

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Alfred Kereama (applicant)
AND	Feilding Venison Limited (respondent)
REPRESENTATIVES	Peter Cranney for the applicant Tony Waddel for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North, 1 February 2006
SUBMISSIONS RECEIVED BY	31 March 2006
DATE OF DETERMINATION	10 April 2006

DETERMINATION OF AUTHORITY: Preliminary Matter

Employment Relationship Problem

1. Mr Alfred Kereama claims that he was unjustifiably disadvantaged and unjustifiably dismissed by the Company – statement of problem received on 8 September 2005.
2. During the investigation, and as confirmed in its closing submission received on 14 March 2006, the applicant amended his position by asking the Authority to determine

an initial matter, namely the meaning of ss 4(1A)(c)(i) and (ii) of the Act in relation to the facts of his employment relationship problem, following which it was his wish to meet again with the Authority *“to discuss the process of finalising this proceeding”*.

3. The Company denies Mr Kereama’s substantive allegations and says he was justifiably laid off at the end of the season consistent with the provisions of his individual employment agreement (IEA) – statement in reply (SIR) received on 4 October 2005. In response to the applicant’s preliminary matter, the Company says that its employment relationship with Mr Kereama is not terminated, that it is ongoing and therefore the provisions of s. 4(1A) of the Act do not apply, in this instance, to the applicant – par 13 of its closing submissions received on 31 March 2006.
4. Agreement was reached by the parties on a one-day investigation by the Authority in Palmerston North on 1 February 2006. Witness statements were received in advance of the investigation. During the investigation the parties agreed the Authority would determine the preliminary matter first, and on a timetable for filing final submissions.

Background

5. The key facts are not in dispute.
6. At all material times Mr Kereama was employed by the Company in its lamb cutting department, Feilding, where each season some staff are laid off.
7. Without prior discussion, although the Company says there was some discussion amongst its managers, Mr Kereama was told by the Company on 6 April 2005 that he was to be laid off on the 22nd of that month. On asking why he had been laid off Mr Kereama was advised it was because of his attitude and attendance.
8. Later, in response to various inquiries by Mr Kereama’s union, the Company advised it employed workers, including the applicant, on an ‘as and when required’ basis, that Mr Kereama did not enjoy any seniority so that the respondent was able to do as it wished. By letter dated 19 April the respondent also advised that,

The process of selecting who stays and who goes is only made after consideration of the following criteria:

Ability and compliance of the individuals to carry out the required tasks to an acceptable standard.

The retention of sufficient skills in the business.

Current seasonal attendance records of the employees.

9. The Company declined to answer Mr Kereama's union's subsequent request for the names of all mutton slaughterboard workers due to be laid off, their initial starting dates and length of service, the number of slaughtering jobs each worker being retained could competently perform, whether or not they were laid off in the previous season and for what period and whether or not they were union members.

Parties' Positions

Applicant's Position

10. The applicant says he was laid off without any fair or adequate reason. He also says the Company failed to consult with him as to its decision or give him a right to be heard, that its actions have led to his unfair treatment in comparison with other employees retained to work, that the Company's actions were a breach of its duty to deal with him in good faith in that it failed to provide the information sought by his union, relating to its decision to dismiss the applicant, and the Company's actions were in breach of ss. 4(1A)(c)(i) & (ii) of the Act.
11. The principal issue of law is, according to the applicant's counsel, Mr Peter Cranney, whether ss. 4(1A)(c)(i) and (ii) of the Act applies to a seasonal lay off.
12. Section 4(1A) provides:

The duty of good faith in subsection (1) –

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

- (b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- (c) *without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more his or her employees to provide to the employees affected-*
 - (i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
 - (ii) *an opportunity to comment on the information to their employer before the decision is made.*

13. Without any opportunity to comment, Mr Kereama was told on 6 April that he was soon to be laid off: s. 4(1A) imposes an obligation on an employer to provide access to relevant information and an opportunity to comment **before** a decision is made. This is because s. 4(1A) applies when the employer is proposing to make a decision that *“will, or is likely to, have an adverse impact on the continuation of employment of 1 or more of his or her employees”*. Those words are significant.
14. The issue for the Authority is whether the words *“adverse effect on the continuation of employment”* are limited to cases of dismissal (the narrow view) or whether the words can also apply to a discontinuation with a possibility of re-engagement (the broad view). The issue is whether such discontinuity with a view to re-engagement is an *“adverse effect on the continuation of employment”* within s. 4(1A)(c).
15. The words *“continuation of employment”* and *“an adverse effect on the continuation of employment”* have a broader effect than *“dismissal”* and *“continuous”* as set out in ss 81(1)(a)(i), 82(1)(ii), 87(5), 88(3), 103(1)(a) and 103A.
16. The broader meaning of 4(1A)(c) is also consistent with ss 4(1A)(a) & (b) and in particular, as set out in the latter, the obligation to be *“active and constructive in establishing **and maintaining** a productive employment relationship”* (emphasis added) as well as *“responsive and communicative”*.
17. The applicant seeks a determination as to the meaning of ss 4(1A)(c)(i) and (ii) and a further meeting with the Authority to discuss finalising this proceeding.

Respondent's Position

18. The Company says that, since 2003, Mr Kereama has been employed by it under an IEA. Clause 6 of his IEA states:

6.2 The Employee acknowledges that he/she will be engaged on an "as and when required" basis depending upon prevailing market conditions and the operational requirements of the Employer

6.3 The Employee agrees that due to the unpredictable and seasonal nature of the industry he/she may be stood down from his/her duties for any period.

6.4 The employer will endeavour to give as much notice as practicable of call up and/or stand down as required.

19. Since 1996, between 15 and 30% of the workforce is laid off each season due to the fall off in the numbers of lambs to be processed.
20. Mr Kereama's employment has not been terminated or dismissed (in which case clause 13 of his IEA would be invoked) but instead, consistent with the provision of clause 6.2 of his IEA, he has been seasonally laid off. In other words, Mr Kereama's employment was suspended as he was not required to work. Other employment benefits continue to accrue, e.g. service is continuous and uninterrupted. Consistent with clause 6.3, he has been stood down.
21. The parties do not have in place agreed and specific criteria for a layoff process. The layoff process applied to Mr Kereama was no different than that applied by the Company for the past nine years. As Mr Kereama's employment has not been terminated s 4(1A) does not apply to seasonal layoffs: the Company's actions were in accordance with the employment agreement (SIR, 3(h)).
22. Section 4(1A) can only apply where an employer is considering termination of employment as it relates to having "*an adverse effect on the continuation of employment*". The concept of "*continuation of employment*" is used in the sense that there may not be a continuation of employment, i.e. dismissal. The Company did not, and is not, contemplating terminating Mr Kereama's employment. It is simply, and as

contractually provided for, unable to provide work for him for a period of time. He and other employees are normally offered re-engagement when the level of processing increases in the following season.

23. Whereas the Company is obliged to inform Mr Kereama about his lay off, it is not required to consult with him. There is no question of, or issue about, being active and constructive and maintaining a productive employment relationship as nothing is occurring that will prejudice the existing relationship: the Company will offer work to Mr Kereama and others as soon as it is available, as previously.
24. The Company does not accept there was any correlation between the applicant's layoff and his union activities.

Discussion and Findings

25. For the following reasons I find in favour of Mr Kereama's preliminary application in respect of the application of s. 4(1A) to his employment relationship problem. In other words, I accept that Mr Kereama was entitled to access information relevant to the continuation of his employment, as well as an opportunity to comment on it, before the Company determined to lay him off.
26. The 2004 Amendment to the Act introduced, at s. 4(1A), an express definition of the scope of good faith, being wider than the implied mutual obligations of trust and confidence. It also requires the parties to an employment relationship to be active and constructive in maintaining a productive relationship. Sub-section 4(1A)(b) clearly encompasses an existing employment relationship, and sets out requirements and obligation of the parties to that (current) relationship.
27. The fact that Mr Kereama remains – from the Company's perspective – an employee reinforces, I find, its obligations to him per s. 4(1A), including that it be "*responsive and communicative*", etc.
28. I therefore accept the applicant's submission, that it would be to read down the scope of the new section by applying it only to impending dismissals: plainly that is not how the section is expressed.

29. I am also satisfied as to the reasonableness of Mr Kereama's request because it is both artificial and unreasonable of the Company to turn a blind eye to the reality that, while the employment relationship continues, for the period he is laid off Mr Kereama's pay does not: that cannot be seen, objectively, in the context of a continuing employment relationship and in terms of the plain meaning of s. 4(1A), as anything other than an "*adverse effect on the continuation of employment*".
30. The Company already recognises this adverse impact as it undertakes to give Mr Kereama "*as much notice as practicable*" of the stand down (sub-clause 6.4 of his IEA refers).
31. It is also reasonable for Mr Kereama to expect answers because of the Company's stance in defence of its position: firstly, in not keeping Mr Kereama on, it relied on attitude and attendance records. Later, and secondly, the Company relied on the application of a broader set of factors, namely ability to carry out the required tasks to an acceptable standard, the retention of sufficient skills and current seasonal attendance records of the employees. Thirdly, it said the decision was not arbitrary but one that "*involved all levels of the management team*" (par 2.I. SIR).
32. Because of its statutory obligation (s. 4(1A)), and because there is no reason to assume that the Company applied these criteria other than fairly, and because its decision-making process was applied by the management team by way of a set of objective criteria, and because this information must exist, it is reasonable for Mr Kereama (and other employees) to expect the relevant evidence to be made available.
33. Legitimate confidentiality measures can readily be put in place: these include the deletion of other employees' names, when listing their attributes to the provision of complete lists to representatives who agree to be bound by appropriate confidentiality measures.
34. I stress here that Mr Kereama is entitled to consultation, and not negotiation, in respect of the fair application of the Company's legitimate criteria for determining how seasonal staff are best laid off so as to meet its operating requirements.

Determination

35. For the reasons set out above, I find in favour of the applicant, Mr Alfred Kereama's claim against the respondent, Feilding Venison Limited, that the latter is in breach of its obligations to Mr Kereama under s. 4(1A) of the Act for failing to make available to him relevant information relating to his seasonal laying off.
36. Consistent with par 25 of the applicant's final submission, leave is reserved to Mr Kereama for him to bring back to the Authority the remaining aspects of his employment relationship problem.
37. At the parties' request, costs are reserved.

Denis Asher

Member of Employment Relations Authority