

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA213/2017
[2017] NZCA 453**

BETWEEN AFFCO NEW ZEALAND LIMITED
 Applicant

AND NEW ZEALAND MEAT WORKERS
 AND RELATED TRADES UNION
 INCORPORATED
 First Respondent

 CLARRY AGNEW AND ORS
 Second Respondents

Hearing: 18 September 2017

Court: Asher, Clifford and Gilbert JJ

Counsel: G P Malone and M A C Williams for Applicant
 P Cranney for Respondent

Judgment: 13 October 2017 at 10 am

JUDGMENT OF THE COURT

A Leave is granted on this point of law:

Are any entitlements of the second respondents arising from being unlawfully locked out entitlements to wages under the Wages Protection Act 1983?

B Costs are reserved pending the determination of the substantive appeal.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] This is an application for leave to appeal a decision of Judge Corkill in the Employment Court.¹ The application relates to the employment dispute arising out of AFFCO's illegal lockout of workers in 2015 and 2016.²

[2] The applicant, AFFCO, seeks leave to appeal on the basis that the Employment Court erred in law in determining that:

- (a) Any entitlements the second respondents (the Union members) had, arising from being unlawfully locked out, were entitlements to wages under the Wages Protection Act 1983 (WPA) and, as such, the duty to mitigate against loss was not relevant.
- (b) There was, in any event, no duty on the Union members to mitigate their losses by accepting AFFCO's offer of employment in September 2015.
- (c) There was also no duty on the Union members to mitigate their losses by accepting AFFCO's offer of employment in late November 2015.
- (d) The issue of whether workers whom AFFCO was entitled to place on the afternoon shift should have accepted AFFCO's offer of employment in late November 2015 was solely one of mitigation and there was no duty on those Union members to accept that offer.
- (e) The failure of the respondents to notify whom wished to return to work was irrelevant to their entitlement to compensation.

¹ *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2017] NZEmpC 33 [Judgment under leave application].

² See *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2015) 10 NZELC 79-057 [Employment Court decision]; *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 482, (2016) 10 NZELC 79-067 [Court of Appeal decision]; and *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135 [Supreme Court decision].

Background

[3] In 2015 the Employment Court held that AFFCO's actions in re-opening its plants for the 2015/2016 season and making offers to Union members on terms different from those of the previous collective agreement amounted to an unlawful lockout because the Union members were still employees under the collective agreement during the off-season.³ Second, the Employment Court held that if they were not employees during the off-season, they were nevertheless locked out as they were still employees for the purposes of s 82 of the Employment Relations Act 2000 (ERA).⁴ AFFCO appealed.

[4] The first ground of the decision of the Employment Court, that the Union members had remained employees under the collective agreements during the off-season, was not upheld in the Court of Appeal or Supreme Court.⁵ However, the second ground, that the Union members were employees for the purposes of s 82 of the ERA, was affirmed in both courts and the appeals were dismissed.⁶

[5] The Union and its members applied to the Employment Court for compliance orders. The Employment Court has issued three judgments relating to compliance. The first of these, dated 11 February 2016, dealt primarily with an order compelling AFFCO to re-engage the workers.⁷ The second, of 8 September 2016, dealt with issues relevant to the calculation of the quantum of lost remuneration.⁸ The third, of 24 March 2017, dealt further with the methodology for the calculation of lost wages, including whether the workers had a duty to mitigate their losses.⁹

³ Employment Court decision, above n 2, at [178].

⁴ At [195].

⁵ Court of Appeal decision, above n 2, at [54]; and Supreme Court decision, above n 2, at [47] and [52]–[53].

⁶ Court of Appeal decision, above n 2, at [70]; and Supreme Court decision, above n 2, at [74]–[77].

⁷ *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 7, [2016] ERNZ 20.

⁸ *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 117.

⁹ Judgment under leave application, above n 1.

Discussion

[6] In this application AFFCO seeks leave to appeal against the third compliance judgment in which Judge Corkill held there was no duty to mitigate losses in relation to unpaid wages under the WPA and that the methodology for calculating lost wages advanced by AFFCO was essentially correct. That judgment refers back to the judgment of 8 September 2016, and counsel in their submissions before us referred to both judgments. The appeal will involve the consideration of both judgments.

[7] As we have set out above, AFFCO challenges several aspects of Judge Corkill's findings in these judgments, including:

- (a) that the compensation claimed was a claim for unpaid wages under the WPA and not a claim for damages;
- (b) that there was no duty to mitigate losses; and
- (c) that the failure to provide an accurate list of workers wishing to return to work was not relevant.

[8] We have formed the view that whether the Union members were entitled to wages under the WPA and not merely to damages is a question of law which, by reason of its general or public importance, ought to be determined by this Court.¹⁰ We grant leave on this question.

[9] However, we will not grant leave to appeal on the other questions of law for which leave is sought.

[10] Section 4 of the WPA provides that there can be no deductions from wages except in accordance with the Act. A worker is entitled to the entire amount of the wages payable to that worker "without deduction". There is no arguable basis for a

¹⁰ Employment Relations Act 2000, s 214.

mitigation argument in relation to wages. This Court will not grant leave to appeal where the proposed question of law is not seriously arguable.¹¹

[11] The other points sought to be raised on appeal can be seen as applying only if the claim by the Union members had been for damages. It is alleged there was a duty on the Union members to mitigate their losses by accepting AFFCO's offers of employment, and that a failure to provide an accurate list of workers wishing to return to work is a relevant factor to entitlement to compensation.

[12] However, the respondents' claim is pleaded as being for wages only and not for damages. Judge Corkill in his second judgment recorded the claim was for wages only and not for damages.¹² Indeed during the oral hearing before us Mr Cranney, counsel for the respondents, eschewed any claim to damages. Therefore the question of mitigation of damages does not arise.

Result

[13] Leave is granted on this point of law:

Are any entitlements of the second respondents arising from being unlawfully locked out entitlements to wages under the Wages Protection Act 1983?

[14] Leave is not granted on any other points of law.

[15] Costs are reserved pending the determination of the substantive appeal.

Solicitors:
Oakley Moran, Wellington for Respondents

¹¹ See for example *Porirua Whanau Centre Trust v Ngawharau* [2015] NZCA 585, [2015] ERNZ 93; and *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 202.

¹² *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 8, at [8] and [9]. See also Judgment under leave application, above n 1, at [48].