IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 136
5376913

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

Member of Authority:	Eleanor Robinson
Representatives:	Simon R Mitchell, Counsel for Applicant Graeme Malone & Rachel Webster, Counsel for Respondent
Investigation Meeting:	On the papers and by telephone
Submissions received:	4 April 2012 from Applicant 12 April 2012 from Respondent
Determination:	17 April 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, the New Zealand Meat Workers & Related Trades Union Inc ("NZMWU") is seeking under urgency an immediate removal of a matter to the Employment Court pursuant to s 178 of the Employment Relations Act 2000 ("the Act") on the grounds that:

a. Important issues of law are likely to arise in the matter other than incidentally;

b. The matter is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; and

c. The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.

[2] The Authority sought a reply from the Respondent, AFFCO New Zealand Limited ("AFFCO"). AFFCO confirmed during telephone conference calls held on 5 and 13 April 2012 that it opposed the application for removal of the matter to the Employment Court.

The Matter before the Authority

[3] The matter NZMWU has laid before the Authority and which it applies to have removed to the Court, is threefold, comprising an unlawful lockout, undermining of bargaining, and breach of s4 (6) of the Act.

[4] According to the facts set out in the Statement of Problem, NZMWU and AFFCO are parties to an expired collective agreement which continues in force pursuant to s53 of the Act.

[5] During the term of the expired collective agreement there was litigation in the Employment Relations Authority and the Employment Court concerning the interpretation, application and operation of it.

[6] By way of notice dated 24 February 2012 AFFCO locked out NZMWU's members at its plants at Moerewa, Fielding, Wanganui, Horotiu and Wairoa.

[7] The lockout notice stated that the lockout would commence at 5 a.m. on 29 February 2012 and end on the earlier of:

a. Acceptance of and entry into a collective agreement on terms contained in a collective agreement attached to the notice, or

b. In respect of any particular employee or employees, upon service upon the plaintiff of a notice that the defendant was withdrawing the lockout in respect of such employee or employees.

[8] NZMWU claims that the lockout is unlawful within the meaning of the Act because it relates to disputes.

[9] NZMWU claims that even if the lockout relates to bargaining for a collective agreement, it is unlawful because it does not relate to bargaining for a collective agreement that will bind each of the employees concerned. In particular NZMWU claims that:

a. AFFCO's notice allows it to lift the lockout for individual employees as it sees fit.

b. AFFCO had made known to NZMWU's members that they can leave the union and return to work on an individual employment agreement.

c. AFFCO has encouraged NZMWU's members to follow this course of action, and many have done so.

[10] NZMWU claims that the lockout as a result of AFFCO's actions cannot result in a collective agreement that binds each of the members concerned and does not relate to bargaining for a collective agreement that will bind each of the employees concerned.

[11] NZMWU claims that the lockout is unlawful in that the dominant motive for it is not to further collective bargaining, and therefore it does not relate to bargaining for a collective agreement within the meaning of s83(b)(i) of the Act.

[12] NZMWU further claims that the actions of AFFCO have undermined bargaining within the meaning of s32 (1) (d) (iii) of the Act. The relevant actions being that AFFCO have:

- incited NZMWU members who are employees to leave the union and sign individual employment agreements;

- encouraged NZMWU members who are employees not to be involved in bargaining; or

- to be covered by a collective agreement.

[13] NZMWU claims that these actions by AFFCO further constitute a breach of s 4 (6) of the Act.

[14] NZMWU argues that the factual background as set out above is relevant to all causes of action. NZMWU claims that the issues raised in the Statement of Problem are not discrete matters, but rather the issues of the alleged undermining and breach of s 4(6) of the Act will involve examination of much of the same evidence which is before the Employment Court in the lawfulness of the lockout matter.

[15] AFFCO opposes the application for removal on the basis that the issue regarding the alleged undermining of the bargaining issue or of the collective agreement are discrete and have no real relevance to the lawfulness of the lockout matter. Further that the decision which is before the Employment Court will not be affected by any issue regarding whether or not bargaining has been undermined.

[16] AFFCO also argues that Parliament intended disputes of fact to be retained by the Authority, and that widening the matters before the Employment Court will result in further and unnecessary delay in determining the issue of the lawfulness of the lockout.

Proceedings in the Employment Court

[17] NZMWU provided as an attachment to the application to the Authority, a copy of the injunctive proceedings which have been filed in the Employment Court.

[18] The injunctive statement of claim before the Employment Court is closely connected the matter before the Authority in that it concerns the actions of AFFCO in imposing a lockout on NZMWU's members which NZMWU claims is unlawful on the basis that the dominant motive for it is not to further collective bargaining and consequently it does not related to bargaining within the meaning of s83(b)(i) of the Act.

[19] In particular the issue of the lawfulness of the lockout is referenced in the injunctive statement of claim before the Employment Court to the same or similar matters regarding the undermining claims which are before the Authority.

[20] It is apparent from the injunctive statement of claim that the proceedings before the Employment Court will involve principally the same evidence as that which would be heard in the matter before the Authority.

Determination

[21] It is not necessary for the Authority to consider whether the grounds for removal as set out in s178(2)(a) and (b) have been established, as it is clear that the grounds supporting a removal to the Employment Court as set out in s 178(2) (c) and (d) of the Act have been established.

[22] The grounds as set out in s178(2)(c)and (d) are:

> ***s178(2)***
>
> *(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues: or*
>
> *(d) the authority is of the opinion that in all the circumstances the court should determine the matter.*

[23] Accordingly the Authority determines that the entire matter before it is removed to the Employment Court.

Costs

[24] Costs are reserved. Any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the other. The other party shall have a further 14 days in which to file and serve a memorandum in rely.

Eleanor Robinson
Member of the Employment Relations Authority