IN THE EMPLOYMENT COURT
WELLINGTON

WC 14/09
WRC 20/08

IN THE MATTER OF	proceedings removed from Employment Relations Authority
BETWEEN	NZ MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Plaintiff
AND	AFFCO (NZ) LIMITED Defendant

Hearing: 27 August and 17 December 2008
(Heard at Auckland)

Court: Chief Judge G L Colgan
Judge C M Shaw
Judge A A Couch

Appearances: Simon Mitchell and Usha Patel, Counsel for Plaintiff
Gillian Spry and Amy Heinrich, Counsel for Defendant

Judgment: 10 June 2009

JUDGMENT OF THE FULL COURT

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[1] The issues for decision in this case concern the status of an informal trial agreement about terms and conditions of employment of meat workers including whether such an agreement continues to have force after its expressed expiry date. The essential question for decision is whether an informal trial agreement dealing with one operation at the meat works was a statutory collective agreement. The meat processing industry has peculiar employment arrangements which mean that the decision in this case may affect not only these parties but other employers and employees in the industry.

[2] When the hearing of evidence concluded in late August 2008, it seemed to us that whatever we might decide on the legal issues, new terms and conditions of employment would have to be negotiated between the parties. Because submissions could not be heard in the time originally allocated to the case and because of the desirability of the parties themselves negotiating and settling these issues, we offered the union and the company an opportunity to do this and they took it. It was only when those negotiations did not result in a further agreement that we reconvened the hearing for submissions in mid-December 2008.

[3] The plaintiff union represents meat workers employed at the AFFCO Wairoa Meat Works. AFFCO also has works at some 8 other sites. The employment of these workers is covered by a collective agreement called the AFFCO New Zealand Core Employment Agreement ("the core agreement") to which the union and AFFCO are parties.

[4] The core agreement specifies the terms and conditions of employment common to all process workers employed by the company at its various works. It also provides that a Site Employment Agreement (a "site agreement") should be negotiated for each of the AFFCO sites covering rates of pay and conditions of employment specific to that site. These site agreements are to be negotiated and administered at site level. Local managers and union officials have the discretion to negotiate any variations to the site agreements during their currency. Some site agreements are in writing; others, including the site agreement at the Wairoa site with which this case is concerned, are not.

[5] In November 2007 the union and AFFCO entered into an arrangement known as the AFFCO Wairoa agreement re: Beef Boning and Beef slaughter departmental trials November 2007 ("the trial agreement"). This arose out of the employer's reconstruction and modernisation of beef processing operations at its Wairoa site. New machinery and new methods of work meant both a substantial reduction in the number of employees engaged and the acquisition of new operational skills for those who remained. The existing unwritten site agreement was inappropriate for these new operations. It needed to be varied significantly to accommodate them. Negotiations between the union and the company led to a facilitated settlement in

mediation for a trial agreement covering the operations of the redesigned beef processing operation at Wairoa. Among the terms of this trial agreement was an arrangement that would allow employees to choose whether they wished to continue working under the new conditions. The terms also included a remuneration system that sought to ensure that employees would not earn less than previously as a result of the start of the new operation and the acquisition of new skills before the beef room could reach intended production levels.

[6] A dispute arose over the rates of pay for workers employed in the beef room. AFFCO now says that it mistakenly paid them more than it intended. When that was discovered it reduced the pay rates by $50 a week. The union brought proceedings in the Employment Relations Authority seeking a compliance order requiring AFFCO to comply with the pay rates specified in the trial agreement.

[7] AFFCO counter claimed for a determination that the trial agreement had come to an end on 1 February 2008 and that the employment relationship between the parties to the trial agreement was governed by the core and site agreements. In the alternative, if the trial agreement was found to still be in operation, AFFCO sought rectification of the trial agreement or relief under the Contractual Mistakes Act 1977.

[8] The Employment Relations Authority removed the matter to the Court. It was agreed that the question of the status of the agreement should be dealt with first and the issues of mistake or rectification could be addressed separately if necessary.

Background

[9] The practice is that AFFCO site agreements provided for in the core agreement were settled through informal processes as necessary and were often not in writing. Such agreements were not the subject of the collective bargaining process provided for in Part 5 of the Employment Relations Act 2000 ("the Act").

[10] The site agreement at Wairoa which preceded the trial agreement was informal and not recorded in writing. It provided for flexible manning levels

depending on the circumstances. Issues that arose under the site agreement were dealt with on an issue by issue arrangement through negotiation or as disputes.

[11] The beef room trial agreement was born out of conflict about AFFCO's decision to rebuild the beef room at the end of the 2007 season. This resulted in a very different beef operation with new equipment and, in turn, reductions in manning levels from 90 to 50 employees in the boning department and a reduction of 3 in beef slaughter.

[12] The parties went to mediation about these changes and the trial agreement was reached by that process. There was no initiation of bargaining under s42 of the Act for that agreement. It was a compromise reached in mediation to resolve the manning level and remuneration concerns of the union.

[13] On 31 December 2007, during the currency of the trial agreement, the core agreement expired and the union initiated bargaining under Part 5 of the Act for a new core collective agreement.

The Trial Agreement

[14] The trial agreement begins as follows:

> ***AFFCO Wairoa agreement re: Beef Boning and Beef slaughter departmentmental* (sic) *trials November 2007.***
>
> *This document reflects the understandings and agreement between AFFCO Wairoa and The NZ Meat Workers and Related Trades Union (inc) relating to the reconfiguration of the Wairoa Beef Boning department and the alteration to the Beef Slaughter department.*
>
> *The parties acknowledge and understand that the employer has altered the Beef Boning department so as to provide for a different method of processing the same or similar product as that processed on the 2006-07 season. As a consequence of this the employer party to this agreement has requested and the union has agreed, that a trial be entered into commencing on Monday the 26 of November 2007 and ending on the 1st of February 2008.*
> *Such trial shall be relevant to the Beef Boning and Beef Slaughter departments at AFFCO Wairoa.*
>
> *Both parties acknowledge and agree that the duration of this trial may be extended by written agreement between the parties.*

> *Should either party believe it be necessary to extend or vary the trial the parties agree to meet and discuss the matter with a view to reaching agreement going forward.*
>
> *Whereas the parties have a difference of opinion and understanding of the interpretation of Appendix A of the AFFCO Core Collective Agreement (redundancy provisions) which has already been discussed in mediation, the parties agree that work trials can commence in the aforementioned Beef departments on a without prejudice basis. It is agreed that either party to this agreement may exercise their right to proceed further with a legal interpretation/ruling re the above dispute despite the implementation of this trial.*
> …

[15] The trial agreement also mentions the AFFCO core agreement in its substantive sections. It refers to manning and remuneration, the application of weekly minimum payments and the provisions of the core agreement relating to redeployment.

[16] The trial agreement was ratified by the affected union members and then signed by union officials and a company representative.

Positions of the parties

[17] For AFFCO, Ms Spry submitted that the trial agreement is not a stand-alone collective agreement as it does not fulfil the statutory requirements for an enforceable collective agreement set out in Part 5 of the Act. Rather, counsel submitted it contains terms and conditions additional to those in the core agreement or is a variation of that agreement for the stated duration of the trial period. Following the expiry of its term, AFFCO says the trial agreement is no longer applicable.

[18] For the union, Mr Mitchell submitted that the trial agreement is a comprehensive departmental agreement providing terms and conditions of employment for the Wairoa beef employees. It does not purport to vary the existing site agreement. He argued that it meets the definition of a collective agreement in s5 and s54(1) of the Act and, although it does not itself meet the other requirements of s54(3), this does not preclude it from being in law a collective agreement.

Discussion

[19] A collective agreement is defined in s5 of the Act:

> ***collective agreement*** *means an agreement that is binding on—*
> *(a) 1 or more unions; and*
> *(b) 1 or more employers; and*
> *(c) 2 or more employees*

[20] Section 5 also provides that:

> ***employment agreement:***
> …
> *(c) includes an employee's terms and conditions of employment in—*
> *(i) a collective agreement; or*
> *(ii) a collective agreement together with any additional terms and conditions of employment;…*
> …

[21] Under s52, a collective agreement comes into force on the date specified in the agreement itself or, if no such date is specified, the date of final signing. Section 52(3) then provides:

> *(3) A collective agreement expires on the close of the earliest of the following dates:*
>
> *(a) the date specified in the agreement as the date on which the agreement expires:*
>
> *(b) the date on which an event occurs, being an event that is specified by the agreement as an event on the occurrence of which the agreement expires:*
>
> *(c) the date that is the third anniversary of the agreement coming into force.*

[22] Section 53 then allows a collective agreement to continue in force for 12 months after its specified expiry date if the union initiates collective bargaining before the collective agreement expires and if that collective bargaining is for the purpose of replacing the collective agreement.

[23] Section 54 prescribes the form and content of a collective agreement:

> *(1) A collective agreement has no effect unless—*
> *(a) it is in writing; and*
> *(b) it is signed by each union and employer that is a party to the agreement.*

> *(2) A collective agreement may contain such provisions as the parties to the agreement mutually agree on.*
>
> *(3) However, a collective agreement—*
>
> *(a) must contain—*
>
> *(i) a coverage clause; and*
>
> *(ii)* Repealed.
>
> *(iii) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; and*
>
> *(iv) a clause providing how the agreement can be varied; and*
>
> *(v) the date on which the agreement expires or an event on the occurrence of which the agreement is to expire; and*
>
> *(b) must not contain anything—*
>
> *(i) contrary to law; or*
>
> *(ii) inconsistent with this Act.*

[24] AFFCO's primary defence is that an agreement will no longer apply after it is expressed to expire. In terms of the law of contract, the union accepts that will normally be so. The union says, however, that because the trial agreement was a collective agreement as defined in the Act, it remains in effect for up to 12 months after its expiry unless and until it is replaced by a successor collective agreement. Further, the plaintiff says that even after the expiry of that statutory extension, the terms and conditions of affected employees will be based on the expired collective agreement including, in particular, its remuneration provisions.

[25] The plaintiff's argument is based on an interpretation of the statutory definition of a collective agreement and several statements in recent judgments of the Court of Appeal dealing with allied questions. The defendant's response is that the trial agreement is not a collective agreement because it fails to meet all the requirements of s54 and, in particular, those in s54(3).

Decision

[26] The essential issue is the application of the definition of *"collective agreement"* in s5 and the requirements in s54 as to the form and content of a collective agreement. Clearly, the trial agreement satisfies the definition in s5. It is an agreement binding on a union, an employer and 2 or more employees. The trial

agreement also satisfies the requirements of s54(1) necessary to make it binding. It is in writing and it is signed by the union and the employer parties.

[27] This narrows the issue to whether an agreement must comply fully with s54(3) in order to be a collective agreement for the purposes of the Act. The defendant says it must meet all of those requirements. The plaintiff says it need not do so.

[28] It is clear that the text of the trial agreement meets only two of the four requirements of s54(3). It has an expiry date and it provides how it is to be varied. On its face, it does not meet the two other requirements of s54(3) in that it does not contain a coverage clause or a plain language explanation of the services available for resolution of employment relationship problems. Those two requirements are, however, met by the core agreement.

[29] In deciding this issue, we must be guided by relevant decisions of the Court of Appeal. We refer to three such decisions.

[30] The first, and most directly applicable, is *Fletcher Construction New Zealand Ltd, Dillingham Construction Inc and Ilbau Gesellschaft (T/A Fletcher Dillingham Ilbau Joint Venture) v New Zealand Engineering Printing & Manufacturing Union Inc* [1999] 2 ERNZ 183. Decided under the Employment Contracts Act 1991 ("ECA"), that case concerned the status of a contract which met the definition of a collective employment contract in s2 of the ECA. It did not, however, meet the requirement in s22 of the ECA that "*Every collective employment contract shall state the date on which it expires…*". In paragraph [32] of the majority judgment, Richardson P explained the consequence of non-compliance as follows:

> *There is nothing expressly provided in s 22 itself or elsewhere in the Employment Contracts Act 1991 which makes a non-complying expiry provision of the collective employment contract unenforceable or of no effect. The collective employment contract is and continues in force notwithstanding that non-compliance unless and until it is set aside as coming from its commencement within the exceptional harsh and oppressive provisions of s 57.*

[31] This reasoning has greater force under the current legislation. Section 54(1) of the Act expressly provides that non-compliance with its requirements will render a collective agreement ineffective. No such consequence is provided for non-compliance with s54(3).

[32] This leads us to the conclusion that the definition in s5 is the key determinant of whether an agreement is a collective agreement. Whether the agreement complies with s54(1) then determines whether it is effective. If it meets those requirements, it does not lose its status or effectiveness if it fails to comply with s54(3). Applying this approach, we find that the trial agreement was a collective agreement for the purposes of the Employment Relations Act 2000.

[33] The conclusion that a document such as the trial agreement can constitute a collective agreement is supported by the recent decision of the Court of Appeal in *New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc v Witney Investments Ltd* [2007] ERNZ 862; [2008] 2 NZLR 228. Although not on the same point, the Court of Appeal's reasoning is applicable to the issue in this case. That case concerned a notice issued under s42 of the Act initiating bargaining with an employer to join an existing collective agreement as a subsequent party. In this Court, we decided that an agreement had to contain terms and conditions of employment to be a collective agreement: see [2006] ERNZ 617. Allowing an appeal (although at para [66] concluding that it did not have to decide whether the Employment Court was correct to hold that a collective employment agreement must contain terms and conditions of employment), the Court of Appeal stated at paragraphs [64] and [65]:

> *[64] The Union's argument before the Employment Court was that any agreement to join the plastics agreement would, in itself, be a collective agreement. Thus any negotiations with regard to that joinder agreement would be bargaining for a collective agreement. This submission was rejected by the Employment Court.*
>
> *[65] Unlike the Employment Court, we consider that the written document provided for in the process agreement at the end of the proposed process … could itself be a collective agreement, provided it contained the minimum terms set out in s 54 and any other terms required under any other legislation. A collective agreement, as defined in s 5 of the ERA, is simply "an agreement that is binding on 1 or more unions; and 1 or more*

> *employers; and 2 or more employees". A joinder agreement, such as is sought by the Union in this case, would fit this broad definition …*

[34] The Court of Appeal in that case then went on to observe that requirements as to content of an agreement may be met by reference to another document containing the appropriate provisions. That view was also expressed by Professor Paul Roth in *"What is a Collective Agreement under the Employment Relations Act?"* [2007] ELB 19. Professor Roth, whose article was endorsed by the Court of Appeal in *Witney*, wrote:

> *The language used in the ER Act makes it clear that the concept of a "collective agreement" is quite separate from that of an "employment agreement". The statutory concept of a "collective agreement" is arguably broad and flexible enough to cover a joinder agreement between a union and an employer, as well as a stand-alone redundancy agreement, or any other collective arrangement that a union and employer agree to enter into.*
> …
> *It is thus entirely possible that an agreement between a union and an employer that provides for the employer to join an existing MECA could constitute a "collective agreement" under the ER Act. In terms of the Court's analysis (above), a collective agreement providing for the joinder of an employer to an existing MECA would in fact "fix terms of employment" because the terms are ascertainable by reference to what is already in the other collective agreement, and it could also "have the form and content required by s 54".*

[35] That approach supports the proposition that the trial agreement meets all the requirements of s54(3) because it refers to the core agreement which contains the necessary provisions not expressly included in the trial agreement.

[36] Another decision of the Court of Appeal in similar vein to that in *Witney* is *Warwick Henderson Gallery Ltd v Weston (No 2)* [2005] ERNZ 921. The issue there was whether an individual employment agreement which did not comply with the requirement in s65(1)(a) of the Act that it be in writing was valid and enforceable. The Court of Appeal found that it was.

[37] The result of our conclusion that the trial agreement was a collective agreement is that the employees covered by it were, for a period, bound by two collective agreements, the core agreement and the trial agreement. This raises the question whether the terms of employment of an individual employee may comprise provisions contained in more than one collective agreement.

[38] This issue was not dealt with explicitly in *Witney* but some guidance can be derived from the decision in that case. The effect of what the Court of Appeal said in paragraphs [65] and [67] of their decision is that it is permissible to have two collective agreements between the same parties covering the same work or employees. In that case, the two collective agreements were one containing terms and conditions of employment and the other providing for the employer to become a subsequent party to that first collective agreement. While the text of the latter did not include a coverage clause or any terms of employment applicable to employees, the Court of Appeal found that such terms could be inferred by the reference in it to the existing collective agreement.

[39] The logical inference to be drawn from these conclusions is that the Court of Appeal had no difficulty in principle with there being two collective agreements in force at the same time between the same parties and covering the same work. Because the issue did not arise on the facts of *Witney*, however, the judgment contains no indication of how such an arrangement might be implemented in practice where the two collective agreements each contain terms of employment applicable to the employees covered by them both.

[40] Where the two collective agreements contain terms which are inconsistent, identifying the terms of employment of particular employees will be problematic. In this case, we do not have to decide the point and consider it is best left to another case in which it arises directly for decision.

[41] Our conclusion that the trial agreement was a collective agreement leads us to consider the plaintiff's second submission which was that the trial agreement continued in force as a collective agreement after its expiry date by operation of s53. We do not accept that submission. Section 53 applies only where the union has initiated bargaining before the collective agreement has expired and that bargaining is for the purpose of replacing the collective agreement. In this case, it was common ground that the union initiated bargaining with AFFCO on 31 December 2007 but that was expressed to be for the purpose of negotiating a new core agreement. There was no evidence that the purpose of the bargaining included replacement of the trial

agreement. It follows that the trial agreement was not continued in force by operation of s53 and that it expired according to its terms on 1 February 2008.

[42] The effect of the expiry of a collective agreement is dealt with in s61(2):

> *(2) If the applicable collective agreement expires or the employee resigns from the union that is bound by the agreement,—*
>
> *(a) the employee is employed under an individual employment agreement based on the collective agreement and any additional terms and conditions agreed under subsection (1); and*
> *(b) the employee and employer may, by mutual agreement, vary that individual employment agreement as they think fit.*

[43] The effect of this provision 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.

[44] Although the conclusions we have already reached decide the key issues before us, we also deal with the plaintiff's alternative argument that, if the trial agreement was not a collective agreement, its terms were nonetheless incorporated into the terms of employment of the individual employees to whom it applied.

[45] The Act clearly contemplates that the terms of employment of an employee may comprise provisions derived from several sources. In particular, the definition of "*employment agreement*" in s5 includes the option of "*a collective agreement together with any additional terms and conditions of employment*". In the case of virtually every employee covered by a collective agreement, there will be such a mixture of terms and conditions. This is because it is well nigh impossible for even the most detailed collective agreement to contain all of the terms of employment. Those from other sources are likely to include terms implied by statute and those derived from custom and practice. In addition most employees will have some terms of employment personal to them. Those will often be defined in individual

agreements which, provided they are not inconsistent with the collective agreement, can co-exist with the collective agreement and be equally enforceable.

[46] That approach was recognised by the Court of Appeal in *Tranz Rail Ltd v Rail & Maritime Transport Union Inc* [1999] 1 ERNZ 460 where the Court stated, at paragraph [26]:

> *Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment contract.*

[47] That had also been determined by the House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366; [1982] 2 All ER 67:

> *… "terms and conditions of employment" is a phrase of wide meaning and includes not only the rights but also the customary benefits and reasonable expectations provided by reason of the employment to the employee by the employer".*

[48] So, we agree with counsel for the plaintiff that "*terms and conditions of employment*" can include concurrently provisions of the core agreement, a site agreement and, in this case, the trial agreement. That is permitted by clause 8 of the core agreement which deals with site agreements and permits their existence expressly in sub clause (c).

[49] This conclusion is consistent with s61(1) of the Act which provides:

> *(1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are—*
>
> *(a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement;*
> *and*
>
> *(b) not inconsistent with the terms and conditions in the collective agreement.*

[50] We agree with Mr Mitchell that there can be no suggestion that the contents of the trial agreement are inconsistent with the core agreement. The phrase "*not inconsistent*" in this context was addressed by this Court in *New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc v Energex Ltd*

[2006] ERNZ 749. There is no such inconsistency between the various agreements covering beef processing at AFFCO Wairoa.

Conclusion

[51] For the reasons we have set out above, we find for the plaintiff. On either analysis, the terms of the trial agreement continued in effect beyond its stated expiry date as terms of the individual employment agreements of the employees to whom it applied. Subject to any further decision of the Court, those employees are entitled to compliance with its provisions to the extent that they have not since been amended by agreement or superseded.

[52] While this decision disposes of the primary dispute between the parties, it does not dispose of the case completely. Other matters were reserved for subsequent trial in the event we reached the conclusion we have. Those issues include the defendant's counterclaims alleging mistake and seeking rectification of the trial agreement.

[53] Although conscious that the parties were previously unable to negotiate and settle long-term arrangements for employment in the beef processing operations, at the Wairoa plant, it remains highly desirable that they do so. The changed nature of the beef operation at Wairoa dictates that there can be no return to old working practices. New terms of employment for the employees engaged in that operation must be decided and that is best done by negotiation.

[54] The parties should now have a suitable, but not open-ended, opportunity to resume negotiation for such new terms of employment. We consider 6 weeks to be a reasonable time for them to do that and to progress to the point where the parties know whether agreement is possible. If, 6 weeks after the date of this judgment, the matters at issue remain unresolved, either party or both may contact the Registrar who will arrange a telephone conference call with a single Judge to set the parameters for a hearing of the remaining issues.

[55] We reserve costs.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 3 pm on Wednesday 10 June 2009