IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 62
WRC 7/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INC Plaintiff
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing: 27 April 2010
(Heard at Wellington)

Appearances: Simon Mitchell, Counsel for Plaintiff
Graeme Malone, Counsel for Defendant

Judgment: 18 May 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

Nature of proceeding

[1] This is a challenge by the New Zealand Meat Workers and Related Trades Union Inc (the union) to the Employment Relations Authority's determination[1] that it is lawful for AFFCO New Zealand Limited (AFFCO) to engage new employees on terms and conditions of employment that include trial or probationary periods. The Authority found against the union's argument that such provisions were inconsistent with the relevant collective agreement and so are unlawful and invalid. This is not a case about the new legislative provisions for trial periods in employment under s 67A of the Employment Relations Act 2000 (the Act) as inserted by s 7 of the

[1] WA210/09, 24 December 2009.

Employment Relations Amendment Act 2008 and which took effect on 1 March 2009.

[2] Counsel advised that several AFFCO employees allege that they were dismissed unjustifiably and/or disadvantaged in their employment unjustifiably by their employer's reliance on the employer's so-called "trial" employment agreement. One of these cases has apparently been settled in mediation, but others are awaiting guidance from this judgment as to the lawfulness of the trial period and its implications.

[3] Although not dealt with expressly in evidence, counsel advised me that AFFCO has made it a condition of employment of any "new" employees in its meatworks that they are to be subject to this "trial" period. However, it is applied only to persons seeking employment who have not been employed by the company in the preceding season and whose employment was concluded by the season ending.

[4] The so-called "trial employment agreement" at issue is not an employment agreement within the terms of the legislation. Further, and as Mr Malone conceded readily, it is not correctly described as a "trial". Rather, it should be a probationary provision pursuant to s 67 of the Act although, for present purposes, there appears to be little difference in practice between those labels.

[5] The provision at the heart of the case is as follows:

> **TRIAL EMPLOYMENT AGREEMENT**
>
> **BETWEEN AFFCO NEW ZEALAND LIMITED** ("the Employer")
>
> **A N D** ("the Employee")
>
> This is to advise that the Employee's first thirty (30) days of employment is deemed to be a trial period. This trial period is to allow the Employee a settling-in time during which their suitability to work in the Meat Industry, their ability to fit in with other staff and their ability to perform the role that they have been engaged for can be assessed, so that the Employer can be satisfied that the Employee is suitable for appointment as a seasonal employee.
>
> During the 30 day trial period the Employee's further terms of employment will be according to the AFFCO/Meat Workers Collective Agreement.

> In assessing whether the Employee is likely to be a satisfactory appointment to the seasonal staff the Employer may take into account such matters as the Employer sees fit, irrespective of whether or not any such matter amounts to misconduct on the part of the Employee.
>
> Notwithstanding this trial period, the Employee is subject to the normal disciplinary process and any outcome therein.
>
> Any outstanding matters regarding the Employee's suitability for seasonal or casual employment that are not resolved by the completion of the trial period may become grounds for termination at the Employer's discretion.
>
> The Employee acknowledges that during the trial period the availability or configuration of work may alter and necessitate a review of the possibility to continue employment at the Employer's sole discretion.

[6] The parties presented the Court with an agreed statement of relevant facts which may be summarised as follows. The majority of employees at AFFCO's Wairoa plant (one of the company's several North Island meat works) are members of the union. What is known as a "core" collective agreement between AFFCO and the union sets "core" terms and conditions of employment of meatworkers at all AFFCO plants. Individual plants have "plant" agreements sitting below and subject to the core agreement and there is also a further subspecies of departmental agreements at individual plants. The core collective agreement makes no express provision for, or otherwise in relation to, trial or probationary periods of employment. The core collective agreement contains clauses that are relevant to the issues in this case relating to security of employment (cl 28), seniority (cl 29), personal conduct (cl 31), warnings (cl 32), and dismissals (cl 33).

[7] From the commencement of the 2009/2010 season, new employees (as defined above) accepted AFFCO's offers of employment by signing a letter that confirmed that for the first 30 days of their employment they were to be employed under a probationary arrangement.

[8] The legislation provides that, as here, where there is an applicable collective agreement covering the work to be performed by new employees who are not members of a union, their terms and conditions of employment are on an individual employment agreement for the first 30 days. This comprises the terms and conditions in the collective agreement, together with such additional terms and

conditions as may be mutually agreed and as are not inconsistent with the terms and conditions of the collective agreement: see s 63(1) of the Act.

What are "probation arrangements"?

[9] There is no legislative definition of a probationary arrangement in employment. Section 67 of the Act provides for employment agreements to contain probationary arrangements but unlike, for example, s 67A in which there is a definition of "trial periods", there is none for probationary arrangements.

[10] No New Zealand judgment appears to have defined the nature and purpose of a probationary arrangement in employment. Rather, those judgments attempt to focus on the effects or consequences of having such a provision in the context of a termination of employment either during the course of or at the end of a probationary period.

[11] The Department of Labour's website fact sheet on the topic (www.ers.dol.govt.nz/factsheets/guide-to-probation-periods.html) states the following in relation to a probationary employee:

> … a permanent employee who is yet to be confirmed in their position and the probation period provides time for this to occur.
>
> A probation period provides time for the employee to show that they are suitable for the position.

[12] While that definition appears to contain some elements of a probationary period's nature and purpose, it also omits some. It is a period that enables the employer to assess an employee's competence and suitability for a position at a time when such an assessment is able to be made and after an appropriate period for training, guidance and, if necessary, modification or improvement by the employee. It takes account of the reality that in some situations a new employee's ability to perform a job and general suitability in that employment cannot be assessed sufficiently before its commencement. The existence of an agreed probationary arrangement also acknowledges on the part of both parties that employment may be terminated at the end of the probationary period if, assessed fairly and reasonably by the employer, the employee is incapable of performing the work or is otherwise

unsuited to the employment. A probationary period is one of some uncertainty as opposed to a greater level of certainty in employment after its expiry and as opposed to employment in which there is no probationary period. Termination of the employment at the end of the probationary period is a possibility upon which the parties agree and acknowledge from the outset.

[13] The case law establishes that requirements of procedural fairness and reasonableness leading to dismissal at the end of a probationary period may be less rigorous than in cases of employment of indefinite duration. That was affirmed, for example, in the judgment of this Court in *Slater (t/a Carpet North) v Smith.*[2] That case had followed an earlier judgment in *Otago Hotel, Hospital, Restaurant and Related Trades Employees' IUOW v Skyline Enterprises Ltd t/a Leisure Lodge Motor Inn.*[3] In *Smith*, the probationary period agreed to was defined in the context of that case as follows:

> Mr Smith and his work would be assessed during and at the conclusion of that period. They intended that if it was regarded as unsatisfactory at the end of the time or it was otherwise open to be terminated for cause during the period, this would be the employer's decision and might occur at that time. But it cannot be implied into the employment contract that such a decision might be made by the employer by exercise of a completely unfettered discretion or arbitrarily in abrogation of even the most basic entitlements of fairness, objectivity, and reasonableness.

[14] The leading case on probationary arrangements under s 67 of the Act is the judgment of the Court of Appeal in *Nelson Air Ltd v New Zealand Airline Pilots Association.*[4] At p669 the Court of Appeal said:

> Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out shortcomings to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will fie a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end.

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[2] [1994] 1 ERNZ 869.
[3] [1985] ACJ 449.
[4] [1994] 2 ERNZ 665.

[15] Probationary periods were also dealt with in the later case of *Greens Industries Ltd v Barton.*[5] There, an employee was found to have been dismissed justifiably after an assessment of performance that took place one week before the end of a six week probationary period. The Court found that dismissals of such employees:

> … are treated differently from dismissals of employees for performance reasons from employment of indefinite duration … That is because the parties to the contract have expressly agreed, and contemplate, that they will review the progress of the employment at the conclusion of a specified period.

[16] As already noted from the judgment of the Court of Appeal in *Air Nelson*, probationary periods also impose obligations upon the employer to supervise and review the performance of probationary employees (*Battin v Western Bay Health Ltd*[6]). Inherent also in the concept is to be an opportunity for correction or improvement of conduct or performance or behaviour by the employee: *Schofield Airport Gateway Hotel Ltd v Clarke.*[7] It is also an expectation that where a probationary period passes without adverse comment or other similar outcome, an employee is regarded as thereafter on employment of indefinite duration or what is sometimes called "permanent employment": *Pegram v Heritage Productions Ltd* .[8]

Decision

[17] It is necessary to deal first with some preliminary and fundamental arguments advanced by the defendant. Mr Malone submitted that the plaintiff's case must be categorised as one of implied prohibition of probationary arrangements because there is no such express provision in the collective agreement. Whilst the latter proposition is true, it does not follow that the only alternative position is one of implied contract.

[18] The test upon which the plaintiff's challenge relies is of compliance with s 63(2)(b) of the Act. It does not follow, therefore as Mr Malone contended, that as s

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[5] (2005) 7 NZELC 97,995.
[6] [1998] 1 ERNZ 462.
[7] [1998] 3 ERNZ 629.
[8] CA43/07, 12 April 2007.

67 of the Act permits expressly parties to agree to probationary arrangements, it is not possible in law for a collective agreement to prohibit such, whether expressly or certainly by implication. If s 67 had required all employment agreements to contain a probationary provision, counsel would be on stronger ground in arguing that a collective agreement could not negate this requirement, whether expressly or impliedly.

[19] But s 67 is permissive and not mandatory. It allows parties to agree upon probationary arrangements. However, in the case of new employees in employment covered by a collective agreement, such an arrangement (being for the first 30 days of employment an additional individual term or condition) cannot be inconsistent with the collective agreement.

[20] I do not agree, as Mr Malone submitted, that there would be a breach of s 54(3)(b), that is that the collective agreement contains something that is either contrary to law or inconsistent with the Act. It is not a matter of the collective agreement containing an implied provision prohibiting probationary provisions that is inconsistent with s 67 which permits them to be entered into, or is otherwise contrary to law.

[21] Next, Mr Malone argued that the terms of the core collective agreement could only be inconsistent with the probationary arrangements if the core collective agreement's references to forms of employment and their termination were "a code". By this I understood Mr Malone to say that if the collective agreement provided expressly, for example, that employment of employees would be as permanent full-timers and permanent part-timers, but not otherwise, this might constitute a code.

[22] This argument also misconstrues the position. The numerous cases addressing the validity of fixed term agreements relied on by counsel are not helpful in determining this case. The question here is not whether, on a proper construction, the collective agreement excludes, expressly or impliedly, certain employment arrangements. Rather, the test for inconsistency is whether the collective agreement makes provision for determining issues of competency and suitability in employment and the consequences of such assessments by the employer if new employees are

found to be incompetent, incompatible or otherwise unsuitable for employment at AFFCO's plants.

[23] Moving now to the appropriate analysis of the issues, counsel were agreed on the applicable tests of inconsistency under s 63(2) and its relevant predecessors. The judgments were recently collated and applied in another case of alleged inconsistency although concerning purported arrangements for fixed term employment, *Maritime Union of New Zealand Inc v Ports of Auckland Ltd.*[9] The Court in that case adopted and applied its earlier judgment in *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Energex Ltd*[10] which had in turn followed the authoritative judgment in the Court of Appeal in *NZ Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd.* [11] At pages 755-756 of *Energex* the Employment Court summarised the principles in the *Alliance* case which dealt with materially identical inconsistency prohibitions under earlier legislation as follows:

> - The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.
>
> - The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.
>
> - The definition of inconsistent is that in the Oxford English Dictionary.
>
>> "Not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous." (footnote omitted)
>
> - If the additional term is more favourable to the employee than the CEA(sic), there is usually no inconsistency.
>
> - Where there is a true inconsistency and where the two provisions cannot stand together, the CEA (sic) must prevail whether the result is perceived as favourable or unfavourable to the employee.

[24] Although Mr Malone was driven to argue, and did contend, that *Ports of Auckland* was decided incorrectly, I consider that the principles relied on from the earlier cases are correct and are not to be departed from in this. Whether they were

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[9] [2010] NZEMPC 32.
[10] [2006] ERNZ 749.
[11] (1990) ERNZ Sel Cas 834, [1991] 1 NZLR 143.

applied correctly in the *Ports of Auckland* case is another question but in any event affects another form of contended inconsistency altogether, fixed term agreements.

[25] Mr Malone's argument is that for there to be any consideration of inconsistency, the relevant terms of the collective agreement must first be valid themselves. I accept that proposition in theory.

[26] However, I do not agree that the terms relied on by Mr Mitchell and, most importantly, cl 28 b)[12] of the collective agreement, are unlawful. These provisions all deal with matters that are available to be addressed lawfully in a collective agreement. None is inconsistent with any provision of the Act or otherwise unlawful. To take the most pertinent example, cl 28 b) requires that work suitability and employee performance issues during employment are to be dealt with by a code that the parties have agreed upon. Although application of that code to performance and competence issues will require some necessary but minor alterations to deal with the different nature of the concerns, there is no unlawfulness in the parties having addressed those matters expressly as they have in the collective agreement. Such provisions are common, useful, and lawful contents of collective agreements.

[27] That being so, it is then a question of consistency or inconsistency between the two sets of provisions, one in the collective agreement and the other in the trial employment agreement.

[28] It is not a question of whether a probationary arrangement per se is inconsistent with the core collective agreement as the Authority appears to have approached the matter but, rather, whether AFFCO's specific probationary arrangements are inconsistent and therefore unlawful.

[29] The form of trial employment agreement is ambiguous and, in parts, not easy to understand. So it is necessary to interpret first what it is intended to allow the employer. I deal with the provision paragraph by paragraph.

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[12] Set out at para [46] of this judgment.

[30] For ease of reference I set out separately each paragraph of the trial employment agreement. The first is as follows:

> This is to advise that the Employee's first thirty (30) days of employment is deemed to be a trial period. This trial period is to allow the Employee a settling-in time during which their suitability to work in the Meat Industry, their ability to fit in with other staff and their ability to perform the role that they have been engaged for can be assessed, so that the Employer can be satisfied that the Employee is suitable for appointment as a seasonal employee.

[31] Although not determinative of lawfulness, to avoid confusion with the separate and distinct provisions of s 67A of the Act in which probationary arrangements are referred to as "trial" periods, the name of the period should probably be "probationary" to follow the statutory provisions under s 67 which Mr Malone accepted were those applicable to it. The remainder of the first paragraph is unexceptional. Its references to the purposes of the probationary period accord generally with those that the courts have said are the proper purposes of probationary arrangements. These include from the judgment of the Court of Appeal in *Nelson Air Ltd v NZALPA*[13] set out earlier in the judgment.

[32] Nor is there any objectionable feature in the second paragraph. This provides:

> During the 30 day trial period the Employee's further terms of employment will be according to the AFFCO/Meat Workers Collective Agreement.

[33] It reiterates, albeit more simply, the statutory provision that the same period of the first 30 days of employment will be on the terms and conditions contained in the collective agreement.

[34] The third paragraph would need at least some modification and explanation. It provides:

> In assessing whether the Employee is likely to be a satisfactory appointment to the seasonal staff the Employer may take into account such matters as the Employer sees fit, irrespective of whether or not any such matter amounts to misconduct on the part of the Employee.

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[13] [1994] 2 ERNZ 665, 669.

[35] To the extent that it purports to allow the employer, in its assessment of the employee, to "take into account such matters as the Employer sees fit, irrespective of whether or not any such matter amounts to misconduct on the part of the Employee", it cannot be right. AFFCO must act fairly, reasonably, and in good faith towards the employee in doing so. The employer cannot take into account irrelevant considerations and must take into account relevant ones. Whilst it is correct that these considerations need not be restricted to instances of misconduct, the employer will need to take account of the statutory entitlement of the employee to bring a personal grievance alleging either unjustified disadvantage in employment or unjustified dismissal from employment. In such circumstances the employer will have to satisfy the s 103A tests, that is in summary that it acted as a fair and reasonable employer would have acted in all the relevant circumstances.

[36] The fourth paragraph is unobjectionable. It provides:

> Notwithstanding this trial period, the Employee is subject to the normal disciplinary process and any outcome therein.

[37] If there is misconduct, serious misconduct, or other act or omission on behalf of the employee during the probationary period, the employee is not immune thereby from the collective agreement's or other fair and reasonable provisions for dealing with such situations.

[38] The penultimate paragraph is problematic. It provides:

> Any outstanding matters regarding the Employee's suitability for seasonal or casual employment that are not resolved by the completion of the trial period may become grounds for termination at the Employer's discretion.

[39] I interpret it to mean that even if an employee's employment is not terminated or otherwise affected adversely at the completion of the 30 day probationary period as a result of suitability issues that have arisen during the period, the employer reserves to itself the discretion to terminate employment subsequently. If that is so, the employer would have to establish fair and reasonable grounds for not having attended to the issue during the 30 day probationary period which is the object or scheme of the provision. In such circumstances, the employer would still nevertheless have to justify dismissal or disadvantage in employment pursuant to s

103A. In those circumstances it is difficult to see how the employer may be entitled to benefit by recourse to its "discretion". In any event, the termination of employment of an employee after the expiry of the initial 30 day period in reliance on events which occurred within that period, will be for assessment under the s 103A tests.

[40] Finally, the trial employment agreement concludes:

> The Employee acknowledges that during the trial period the availability or configuration of work may alter and necessitate a review of the possibility to continue employment at the Employer's sole discretion.

[41] If (as I consider it does) the last paragraph refers to circumstances of redundancy as these are defined under the collective agreement, then that document's provisions will apply to those circumstances. To that extent, the reference to "at the Employer's sole discretion" cannot relieve the employer of the obligations of fair and reasonable treatment of an employee both under the collective agreement and pursuant to s 103A. If, as appears likely, the last sentence's intention is to permit the employer to dismiss employees who are on probation without recourse to the statutory or collective agreement's protections in these circumstances, then the provision is ineffectual and indeed unlawful.

[42] I turn now to the collective agreement.

[43] There are a number of relevant provisions in the collective agreement which expired on 31 December 2009 but remains in effect statutorily because there are current collective negotiations for its replacement. The first of these is cl 31 entitled "Personal Conduct". This sets out "Rules for Personal Conduct" to "maintain an acceptable level of conduct throughout the site in the interest of all workers and supervisory staff and the orderly operation of the site." The clause sets out "[e]xamples of offences which would normally warrant dismissal …" and "[e]xamples of offences which would normally incur a warning in respect of an offence, if the supervisor decides formal disciplinary action is required." Although most of the examples of so-called "offences" in both categories are not the same as the considerations for assessment by the employer during a probationary period, some others may fall into that category. For example, a "warning offence" under cl

31(c)(iii) is "substandard workmanship [that] places unnecessary burdens on others and can place an export licence at risk." Likewise is "an unsatisfactory trend in attendance for reasons that may include repeated sickness and injury."

[44] The next provision of the collective agreement relied on by Mr Mitchell for the union is cl 32 ("Warnings"). This sets out a code for dealing with "offences outside those that would result in summary dismissal" and provides for "a warning procedure prior to being dismissed." Such warnings must be given in the presence of a delegate or deputy delegate or shed official and the worker concerned and the time, date, reason, and nature of the warning recorded by the supervisor. The clause provides for three stages of warnings culminating in a stage 3 official final written warning. Warnings lapse after certain specified periods applicable to them. The clause also provides that final warnings must be given to employees in the presence of the union's plant official or his or her nominated representative if not available.

[45] The next provision relied on by the union is cl 33 ("Dismissals"). This provides a methodological code for the employer and employees to follow if an event or other incident may result in suspension or dismissal. Its requirements include advice to union officials, the presence of a union official with the employee concerned, and the requirement to create a record of the time, date, and reasons for a suspension or dismissal. It also makes provision for suspension on full pay in certain circumstances. The clause requires the company to keep records of dismissals, suspensions, and current warnings, and for this to be available to the union on request. The clause provides for the consideration of a lesser sanction than dismissal or suspension by agreement between the employer, the union and the employee concerned.

[46] Finally, out of chronological order but, in my view, most significantly, is cl 28 of the collective agreement. It is the first provision in the agreement's "Section 6: Terms of Employment" and provides:

> **28. SECURITY OF EMPLOYMENT**
>
> a) The Company acknowledges the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required.

> b) When engaging workers at the commencement of each season priority shall be given to the employment of those workers who have been competent and satisfactory workers at that particular site during the previous season and who are ready, willing and able to commence work when required. Incompetent and or unsatisfactory workers shall be dealt with through the disciplinary procedures laid down in clauses 32, 33 and 34.
>
> c) The parties acknowledge the difficulties of accurately predicting livestock flow throughout the season and the consequential effects on production planning. Notwithstanding this, the Company shall provide seven-calendar days notice of any seasonal lay-off. Such notice to be given no later than 10 am on the first day of the period.

[47] The subject matter of cl 28 is generally "security of employment". Clause 28 b) sets out a form of priority of engagement of meatworkers at the start of each season. Employees who have been competent and satisfactory workers at the site during the previous season and who are willing and able to commence work when required, get priority. Although not stated expressly, it is clear that the priority is over those who do not meet those criteria. Counsel told me that within the class given express priority in cl 28 b), there are further priority rankings dependent on seniority at a particular works and sometimes within a particular department.

[48] It is the second sentence in cl 28 b) (underlined above for emphasis) which gives the union its strongest argument of inconsistency with the probationary arrangements. This provides: "Incompetent or unsatisfactory workers shall be dealt with through the disciplinary procedures laid down in clauses 32, 33 and 34."

[49] The union's case is that this methodology of dealing with competency and satisfaction imposes obligations on the parties to the collective agreement and employees to deal with issues as they arise during a season. That is rather than allowing the employer to address such issues more effectually, albeit perhaps belatedly, by simply not hiring meatworkers whom it regards as either incompetent or unsatisfactory at the start of the following season. I agree with that interpretation.

[50] It follows that cl 28 b) imposes an obligation on the company to deal with issues of alleged incompetence or other unsatisfactory working relationships by reference to the procedures laid down in cls 32, 33 and 34. There is no constraint on the temporal scope of cl 28 b). It applies at all times that the collective agreement

applies to the employment of union members. That will include during the first 30 days of employment and, if an employee remains or becomes a member of the union, also thereafter.

[51] Addressing the plaintiff's argument of inconsistency between cl 28 b) of the collective agreement and the trial employment agreement, Mr Malone argued that probationary employment is not inconsistent with the collective agreement's provisions. Counsel submitted that cl 28 b) addresses and recognises workforce security, but in the context of engagement priorities at the start of each meat season. As a matter of collective agreement interpretation, I do not agree that this is the extent of the protections in cl 28 b). On its clear words, it extends the acknowledged priority of the engagement provisions to encompass also general work competence and suitability of employees throughout their employment.

[52] Mr Malone's next argument was that the trial employment agreement can nevertheless sit alongside cl 28 b) without conflict because cl 29 of the collective agreement recognises that seniority can be broken where an employee is discharged from employment. Mr Malone submitted that if the union and the employer had agreed that the probationary arrangement be included in the core collective agreement, it and cls 28 and 29 could have co-existed without internal inconsistency.

[53] I do not agree with that submission. Indeed, the contrast would have been starkly contradictory. The position is even weaker for the defendant because the parties to the collective agreement did not agree upon such a provision so that its unilateral imposition by the employer must pass the consistency/inconsistency test if it is to be lawful. It is not then a matter of the Court attempting to interpret what the parties have agreed if Mr Malone's hypothetical inclusion of both provisions in the collective agreement had been tenable.

[54] So is the probationary arrangement inconsistent with cl 28 b) of the collective agreement? The probationary provision addresses issues of competence of a new employee and suitability for continued employment by AFFCO. Those are, in essence, the same matters addressed in cl 28 b) by the adjectives "[i]ncompetent" and "unsatisfactory" describing "workers". The collective agreement requires that

such issues be dealt with by the collective agreement's disciplinary processes in cls 32, 33 and 34. As already noted, these mandate a process of progressive warnings and leading, in some cases, to dismissal. There is no restriction in the collective agreement on the time at which cl 28 b) operates in relation to an employee's employment or in relation to the season. It follows that cl 28 b) operates at all times whilst employees are employed at AFFCO's plants.

[55] The provisions of the trial employment agreement are inimical to cl 28 b) and so are inconsistent with the collective agreement, at least so far as the paragraphs of the trial employment agreement purport to modify the collective agreement's express provisions and/or the statutory provisions under s 67 of the Act and/or the statutory personal grievance rights available to employees under Part 9 of the Act.

[56] The plaintiff's challenge to the Authority's determination succeeds and it is set aside. AFFCO's so-called trial employment agreement is unlawful.

[57] Costs on this challenge are reserved for consideration by the parties themselves in the first instance but, if they cannot agree, by memorandum to be filed and served by the plaintiff within two calendar months of the date of this judgment with the defendant having the period of one month within which to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 9 am on Tuesday 18 May 2010