IN THE COURT OF APPEAL OF NEW ZEALAND

CA576/2011
[2011] NZCA 609

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

Hearing: 29 November 2011

Court: Arnold, Randerson and Stevens JJ

Counsel: S Mitchell for Applicant
M J Hammond and R Webster for Respondent

Judgment: 2 December 2011 at 2:30 PM

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs to the respondent as for a standard application on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] The applicant Union seeks leave under s 214 of the Employment Relations Act 2000 (the Act) to appeal against a decision of the Employment Court given on 15 August 2011 by Judge Ford.[1] The judgment arose from a dispute between the

[1] *NZ Meat Workers Union v AFFCO NZ Ltd* [2011] NZEmpC 106.

Union and the respondent (AFFCO) as to the terms and conditions of employment for beef process workers at AFFCO's Wairoa plant.

[2] The brief facts are that the Union and AFFCO are parties to a Core Collective Agreement which requires that site agreements be entered into on a site-specific basis at AFFCO works. The Core Agreement specifies terms and conditions of employment common to all workers employed by AFFCO, while the site agreements cover rates of pay and conditions of employment specific to each site.[2] The Judge found that some site agreements in the industry are in writing but this has never been the case at the Wairoa plant. We note, however, that the Core Agreement clearly contemplates that site agreements are collective employment agreements which must be in writing if they are to be effective. Similarly, while a site agreement remains in force, the Core Agreement provides that it may be varied in writing.

[3] As a result of major reconstruction and modernisation of AFFCO's beef processing plant at Wairoa, a written agreement described as a Trial Agreement was entered into between the Union and AFFCO for the 2007/2008 season. The Trial Agreement provided that it would expire on 1 February 2008. Shortly afterwards, AFFCO notified the Union that the trial period had ended but the company continued to pay workers on the basis provided for in the Trial Agreement while it endeavoured to negotiate a new site agreement with the Union.

[4] In April 2008, a dispute arose between the Union and AFFCO about pay rates which resulted in the Union bringing proceedings before the Employment Relations Authority seeking a compliance order. The proceedings were removed to the Employment Court for a ruling upon the status of the Trial Agreement. A Full Court was convened and subsequently ruled that the Trial Agreement was a collective employment agreement within the meaning of s 5 of the Act.[3] Applying s 61(2) of the Act, the Full Court found that, notwithstanding the expiry of the Trial Agreement, its terms continued in force as terms of the individual employment agreements of the employees to whom it applied, until such time as any such agreements were varied

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2 Clause 6 of the Core Agreement.

3 *NZ Meat Workers and Related Trades Union Inc v AFFCO (NZ) Ltd* WC 14/09 and WRC 20/08, 10 June 2009.

or superseded by agreement between AFFCO and the employees concerned. There is no challenge to the Full Court's findings in that respect.

[5] Despite extensive negotiations between representatives of the Union and AFFCO in relation to the 2008/2009 season, no agreement was reached on the terms for a new site agreement. After an exchange of emails between the representatives on each side and a staff meeting on 3 November 2008 (which we discuss below) the workers commenced work as agreed between the Union and AFFCO representatives. The affected workers later agreed to reduce the daily tally from 300 to 200, but a new site agreement was not agreed.

The Judge's decision

[6] The issue before Judge Ford was whether the terms and conditions of employment of the beef processing workers at the Wairoa plant under the Trial Agreement for the 2007/2008 season remained in force. It was submitted on behalf of the Union that there was no clear evidence of any agreement to vary the individual employment agreements. In those circumstances, it was submitted that the terms and conditions of the Trial Agreement remained in force as individual employment agreements by virtue of s 61(2). AFFCO's position was that the terms of employment contained in the Trial Agreement expired at the end of the 2007/2008 season and that new terms were negotiated and agreed when the plant re-opened on 3 November 2008 for the following season.

[7] Judge Ford accepted AFFCO's submissions. He traversed the evidence relating to the negotiations which showed that AFFCO had made it clear it was not prepared to begin the new season on the basis of the Trial Agreement and was insisting that new terms be agreed. A number of draft site agreements were discussed between AFFCO and the Union with a view to reaching agreement. However, no agreement had been reached by 30 October 2008 and the workers were anxious to commence work for the new season. An exchange of emails between the Union and company representatives occurred that day. The essence of the email exchange was an agreement that work would commence on the basis of the latest

draft agreement with the parties agreeing to work together to have a final written agreement in place within a month.

[8] A staff meeting took place on 3 November 2008. Although the evidence was not entirely clear, the Judge found that the great majority (perhaps 85 per cent) of the plant's 87 member work force was present at the meeting. The Judge accepted the evidence of a former union negotiator that, while the workers still wished to try to negotiate better terms, they were content to start the season on the basis agreed in the email exchange. The Judge also accepted the evidence of this witness that the workers knew that AFFCO was not going to re-open the beef plant until it had an acceptable agreement and that it was not offering employment on the terms of the Trial Agreement. The witness said it was agreed by those present at the meeting that they would commence work on the terms offered by the company on the basis that the Union and AFFCO would later negotiate a collective employment agreement.

[9] The Judge was satisfied on the evidence that the Union and AFFCO representatives had "negotiated a site agreement to allow for the return to work for the 2008/2009 season". He went on to find:

> [46] I accept [counsel's] submissions that the workers at the meeting on 3 November 2008 knew the relevant terms and conditions as had been agreed between [the Union and AFFCO representatives] and they all agreed to return to work under those terms. Admittedly, there was no self contained written and signed site agreement in place but, unfortunately, that had been the norm for the Wairoa plant. Since 3 November 2008, the plant has operated under the terms and provisions of the draft agreement and subsequently the 200 tally agreement. In terms of the findings of the full Court, the provisions of the trial agreement that had carried over as terms of individual employment agreements were varied and superseded by the site agreement negotiated between [the Union and AFFCO representatives]. There is no question of that agreement being inconsistent with the core agreement. On the contrary, it was a site agreement specifically authorised under the core agreement.

Submissions

[10] Mr Mitchell submitted there were important questions of law arising from Judge Ford's decision for which leave to appeal ought to be granted. He accepted that individual employment agreements could be made and varied orally but he submitted that acceptance of new or varied employment terms must be clear and

unequivocal, relying on the decision of the Employment Court in *IH Wedding & Sons Limited v Henry*[4] and the subsequent decision of this Court declining leave to appeal.[5]

[11] Mr Mitchell submitted that the calling of the staff meeting was not consistent with clear and unequivocal acceptances by each worker of varied terms of their individual employment agreements for the purposes of s 61(2) of the Act. Rather, he submitted, the evidence was consistent with efforts to agree upon a collective agreement which would have no effect unless in writing (s 54(1) of the Act). Even if, contrary to his submission, the individuals present at the meeting who signified their assent could be regarded as having agreed to a variation of the terms of their individual employment agreements, that conclusion was not open to workers who were not present at the meeting. Nor, Mr Mitchell submitted, could the consent of individual workers be implied by their conduct in returning to work since they were bound by the terms of the Core Agreement to commence work if called upon by the employer.

[12] While acknowledging that the facts of the case were unusual, Mr Mitchell submitted that the issues nevertheless raised questions of law which would be of importance more generally in the employment context. He submitted that seasonal workers were in a vulnerable position and there should be clarity as to the circumstances in which variations of individual employment agreements may occur.

[13] For AFFCO, Mr Hammond submitted that the case did not disclose any questions of law. Rather, the impugned decision rested purely on factual conclusions the Judge reached on the evidence. There was, he submitted, no question of law which, by reason of its general public importance or for any other reason, ought to be submitted to this Court for decision.[6]

[14] Mr Hammond also submitted that the issues involved the construction of the terms of the employment agreements and, as such, this Court did not have jurisdiction to consider the issue under s 214(1) of the Act. He accepted in

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4 *IH Wedding & Sons Ltd v Henry* [1998] 1 ERNZ 649.
5 *IH Wedding & Sons Ltd v Henry* [1998] 2 ERNZ 156.
6 Employment Relations Act 2000, s 214(3).

argument, however, that this submission was probably not determinative in this case which is a dispute over the applicable terms and conditions of employment rather than an issue about their construction.

Discussion

[15] We accept Mr Mitchell's submission that there is a degree of confusion about the approach the Judge adopted. While it may have been open for the Judge to find on the facts that individual workers did assent to the new employment terms offered by AFFCO as varying or superseding the terms and conditions of their individual agreements, he appears to have approached the matter on the basis that the terms of individual agreements were varied and superseded by a site agreement negotiated between the Union and AFFCO representatives. On that approach, a written agreement would be required before a collective employment agreement of that nature could have had any effect.

[16] However, while it may be arguable that the Judge erred in law in that respect, we do not consider that the issue is of sufficient general or public importance to warrant the grant of leave to appeal or that there is any other valid reason for doing so in the unusual and fact-specific circumstances of this case. This case is unusual because at the time of the negotiations in 2008 the Employment Court had not delivered its decision on the status of the Trial Agreement and its implications. Accordingly AFFCO and the Union were negotiating against a background of some uncertainty. Despite that, both were attempting to find a basis on which the plant could re-open. The Judge found that all those present at the meeting had agreed to work under the new terms and did in fact do so. We are satisfied that such a finding was open on the evidence.

[17] The same can be said of those employees who were not present at the meeting but who nevertheless commenced work under the new terms. In that respect, we accept Mr Hammond's submission that all the workers were aware, as the Judge found, that AFFCO was not prepared to offer employment on the basis of the terms of the Trial Agreement. It follows that the affected employees could not have understood the terms of the Trial Agreement were to continue and that their

commencement of work could only be consistent with their acceptance of the new terms offered, subject to a new site agreement to be negotiated in due course.

Result

[18] For the reasons given, the application for leave to appeal is dismissed. The applicant must pay costs to the respondent as for a standard application on a band A basis with usual disbursements.

Solicitors:
Oakley Moran, Wellington for Applicant
Tompkins Wake, Hamilton for Respondent