VICTORIA
UNIVERSITY OF WELLINGTON
TE WHARE WĀNANGA
O TE ŪPOKO O TE IKA A MĀUI

Centre for Labour, Employment and Work

LEGAL UPDATE: NZ MEAT WORKERS & RELATED TRADES UNION INC AND ROBERTA KEREWAI RATUI AND OTHERS V AFFCO NEW ZEALAND LIMITED [2015] NZEMPC 204.

The Employment Court has ruled that a lockout of AFFCO union members was unlawful and AFFCO did not act in good faith during collective bargaining with the New Zealand Meat Workers & Related Trades Union.

Background

AFFCO New Zealand Limited ('AFFCO') is a meat processing company which operates plants around New Zealand. This case directly relates to the AFFCO plants at Rangiuru (Bay of Plenty), Imlay (Whanganui) and Feilding (Manawatu), but the issues decided will also affect several of their other plants around the country.

Meat processing is a seasonal industry in New Zealand. During the 'off season', employees are 'laid off', and are then 're-engaged' before, at or after the commencement of the next season.5

New Zealand Meat Workers & Related Trades Union Inc ('the Union') was a party to a collective agreement with AFFCO which expired on 31 December 2013. The collective agreement continued in force until 31 December 2014 pursuant to the statutory 12-month extension allowed under the Employment Relations Act 2000. During this time the parties had been engaged in collective bargaining but this had not made significant process by the time the collective agreement expired.6

From 31 December 2014 to the 2014/2015 seasonal closure of each plant, union members were employed under individual employment agreements ('IEA') based on the expired collective agreement.

The Rangiuru plant closed for the season on 17 April 2015. On or about 2 June 2015 AFFCO informed those who had worked at the plant the previous season and had been laid off of its intention to reopen on 22 June 2015. They invited them to attend introduction presentations from 8 June 2015 for a new intended IEA at the plant.7 At the introduction presentations, each person was given an information document and a proposed IEA.8 The documentation stated that AFFCO required a signed IEA with each employee before they commenced work.

The Union learnt of this process from its members and objected on their behalf, but these objections were effectively ignored by AFFCO.9 The Court asserted:10

AFFCO's specified timeframes [for considering and signing the proposed individual employment agreements] were short and there is no evidence, as we would have expected if this had

5 At [8].

6 At [15].

7 At [6].

8 At [6].

9 At [23].

10 At [23].

At the introduction presentations, each person was given an information document and a proposed IEA. The documentation stated that AFFCO required a signed IEA with each employee before they commenced work

happened, that the Union had been forewarned of these significant changes to the usual process of re-engagement at the start of the season or involved in its formulation or management.

That was despite AFFCO being aware that a significant number of employees were union members and despite the fact that it was then in collective bargaining with the Union for a replacement collective agreement that was intended, at least by the Union, to operate in respect of the coming season.

On 9 June 2015 the Union filed proceedings in the Employment Court alleging an unlawful lockout and seeking an interim injunction to stop AFFCO's actions. This application for an interim injunction was denied.11 Following this, almost all members of the Union at the Rangiuru plant signed the proposed IEA without seeking any changes to the document, and were engaged for employment from 22 June 2015.12

During June and July 2015 this process also occurred at the Imlay and Manawatu plants before the commencement of the new season.

The Union brought a case to the Employment Court challenging AFFCO's actions.

The issues before the Employment Court were:1

• *Did AFFCO unlawfully lock out the union's members by refusing to re-engage them in employment at the start of the 2015/2016 killing season other than on AFFCO's terms and conditions of employment set out in the new IEAs?*

• *Did AFFCO breach its statutory obligations of good faith in collective bargaining?*

Was there continuous employment from season to season?

For AFFCO to have committed an unlawful lockout, the union's members would need to have been employed at the time of the lockout, and the lockout would need to be unlawful.

A key issue was whether the union members were continuously employed from season to season (the Union's position), or were no longer AFFCO employees after being laid off at the

end of the 2014/2015 season and so would have been applicants for new employment for the new 2015/2016 season (AFFCO's position).13

The Court analysed the terms of the expired collective agreement; the working arrangements of the parties; the differences between the expired collective agreement and the new IEA; the definition of 'employee' under the Employment Relations Act 2000; and the relevant case law on the meat working industry.

The Court held that the union members were employees during the seasonal lay-off.14

11 At [6].

12 At [6].

13 At [30].

14 At [179].

Quote from judgment

'The off-season is, however, a period during which it is agreed that the employees will not perform work and will not be paid but will have, nevertheless, an expectation that they will be re-engaged'.

That is not to say that the work is not seasonal: clearly it is. The off-season is, however, a period during which it is agreed that the employees will not perform work and will not be paid but will have, nevertheless, an expectation that they will be re-engaged (although termed "re-employed") subject to the fulfilment of conditions relating to the date or dates on which that occurs, their seniority and their satisfactory performance during the previous season.

Was there an unlawful lockout?

The Court concluded that on the basis that the union members were employees of the defendant when seeking to be re-engaged at the end of their seasonal lay-off, the lockout was unlawful:15

The Court held:16

Combined with its actions in current collective bargaining for a collective agreement with which the Union did not agree, AFFCO's refusal to re-engage the [union members] amounted to a lockout under s 82 of the Act. They were the acts of the employer of those employees in refusing or failing to engage those employees for work for which the employer usually employed employees, with a view to compelling those employees to accept terms of employment, or, alternatively, to comply with the employer's demands (s82(1)(a)(iv) and (b)).

AFFCO was intent upon achieving its outcome in difficult collective bargaining, by purporting to re-engage the employees for the coming season effectively on its desired collective terms and conditions of employment, but contained in IEAs rather than a collective agreement.

The lockout was also unlawful because it was imposed without the required notice to the employees.

Did AFFCO breach its duties of good faith in collective bargaining?

The Court found that AFFCO had breached its duties of good faith in collective bargaining. AFFCO's actions in engaging or attempting to engage the union members in re-employment under the IEAs breached its duties of good faith in collective bargaining.17

AFFCO was held to have acted in bad faith by:18

- Directly approaching the employees because it had failed or refused to involve the Union. AFFCO's strategy in approaching the employees and engaging directly with them was, directly or

15 At [194].
16 At [197] and [198].
17 At [201].
18 At [202] – [205].

Quote from judgment

'AFFCO was intent upon achieving its outcome in difficult collective bargaining, by purporting to re-engage the employees for the coming season effectively on its desired collective terms and conditions of employment, but contained in IEAs rather than a collective agreement'.

indirectly, likely to mislead or deceive the Union and the union members. This was misleading conduct concerning AFFCO's intentions both in the collective bargaining and for employment in the new season. AFFCO's actions were not active or constructive in building a productive employment relationship with the Union or the employees.

- By bargaining directly with the individual employees about matters relating to the terms and conditions of their employment, who were represented by the Union. The Union was not given an opportunity to agree to AFFCO contacting the employees. AFFCO had an obligation to consult fully and openly with the Union, but refused or failed to do so.

The Court stated:19

The terms and conditions of AFFCO's standard or generic form of IEA, agreement to which in substance it insisted upon before work was provided, were essentially its claims to, or demands for, those terms and conditions for which it was bargaining collectively with the Union.

AFFCO sought to short-circuit collective bargaining by seeking to achieve its objectives therein by insisting upon them as a condition of re-engaging individual employees for the current season.

The Court also commented that in the alternative, the actions of AFFCO undermined, or were at least likely to undermine, the collective bargaining and/or authority of the Union in bargaining. Once many employees were signed onto the IEAs, there was little point in AFFCO continuing to bargain with the Union.20

Remedies The Court declined to award the remedies sought for several reasons including the possibility of further mediation or facilitated collective bargaining where the parties may come to an agreement as to how to proceed.21

LEGAL UPDATE: The NZ Meat Workers Union & AFFCO New Zealand Limited keep the Employment Court busy

Carol Jess, PhD Student, Victoria University of Wellington

Subsequent to the judgment in NZ Meat Workers & Othrs v AFFCO New Zealand Limited1, finding that the lockout of workers at AFFCO plants were unlawful, and that the company had failed to act in good faith during collective bargaining, further proceedings have been taken by the Union. The new court action relates to the way in which the locked out workers at the Wairoa plant are to return to work; as the lockout was found by the Court to be unlawful the workers should be returned to the position which should have pertained, but for that lockout. This has resulted in the reporting of a hearing in Chambers on 8 December 20152 in front of Chief Judge Colgan followed by a hearing on an application for interim injunction before the Court on 21 December 20153. The interim injunction was denied, partly on the ground that a hearing on the substance of the claims was put down for the week beginning 25 January 2016. At the time of writing that judgment has not yet been reported.4

The case arises from AFFCO having offered the locked out workers a return to work on an afternoon shift, as opposed to the day shift. The normal practice, it is alleged, is for seniority to be applied, and those with seniority to be engaged on the day shift. The Union argues that if seniority were to be applied the locked out workers would return to the day shift. It is also contended that the offers of re-engagement on the afternoon shift are discriminatory and impose disadvantage on those workers. The disadvantage of the afternoon shift is alleged to be due to its shorter duration at the peak of the season, and because it requires workers to be available at times when they have never worked for AFFCO before.

AFFCO has asserted that it is entitled under the expired collective agreement to engage those Union members on an afternoon shift as opposed to a morning shift, on individual employment agreements based on the expired collective agreement. AFFCO, also argued that those who had not returned to work on the terms offered were either on strike, or had abandoned their employment. The argument that the workers were on strike was not developed in the case heard on 21 December, but the judge did reject it, and did not consider the circumstances to constitute a strike.

---

1 [2015] NZEmpC 204 EMPC 152/2015 which was reported in CLEW'd In Issue 8 December 2015 2 New Zealand Meat Workers & Related Trades Union Inc, and Roberta Kerewai Ratu and Others v AFFCO New Zealand Limited [2015) EmpC 219 3 New Zealand Meat Workers & Related Trades Union Inc, and Roberta Kerewai Ratu and Others v AFFCO New Zealand Limited [2015) EmpC 233 4 Update 12 Feb: The decision delivered yesterday (Feb 11) was in favour of the union claims. The full decision will be considered in subsequent issues of CLEW'd IN.

Evidence was led by both parties before the court in the week commencing 25 January 2016 to allow the Court to consider the interpretation of the collective agreement on which the individual employment agreements offered to the locked out workers were based. The judgment will be considered in full in CLEW'd in when it is reported. Additional cases relating to this dispute remain outstanding, including an application from AFFCO for a declaration that bargaining is at an end. The Union has counter-claimed with an application for facilitation, and a subsequent application under s50J of the Employment Relations Act to fix the terms and conditions of a collective agreement between the parties. These actions are all adjourned sine die. AFFCO's counsel has also indicated that they will apply to the Court of Appeal for leave to appeal the judgment of 18 November 2015.
