IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 106
WRC 44/10

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

Hearing: 10 May 2011
11 May 2011
(Heard at Wairoa)

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

Judgment: 15 August 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff union, which represents meat workers employed at the AFFCO Meat Processing Plant at Wairoa, seeks a declaration to the effect that the terms and conditions of employment for beef process workers at the Wairoa plant remain the conditions in place at the conclusion of the 2007/2008 season, namely, those prescribed in an agreement dated 23 November 2007 intituled "AFFCO Wairoa agreement re: Beef Boning and Beef slaughter departmental trials November 2007" (the trial agreement).

[2] AFFCO does not specifically refer to the trial agreement in its statement of defence but its case, as presented in submissions by its counsel, Mr Malone, was that

the terms and conditions contained in the trial agreement expired in July 2008 at the end of the 2007/2008 season and that new terms and conditions were negotiated and agreed to by the workers when the plant reopened for the 2008/2009 season on 3 November 2008.

[3] In its determination[1] dated 13 December 2010, the Employment Relations Authority (the Authority) upheld AFFCO's contention and dismissed the union's claim. In this Court, the union challenged the whole of the Authority's determination by way of a full hearing de novo.

[4] Some of the issues involved in the case have already been the subject of judicial consideration by the full Court in *NZ Meat Workers and Related Trades Union Inc v AFFCO (NZ) Ltd*,[2] (the full Court judgment) a judgment dated 10 June 2009. The case before the full Court related to the duration of the trial agreement. The trial, to which the trial agreement related, was expressed to operate until 1 February 2008 and AFFCO argued that the trial agreement came to an end on that date. The full Court, however, accepted the union's contention that the trial agreement was, in fact, a collective agreement for the purposes of the Employment Relations Act 2000 (the Act).[3] The Court went on to conclude that, in terms of s 61(2) of the Act, upon its expiry the terms of the trial agreement became terms of individual employment agreements of the employees who were bound by it and those terms remained effective and enforceable until they were varied by mutual agreement.[4]

[5] I will need to come back to the full Court judgment. But essentially the difference between the parties in the present challenge is that the union contends that the terms of the trial agreement have never been varied by mutual agreement (paragraphs 8 & 9 of statement of claim) whereas AFFCO maintain that they ceased to have any relevance when the season ended in July 2008 and new terms and conditions of employment operated for the 2008/2009 and 2009/2010 seasons.

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[1] WA 197/10.
[2] [2009] ERNZ 68.
[3] At [41].
[4] At [43].

Background

[6] In my judgment in *New Zealand Meat Workers Union of Aotearoa Inc v AFFCO New Zealand Ltd*,[5] I noted that one of the features of the meat industry in New Zealand is that plants operate on a seasonal basis. The duration of the season varies from plant to plant depending upon such factors as the availability of stock and seasonal climatic conditions. For the record, I again cite the passage I then quoted from the full Court judgment in *New Zealand Meat Workers' Union Inc v Alliance Group Ltd*:[6]

> [5] ... Most [meat works] operate for only part of each year. Different plants kill and process different products. The availability of stock, together with climatic, market-related and other factors determine the start and finish dates at each plant. The period for which a plant operates is known as the "season". The period when the plant is not operating is known as the "off-season".
>
> [6] Seasons rarely start and finish for all employees at the plant on the same dates. During the season, the volume of work available varies. The usual pattern is that it builds up to a peak and then tapers off towards the end of the season. Occasionally, production may cease altogether temporarily during a season. As the volume of work available increases and decreases, workers are progressively taken on or laid off.

[7] Wairoa is just one of some eight meat processing plants AFFCO operates on various sites throughout the North Island. The workers on each site, who are members of the union, are covered by a collective agreement under the Act between AFFCO and the union called the AFFCO New Zealand Core Employment Agreement (the core agreement). The core agreement specifies terms and conditions of employment which are common to all process workers employed by AFFCO. It also provides that a Site Employment Agreement shall be negotiated for each site covering rates of pay and conditions of employment specific to that site.

[8] The relevant provisions of the core agreement relating to site agreements have remained unchanged for many years and now appear in cl 6:

> 6. ...

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[5] [2011] NZEmpC 32 at [6].
[6] [2006] ERNZ 664.

b) The parties agree that the Employment Agreement structure must recognise that:

ii) There are some conditions of employment that are common for all process workers employed by the Company.

ii) Individual site circumstances do differ from one site to another. This includes geographical and stock catchment regions, proximity of competitor plants, and existing employment conditions.

iii) Individual sites need to adapt in different ways to achieve and maintain economic competitiveness in their region.

c) It is agreed that in addition to this Core Agreement, a Site Employment Agreement shall be negotiated for each Site listed in sub-Clause 1(a). Each Site Agreement shall cover rates of pay and conditions of employment specific to that site, but shall not cover any of the matters contained in this agreement unless expressly provided for in this Agreement.

d) Negotiation and administration of the Site Employment Agreements shall occur at the site level, and shall be performed by the local management and local union officials concerned, who shall also be given adequate discretionary authority to negotiate any variations to Site Agreements which may prove necessary during their currency. At the request of the local representatives, both the Company and Unions retain the ability to be represented at a more senior level.

[9] Some site agreements in the industry are in writing but the evidence was that over the years site agreements at Wairoa have never been in writing.

[10] Another feature of the industry which was not in dispute and has been recognised in a number of judicial decisions, most recently by the full Court in *New Zealand Meat Workers' Union Inc v Alliance Group Ltd*, is that when employees are laid off at the end of a season, their employment can be regarded as having been terminated and they are not employed by the company during the off-season.[7] Although the core agreement continues in effect and imposes obligations in terms of offering re-employment based on seniority,[8] a new employment relationship is entered into for each season.

[7] At [7].
[8] See *New Zealand Meat Workers Union of Aotearoa Inc v AFFCO New Zealand Ltd*.

The trial agreement

[11] During the off-season in 2007, AFFCO carried out major reconstruction and modernisation of its beef processing plant at Wairoa. The evidence was that after such major rebuilds, it is reasonably common practice in the industry to allow for a trial period of work during which the company will make up the workers' pay to ensure that they will not lose wages because of teething problems encountered with the new plant, equipment or procedures. The Court was told that the situation is usually covered by a "commissioning agreement" or "trial agreement".

[12] The usual basis of pay for the majority of process workers at the Wairoa site comprises two components, namely, a base hourly rate plus a carcass rate which is a payment for each carcass processed. The carcass rate is seen as an incentive to greater production and it is payable only if the workers achieve a particular carcass tally for the day. At the material time, the daily tally was 300 carcasses.

[13] To allow for the type of teething problems identified, which would mean that workers may not be able to achieve the daily tally of 300 carcasses, a trial agreement was negotiated. In this case, the agreement provided that, during the period 26 November 2007 to 1 February 2008, workers would be paid a straight hourly rate equivalent to what they would have earned on an hourly rate/carcass rate basis if the tally had been achieved.

[14] On 3 February 2008, 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 discussed and endeavoured to reach a new site agreement with the union.

The case before the full Court

[15] In April 2008, AFFCO discovered that an error had been made in calculating the hourly rates in the trial agreement and the workers had been receiving higher wages than their entitlement. The error related to payment for smoko breaks. In calculating a single hourly rate of pay for the purposes of the trial agreement, an additional payment had been included to cover smoko breaks whereas payment for

such breaks had already been provided for in the hourly rate/carcass rate basis of pay. AFFCO advised the union of the error in April and on 8 May 2008 the company advised staff that it would be correcting the error and paying correct rates as from 12 May 2008. The pay rates were then reduced by $50 a week. On 19 May 2008, the union brought proceedings in the Authority seeking a compliance order requiring AFFCO to comply with the pay rates specified in the trial agreement.[9]

[16] As noted above, after considering the relevant statutory provisions, the full Court concluded that the trial agreement had been a collective agreement and upon its expiry on 1 February 2008, it had continued in force by operation of s 61(2) of the Act with its terms becoming the terms of individual employment agreements of the employees who were bound by it. In a passage strongly relied upon by Mr Mitchell, counsel for the union, the full Court stated:

> [43] The effect of this provision [s 61(2)] in the context of this case is that the terms of the trial agreement became terms of the individual employment agreements of the employees who were bound by it. Those individual employment agreements can only be varied by mutual agreement and not unilaterally as AFFCO has purported to do. They remain effective and enforceable unless and until they are specifically varied by agreement or superseded by inconsistent provisions of a new applicable collective agreement.

[17] The date of the full Court judgment is significant. Mr Mitchell explained that at the conclusion of the taking of evidence on 27 August 2008, the full Court suggested to the parties that there be further negotiations for an agreement. The Court then heard submissions on 17 December 2008 reserving its decision and eventually issuing its judgment on 10 June 2009. AFFCO witnesses stated that it was not until after the release of the full Court decision, that the union raised the issue of the 2007 trial agreement claiming that, since the start up of the 2008/2009 season, the workers should have been paid on the hourly rate basis provided for in the trial agreement.

Negotiations for a return to work

[18] One of the principal witnesses for AFFCO was the company's Employment Relations Manager, Mr Graeme Cox. In his evidence, Mr Cox said:

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[9] Full Court judgment at [6].

> 15. The company was not prepared to restart the season on the basis of the 2007 trial agreement or put itself in the position again, where the union could claim that they thought the trial agreement was still continuing.
>
> 16. It was made clear to the union and delegates that the company would not restart the plant in 2008 2009 season under the terms contained in the trial agreement and required new terms to be agreed. The company's position ensured that, whatever the eventual outcome in respect of the 2007/2008 season, there could be no argument as to what terms applied for the 2008/2009 season.

[19] Following the hearing before the full Court in August 2008, various attempts had been made by AFFCO and the union to reach agreement as the Court had encouraged. A bargaining process agreement was entered into and there was a reference to mediation but, although a number of draft written agreements had been exchanged between the company and the union, the position as at the end of October 2008 was that no agreement had been reached and there had been no start-up of the beef plant. Describing the situation, Mr Cox said:

> 20. Despite attempts to negotiate a new agreement none was able to be reached and by late October beef staff had been out of work for some months and were very keen to restart.
>
> 21. As staff were keen to restart but we were not prepared to do so a compromise was suggested where staff would agree to come back on our proposed terms (these had been provided to staff via the union delegates...)

Mr Cox then proceeded to refer to the relevant documents.

[20] The first document Mr Cox identified was an unsigned agreement stamped on each page with the word "draft" which was headed "AFFCO Wairoa Beef Processing Agreement" (the draft agreement). The draft agreement produced has the number "10" pencilled in at the top. Mr Cox explained that he had written in the number 10 because that was the tenth draft which had been exchanged between AFFCO and the union in their negotiations. One of the organisers for the union, Mr Eric Mischefski, claimed that the numbering was wrong and the draft agreement should have been numbered "11". Nothing hinges on this point but this evidence shows the efforts that had been made to try to reach agreement on the issues. Page 15 of the draft agreement was the subject of intensive scrutiny in the course of the hearing. It comprised Appendix B – Manning Levels and Appendix C – Pay Rates. The pay

rates were shown as an hourly rate plus a carcass rate based on a daily tally of 300 carcasses.

[21] The next document referred to by Mr Cox was a one-page "Memorandum of Understanding" dated 17 October 2008 which had been produced by the company and discussed between the parties. Mr Cox explained the background to the main point covered in the memorandum which was related to make-ups. During the off-season in 2008, further upgrading work had been carried out at the plant and it was accepted that this work may affect the ability of the workers to operate at the intended chain speed. The union had argued that there should, therefore, be a period of make up pay. The company agreed with that proposition and the memorandum of understanding provided that for the first two weeks after the start-up (referred to as the bedding in period) the company would make up "full potential earnings for any losses as a result of stoppages [within] the Company control" and during the following two weeks such make-ups would be at the company's discretion.

[22] Mr Cox told the Court:

> 22. The very point of the memorandum was to avoid any doubt that make up pay would be on-going beyond a maximum of four weeks and that even after two weeks make up pay would be at our discretion.

[23] The next document produced by Mr Cox was a one page exchange of emails between himself and Mr Mischefski. The emails figured prominently at the hearing and I will set them out in full. They are both dated Thursday, 30 October 2008. Mr Cox's email stated:

> **Subject:** Wairoa restart
>
> Hi Eric
>
> This is to confirm our conversation this morning re the start up of the Beef at Wairoa with a target tally of 300 per day
>
> Inductions to be carried out Monday morning with actual kill commencing as soon as [practicable]. (depending on staff availability)
>
> Payments and mannings to be as per draft agreement,. with the operation being in accordance with the memorandum of understanding
>
> The parties agree to work together to have a signed final agreement in place [within] a month.

Please confirm your agreement

Regards
Graeme Cox

[24] Mr Mischefski's response reads as follows:

Subject: Re: Wairoa restart

Hello Graeme
Thank you for this confirmation of your intention to re start the Wairoa beef operation on Monday the 3rd of November despite your previous position of not starting until a signed CEA is in place. We regard this as a progressive step that will enable the parties to accurately assess the true potential of the operation prior to signing off on an agreed final document. I can confirm that, as per the memorandum of understanding, the first 4 weeks of the operation will be deemed to be a bedding in period with a daily target tally of 300 bodies. During this time we will be keen to try and conclude a final document for the beef operation. I can confirm my availability on plant on Monday to meet with our members and discuss the expectations of the parties during the bedding in period. We will also be available on Monday to meet with company representatives regarding the beef operation.
Eric

The staff meeting

[25] The evidence was that the beef workers were contacted by the company and requested to report for work on Monday, 3 November 2008. A union witness told the Court that upon any start-up there is an induction session involving discussions about compliance issues and, at the same time, workers are issued with their gear for the new season. On this occasion there was also a meeting about returning to work. There was a large turnout of workers. There was evidence that the total workforce in the beef plant at the time was approximately 87 employees. One witness put the number in attendance at the meeting as being in excess of 85 per cent of the workforce. Another estimated the number of attendees at 80. Mr Mischefski described the meeting as being:

> ...reasonably heated with a number of members of the Union having different opinions as to how the matter should be addressed. There was a keenness on the part of members to return to work. This was completely understandable after a period of four months when the plant had been closed for the off season.

[26] There were some conflicts in the witnesses' account of the meeting but two of the significant participants were Mr Dean Tucker and Mr Shane Hubbard.

Mr Tucker had been appointed manager of the Wairoa plant in June 2008. Prior to that he had been the plant manager at the Silver Fern plant at Dargaville. Mr Tucker told the Court that he attended the 3 November meeting and he spoke to the beef workers about the invitation to return to work. He had a copy of the draft agreement with him and he explained to the workers details of the manning and pay rates set out in the appendices on page 15 of that document. He also talked to them about the provisions in the memorandum of understanding relating to the four week make-up period.

[27] At the time of the meeting, Mr Hubbard was the union beef boning room delegate but at the time of the hearing before me, he had been promoted to a senior supervisor position at the Wairoa plant. He had been directly involved, on behalf of the union, in the mediation and the unsuccessful attempts between AFFCO and the union to finalise a new collective agreement. He said that the workers were all aware that the company was not going to reopen the beef plant until it had an acceptable agreement and that it was not offering the terms of the trial agreement for the 2008/2009 season. He continued in evidence:

> 7. By around mid October we, the delegates, were under pressure to reach agreement because staff had been off work for so long and wanted to restart.
>
> 8. Although we had a number of meetings and attended mediation we couldn't finalise a collective agreement but needed a compromise that would allow the beef plant to re-open. The compromise agreed to was that we would operate under the company's proposed terms but that we would have a maximum of four weeks make up pay before the stoppage clauses in the agreement applied and even though the agreement then applied could still negotiate to have the terms changed and the collective agreement entered into. The memorandum that Mr Cox has produced [the memorandum of understanding] sets out that agreement.
>
> 9. While staff still wanted to try and get better terms they were happy to start the season on that basis and knew that the old agreement would not apply.

[28] Mr Hubbard explained that when Mr Tucker spoke to the staff, he had made it clear that if they were prepared to return to work on the terms he had outlined then there was a job for them. Mr Hubbard said that after Mr Tucker had spoken to the workers there was a fairly heated discussion for 10 to 15 minutes and then he

(Mr Hubbard) recommended that the employees accept the company's offer and on a show of hands the workers agreed to return to work. Mr Hubbard told the Court:

> 13. ... I moved that we go back on the terms that Dean (the manager) had offered as there was nothing else out there. I said we should give it a go and leave it to the union and company to sort out a collective later. Alf Whatuira seconded the motion and people agreed to go back.

[29] In answer to a question from the Court, Mr Hubbard explained the factors that made him recommend acceptance of the company's offer:

> A. The pressure, you know I had people coming down to my house and telling me you know that you got loans for cars and you can't afford to pay your bills you know those sorts of things and then beating you out for six months and you got no money coming in and they haven't got any other job and then these people have to be really forced you know to stay out the gate because you got to wait for a Court case to determine whether you are still here or whatever, you know, and the thing is, and the other thing that really made me make the call is because of Wairoa. Wairoa needs that place. You know there's a lot of people here that you know, they haven't got anything else. You can't get jobs anywhere and the money they're getting here compared to what I used to get when I first started there is way better for what they are actually doing. We used to physically really work hard. Some of these people today have got real cruise numbers and that's the way things are but I believe for the future of Wairoa I think it was a good call on my behalf, it might not be, but I think certainly today a lot of those people over there are happy with their pays.

[30] In his evidence in relation to the meeting, Mr Mischefski said that in negotiations, there had been discussion about the company wanting to have a 300 carcass tally and the union had proposed a 275 tally which was not acceptable to the company. Mr Mischefski told the Court that in moving his motion that "we give it a go" or words to that effect, Mr Hubbard was referring to giving the 300 carcass tally a go. When that proposition was put to Mr Hubbard, however, he said that it was simply not true. He was not challenged about this denial.

[31] Two other witnesses for the union, Mr Harry Te Rangi and Ms Cheryl Te Amo, also indicated that the agreement was to return to work with a 300 tally but no other terms and conditions of employment were agreed to. Both witnesses told the Court that they considered that the terms and conditions of the trial agreement still applied.

[32] Mr Hubbard told the Court that there was no reference by anyone at the meeting to the trial agreement. Mr Cox confirmed that from November 2008 payments, tallies and manning have been in accordance with the draft agreement (based on a 300 carcass tally) and a subsequently varied site agreement (based on a 200 carcass tally) and not the 2007 trial agreement.

The 200 tally agreement

[33] To complete the narrative, I now refer briefly to the evidence given in relation to the subsequent site agreement referred to in the previous paragraph. I note that the core agreement at cl 6 d) expressly allows for variation of site agreements. Mr Tucker explained how it came about:

> 20. In around April 2009 it became apparent that stock numbers were not sufficient to keep the beef plant going on a 300 tally and so unless tally could change we would have to close the beef plant for the season. This would have resulted in a very short season for beef employees, which given the late start was a concern.
>
> 21. I discussed the matter with the delegates and to keep the season as long as possible, we agreed to reduce tally to 200 with a corresponding reduction in manning. I note that operating a 200 manning wasn't something that came out of the blue in that Darden (production manager) and I had had discussions with Eric and delegates in January about what would be required in terms of manning for a 200 tally when we had looked at the possibility of operating a night shift on that basis.
>
> 22. A 200 tally agreement was prepared reflecting the changes in tally, manning and rates.

[34] Mr Tucker said that in order to keep the 200 tally going AFFCO had to pull livestock in from other areas. He confirmed Mr Cox's evidence that since November 2008 the plant has operated on the draft agreement based on the 300 tally and the subsequent 200 tally agreement. Both agreements remain unsigned.

Submissions

[35] Against that background, Mr Mitchell invited the Court to conclude that there was no evidence that the 2007 trial agreement had been replaced and, therefore, it continued to bind the parties until a new agreement is reached. Mr Mitchell submitted that there was no evidence that a new collective agreement had been made

because that would have required ratification and the agreement would need to be signed. Mr Mitchell also submitted that there was no evidence that individual employment agreements had been entered into.

[36] Mr Mitchell accepted that individual agreements could be varied orally but he submitted that acceptance of new or varied employment terms must be clear and unequivocal. Reference was made to the decision of this Court in *I H Wedding & Sons Ltd v Henry*,[10] and the subsequent decision of the Court of Appeal in *I H Wedding & Sons Ltd v Henry*.[11] That case, decided under the Employment Contracts Act 1991, involved a claim for recovery of wages. The employee had been asked to sign a new contract but had declined. The employer started to pay him pursuant to the new contract. The employee made no protest and continued to work. When his contract ended, he sued for arrears of wages claiming that, in the absence of a new contract or agreed variation he remained employed under the terms and conditions of the award continuing on an individual contract of employment on those same terms following its expiry. The Employment Tribunal found for the employee and that finding was upheld on appeal by the Employment Court. Mr Mitchell referred expressly to the following passage from the judgment of Judge Colgan:[12]

> That is, nonetheless, the outcome of the philosophy and practice of the legislative regime and this case is illustrative of the need of employers to obtain sufficient certainty in those relationships and not to rely upon convenient assumptions.

[37] The Court of Appeal dismissed the appeal brought by the employer. It concluded that the appeal did not involve any point of law because underlying the issues raised was the factual finding made by the Employment Tribunal and then the Employment Court that the employee had not assented to the variation and thereby accepted the new contractual terms proposed by the employer.[13] In the Employment Court, Judge Colgan had noted that the employer had "at best, dubious acceptance by Mr Henry of altered terms and conditions of employment".[14]

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[10] [1998] 1 ERNZ 649.
[11] [1998] 2 ERNZ 156.
[12] At 656.
[13] At 158.
[14] At 652.

[38] Mr Mitchell went on to submit:

> 38. There is no suggestion of any individual assent by employees to the terms being proposed by the employer. At best the employer can rely on the motion put by Mr Hubbard, and employees returning to work. This is not sufficient to establish a variation to the terms of individual employment agreements.
>
> ...
>
> 41. To accept the position of the Defendant is to allow the employment agreements to be made by employer dictate, rather than by bargaining or agreement. This employer considers it should be able to dictate terms of employment. This Court must not mandate such an approach.

[39] Mr Malone submitted that the plaintiff faced an "insurmountable burden in seeking to obtain a compliance order" to enforce the terms of the 2007 trial agreement because to do so it would need to show that the company agreed to the terms of the trial agreement forming part of the employees' terms of employment for the 2008/2009 season and there was no evidence to this effect.

[40] Mr Malone's principal submission in relation to the trial agreement was that it ceased to have any effect in July 2008 at the end of the season and was "irrelevant" thereafter. In this regard, counsel relied on a passage from the judgment of Judge Palmer in *New Zealand Meat Workers Etc Union Inc v Richmond Ltd*[15] which concluded with the statement:[16]

> To the extent that such second tier agreements had in practice comprised part of the terms and conditions of particular meat-workers' contracts of employment with their particular industry employers, then they (the second tier agreements) comprised, I conclude, part of the employment contracts of affected workers which were terminated when the workers concerned were laid off in the 1991 off-season.

[41] I cannot tell from the judgment whether AFFCO made that same submission at the full Court hearing. But the difficulty for Mr Malone is that the full Court, which heard evidence in the case on 27 August 2008 is likely to have been aware that the season would have ended in July but, nevertheless, it went on to make a specific finding that the trial agreement continued in effect as terms of individual employment agreements "until they are specifically varied by agreement or

[15] [1992] 3 ERNZ 643.
[16] At 703.

superseded by inconsistent provisions of a new applicable collective agreement."[17] No mention is made in the judgment, however, of the usual end of season termination of employment.

Discussion

[42] In [8] above I set out the provisions of the core agreement relating to the creation of site agreements. The provisions are expansive and they allow considerable discretionary authority to local management and local union officials to negotiate rates of pay and other conditions of employment specific to a site. There is no requirement for site agreements to be in writing and, as I have noted, site agreements at Wairoa have never been in writing.

[43] In the build up to the commencement of the 2008/2009 season, AFFCO management and local union officials were engaged in extensive negotiations to try to reach a new agreement for the beef plant. The company's initial position was that it would not reopen the beef plant at all until a new signed agreement was in place. In the end, it was not possible to have a signed agreement but the company compromised and proposed a return to work on the basis set out in the exchange of emails between Mr Cox and Mr Mischefski set out in [23] and [24] above. Details of the proposed rates of pay, carcass tally and mannings were fully particularised in the appendix to the draft agreement and the company's proposal for make-up pay during the "bedding in period" and other issues relating to departmental cleaners, previous arrangements and alterations to manning levels were all spelt out in the memorandum of understanding.

[44] These were all matters which the core agreement contemplated could properly be the subject of a site agreement. They had been debated at length between the union and company representatives. One of the union delegates who gave evidence for the union said in cross-examination, "There was – because it was a whole new ball game there was discussions on everything". I am satisfied on the evidence that through the exchange of documentation referred to in the previous paragraph, Mr Cox on behalf of the company, and Mr Mischefski on behalf of the

[17] At [43].

union, negotiated a site agreement to allow for the return to work for the 2008/2009 season.

[45] In relation to the meeting on 3 November 2008, I accept the evidence of the AFFCO witnesses as to what transpired at that meeting and in relation to the events leading up to the meeting. Mr Mitchell, quite properly, reminded the Court of the fact that Mr Hubbard, who gave evidence on behalf of the company, had been the union negotiator and one of the union witnesses in the case before the full Court. For that reason, I paid particular attention to what he had to say and to his demeanour in the witness box. I am bound to say, however, that I found him to be a credible and convincing witness. I do not believe that he embellished any of his evidence as a result of his new position with the company. To the extent, therefore, that there are conflicts in the relevant evidence presented by the various witnesses, I prefer the evidence given on behalf of the company.

[46] I accept Mr Malone's submissions that the workers at the meeting on 3 November 2008 knew the relevant terms and conditions as had been agreed between Mr Cox and Mr Mischefski 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 Mr Cox and Mr Mischefski. 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.

[47] For these reasons, the union fails in its claim. The defendant is entitled to costs and if agreement cannot be reached on that issue then Mr Malone is invited to make further submissions within 21 days and Mr Mitchell will have a like time in which to respond.

A D Ford
Judge

Judgment signed at 9.30 am on 15 August 2011