

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 12/06
WRC 34/05**

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

Hearing: 14 and 15 February 2006
(Heard at Wanganui)

Appearances: G Pollak, Counsel for Plaintiff
E J Unsworth, Counsel for Defendant

Judgment: 13 July 2006

JUDGMENT OF JUDGE C M SHAW

[1] This case concerns AFFCO employees in the lamb cutting room at its Wanganui meat plant at Imlay and whether, following the changes to their pay structure, they were properly paid for smoko breaks.

[2] AFFCO New Zealand Ltd has challenged a determination of the Employment Relations Authority. The Authority ordered AFFCO to cease making smoko payments to its lamb cutting department employees by deduction from their incentive pool and instead pay those workers in the same manner that other hourly employees are being paid for smoko. That determination followed a consideration of the relevant parts of the collective agreement and the way that AFFCO was currently paying lamb cutters for smokos.

[3] The main issue on this challenge is whether AFFCO is obliged to pay lamb cutters for smoko time over and above their incentive payments based on the number of carcasses processed. The parties identified that the two issues which are material to that main question are:

1. Has AFFCO been paying the lamb cutters for their smokos?
2. Did AFFCO represent by its words or actions to pay these employees for their smoko breaks over and above the incentive pool?

The facts

[4] In 2002 AFFCO's Imlay meat plant at Wanganui was closed for an extended 5-month period. There were significant disagreements between the union and AFFCO over the nature of the closure and the conditions for returning to work but these were resolved after considerable concessions by the New Zealand Meat Workers Union in order to make the plant economic and to achieve similar production costs to those in other AFFCO plants. The resolution included significant variations to pay rates of most of AFFCO's employees at Imlay.

[5] The collective employment agreement in force at the time was the AFFCO New Zealand Limited Process Employees' Core Collective Agreement 2000 to 2002 which has since been rolled over. It provides for employees who are paid on hourly rates to have two paid 15 minute smoko breaks each day. The full clause reads:

14. SMOKO

Provided that two hours work has been performed since commencing work or since a meal interval, all hourly paid workers shall be allowed a paid 15 minute smoko break each morning and afternoon, and when working overtime and on shift at intervals of approximately two hours.

Where mechanical, organisational or hygiene hold-ups occur such breaks may be moved up to 30 minutes either side of the usual break time to minimise the affect [sic] on wages and production while the cause of the stoppage is rectified.

When work is continued for more than an hour after the ordinary time of ceasing work, the smoko shall be allowed on the expiration of two hours from the last smoko in ordinary time. No smoko is allowable upon cessation of work either in ordinary time or overtime.

[6] While the core collective sets out the underlying contractual position between the union and the company, site employment agreements are negotiated for each site which may be varied as necessary during their currency.

[7] Before the Imlay shutdown in 2002, there were 93 different payment arrangements for employees over nine departments depending on the work they did. In essence, employees were paid either on an hourly rate or on an incentive basis as piece workers. Lamb cutters and mutton butchers were two of the latter. Their pay was calculated on a piece or carcass rate which varied according to work speeds and types of cutting. They were paid by productivity only.

[8] The Imlay plant works a basic 7½ hours or 450 minute day. All workers took an unpaid 30 minute lunch break. There were also two 15 minute smoko breaks, one in the morning and one in the afternoon. Under clause 14 of the core agreement all hourly rate workers were paid the base hourly rate for their smoko break but the piece/incentive workers were not paid for their smoko breaks. That meant that there were some workers who were paid for their smokos and some who were not.

[9] The shutdown provided an opportunity to tidy up the methods of payment. Following negotiations in 2002 the parties reached a plant variation agreement. The final position of the parties on the terms for the return to work in September 2002 is set out in a document dated 23 September 2002. The agreement included a payment system which was based on an hourly rate of \$10.89 to be paid to all employees, overtime rates which were linked to the operations being performed, and a payment to all employees of an incentive carcass/production rate component above the hourly base rate. The variation was silent as to the payment of smokos.

[10] Clause 14 of the plant variation agreement reads:

14. Payment system

The basis for the payment system will be:

Normal hourly rate of \$10.89 for each hour worked for all employees (except Chain slaughtermen and Lamb Cutting Operations) plus an incentive carcass/production rate component over and above the base rate.

[11] It was agreed by counsel that the words in brackets were intended to refer to overtime rates and are not relevant to the present case.

[12] The then plant manager, Bryan Goldsack, said that, as a result of an Employment Court case¹, AFFCO wanted to establish a daily rate which included meal breaks for the purposes of calculating payments for statutory holidays.

[13] The newly negotiated method of payment reduced the remuneration to almost all employees but, on the other hand, AFFCO believed it would give them the opportunity to increase their earnings if productivity and throughput increased.

Implementation of plant variation agreement

[14] Since the agreement, AFFCO has calculated the payment of the lamb cutters by starting with the number of carcasses processed. Each are paid for at a set rate. If that rate is \$5, a thousand carcasses creates a pool payment of \$5,000. From this pool AFFCO then subtracts 8 hours times the hourly rate of \$10.89, which is the payment for 7.5 hours a day plus .5 of an hour for smoko. The pool that is left is then divided amongst the workforce within each department. Therefore, each lamb cutter gets payment for 8 hours a day plus a percentage of the balance of the pool once the 8 hours' payment is subtracted from it.

[15] It was Mr Goldsack's evidence that, since the reopening of the plant, the lamb cutters have been paid for smoko breaks which are identified on payslips but AFFCO did not contemplate paying half hour smoko breaks above and beyond the incentive pool. He said it would amount to a huge cost which he was not authorised to make and which AFFCO could not have afforded. It would have defeated the purpose of trying to reduce costs of lamb cutting at Imlay which is the largest department.

[16] Mr Bell is the current plant manager at Imlay who inherited the dispute. He said that the smoko breaks were being paid to the lamb cutters. The calculations by which the pool payment was made each day was based on 450 minutes of production time but a percentage of the pool was allocated over 480 minutes which showed the smoko breaks being paid out of the pool. He accepted that, even if the lamb cutters hit their tally, under this system they

¹ *Horn (Labour Inspector) v Greenlea Premier Meats Ltd* unreported, Shaw J, 7 May 2002, AC 25/02

would never get their indicative rates. Union officials raised this issue with him in March 2004.

[17] Mr Cox, human resources manager for AFFCO, said that there was a very long established custom and practice for lamb cutters to be paid by the piece rate system which was always an all inclusive rate and quite separate from other distinct operations at Imlay. It was Mr Cox's view that the payment for smoko breaks was always to come from the incentive pool and although that had not been put in writing it had been clearly explained to the union. Other than moving to the hourly rate and isolating the payment for smoko breaks from the pool, the payment system for the lamb cutting room remained exactly as it always had been. He said that if AFFCO had to pay lamb cutters for smoko breaks as it does for the slaughtermen then the carcass rate and the pool would need to be reduced for the lamb cutters to take that into account otherwise, for all practical purposes, AFFCO would be paying twice for the smoko breaks. He said the carcass rate for lamb cutting is significantly higher than for any other group of workers at Imlay specifically to take this payment system into account and the costs of paying smoko breaks over and above the incentive pool would be prohibitive.

[18] Mr Cox said all employees within Imlay are paid for smoko breaks. Some employees get paid at an hourly rate which includes the smoko breaks and others receive them from an all-inclusive carcass rate and incentive pool. He accepts that the lamb cutting room remuneration is different from the rest of the plant but does not accept that there is anything in the core agreement that requires AFFCO to remunerate all employees in the same way.

[19] Because of the complexity and the costs associated with the lamb cutting, Mr Cox said there needed to be even greater cost reductions and he and Mr Goldsack decided to treat smoko breaks for lamb cutters differently from all the other workers in order to reduce the cost.

[20] On the other hand, the union officials who gave evidence all said they gained the impression from the negotiations that payment for smokos at the rate of \$10.89 an hour would be on top of the incentive payments. They believed that Mr Goldsack had told them that the lamb cutters would be paid for smoko breaks like all other departments. They relied on the figures he gave to them during negotiations as indicative rates of pay.

[21] It is the union position that the payment method adopted by AFFCO means that the lamb cutters are effectively not being paid for the smoko breaks unlike other meat workers such as the slaughtermen.

[22] Mr Ratana, a vice-president of the union and the dayshift slaughter room delegate, is employed in the lamb slaughter room as a butcher. He said that, during the negotiations, one of the few positives AFFCO was offering the workers who had been purely incentive or piece workers, was that they would be paid for smokos if they became hourly rate workers. When they returned to work in October 2002 the slaughtermen received a new pay rate based on an hourly rate plus an incentive per carcass, plus two 15 minute paid smokos. The smokos paid to the slaughtermen are not paid out of the incentive pool. Using the bonus calculated for 31 May 2005 he demonstrated how this occurs. First, the payment for hours worked by the workers is calculated at 8 hours per day (7.5 hours of work plus two 15 minute smokos). Next the target tally is set out along with the rate per carcass. The bonus rate is then calculated. If the slaughter butchers reach their tally, they get paid 8 hours (including smoko) plus the full bonus based on the tally reached. Provided the butchers meet the tally, they are paid their indicative rate. Mr Ratana was not challenged in cross-examination on this point.

[23] The question is what, if anything, was agreed about this in the course of the negotiations.

Negotiations

[24] In 2002, the AFFCO negotiating team was represented by Graham Cox; Tony Egan, the CEO; Bryan Goldsack, and others. The union was represented by David Eastlake, the general secretary of the New Zealand Meatworkers and Related Trades Union; Trevor Beamsley, Wanganui Branch Union Secretary; and others including legal advisers, and Jimmy Collins, the union president.

[25] Negotiations began in June and continued into July and involved numbers of meetings between the union and AFFCO. The union held three shed meetings with its members to convey to them the proposals that were being offered by AFFCO.

[26] One of the first proposals put by AFFCO to the union was that the core collective agreement would be varied by removing overtime rates, paying the first half hour in ordinary time, and not paying for smokos. The union members rejected that proposal and any suggestion of variation to the core agreement. A subsequent proposal from the company did not refer to smokos at all and that issue was not specifically discussed at the negotiations again. The negotiations instead focused on the indicative payments that could be earned by the workers if AFFCO's new proposals were accepted. All the calculations were done by Mr Goldsack on a whiteboard. He set out indicative rates of pay that lamb cutters could

potentially earn under the new system compared with payments received under the previous piece work system. He explained that the smoko breaks were included in the hourly rate.

[27] Under the piece payment system the lamb cutters worked for 7.5 hours but were paid from a payment pool calculated only according to how many carcasses had been processed. In this way they earned on average \$20 and \$24 an hour. Mr Goldsack's indicative figures for the new system started with payments for 8 hours at the base hourly rate (7.5 work hours plus two 15 minute paid smoko breaks) plus incentive piece payments related to production. If they met their tallies, the cutters could expect to have their hourly rates topped up to \$17, \$18, and \$18.50 an hour depending on their functions. He told Mr Beamsley that the lamb cutters were going to be paid for their smokos. Mr Beamsley said that, as the actual hours were 7½ hours, it was correct to assume that the workers were going to be paid an additional half hour at their base hourly rate over and above the incentive pool so there was no need for them to raise an issue about it.

[28] Mr Collins recalls Mr Goldsack telling the union on more than one occasion that smokos would be paid for and as union officials they sold that to the workers at shed meetings in 2002. He agrees that Mr Goldsack never promised payment over and above the pool but it was clear to Mr Collins that he gave the impression that payment for smokos was something extra that the workers had not been receiving previously. As Mr Eastlake put it, without smokos being paid for outside the incentive pool, the workers would be paying for their own smokos.

[29] Mr Collins said that, at two of the shed meetings at which the conditions were discussed, the company's proposals were turned down by the workers but at the third meeting one of the conditions was that smokos would be paid. There was no suggestion that there would be a difference between the cutting room (lambs) and the slaughter board which at that time were also piece rate workers.

[30] Mr Eastlake said that the final settlement was reached when the shed meeting in September 2002 agreed to the proposal. As it contained wage cuts for the majority of the workers, one of the main selling points for the union was that, by changing the system of payment to base hourly rates plus incentives, all workers would now be paid for the smoko breaks. He said this was accepted by the majority.

[31] The return to work then proceeded with the union and its members assuming that they were being paid the half hourly smoko per day as a sweetener because of the substantial drop in lamb cutting remuneration. It was not until the lamb cutting department hit tally in March

2004 that they became aware that the smokos were in fact being paid out of the incentive pool rather than as an addition to the hourly rate. When the tally was hit there was much jubilation among the workers that they had reached this and that AFFCO would not have to provide a make-up payment. It was at that point they realised that even if they made tally they would never reach the indicative rates calculated by Mr Goldsack. Mr Kenworthy, a union delegate at the time, then made notes of production and pay levels over 4-6 weeks to confirm this and then raised it with his managers but made no progress until some time later because of changes of staff and other pressing issues.

[32] Mr Beamsley did some hypothetical calculations comparing the payments to lamb cutters where the smoko was paid from the pool, with payments to others where smoko was paid from outside the pool. These calculations are annexed as a schedule and demonstrate that if the smoko payments are deducted from the pool then the lamb cutters could not achieve the indicative rates represented to them by Mr Goldsack.

Submissions

[33] Mr Pollak, for AFFCO, argued that the Authority had made incorrect conclusions and legal principles. He submitted that the Authority posed the wrong question which was whether the lamb cutting department employees had to be paid their smoko breaks in the same way as all or most other workers at the plant are paid, or should payment continue to be made from the incentive pool. He submitted that that is not an issue that should have arisen in this way because the lamb cutting employees have always been remunerated differently from other employees.

[34] Mr Pollak submitted that the Authority placed undue weight on the fact that those in the lamb cutting room are treated differently from other employees. He was also critical of the Authority's emphasis on the need for the company to discuss with the union that the smoko break for the lamb cutting employees was coming from the incentive pool. He said that that was not required because at no time did AFFCO undertake or represent that it would make any remuneration separate from the incentive pool. In Mr Pollak's submission, it was for the union to establish to a reasonable degree what condition of employment had been broken. In his submission the union could not point to any evidence that what it sought had been agreed to.

[35] He argued that the Authority was wrong to emphasise that the agreement was silent about the payment of smokos. In his submission the defendant should, at the very least, have been required to establish to a reasonable degree that the parties had actually agreed to pay

the smoko breaks other than from the incentive pool. The effect of finding that the smoko payments should be over and above the incentive payments would mean a doubling up of entitlements. Finally, he says that the Authority's determination amounts to it giving effect to a new condition of employment that was not agreed to by the parties in the absence of any evidence to establish that such a contractual term exists.

[36] For the union, Mr Unsworth concentrated on factual issues but his main point was that the union had been told that piece rate workers, including lamb cutters, would be getting paid for their smokos which was something new therefore, in his submission, it was incumbent on the company to make sure that this change in the method of payment was clear and accepted by the union, particularly when it differed from the way that payments were made to other employees who were ex-piece workers.

[37] He submitted that AFFCO's argument that lamb cutters had always been treated differently, and therefore should continue to be treated differently, should not be accepted because AFFCO was varying the plant agreement that it had reached in respect of all employees to alter the method of payment for the lamb cutters and the different treatment was done without their consent. He noted that the core agreement can only be varied by written agreement (clause 5 of the core collective agreement).

Decision

[38] There is no question that the reason why AFFCO was making the smoko payments to lamb cutters out of the incentive pool was to reduce the cost of the lamb cutting, but two questions arise: First, were smoko payments being made to the lamb cutters, and second, whether the method of paying them was by agreement with the union.

[39] The starting point is what was agreed by the September plant variation agreement. I find that AFFCO and the union agreed a comprehensive change to the way AFFCO would pay its employees at Imlay. AFFCO's desire to simplify its payment systems was met by means of the agreement that all employees would be paid at least in part on hourly rates regardless of how they had been paid in the past. All employees were also to receive an incentive carcass/production rate component over and above the base rate (clause 14). The agreement did not record any differentiation between types of employees in the manner of payment of the hourly rate or the incentive rate.

[40] On the plain meaning of the words of the agreement therefore there is nothing at all to differentiate the entitlements of the employees at the Imlay plant except for the hourly and piece rates which reflected differing types of work performed.

[41] The effect of previous piece workers becoming hourly rate workers was that clause 14 of the core collective agreement applied to them for the first time and they became entitled to payment for smoko breaks. However, the method of payment adopted by AFFCO determined whether in fact the smoko payments were actually being made. I find that the lamb cutters are not receiving remuneration for smoko payments. While the payments were referred to in the 8 hour payments they were effectively removed by pooling them with the incentive payments.

[42] I am satisfied from the evidence of the union, Mr Ratana in particular, that the way that the slaughtermen/butchers are remunerated means that they receive their hourly rate which includes a smoko rate plus their full incentive payments. They are, therefore, receiving identified smoko payments as agreed. This is different from the way the lamb cutters have been paid since the variation was agreed to.

[43] I do not accept AFFCO's position that it is for the union to prove that AFFCO expressly agreed to pay the lamb cutters smokos over and above the incentive payments. On the contrary, because it required the variation agreement to apply without exception across all employees, it was for AFFCO to establish that it had a separate agreement in relation to the lamb cutters which would entitle it to pay them by a different method from the other employees. By making them hourly workers, AFFCO bound itself to pay them accordingly. As it was, the method it used resulted in them effectively not getting a smoko payment. The addition of half an hour to each 7.5 working hours was negated by that amount being deducted from the incentive pool before it was divided among the lamb cutters. It meant the division of the pool was reduced by the smoko rates. For this reason AFFCO was in breach of the clause 14 obligation to pay for smoko breaks to hourly workers. It is implicit in the variation of the core agreement that the hourly rate struck includes the smoko rates. Incentive payments are to be made over and above this base rate.

[44] I find that there was one agreement reached in the settlement with AFFCO that applied right across the Imlay plant for all the workers, whether they had previously been piece/incentive workers or on hourly payments. However, the decision to implement it differently for the lamb cutters was not discussed with the union and certainly was not recorded. I agree with Mr Beamsley that, if the lamb cutting was to be treated differently from the rest of the plant, there would have to have been a further variation to the core agreement. Although clause 14 of the core agreement applied across the works, it was not being implemented in the same way for the lamb cutters and that required a variation.

[45] I find that, during the 2002 negotiations for a variation to these payment arrangements, AFFCO proposed that all workers would become hourly rate workers with an incentive on top. The union officials believed that, because the workers would all become hourly workers, they would be paid an additional 30 minutes a day at the hourly rate for smoko breaks. While it was accepted that this was never a firm undertaking given by AFFCO, the union was clear that Mr Goldsack gave the impression at the Imlay meetings that smoko breaks were to be paid over and above the incentive rate.

[46] The evidence concerning the negotiations for the plant variation agreement and subsequent conduct are relevant to this case only to the extent that they serve to reinforce the interpretation which the Authority reached and with which I agree.

[47] Mr Goldsack told the union what the indicative rates would be for each of the groups of workers. In the case of the slaughtermen/butchers, because they were paid their smoko rates above the incentive pool, these rates were attainable but in the case of the lamb cutters they were not because deducting the smokos from the incentive pool deprived them of that opportunity even when they reached their tally. I find that, while Mr Goldsack never expressly promised that the smokos would be paid over and above the incentive pool, it was implicit in the indicative rates which he promulgated at the meetings that this would occur. These rates did not have the status of contractual terms but are evidence of the basis on which the parties agreed the variation.

[48] I am also satisfied from the evidence that it is more likely than not that once the costs implication of this was fully apparent to AFFCO that, without consultation, it decided to pay the lamb cutters using a different methodology from that paid to the other employees. From the evidence of the union officials and the stance they adopted both during the negotiations and subsequently, I have little doubt that had AFFCO advised the union of what they were going to do there was a strong possibility of further industrial action.

[49] It is plain that the effect of this decision will be that AFFCO has to pay considerable back pay to the lamb cutters in order to properly comply with its 2002 agreement. I am conscious that AFFCO has concerns about the financial implications of this decision but this is a consequence of it unilaterally adopting a method of payment which was different from the one it used for other employees and which disadvantaged one section of its workforce. I also accept the evidence that, because AFFCO's original proposition was based on the indicative rates, the payment of them must have been anticipated when the plant variation agreement was entered into.

[50] I therefore confirm that the Authority interpretation of the issues between the parties was correct; that the lamb cutters are to be paid in the same manner as all other employees covered by the plant variation agreement. As a result, their smoko payments must be paid over and above any incentive payments made to them.

[51] The question of quantum was not addressed in this challenge. That is a matter for the parties to sort out between them.

Costs

[52] These were reserved. If the parties cannot agree these, the defendant is to file a memorandum as to costs within 28 days of this decision. The plaintiff has 14 days to respond.

JUDGE

Judgment signed at 4pm on 13 July 2006

Example One : Smokos outside pool

- Example Two : *Smokos from pool*