IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 175
5561003

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

Member of Authority:	Eleanor Robinson
Representatives:	Simon Mitchell, Counsel for the Applicant
	Christine Pidduck, Counsel for Respondent
Investigation Meeting:	On the papers
Determination:	19 June 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, New Zealand Meat Workers & Related Trades Union Inc (the Union), is claiming that the Respondent, AFFCO New Zealand Limited (AFFCO) breached its obligation of good faith and undermined bargaining for a Collective Agreement.

[2] Specifically the Union claims AFFCO undermined bargaining and is in breach of the Employment Relations Act 2000 (the Act) by:

i. Failing to recognise the role or authority of the Union in the bargaining pursuant to s. 32(d)(i) of the Act;

ii. Dealing directly with the Union's members about matters relating to terms and conditions of employment pursuant to s. 32(d)(ii)

iii. Undermining bargaining pursuant to s.32(1)(d)(iii)

Issues

[3] Mr Mitchell for the Union seeks an order for removal to the Employment Court pursuant to s 178(2) of the Act on the grounds that:

> *a. an important question of law is likely to arise in the matter other than incidentally, the important question of law being the nature of the conduct which can be considered to be undermining of bargaining: s. 178(2)(a):*
>
> *b. 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);*
>
> *d. The Court already has before it proceedings which are between the same parties and which involve the same, or similar, or related issues: s. 178(2)(c)….in all the circumstances the court should determine the matter.*

[4] AFFCO opposes the application for an order for removal submitting that there is no basis for removal on the grounds claimed and that the Authority should exercise its discretionary authority by declining to remove the matter to the Employment Court.

Brief Background Facts

[5] The Union represents members employed by AFFCO at its meat processing plant at Rangiuru, and at other places.

[6] AFFCO is a duly incorporated company that operates meat works throughout the North Island.

[7] The Union and AFFCO are bargaining for a collective agreement to cover meat workers employed at Rangiuru and other places.

[8] The terms and conditions of employment of the Union's members were contained in the Collective Agreement which finally expired on 31 December 2014.

[9] The members of the Union are seasonal workers who are currently laid off, and have been asked to attend meetings during the week of 8 June 2015 to discuss new individual employment agreements.

[10] The Union had not been advised that AFFCO was meeting with its members.

[11] AFFCO intends to re-engage the Union members on the new employment agreements from 22 June 2015.

Removal Application

General Principles of Removal

[12] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[13] In the event that the party or parties applying for removal satisfy the tests set out in s.178(2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[1].

[14] In *Auckland DHB v X (No2)*[2] the Court provided guidance on how the Authority's residual discretion in s 178(2) must be exercised:[3]

> *[T]he inquiry must not be on the desirability or undesirability of removing cases, generally because Parliament has decided some should be removed. Rather it should be on whether it may be undesirable to remove a particular case.*

Submissions on behalf of the Union

[15] Mr Mitchell on behalf of the Union submits that it is appropriate to remove the entire proceedings to the Employment Court for Resolution.

S. 178(2)(a) of the Act: Important Question of Law

[16] Mr Mitchell submits that an important question of law is likely to arise in the matter other than incidentally. The test for an important question of law is not whether it has been determined before, or whether it is narrow, but rather whether it is important.

---

[1] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]
[2] [2005] ERNZ 551
[3] Ibid at para 29

[17] In *Flight Attendants & Related Services (NZ) Association Inc & Others v Air New Zealand Limited & Another*[4] the Court addressed the meaning of an important question of law, setting out the issues of law that needed to be addressed, stating at paragraph [28]:

> *… Section 178(2)(a) does not refer to whether important questions of law can be determined by established legal precedents. Rather, the test is that an important question of law is likely to arise in the matter (first limb of the test) will do so 'other than incidentally' (second limb). The second test is not whether there is precedential guidance for the determination of those legal questions.*

[18] It is submitted that it is an important question of law being raised by the Union. That is, the meaning of undermining collective bargaining, (s. 32(1)(d)(iii) of the Act), and also the obligations to bargain with the Union, (s.32(1)(d)(ii) of the Act) and to recognise a representative (s. 32(1)(d)(i) of the Act). These are important considerations that are applicable to all bargaining situations. It is submitted that they are important questions.

s. 178(2)(b) of the Act: Of such a nature and urgency that it is the public interest that it should be removed immediately.

[19] Mr Mitchell submits that the issue of undermining bargaining is urgent for the parties. The action of which the Union complains is the offering of individual employment agreements to members of the Union at the commencement of a new season, and requiring those agreements to be accepted.

[20] To date, the proceedings relate to AFFCO's meat processing plant at Rangiuru, outside Te Puke. It is likely the same issue will arise at other meat processing plants operated by AFFCO that are operated throughout the rest of the North Island. This gives the proceeding urgency and requires a prompt resolution.

[21] Mr Mitchell submits that Counsel for the Respondent suggests because the same facts are before the Employment Court in relation to the lockout application, that this does not mean that the current issue is urgent. It is rather submitted that the Court has accepted that urgency should be granted to the lockout proceeding, which is based on the same facts, and this suggests the reverse is the case.

[22] The Employment Court has hearing time available as early as 7 July 2015 to determine the lockout application, and it is likely that it could determine this matter at the

[4] [2013] NZEmpC 125

same time. In such circumstances, removing the matter to the Employment Court will remove duplication.

s. 178(2)(c) of the Act Court having proceedings before it

[23] It is submitted that the lockout proceedings involve the same, or similar, or related issues.

[24] It is accepted that the issue currently before the Employment Court relates to whether the actions of AFFCO amount to a lockout. However the lockout proceeding is related to the lawfulness of AFFCO's actions in offering individual employment agreements in the manner it has at Rangiuru. While the causes of action are different, the facts relied upon are the same.

[25] In addition, the issue is the legality of the actions of AFFCO. Different causes of action arise, but they are both the causes of action that relate to bargaining.

[26] It is submitted by the Union that the lockout application relates to the lawfulness of AFFCO's actions in attempting to procure individual employment agreements. The undermining of bargaining action relates to how the attempt to procure individual employment agreements relates to the bargaining for a collective agreement, with an allegation that it undermines it. These issues are closely related.

[27] It is submitted that in all the circumstances, it is appropriate for the matter to be removed.

Submissions on behalf of AFFCO

s. 178(2)(a) of the Act: Important Question of Law

[28] AFFCO submits that there is no important question of law that necessitates the removal of this matter to the Employment Court.

[29] Ms Pidduck on behalf of AFFCO submits that the important question of law as posited by the Union in the Statement of Problem states that: "*the important question of law is as to the nature of conduct which can be considered to be undermining of bargaining".* Therefore the focus of the enquiry in relation to 'undermining' within the good faith obligations in collective bargaining must first be on identifying the behaviour, conduct or actions complained of, and secondly on assessing the effect of that conduct or behaviour on the bargaining.

[30] It is submitted that there is no question of law in this matter that necessitates removal to the Employment Court for determination. What is at the heart of the Union's claim is a factual exploration and analysis of the particular factual matrix to examine the alleged conduct and the effect of the alleged conduct, which is squarely within the jurisdiction of the Authority. Each matter must turn on its own facts in terms of the conduct complained of and the effect of that conduct.

[31] AFFCO also submits that Counsel for the Union has failed to establish the second limb of the test in s. 178(2)(a) of the Act, namely that the important question of law will arise other than incidentally.

[32] It is submitted that even if the Authority accepts that there is an important question of law that arises in the current matter, it is submitted that the second limb of the test is not satisfied in that the question of law will only arise peripherally, and does not lie at the heart of the case. It is further submitted that if there is a question of law to be decided, it is a narrow issue of statutory interpretation that the Authority is able to decide.

[33] It is submitted that what is at the heart of the claim as pleased by the Union is a factual analysis to examine the alleged conduct and the effect of the alleged conduct.

s. 178(2)(b) of the Act: Of such a nature and urgency that it is the public interest that it should be removed immediately.

[34] The Employment Court has now heard the interim application to restrain the actions complained of by the Union. The matter was heard on Tuesday 16 June 2015. The Employment Court refused the interlocutory application for injunctive relief and the Chief Judge directed the parties to urgent mediation to address bargaining.

[35] It is submitted that there is no urgency that attaches to the matter before the Authority that warrants removal to the Employment Court. The Union was able to make a claim that the application lodged with the Authority be accorded urgency pursuant to schedule 2, clause 17 of the Act, however it elected not to make that application.

[36] AFFCO has a separate claim before the Authority claiming the Union has undermined bargaining and has breached the Bargaining Process Agreement between the parties. That matter has been referred to mediation. It is submitted that this matter is also appropriate foe mediation, and, if not resolved at mediation, be dealt with by the Authority. Mediation is able to be arranged with urgency.

[37] In any event, it is only the conduct complained of by the Applicant that is the same in both the Authority proceedings and the Employment Court proceeding. There is no duplication in terms of the claims and the issues for determination.

s. 178(2)(c) of the Act Court having proceedings before it

[38] The Union has filed contemporaneous proceedings in the Employment Court alleging that the actions of AFFCO amount to an unlawful lockout.

[39] The proceedings in the Employment Court and the matter before the Authority are between the same parties, however it is submitted that although the conduct complained of is the same, the issues for determination are not the same or similar, but fundamentally different.

[40] The issue before the Court is whether the conduct amounts to an unlawful lockout and will primarily involve determinations as to:

a) Whether or not the union members are 'employees'; and

b) If so, whether offering union members employment in the manner undertaken meets the criteria necessary to be classified as a lockout.

[41] As there is no collective agreement covering the union members, the issue before the Court is solely related to individual employment agreements and obligations and rights associated with the same.

[42] Further in the event that the conduct was found to be unlawful, the remedy is not discretionary and such conduct would be prohibited.

[43] The issues before the Authority however relate to collective bargaining rights and obligations and even were a breach be found to have occurred, any remedy would involve wider considerations, including conduct of both parties.

s. 178 (2)(d) discretionary considerations

[44] It is submitted that there are relevant discretionary considerations against removal, namely:

A) On Friday 29 May 2015 AFFCO lodged a Statement of Problem in the Authority file #5559394. In that matter AFFCO claims that the Union has breached the good faith obligations, undermined bargaining and breached the Bargaining Process Agreement between the parties. The Authority has referred that matter to mediation to be held in Auckland on 24 June 2015. Counsel submits that the

current matter is appropriate for mediation, and could be mediated at the same time.

B) Bargaining for a collective agreement between the parties is ongoing. It is in the interests of parties and the bargaining that the matter be resolved with the minimum of judicial intervention.

[45] Counsel submits that the matters the Authority takes into consideration as contrary to removal include:

a) The recent direction by way of interlocutory oral judgment by Chief Judge Colgan for the parties to attend urgent mediation to address bargaining;

b) The referral to mediation for AFFCO's claim that the Union has undermined bargaining, such mediation to take place on 24 June 2015;

c) The objects of the Act, including mediation as the primary problem solving mechanism, and the need to build productive employment relationships by reducing the need for judicial intervention.

d) That it is in the interests of the parties and the bargaining that the matter be resolved with the minimum of judicial intervention.

[46] In conclusion, Counsel for AFFCO seeks that the Authority decline the application for removal of the matter to the Employment Court.

Determination

Important Question of Law

[47] Having carefully considered all the submissions, I am persuaded that the issues which Counsel for the Union submits constitute an important question of law, being the meaning of undermining collective bargaining, the obligations to bargain with the Union, and to recognise its representative, can be determined by the Authority conducting an analysis of the particular factual matrix in this case and examining the alleged conduct and the effect of it.

[48] Whilst I accept that a question of law may arise in this case, I am not persuaded that it will constitute an important question of law. As His Honour Chief Goddard observed in *Hanlon v International Educational Foundation (NZ) Inc*[5]:

> *... I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law.*

[49] Further I am not persuaded that it will arise other than peripherally, and I accept that it will constitute a narrow issue of statutory interpretation which can be determined by the Authority.

Urgency

[50] In the submissions on behalf of the Union it was noted that the Employment Court had accepted urgency in respect of a lockout application for injunctive relief, and that this fact argued in favour of urgency attaching to the matter before the Authority which is based on the same facts.

[51] I observe that the Employment Court refused the interlocutory application for injunctive relief and the Chief Judge directed the parties to attend urgent mediation. I further observe that AFFCO has a separate claim before the Authority claiming that the Union has undermined bargaining and breached the Bargaining process Agreement between the parties, this matter has also been directed to mediation.

[52] In the circumstances I am not persuaded that urgency attaches the matter before me, and that since it is only conduct by AFFCO that is the same issue in both the Authority and Employment Court proceedings, that there will not be duplication in terms of the claims and the issues for determination.

The Court having proceedings before it

[53] I accept the submissions of Counsel for the Union that the lockout proceedings involve the same facts as are relied upon the matter before the Authority in this proceeding. However I find that, as set out in the submissions by Counsel for AFFCO, the issues for determination are not the same or similar.

---

[5] [1995] 1 ERNZ 1

[54] As such I do not find that removal should be granted on this basis.

Residual Discretion

[55] In exercising its residual discretion the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[6].

[56] I find of most persuasion as a factor against removal the fact that the statutory imperative in the Act is that mediation is to be the primary method of solving problems and building productive employment relationships.

[57] In associated proceedings, being the lockout application for injunctive relief before the Employment Court, the Chief Judge has directed the parties to attend urgent mediation. There is also a direction to mediation in respect of AFFCO's claim that the Union has undermined bargaining.

[58] I find that it is also in the interests of the parties in this proceeding and their bargaining process that the proceeding is resolved with the minimum of judicial intervention.

[59] In these circumstances, I find that there is a significant relevant factor against removal to the Court, such that I am not satisfied that it is appropriate for the Authority to exercise its discretion to remove in accordance with s. 178(2)(d) of the Act.

[60] I determine that the Application for Removal should not be granted, but that the matter should be set down for an Investigation at first instance by the Authority.

[61] Whilst a telephone conference will be arranged with the parties to set the matter down, it will also be focused on whether or not the parties would be amenable to having mediation for this matter consolidated with that of the mediation set down on 24 June 2015 in respect of file #5559394.

Costs

[62] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority

---

[6] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]