or *permanent*) is a mandatory injunction, requiring one party to take certain actions or desist from them. In effect, the consequences of such a *permanent* injunction can be seen as equivalent to a compliance order, despite the non-availability of interim compliance orders.

[22] The issues for determination over an interim injunction are whether or not the union has an arguable case of breach of duty by AFFCO, and if so whether it has an arguable case for a permanent injunction. The Authority must then assess where the balance of convenience, including the adequacy of damages as a remedy, will lie until there is a substantive determination of the matter and where the overall justice of the case lies during that time.

Arguable Case

[23] Whatever else might be said about the relationship between the parties, at least as at 21 July AFFCO was prepared to recognise Mr Mischefski as the union's

advocate and therefore something must have changed since then to make it alter its approach. Hence the focus on matters between 21 July and 22 October 2010.

[24] It is not possible to determine at the interim stage, without tested evidence, whether in fact Mr Mischefski has breached his duties of good faith to AFFCO in any or all of the instances that arose at the relevant time, and if so to what degree. For example, it is clear that many of the comments made to the media by him can only have been inflammatory to AFFCO (and therefore counter-productive to resolving issues in dispute), but that does not necessarily make them breaches of good faith. Furthermore, as discussed below, any minor breach or breaches would not justify the extreme action taken by AFFCO.

[25] Even if AFFCO were right in all of its allegations, I conclude that the union would still have an arguable case because of the high threshold implicit in the American cases (even if they were to be followed in New Zealand), especially given the absolute nature of the law relating to a union's ability to organise its own affairs without interference from an employer. Given the union's power to determine its own policies, procedures and operations, and the apparent absoluteness of the rules of law allowing this, I therefore conclude that the union does have an arguable case for a permanent injunction and/or a compliance order.

Balance of Convenience

[26] While the union has provided an undertaking as to damages it is difficult to conceive what damages AFFCO might suffer if it was required to continue to deal with Mr Mischefski, other perhaps than some potential claim for recompense of executive time for attending meetings that turned out to be less productive than the company thought they should be. Therefore, if there were any damages to AFFCO, they could be met by the undertaking.

[27] On the other hand, I conclude that damages are not an adequate remedy for the union. I accept that any financial costs to the union of providing alternative representation at Wairoa may be compensated for by damages. However the union's right to determine its own operations will have been compromised, albeit for a limited period. This could lead to a lessening of the union's standing with its members and other unions. Similarly, Mr Mischefski has been a longstanding union official at Wairoa and it may negatively affect his reputation if he was not allowed to represent it

in the interim. Furthermore, given Mr Mischefski's experience at Wairoa, the union could potentially be compromised in its approach to matters in his absence. These are not matters for which damages are an adequate remedy.

[28] While AFFCO claims that there is no bargaining at Wairoa at the moment, there is still a bargaining process agreement in place for the ovine site agreement, and there is still no written site agreement for either the bovine or ovine operations. As part of the settlement of Court proceedings referred to above, the parties agreed to the following arrangements over the ovine operations and negotiating for a new agreement. Effectively these were that:

- they would confirm in writing the rates of pay and conditions that applied at the end of the 2009/2010 season;
- they would apply those terms in the absence of any further agreement;
- in the absence of further agreement the parties would discuss and record such agreed terms; and
- if unable to agree on what the terms and conditions last season were that this matter could be resolved as a dispute by the Employment Relations Authority.

[29] It may be said that this process is not bargaining, but in fact it arose out of bargaining. It must be seen as part of the bargaining process, because collective bargaining is implicitly part and parcel of the above agreement, particularly as the process that the parties would adopt is set out in the agreement and is part of the bargaining. Even if I am wrong and it is not, it is certainly a matter involving the collective interests of union members as employees of AFFCO and therefore the union is entitled to represent its members in that matter under s.18. It wishes to retain Mr Mischefski.

[30] I conclude that, while in the interim AFFCO might be mildly inconvenienced, it can continue to deal with Mr Mischefski, as it has done for many years. By contrast, the union will be substantially inconvenienced and unable to run its own affairs in the way it wants. For all the above reasons, I therefore determine that the balance of convenience lies with the union.

Overall Justice

[31] It is important to look back on the overall impression that the Authority has gained from the limited evidence and submissions to date, to determine where the overall justice may lie. An important factor here is the strength of one or other party's cases. There are no other factors such as delay that need to be considered by the Authority.

[32] It is clear that AFFCO is genuine in its concerns over Mr Mischefski's activities. However, there is no evidence that Mr Mischefski has taken a position that is inconsistent with that of the union as a whole in terms of its attitude towards AFFCO and its owners. Therefore, if there is any *animus* towards them it may be a union *animus* as opposed to the personal *animus* found to exist in the *Kentucky Utilities* case.

[33] Similarly, even if Mr Mischefski had committed all the breaches of good faith as alleged, I am not sure that such would constitute sufficient breach to reach the high threshold necessary to override the apparently absolute series of powers that unions have to run their own affairs. In particular, here there were no direct warnings that if Mr Mischefski continued to behave in the way that he did that AFFCO would refuse to recognise him. Similarly, AFFCO does not appear to have pursued any actions in the Authority seeking findings of breaches of good faith by the union through Mr Mischefski. If such a major imposition on a union's rights is to be made by an employer such as AFFCO, one would expect more evidence of attempts to put the union on notice of potential retaliatory action.

[34] No doubt AFFCO is uncomfortable with the actions of Mr Mischefski and its inability, as noted in the previous case referred to, to reach agreements with him. The Authority itself has noted on occasions the difficulties in concluding written site agreements at Wairoa, but that is not the same as sheeting home responsibility for that to Mr Mischefski. Similarly, it appears that the seriousness of any breaches of duty by Mr Mischefski, if proven, are unlikely to be in the sort of category that might justify AFFCO's refusal to deal with him.

[35] There is no precedent known in this area, so any views on the law expressed here are only tentative and must be taken in that light. However it is axiomatic that unions and employers will be hindered in their respective roles if one is allowed to

determine in any way the actions of the other. The law apparently allows for no exceptions to this ability to organise one's own affairs. On the other hand, parties are required to act in good faith and AFFCO disputes that the rule can be immutable where there is a serious lack of good faith by a representative of another party. The law provides, however, for compliance orders to be made over proven breaches of good faith. Furthermore, following an amendment to the Act, penalties have been made available for serious and sustained breaches, or breaches intended to undermine bargaining, amongst other things. It is therefore a possible interpretation that these are the only remedies available to parties, even in the type of situation alleged here and as covered by the American authorities.

[36] I consider that if there are to be any exceptions to the apparently blanket rule allowing the union to organise its own affairs, then the law would most likely require that one of two things would have happened. First, there would have had to have been some significant incident, such as a serious unprovoked assault on one of the representatives, that would justify taking such a serious step without notice. Alternatively, such drastic action might be taken after proven breaches of good faith, and warnings by the employer and/or the Authority, provided there was further non-observance of the duty of good faith,. It does not appear that either has occurred in this case. It was for these reasons that I informed the parties on 17 December that if successful I would consider a claim for indemnity costs from the union against AFFCO.

[37] It therefore follows that the overall justice of the case is consistent with the balance of convenience and favours the union, hence the order made on 17 December 2010. Finally, I would again press on the parties the strong desirability (if not necessity) of obtaining external assistance to address how they might be able to develop (as mandated by the Act) an effective form of relationship, even though they can not be required to like or even respect each other.

G J Wood
Member of the Employment Relations Authority