IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 24
5577392

BETWEEN	WILLIAM ALEXANDER (SANDY) BUTTERFIELD Applicant
AND	ALLIANCE GROUP LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Mary-Jane Thomas, Counsel for the Applicant Susan Rowe and Shaun Brookes, Counsel for the Respondent
Submissions received:	From the Respondent on 2 September and 14 December 2015. From the Applicant on 30 November 2015 and 7 December 2015.
	On the papers
Determination:	8 March 2016

DETERMINATION OF THE AUTHORITY

A. The Authority retains jurisdiction in this matter.

B. The parties are directed to mediation.

Employment relationship problem

[1] On 21 August 2015 Mr Butterfield lodged an application with the Authority that he had been unjustifiably disadvantaged and that on 23 December 2014 he was unjustifiably dismissed. Mr Butterfield is a member of The New Zealand Meat Workers' and Related Trades Union Incorporated and covered by the Collective Employment Agreement (CEA) between it and Alliance Group Limited 2014-2016.

[2] In response Alliance Group Limited (Alliance) replied on 2 September 2015 that Mr Butterfield was not an employee at the relevant times, initially because it was the off season and he was not re-engaged. Therefore it argued that the Authority does not have jurisdiction to deal with the matter. Alliance has applied to have Mr Butterfield's claim struck out for lack of jurisdiction.

[3] The parties agreed to this jurisdictional issue being decided on the papers. However, Ms Thomas submits that because one of the factors in deciding whether or not Mr Butterfield was an employee is his intention, the determination of whether or not he was an employee is not readily amendable to a strike out application on the papers as I will need to hear from Mr Butterfield to ascertain his intention.

[4] I had received submissions from both parties when Mr Brookes very properly suggested that the recently decided Employment Court decision in *New Zealand Meat Workers & Related trades Union Incorporated and Others v AFFCO New Zealand Limited*[1] should be addressed by the parties. I received further written submissions from both parties.

Background facts

[5] Mr Butterfield had been employed by Alliance at the Lorneville plant for every season since his first in the 2000-2001 season until these events in 2014 resulted in him not being offered re-engagement for the 2014-2015 season.

[6] There had been some events concerning Mr Butterfield and another Lorneville employee who Mr Butterfield considered had been involved in, or causative of, assaults on Mr Butterfield.

[7] On 8 July 2014, during the 2014 seasonal lay-off, a text was sent to a friend of that other employee which was clearly meant to be passed on to that employee:

> *… u tell the gutless sack of shit that we r going to ply th same game to hav someone sort him out and and* (sic) *when done properly we won't have to work with the coward again karma and money well spent :-)*[2]

[1] [2015] NZEmpC 204

[2] This is re-produced exactly as it was sent via text.

[8] The employee who the text was meant for showed it to the Police, to his employer at Lorneville and to a Meatworkers Union representative. He alleged the text was sent by Mr Butterfield.

[9] On 29 July 2014, the Lorneville plant manager, David Kean, sent a letter to Mr Butterfield stating that Alliance viewed the matter seriously and it was obliged to take all practicable steps to manage health and safety. It said the threatened employee was genuinely concerned the threat may be followed through by Mr Butterfield getting someone to assault him.

[10] The letter invited Mr Butterfield and his representative to a meeting to obtain his response to the matter:

> *As you are aware, you are currently not an employee and accordingly your attendance at such a meeting would be entirely voluntary.*
> *However, I must advise that this issue must be satisfactorily resolved before you can re-engage as an employee for the 2014/2015 processing season.*
> *A potential outcome of the meeting is that the company may redeploy you to a different shift or area of the plant. This would be on the basis that such a measure was a practicable step the company is required to take to manage workplace health and safety.*
> *Any redeployment could result in your length of season and earnings being detrimentally affected.*

[11] At a meeting on 27 August 2014 Mr Butterfield said he didn't send the text and denied it came from his phone. He also suggested that the text could have been sent by an app making it look like it came from his phone and that it could have been intended to make him the victim of the serious allegation he now faced. He argued he may have been set up.

[12] Alliance sent a letter to Ms Thomas, Mr Butterfield's counsel, on 4 September 2014 asking for Mr Butterfield to provide his phone for forensic analysis to see if the text was sent from his phone and to undertake forensic analysis of other texts sent from his phone to see if the use of language matched the language used in the subject text.

[13] On 10 September 2014 Ms Thomas replied that Mr Butterfield was not willing to allow Alliance to obtain extracts of other messages sent from his phone but was willing to allow an investigation of whether or not the message had come from Mr Butterfield's phone.

[14] On 15 September 2014 Ken Smith, the Alliance Group's Legal Counsel, responded that in the circumstances, with Mr Butterfield's involvement in the investigation being voluntary, the investigation would be concluded on the evidence available.

[15] On 17 September Ms Thomas replied that she did not consider the investigation could be concluded on the evidence available without examining Mr Butterfield's phone to see if the text had been sent by him from his phone.

[16] On 14 October 2014 Mr Smith replied that Alliance had requested information from Mr Butterfield's cellphone provider and Alliance should be in a position to report further on the status of the investigation once it received such information.

[17] On 15 October 2014 Ms Thomas emailed that she had concerns if Mr Butterfield was not going to be able to start work for the season until after the investigation was completed. She asked when he could expect to start.

[18] On 30 October 2014 Mr Smith replied that Alliance's view was that any re-engagement prior to the completion of the investigation would be inappropriate in light of the company's concerns which have been *elevated following developments in the investigation*. In addition, Mr Butterfield had been informed already that the matter needed to be resolved satisfactorily before the company would re-engage him for the current season.

[19] The letter disclosed that a cellphone forensic examination report shows that a message was sent from Mr Butterfield's phone on 9 July 2014 which matched up with the text message in question. Mr Smith stated that given Mr Butterfield's emphatic denial the issue of authorship was still in question and noted that the company wanted to undertake forensic linguistic analysis but that Mr Butterfield refused to give permission to access sample text messages. The letter concluded:

> *… your client is not an employee and is not required to actively involve himself in the investigation, however, in order to avoid any misunderstandings, we wish to be clear that given his explanation, if he does not take reasonable steps to assist the investigation then this may justify the company drawing reasonable inferences from the information that is available. …*
> *If it is proven that your client is in fact responsible for this message and has fabricated the scenario of a third party being responsible this would elevate the existing health and safety concerns in relation to your client working in any area of the plant and further would constitute a fundamental breach of trust and would likely result in your client not being allowed to re-engage at the plant again.*

[20] On 3 November 2014 Ms Thomas raised a personal grievance of unjustified disadvantage alleging Mr Butterfield's return to work had been delayed unjustifiably and unreasonably. On 5 November 2014 Mr Smith responded that Alliance denies Mr Butterfield had a valid personal grievance of any kind.

[21] On 20 November 2014 Ms Thomas wrote to Mr Smith stating that Mr Butterflied had told her he did send the text. Ms Thomas was very clear that she did not have any knowledge of that previously. She raised the possibility that Mr Butterfield may have been suffering from severe depression when the text was sent. She suggested he could return to work if he was not in the presence of the employee to whom the text was sent or his associates. She suggested Mr Butterfield be put on night shift.

[22] On 20 November 2014 Ms Thomas sent a medical certificate from Mr Butterfield's GP stating that Mr Butterfield had been his patient for many years and that he had struggled with mental health issues for some time having anxiety and stress symptoms after having been assaulted three times by former work mates. He wrote that he had *no doubt his mental health issues have resulted in bad decision making.* He wrote that Mr Butterfield was taking medication and seeing a counsellor and seemed to be improving.

[23] On 23 December 2014 Mr Smith conveyed Mr Kean's decision that:

> *For obvious health and safety reasons he is not prepared to have your client on the Plant again. This matter has destroyed all trust and confidence in relation to your client.*

Alliance's submissions

[24] Alliance submits that Mr Butterfield was not an employee because he was on the seasonal lay-off which began on 7 June 2014. It relies on a line of cases from the Employment Court and the Court of Appeal, notably the 2006 case of *The New Zealand Meat Workers' Union Incorporated v Alliance Group Limited*[3] in which the Full Court decided a case under the Holidays Act 2003 and concluded that:

> *… meat workers who are laid off seasonally are not in "current continuous employment" for the period of the seasonal lay-off. … We therefore conclude that meat workers who are employed by the defendant and covered by the collective agreement who are laid off on a seasonal basis are not employed by the defendant during the off-season …*[4]

[3] [2006] ERNZ 664
[4] Ibid at [109] and [110].

[25] The Court also considered:

> *The process by which the defendant invites applications for re-engagement and the forms of offer and acceptance that are signed by the defendant and its employees are all consistent with a new employment contract being entered into for each season.*[5]

[26] Alliance submits, and I accept, that the relevant clauses in the CEA for 2014-2016 are unchanged from those in the CEA considered by the Court in 2006. It submits that if the parties to the CEA had intended meat workers to become or remain employees during the off-seasons they would have renegotiated the CEA to give effect to that intention. Instead, in material aspects the CEA has remained the same.

[27] Therefore, despite an apparently contrary decision by the Full Court of the Employment Court in the more recent case of *The New Zealand Meat Workers' Union Incorporated and Others v AFFCO New Zealand Limited*[6], Alliance submits that during the seasonal lay-off in 2014 Mr Butterfield was not an employee and because he was not re-engaged he did not become an employee again at any time before 23 December 2014. Therefore, he does not have access to the Authority.

[28] Alliance submits that the same process for re-engagement of workers in a new season took place as had been examined by the Court in the 2006 case. It provided examples of how Mr Butterfield had been re-engaged in the 2006-2007, 2011-2012, 2012-2013 and 2013-2014 seasons. This process started with Alliance sending out a letter asking for meat workers who wished to be re-engaged in the coming season to fill out a form provided by Alliance which read:

> *I wish to be considered for employment at the Alliance Lorneville Plant in the … processing season …*
> *I acknowledge and accept that if I am offered work in the 2011/2012 processing season …*

[29] Mr Butterfield was sent such letters and filled in such forms in all those years for which I was given examples.

[30] Alliance submits that Mr Butterfield was a member of the Union in 2006 and worked at Lorneville. Therefore, he was aware that he was not an employee in the off-seasons and re-engaged with Alliance during the subsequent years on that understanding.

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[5] Ibid at [108].
[6] Ibid.

[31] Mr Brookes also submits that in the recent AFFCO case the Court reviewed its decision in the 2006 Alliance case and did not say it had been wrongly decided. Instead, it disagreed with the 2006 decision insofar as that had concluded that‘re-employment’ meant entering into an employment contract with someone who was previously employed but whose employment contract has terminated.[7]

[32] However, I note that in the AFFCO 2015 case the Full Court decided that:

> *… ‘re-employment’ must mean the creation of a new employment relationship; that is it is not a re-engagement after a period of no work/no pay. What is ‘re-employment’ must be considered and defined by reference also to the nature of the situation which brought it about; that is the seasonal ‘lay-off’ which was not a ‘termination of employment’ or ‘dismissal’. Significant also is the nature of lay-offs as including not only inter-seasonal cessations but also intra-seasonal cessations brought about by the same factors of insufficient work.*[8]

[33] I accept that there were a number of other factors in the recent AFFCO case that the Court relied on to distinguish its approach from that in the 2006 Alliance case.

[34] Mr Brookes submits that a decision about whether or not Mr Butterfield was an employee must only look at the particular circumstances of this case. The provisions in the AFFCO expired collective agreement are so significantly different from Alliance’s CEA to make the AFFCO case distinguishable from these proceedings.

[35] Mr Brookes also submits that Mr Butterfield did not have a legitimate expectation of being offered future employment. Even if he had some kind of expectation that could not displace the clear provisions of the collective agreement which mean that he was not continuously employed by Alliance.

[36] Alliance submits it was not under any contractual obligation to make an offer of employment to Mr Butterfield for the 2014-2015 season.

Mr Butterfield’s submissions

[37] Ms Thomas submits that Mr Butterfield falls under the definition of ‘employee’ under s 6(1)(b)(ii) of the Employment Relations Act 2000 (the Act) in that he was “a person intending to work”. She submits that there was a conditional offer

[7] 2006 Alliance case, ibid. at [106].
[8] AFFCO case, ibid. at [160].

of employment in the 29 July 2014 letter to Mr Butterfield which was subject to a satisfactorily concluded investigation. She further submits that Mr Butterfield's engagement in the investigation was an acceptance of that conditional offer.

[38] Ms Thomas also submits that Alliance commenced a disciplinary investigation during the off-season and that was clearly linked by Alliance to Mr Butterfield's employment as it envisaged an outcome of the investigation to be his resumption of work in the new season. Therefore, Alliance cannot now argue that the Authority does not have jurisdiction.

[39] Ms Thomas argues that the 2006 Alliance case was only concerned with the meaning of 'continuous employment' in the Holidays Act and a person intending to work is expressly excluded under the Holidays Act. Therefore the 2006 Alliance case does not assist in these proceedings.

[40] Ms Thomas refers to a number of similarities between the AFFCO expired CEA and the current Alliance CEA and to the Full Court's decision to expand the statutory definition of employer and employee. She submits the AFFCO decision means that to define the term 'employee' too narrowly and exclude Mr Butterfield from access to the personal grievance process would be unjust.

Determination

[41] The Authority has exclusive jurisdiction under s 161(c) of the Act to make determinations about whether a person is an employee or not.

[42] In my view the relevant clauses of the CEA are:

> *2* ***Intent***
> *The intention of this Agreement is to:*
> *(a) Safeguard the safety, health and welfare of the workers.*
> *(b) Provide for conditions of employment which are fair and equitable to workers that are employed, and the employer, and which safeguards their various interests while providing maximum possible security of employment in a seasonal industry…*
>
> *32* ***Seniority***
> *(a) Every worker, except in the circumstances specified in clause 32(g)(ii) shall acquire and retain, as agreed at the plants, seniority according to the date of their commencement of employment.*

(b)Seniority will operate on a department and/or group basis, except where otherwise agreed upon.

(c) The employer acknowledges the benefits of a stable, competent workforce which is familiar with and trained in the employer's requirements. Employees seasonally laid off the previous season will be offered the first opportunity of re-employment at respective plants for the new season and the first opportunity of re-employment prior to the engagement of new employees, subject to:

(i) Re-employment being consistent with individual plant's requirements and a satisfactory work record.

(ii) Departmental and positional skills/experience requirements and a satisfactory work record.

Lay-offs and re-employment will be based on departmental and/or plant seniority.

(d)A seniority list will be prepared for each department or group and handed to the worker representative each season, prior to the commencement of seasonal lay-offs.

(e) At the commencement of each season, the management shall furnish the worker representative of the department or group with a list of new workers.

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

(i) seasonal management lay-offs shall not break seniority rights;

(ii) absences 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 Accident Compensation Corporation.

(g) Seniority shall be broken in the following circumstances:

(i) Voluntarily leaving or being discharged from their employment…

(j) Nothing in this clause shall affect any right which the employer has in terms of clause 34 of this Agreement…

34 ***Management***

Subject to the special provisions of this Agreement, the employer shall retain and have full power to manage and control their own business and the conduct of their workers in connection therewith, and to make reasonable rules and regulations not inconsistent with the provisions of this Agreement relating to the management thereof, and to the hiring, conduct, duties and dismissal of persons in their employment.

[43] I consider that even if I follow and apply the 2006 Alliance case and not the 2015 AFFCO case, and conclude that in the off-season Mr Butterfield was not an employee there is still a very real question about whether Mr Butterfield was an employee in terms of s 6(1)(b)(ii) being *a person intending to work.*

[44] That is not so much because of Alliance's letter to Mr Butterfield of 29 July 2014 contemplating some future deployment of him at the plant. My view is significantly coloured by considering the fact that the on-season had begun before 23 December 2014 and that 're-employment' under clause 32, based strictly on seniority, applied to Mr Butterfield at the time the new season began. That clearly sets out the agreed process for workers with seniority to get priority when the employment needs for the new season are assessed. The only exceptions to workers like Mr Butterfield with seniority rights being offered the first opportunity of employment are the individual's competency, the department's need for skills and experience and Mr Butterfield having a *satisfactory work record*. Alternatively seniority could be broken by Mr Butterfield *being discharged from* [his] *employment*. As far as I am aware Mr Butterfield had a satisfactory work record and he had not previously been discharged from his employment, which I take to mean dismissed from his employment.

[45] None of those exceptions or breaches of seniority apply in this case. Therefore, prior to the beginning of the 2014-2015 season Mr Butterfield ought ordinarily have been asked if he wished to be considered for employment the following season. He was not so asked because Alliance began investigating a serious allegation against him arising out of actions he had allegedly undertaken in the off-season. If the parties had intended seniority to have been broken by in-appropriate actions undertaken by a worker in the off-season that would have been included in the CEA. It is not included in the CEA.

[46] Clause 34 may be broad enough to cover Mr Butterfield's circumstances but I have not heard any argument on that possibility from either party.

[47] I do not consider there is settled law on the issue of whether in light of the seniority clause Mr Butterfield was a person intending to work, and therefore an employee under s 6(1)(b)(ii) of the Act.

[48] Any application to strike out proceedings must meet a high threshold. That is because of well-settled principles including that the case pleaded is so clearly untenable it cannot possibly succeed. If the Authority has jurisdiction to strike out proceedings, as opposed to striking out parties[9], which is questionable, the jurisdiction is to be used sparingly. Possibly the most I could do if I become convinced that Mr

[9] Conferred under s 221 of the Act.

Butterfield was not an employee as defined under the Act is to decline jurisdiction to hear his application.

[49] I decline to strike out Mr Butterfield's claims. I can hear further argument on the jurisdiction point at the investigation meeting if one proceeds. I note that the parties have not been to mediation. I direct them to do so and to attempt in good faith to resolve the matter between them. Ms Thomas is to inform the Authority of the outcome of mediation and whether or not Mr Butterfield wishes to pursue his claim in the Authority.

Costs

[50] Costs are reserved.

Christine Hickey
Member of the Employment Relations Authority