IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC32
ARC 15/11

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND MEAT WORKERS UNION OF AOTEAROA INC Plaintiff
AND	AFFCO NEW ZEALAND LTD Defendant

Hearing: 16 March 2011
17 March 2011
(Heard at Auckland)

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

Judgment: 12 April 2011

JUDGMENT OF JUDGE A D FORD

The matter before the Court

[1] Section 178 of the Employment Relations Act 2000 (the Act) provides that where a matter comes before the Employment Relations Authority (the Authority), any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine.

[2] On 25 January 2011, the New Zealand Meat Workers Union of Aotearoa Inc. (the union) lodged a statement of problem with the Authority alleging that the defendant (AFFCO) was in breach of its obligations of good faith and certain provisions of its Core Collective Employment Agreement (the collective agreement) which is in force until 31 December 2011 and covers the terms and conditions of

employment common to all process workers employed by AFFCO. AFFCO in its statement in reply denied the allegations.

[3] In a determination dated 28 February 2011,[1] the Authority recorded that both parties had agreed that there was an important preliminary issue to be resolved and that related to the correct interpretation and application of a particular provision in the collective agreement, i.e. cl 30 which was referred to throughout the hearing as the "seniority clause". The union requested the Authority to remove this preliminary matter to the Court for determination pursuant to s 178 of the Act. AFFCO did not oppose the application. For its part, the Authority accepted that the interpretation of the seniority clause involved an important issue of law and it proceeded to make a formal order for removal. In brief, the issue is whether union members covered by the collective agreement are entitled to retain their seniority rights as against non-union employees engaged under individual employment agreements.

The order for removal

[4] For completeness I set out the order of the Authority in full:

> [12] In terms of section 178(2)(a) of the Act I order the removal of part of the matter before the Authority. The part to be removed being the dispute between the parties as to the application and interpretation of the "seniority" clause, clause 30, of the *AFFCO New Zealand Core Collective Agreement* and whether
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> (i) that clause requires seniority to be afforded to all employees or only to Union members;
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> (ii) that clause is complied with by AFFCO if it lays off and re-engages union members in accordance with the seniority of such members as between themselves; and
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> (iii) employees on individual employment agreements (IEA's) may be laid off and re-engaged in accordance with the different criteria applying to them under their employment agreements.

The seniority clause

[5] Again, for completeness, I set out the two relevant provisions of the collective agreement which were the focus of much of the evidence and submissions:

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[1] [2011] NZERA Auckland 75.

29. 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.

30. SENIORITY

a) All workers shall acquire and retain, as agreed at the site, seniority according to the date of the commencement of their employment.

b) Seniority will operate on a departmental and or site basis except where otherwise agreed.

c) Consistent with departmental needs and the individual's competency, lay-off and re-employment shall be based on departmental and/or site seniority.

d) A seniority list shall be prepared for each department and/or site and be made available to the delegate each season prior to the commencement of [the] seasonal lay-off.

e) At the commencement of each season a list of new workers shall be made available to the delegate.

f) The relative seniority standing of workers within the same department and/or site seniority shall be determined by the practice now in effect at each site.

    i) Seasonal management lay-off shall not break seniority rights.

    ii) Absence due to sickness or injury supported by a medical certificate shall not break seniority rights providing the worker has not been employed elsewhere during the period of absence unless so directed by the Company or the Accident Compensation Corporation.

g) Seniority shall be broken in the following circumstances:

i) Voluntary leaving or being discharged from employment.

ii) Failure to return to work from a lay-off after being notified by management and being given five working days notice as per the Company's customary procedure; in exceptional circumstances and upon the request of the delegate additional time to report shall not be unreasonably refused.

h) When a department or part of a department is closed down permanently, such workers, subject to suitability, shall on the basis of their existing seniority be offered vacancies in any other department. Seniority in their new department shall be determined within the practice at each site.

i) Any dispute regarding seniority shall be settled between the Company and the Union and if no agreement is reached shall be decided within the "disputes" clause of this agreement.

j) Any local agreements now applying at sites shall not be considered inconsistent with this clause.

The relevance of seniority

[6] AFFCO is a meat company which owns and operates a number of processing plants throughout the North Island. One of the features of the meat industry is that the 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. Although the case related to another meat company, the full Court in *New Zealand Meat Workers' Union Inc v Alliance Group Ltd*[2] described in some detail the practice which has historically been followed in the meat industry in relation to seasonal lay-offs and re-engagements. The Court's description is uncontroversial and mirrored the evidence given in the present case. The following passages are taken from the full Court judgment:

> [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".
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> [6] Seasons rarely start and finish for all employees at a 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

[2] [2006] ERNZ 664.

> season. As the volume of work available increases and decreases, workers are progressively taken on or laid off.

[7] In reference to seniority, the full Court in a subsequent passage stated:

> [12] One of the most important aspects of the employment of the plaintiff's members is what is known as the "seniority system". The manner in which this operates varies slightly from plant to plant. At the Mataura plant, seniority is determined across the whole plant. At other plants, seniority is determined within departments. Seniority lists are maintained which rank the workers in order of their initial start date in the department or, in the case of Mataura, their initial start date at the plant. These seniority lists determine the order in which workers are called in at the beginning of each season and the order in which they are laid off at the end of the season. The higher the seniority, the longer the season, and hence the greater an employee's earnings will be. As a general rule, work for the new season is offered to workers who worked at the plant in the previous season before it is offered to others. This seniority list is also sometimes used to determine who is offered off-season work.

[8] In the present case, both counsel agreed that a seniority system has been a feature of the meat industry for many years going back to the days of the old industrial awards. Mr Mitchell, counsel for the plaintiff, told the Court that his research revealed that, with some "slight changes", seniority has applied in the industry at least since 1968. Among the documents produced in evidence was a seniority list issued in April 2010 in respect of AFFCO's Horotiu meat processing plant, which was said to follow the typical format for seniority lists in other plants or departments. It comprises a six and a half page typed list of employees numbered one to 373. The list records the employee's name and number as well as his or her site seniority number and employment commencement date. Seniority is based on the employment commencement date. The individual holding the number one seniority position is recorded as Tahi Rota who commenced employment on 11 February 1963. The most junior ranked employee, holding position number 373, is Mark Holstein whose commencement date is shown as 23 April 2010. The evidence established that if several new employees commenced work on the same day, then they would each be given an interim seniority number which would be firmed up at a later date depending upon various factors which I do not need to go into. It may take up to four years before the advantages of seniority begin to have any significant practical effect.

[9] The evidence was that having high seniority on the list generally meant that the employee would have the advantage in a good season of having security of employment for perhaps 10 months of the year compared with a recent starter, with low seniority, who could expect to secure employment for only five to six months of the year. The *Alliance* case determined that meat workers who are laid off on a seasonal basis are not employed by the company during the off-season. It also accurately recorded that many of those on low seniority endeavour to obtain alternative employment during the off-season or take up the unemployment benefit.

[10] Against that background, it can be seen that historically the seniority system has always been regarded as a significant feature of employment in the meat industry. Mr Mitchell described it as being "something akin to the Holy Grail by union members".

The development in 2010

[11] In the latter half of 2010, AFFCO developed what Mr Graeme Cox, the group employee relations manager, described as "a generic individual employment agreement as a base for employees who are not members of the union and who would prefer to be on an individual agreement." Mr Cox explained the reasons behind this development but it is unnecessary for me to go into those details. Suffice to say that AFFCO claims that the seniority provisions in the collective agreement do not apply to employees employed under individual employment agreements (IEAs) and this is the essence of the dispute between the parties. The introduction of IEAs has led to employees covered by the collective agreement, who have seniority according to the seniority list, being laid off in preference to new employees engaged under IEAs.

[12] Mr Cox acknowledged that under s 62(2)(a)(v) of the Act, if work is covered by a collective agreement, then whenever a new employee is engaged under an IEA, the employer must inform the employee that during the first 30 days of employment, the employee's terms and conditions of employment are those comprised in the collective agreement. He said that AFFCO complies with that legislative requirement.

[13] The IEAs do not provide for seniority but instead, as Mr Malone expressed it, they "record that employment is seasonal and that as the number of employees reduces, AFFCO can select workers for lay-off based on its needs in terms of skills and also can take into account aptitude and attendance."

The contentions

[14] The defendant's position is that the provisions in the collective agreement do not apply to employees employed under IEAs but only to union members covered by the collective agreement. In other words, seniority determines the order of lay-offs and re-employment only as between union members covered by the collective agreement.

[15] The defendant also argues that its action in laying off employees with seniority while retaining newer employees engaged under IEAs is permitted under cl 30.c) of the collective agreement which permits the company to retain individuals out of seniority order to meet departmental needs.

[16] The plaintiff does not dispute that the collective agreement applies only to union members covered by the collective. The plaintiff accepts that AFFCO can contract with individuals who are not members of the union on terms and conditions satisfactory to them. Such terms and conditions may or may not include seniority provisions. What the plaintiff principally contends, however, is that the collective agreement guarantees the employees covered by the collective agreement a right to engagement at a site or in a particular department in accordance with their seniority. When it comes to lay-offs and re-engagements, those employees are entitled to retain their seniority ranking as against all other employees working at that site or in the particular department regardless of whether the other employees are covered by the collective agreement.

The evidence

[17] The point at issue between the parties can perhaps best be illustrated by reference to the evidence of Mr John Tierney. He lives in Whangarei and has been employed as a meat worker at AFFCO's Moerewa plant since 2004. He described himself as having "substantial seniority". Mr Tierney told the Court that he and his

partner have two children aged five and four and he is paying off a mortgage. In the past, because of his seniority, he had been laid off for only short periods of time and he had been able to get by on his savings and holiday pay. On 21 January 2011, Mr Tierney was laid off although the plant continued operating and in the past he would have expected to continue working. He said that his supervisor had asked him to train up a new worker as an "in-feed" operator, which the witness described as a technical position. He duly did so and the new worker was retained by the company when Mr Tierney was laid off in January. The new worker, who had been employed under an IEA, had commenced working for AFFCO on 15 November 2010. The manager of the Moerewa plant, Mr John McConnell, accepted that if Mr Tierney had agreed to leave the union and sign up under an IEA then he would not have been laid off in January.

[18] A similar situation arose in the case of another employee at the Moerewa meat processing plant, Mr Cedric Anania. Mr Anania described himself as a very experienced A-grade butcher with a very good attendance and disciplinary record at the plant, but he was laid off on 21 January 2011 whereas other employees who had left the union and signed up under IEAs were retained even though they had been employed for "very short periods, including a matter of weeks". At one point in his evidence Mr Anania said:

> 8. During the day on Thursday 20 January employees were going off the chain and meeting with the supervisor. When they came back they were saying that they would not now be laid off as they had signed individual agreements. These workers were not laid off, but [came] after me in the seniority.

[19] The defendant did not challenge this evidence. On the contrary, Mr Malone accepted that AFFCO had laid off longer serving members while retaining newer employees employed under IEAs but he submitted that such actions did not breach the collective agreement.

[20] Witnesses called on behalf of the defendant made it clear that they considered that employees on IEAs could be retained while those who were employed pursuant to the collective agreement with longer service and higher seniority could be laid off. Mr Cox accepted in cross-examination that under the company's approach, there was

a theoretical possibility that no employees covered by a collective agreement would be re-engaged and plants could operate entirely with IEA staff.

[21] Much of the evidence called on behalf of the defendant focused on exceptions to seniority. Mr McConnell, for example, stated:

> 10. I disagree that in the past lay-offs in the past have always followed strict seniority. As between union members length of service seniority does apply but it is not absolute and has not been universally applied even to Union employees for many years; those with specialist skills or with the need for training have been retained, as the company exercises its rights under clause 30(c) of the Core.

Submissions

[22] Dealing first with the point referred to in the previous paragraph regarding exceptions to seniority, Mr Mitchell in his submissions described the evidence relating to exceptions as "a red herring". He made the point that the plaintiff has always accepted that if a particular skill is required to operate the plant or a department and that skill is not available on a pure seniority basis then cl 30(c) of the collective agreement provides that an exception to the seniority system will apply. This submission was consistent with the evidence given on behalf of the plaintiff by Mr Michael Nahu, the president of the New Zealand Meat Workers Union.

[23] Mr Mitchell stressed that the plaintiff was not asking for anything new or for any entitlement that employees under the collective agreement did not have last season. What the plaintiff was asking for, counsel said, was simply a continuation of the same seniority rights that had existed at meat work plants for decades. Mr Mitchell submitted that there was nothing confidential in the seniority list because seniority is based on an employee's commencement date and there is nothing confidential about when an employee commences work at a plant or in a particular department.

[24] Mr Mitchell submitted that the plaintiff's approach to the interpretation of the seniority clause is not only consistent with the actual words used, but it is also a reasonable interpretation and it is consistent with the way in which the clause has been applied over the years. Counsel was critical of the defendant's approach to the interpretation of the clause. He submitted:

> 28. The Defendant contends that seniority rights only apply between Union members. This fails to recognise that it is a site seniority. It determines your place in the site, as compared to others in the site. Your number places you in the site – and determines your right of engagement.
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> 29. The whole purpose of seniority is to take out the guess work involved in lay-off and re-engagement, and to base it purely on length of service as the criteria. This is a longstanding practice in the industry. It provides a contractual right to work, based on your number.

[25] Mr Mitchell contended that the plaintiff's approach was recognised by this Court in *New Zealand Meat Workers etc Union Inc v Richmond Ltd*[3] in the *Alliance* case (supra) and in *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*.[4] Counsel referred to a particular passage in the *Richmond* decision where, in reference to the seniority provision of the award, Judge Palmer stated:[5]

> In short, particular employers were obliged, in engaging its seasonal work force, to sequentially re-employ, at the commencement of the season, their most senior employees through continued service, in the differing departments at the plant concerned, strictly in conformity with the seniority list/s which the employer was obliged to scrupulously maintain. This particular recurring obligation arising from employment seniority was, I accept, regarded as the cornerstone of re-employment precedence at the commencement of a killing season by meatworkers, their union and industry employers.

[26] Mr Malone did not cite any authorities in his closing submissions but he submitted that the decisions cited by Mr Mitchell could be distinguished from the present case because none of them were concerned with the situation of workers being employed under IEAs. Mr Malone submitted that the seniority clause needed to be interpreted against the provisions in the New Zealand Bill of Rights Act 1990 which confers on all people the right to freedom of association[6] and the provisions of the Act dealing with voluntary membership of unions and union representation of employees.[7] Mr Malone also referred to particular provisions in the collective agreement itself, in particular cl 52.a), which states that "this collective agreement

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[3] [1992] 3 ERNZ 643.
[4] [2010] NZEmpC 62, (2010) 7 NZELR 280.
[5] At 699.
[6] Section 17.
[7] Part 3 of the Act.

will not apply to employees who are not members [of the] Union." Counsel then went on to submit:

> 26. In summary therefore, both under the Act and express terms of the Core, the Core is only binding on and enforceable by employee who are members of the union and its provisions are not intended to and do not apply to IEA employees.

[27] Mr Malone argued that the plaintiff's approach to the interpretation of the seniority clause could not be sustained because, first, it involved reading the clause as having a wider application than to only union members and, secondly, such an interpretation would, in his submission, interfere with the rights of employees to negotiate an IEA on their own terms. Finally, Mr Malone submitted that if the union's contention was correct, then cl 30 would be invalid as being in breach of s 9(1)(a) of the Act which prohibits any preference in obtaining or retaining employment.

Construction of the seniority clause

[28] In *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*[8] the Court of Appeal affirmed the approach adopted in that case by Judge Shaw to the interpretation of a collective employment agreement, describing it as "conventional and appropriate".[9] The Court of Appeal recorded that in her approach to the interpretation of the relevant provision, Judge Shaw had considered the language used in the context of prior instruments and she had striven to interpret the relevant clause in a way which would remove apparent inconsistencies and give effect to what she considered to be the relevant purpose of the provision.[10] The Court of Appeal also recognised that the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[11] a judgment delivered subsequent to Judge Shaw's decision, had reaffirmed that in the construction of a commercial agreement, material extrinsic to the agreement could be used to clarify its meaning, whether or not the terms used were ambiguous.[12] Of special relevance to the instant case, the Court of Appeal noted that *Vector* had recognised that in the interpretation exercise it was appropriate

[8] [2010] NZCA 317.
[9] At [42].
[10] At [42].
[11] [2010] NCSC 5, [2010] 2 NZLR 444.
[12] At [26].

to examine the history of the parties' dealings and prior instruments between the parties.[13]

[29] Mr Mitchell referred the Court to the judgment of the full Court in *Dwyer v Air New Zealand Lt (No 2)*[14] which was a decision concerned with the meaning of a collective employment contract. In that case the Court stated:[15]

> We accept that our task in this part of the case is objectively to ascertain the mutual intentions of the parties and that by doing so we not only have regard to the particular words in the particular clause at issue but also to the nature and purpose of the employment contract. Reasonableness of result is a relevant consideration also in choosing between rival constructions and the contextual matrix is also to be taken into account.
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> ...
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> It is important to recall that, as in the case of many other employment contracts, this was a special contract written not by lawyers but by the participants in the enterprise that it was to cover and intended to be understood by them and not for later dissection by lawyers. The contract is to be interpreted in the context of the community within which it operates.
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> It is for that reason that the Court looks in the evidence to find what interpretation has been applied in the operation of the contract rather than what interpretation might subsequently be drawn from its words when one party is dissatisfied with the consequences of the contract in operation.

Discussion

[30] As noted in [26] above, the defendant's position is that the collective agreement is binding on and only enforceable by employees who are covered by the collective agreement and that its provisions are not intended to and do not apply to IEA employees. The plaintiff does not dispute that assertion. What the plaintiff contends, however, is that cl 30 guarantees employees covered by the collective agreement a right to seniority based on the commencement date of all employees on the site or in the relevant department, regardless of whether they are union members covered by the collective agreement or non-union workers employed under IEAs.

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[13] At [35].
[14] [1996] 2 ERNZ 435.
[15] At 474 – 479.

[31] One important fact which emerged from the evidence, and which I accept, was that there have always been workers in the defendant's meat plants who have not been members of the plaintiff union. There may not have been a large number numerically, although there was some dispute about this, but the evidence established, nevertheless, that the names of those non-union members had always been recorded on the priority list in accordance with their commencement date. In other words, historically, the seniority provision has been interpreted and acted upon by the parties consistently with the approach the plaintiff now advocates. The non-union members did not come within the coverage provisions of the collective agreement but for the purposes of operating the seniority system, their names and commencement dates were recorded in the list and union members were always entitled to maintain their seniority status as against non-members. The evidence also established that the company and union members recognised the seniority ranking of non-union members in the list.

[32] I find the historical practice and the approach contended for by the plaintiff to be perfectly consistent with the natural and ordinary meaning of the language used in cl 30. Clause 30.a) provides that all workers are to have seniority "according to the date of commencement of their employment". Clause 30.b) then provides that: "Seniority will operate on a departmental and/or site basis except where otherwise agreed." That sub-clause, in other words, ties seniority into the site or the department. Clause 30.d) then provides that: "A seniority list shall be prepared for each department and/or site and be made available to the delegate each season prior to the commencement of seasonal lay-off[s]." The natural and ordinary meaning of those provisions, which is consistent with the way in which they have historically been applied, is that the list recording the names and commencement dates is to include every process worker on the site or in a department as the case may be.

[33] The provisions of cl 30, in my view, reflect the objective recorded in cl 29.a) which, under the heading of SECURITY OF EMPLOYMENT, states:

> The Company acknowledges the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required.

It is significant that the clause uses the term "workforce" which is an obvious reference to all workers regardless of whether they are union members covered by the collective agreement or non-union workers employed under IEAs.

[34] The defendant's interpretation of cl 30 would mean that a worker covered by the collective agreement would not be entitled to enforce his seniority right on the list against any worker employed under an IEA and, as Mr Cox accepted in cross-examination, it would then be a relatively simply process for the defendant to manipulate the long recognised re-engagement system in the industry so it ended up employing only those workers who were prepared to sign IEAs. That could never have been the intention of the parties and it is not the way in which the provision has been construed in the past either under the collective agreement in question or under prior instruments. As McGrath J stated in *Vector*, at the conclusion of his summary of Lord Hoffmann's five principles of interpretation in the *Investors Compensation Scheme Ltd v West Bromwich Building Society*[16] case:[17]

> ... the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[35] How the defendant operates its lay-off and re-engagement system with employees on IEAs is not a matter the plaintiff is concerned with. The plaintiff's concern is with employees covered by the collective agreement and it is simply seeking to uphold the contractual rights those workers have to be laid off and re-engaged in accordance with their particular seniority position in relation to the rest of the workforce. I uphold the plaintiff's claim in this regard.

[36] There are two other matters I refer to briefly. First, I agree with Mr Mitchell's submission that the evidence relating to exceptions to the seniority system was not particularly relevant to the issue before the Court. I am satisfied on the evidence that over the years the parties have been able to satisfactorily resolve issues relating to exceptions to the seniority system. Secondly, Mr Malone argued, in the alternative, that if the plaintiff's contention was correct then the seniority clause would be invalid as being in breach of s 9(1)(a) of the Act which prohibits any

[16] [1998] 1 WLR 896.
[17] At [61].

preference in obtaining or retaining employment. Counsel's argument was that, on the plaintiff's approach, cl 30 would confer a preference on employees who were union members in obtaining or retaining employment based on their start date. With respect, I do not accept that submission. Subsection 9(2) provides that s 9(1)(a) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.

Conclusions

[37] The three questions which the Authority referred to the Court to hear and determine are answered as follows:

(i) Whether cl 30 of the collective agreement requires seniority to be afforded to all employees or only to union members?

ANSWER: Clause 30 requires seniority to be afforded only to union members.

(ii) Whether cl 30 is complied with by AFFCO if it lays off and re-engages union members in accordance with the seniority of such members as between themselves?

ANSWER: Clause 30 requires AFFCO to lay-off and re-engage union members in accordance with seniority lists issued under cl 30.d) of the collective agreement which are to be based on the commencement date of all workers at the relevant site or in the relevant department irrespective of whether they are covered by the collective agreement or IEAs.

(iii) Whether employees on individual employment agreements (i.e. IEAs) may be laid off and re-engaged in accordance with the different criteria applying to them under their employment agreements?

ANSWER: Yes, they may.

[38] Costs are reserved.

A D Ford
Judge

Judgment signed at 12.10 pm on 12 April 2011