IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 22/08
5111643

	BETWEEN	JAMES STANLEY MIKARA First Applicant
		JACK RAIHOURE MIKARA Second Applicant
		PARE TUTAKI Third Applicant
	AND	CRUSADER MEATS NEW ZEALAND LIMITED Respondent

Member of Authority:	Dzintra King
Representatives:	Simon Mitchell, Counsel for Applicant Julie Hardaker, Counsel for Respondent
Investigation Meeting:	15 January 2008
Determination:	24 January 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants, Mr James ("Stan") Mikara, his father Mr Jack Mikara and Mr Stan Mikara's partner, Ms Pare Tutaki, say that they has been unjustifiably dismissed by letter dated 14 December 2007 from their employment with the respondent, Crusader Meats NZ Ltd ("Crusader" or "the company"). The respondent says that the applicants were not dismissed. Both Mr Mikaras took other employment during the period of unlawful lockout. The company believed that Ms Tutaki had also taken up other employment although at the Investigation she testified that she had not done so.

[2] The respondent says that obtaining other employment constitutes a resignation; or, alternatively, that the applicants terminated their employment when

they failed to attend work at the respondent's plant within the timeframe provided by the respondent following the lifting of the lockout. Crusader says the failure to return to work on the date set by the company constituted a repudiation.

[3] The applicants seek reinstatement and compensation in the sum of $10,000.

Issues

[4] The legal issues for determination are:

(i) Does discontinuance of employment under s.82(i)(a)(ii) constitute termination of employment;

(ii) Does accepting employment with another employer during a lawful lockout constitute repudiation of the existing employment agreement resulting in summary termination of employment by the employee;

(iii) Does failure to report to work following lifting of a lawful lockout constitute repudiation of the existing employment agreement resulting in summary termination of employment by the employee or abandonment of employment?

Background

[5] Mr Stan Mikara has been employed by the respondent for nine years and Mr Jack Mikara for thirteen years. The applicants are members of the New Zealand Meat Workers Union.

[6] Over the past 18 months the company and the union have been bargaining for a collective employment agreement. The negotiations for a new collective employment agreement commenced on 20 February 2006. The bargaining process has included the issuing of strike notices, short strikes, issuing of suspension notices by the company, applications for facilitation, a referral to facilitation, and a facilitation recommendation being issued by the Authority.

[7] On 5 November 2007 the company gave notice of lockout from 27/28 November until 20/21 December. On 31 November and 3 December the company and the union attended facilitation in the Employment Relations Authority. The applicant attended that facilitation.

[8] On 4 December 2007 the Authority notified the parties of its recommendation.

[9] By 11 December the company had not heard from the union regarding the recommendation although it had heard that there had been a meeting of union members on Wednesday 5 December. On 11 December the company instructed Ms Hardaker to write to Mr Mitchell advising that it had accepted the recommendation and were removing the lockout notice effective midnight Tuesday 11 December. The company advised that union members were to return to work at their normal start times on Wednesday 12 December.

[10] The company premises are located in Benneydale which is near Te Kuiti. A copy of the letter advising the lifting of the lockout was also emailed by Mr David Wackrow, the Human Resources Manager at Benneydale, to Mr Graham Cooke, the Secretary of the union, with a notice lifting the lockout.

[11] The lockout adversely affected the applicants economically. They became aware that there was casual work available AFFCO in Wairoa where they had family. On 10 December 2007 Messrs Mikara commenced what they say was a casual job at AFFCO in Wairoa.

[12] On Wednesday 12 December the union forwarded an email to the company showing that the union had given notice to members to return to work and that some people would be in a position to return by Monday 17 December 2007 as they had taken on other work and needed to given their employers the requisite notice.

[13] On Wednesday 12 December at 7.15am Mr Stan Mikara phoned Mr Wackrow. Mr Wackrow said Mr Mikara told him he would not be able to return on the day requested. Mr Wackrow told him that the following day would be okay, but that everyone was needed back at work. He said Mr Mikara then said that he would not return until Monday 17th as he was waiting for his pay and had to give notice. Mr Wackrow told him that Monday was unacceptable and he needed everyone at work by Thursday.

[14] Two aspects of this conversation are in dispute. Mr Mikara said Mr Wackrow told him that the job may not be there on Monday, and Mr Mikara says that he told Mr Wackrow that he could not afford to return to Crusader Meats until he had received some wages as he would not be able to meet the cost of travel before he had been

paid. Mr Wackrow says he did not make the remark about Monday and that Mr Mikara did not say anything about not being able to travel back to Benneydale.

[15] On 12 December Ms Hardaker faxed a letter to Mr Mitchell. She referred to the communication from Mr Cooke and in her letter stated:

> *The discontinuing of employment under s.82 does not constitute termination of employment. Accordingly, union members that have obtained employment elsewhere during the lockout have ended their employment with Crusader Meats. I am however instructed that despite this, Crusader Meats is prepared to re-employ those union members who are currently employed elsewhere, provided they report to work by 7am on Friday 14 December 2007. Please ensure that those union members affected are given notice of this.*

[16] On 13 December at 6.43am Mr Jack Mikara telephone Mr Wackrow. He said he was ringing on behalf of Stan and Pare as well as himself. He said they would not be returning to work until Monday as they had to give notice to their new employer. Mr Mikara said he had spoken to his supervisor who had said they needed to give five days' notice but he would include in the weekend in the notice period. Mr Wackrow told him that he needed to talk to the union about that.

[17] On 13 December at 13.34 Mr Mitchell faxed a letter to Ms Hardaker. The letter stated that there was no reason why employees could not find alternative employment while locked out. Given a notification of a lockout until Christmas it was reasonable for employees not to be immediately available to return to work. It stated that the requirement that they return by 7am on Friday 14 December was not reasonable. It went on to say that any dismissal of employees would need to be justified.

[18] The applicants did not return to work on Friday 14 December. On that Mr Wackrow sent a letter to the applicants. The letter is headed "Resignation". It reads:

> *On Tuesday 11 December we informed the union about the removal of the lockout notice and employees were to attend work at their normal start time on Wednesday 12 December. You did not attend work at this start time.*
>
> *A second letter was sent to the union on Wednesday 12 December explaining that union members who had obtained employment elsewhere during the lockout had ended their employment with Crusader Meats. However, the company was prepared to re-employ*

those union members, provided they reported to work by 7am Friday 14 December 2007. You have not reported for work at this time.

Accordingly, you are deemed to have resigned from your employment with Crusader Meats. Your final pay and holiday pay owing will be made up and deposited into your bank account in to the next pay run with any monies owing deducted.

We have sent a copy of this letter to the union.

David Wackrow.

Legal Issues

Discontinuance of employment

[19] Ms Hardaker argued that discontinuance of employment did not constitute termination of employment and that the employees remained bound by the terms and conditions of the existing employment agreement. She referred me to two dictionary definitions of discontinue, one of which was *break of the continuity of, cease to operate, administer, use, produce or take.* The second is *to come or bring to an end, interrupt or be interrupted.* In *Witehira v. Presbyterian Support Services (Northern)* [1994] 1 ERNZ 578 the Employment Court said in relation to lockouts and strikes:

> *In neither case is the employment finally determined*

[20] In *David v. Ports of Auckland Limited* [1991] 3 ERNZ 475 the Employment Court acknowledged the submission on behalf of the employer that discontinuance contemplated a limited cessation of employment and not an actual dismissal. That accords with the dictionary definitions.

[21] Ms Hardaker also noted that lockout employees are not entitled to an unemployment benefit during the lockout. I note however that they may be entitled to an emergency benefit.

[22] I accept that the inclusion of s.96 (i) and (ii) in the Employment Relations Act 2000 provides a clear intention that the legislation does not contemplate termination of employment during lockout.

[23] In the case of *Whaanga v City Line* (*New Zealand) Limited* [2001] ERNZ 222 the Court held that the employer should have allowed employees to take prearranged holidays on pay during the lockout and that the existence of a lockout did not effect

the employer's obligation under the Holidays Act to grant paid leave for certain public holidays.

[24] While the employment continues in a sense during a lockout part of the employment is clearly discontinued and interrupted. The fundamental part of the employment relationship that is discontinued during the lockout is the wage/work bargain. The employer is under no obligation to provide work for the employee and the employer is under no obligation to pay the employee. Concomitantly, the employee is under no obligation to make him or herself available for work and can have no expectation that he or she will receive wages during this period. These are obligations that are suspended temporarily during a lockout, although the employment relationship itself is not severed.

Did the taking up of employment with another employer during the lockout constitute a reputation or deemed resignation?

[25] There is nothing in the Employment Relations Act 2000 which prevents a locked out employee from taking up employment with an alternative employer during the course of a lockout. Interestingly, s.97 of the Act limits the ability of an employer to engage another person to perform the work of a locked out employee. There is nothing in the employment agreement between the parties which declares employees from accepting alternative employment with any other meat company or any other employer.

[26] The alternative employment the two applicants took up in no way interfered with their meeting their obligations to the respondent. There is nothing to prevent an employee taking up other employment provided that employment in no way conflicts with the existing employment agreement during the course of a lockout. This does not constitute, in these circumstances, a repudiation of the existing agreement or a resignation.

Did the failure to return to work after the lifting of the lockout constitute repudiation or abandonment of employment?

[27] The employment agreement has a provision regarding abandonment of employment – clause 2.3. This states:

> *Where employees are absent from work for three consecutive working days and have failed to contact the company, employees shall be deemed to have terminated his/her employment without notice.*

[28] The respondent does not claim that the applicants fall within the ambit of this clause. The respondent says that they repudiated their employment agreement by not returning to work immediately the lockout was lifted. Clearly the respondent knew from the telephone calls made by both Mr Mikaras that the applicants intended to return to work on the Monday. The respondent therefore cannot say that they abandoned their employment.

[29] Section 5 Contractual Remedies Act 1979 provides:

> *Remedy provided in contract – If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the matters to which sections 6 to 10 of this Act relate, those sections shall have effect subject to those provisions.*

[30] In *Ford v Hutt Valley Health Corporation Ltd* [1994] 1 ERNZ 563 the respondent maintained that Mr Ford had repudiated his contract by failing to carry out a lawful instruction. At 573 Goddard CJ referred to repudiation and said:

> *It seems to me from the material produced that the employment contract may indeed provide its own remedy and may indeed makes express provision to the topic of repudiation by disobedience. The matter should be dealt with under the contract and is a matter of employment law before resort is to be had with the Contractual Remedies Act 1979.*

[31] The parties have made express provision for abandonment. The failure to return to work should therefore be considered pursuant to the abandonment clause.

[32] Ms Hardaker submitted that repudiation occurs where a party makes it clear that he or she does not intend to perform or complete performance of the obligations under a contract. Repudiation may occur by words or conduct. Repudiation by conduct may be inferred if the behaviour concerned would lead a reasonable person to believe that there is an intention not to perform the obligations of the contract

[33] It was clear to the respondent that the applicants did intend to perform the obligations under the contract. The communications of Mr Jack Mikara and Mr Stan Mikara did not constitute an intention to end the employment agreement. They clearly said that they were coming back to their employment.

Status of employment at AFFCO

[34] I experienced some confusion regarding Mr Mikara's assertion in his evidence that he had sought and undertaken casual employment and the requirement by AFFCO for him to give five days notice. I explained to Mr Mikara what casual employment was and asked him if that was what he had undertaken. His reply to me was that he thought he was expected to be there every day. He said he had just asked for a job until he could go back to work and the agreement with AFFCO was for him to work until the lockout had lifted.

[35] I have since received some documents which appear to show that the employment undertaken was full time. I am not aware that either Mr Stan Mikara or Mr Jack Mikara has seen this document in its fully completed. When I asked Mr Stan Mikara if he was given anything by AFFCO he advised that he did not think he had been given anything. I was informed that there was a CEA in place at AFFCO.

[36] The top portion of the document has been filled in by the employees. The bottom portion deals with the employee's position and pay rate details. I do not know who ticked the "full time" box in preference to the "part time", "casual" or "fixed term" boxes. Certainly the evidence I heard would lead me to believe that the applicants would have disputed their status as permanent if not as full time.

[37] I heard further from Mr Mitchell and Ms Hardaker on the issue of the forms. I have considered whether it was necessary for me to obtain further evidence regarding the forms. I have concluded that I do not need to do so. Whatever the documents may or may not show it is clear that Messrs Mikara did intend to return to Crusader once the lockout finished. Mr Stan Mikara said he had asked for employment until the lockout finished and told AFFCO the date. Even if they had taken up full time i.e. permanent employment that in itself would not have constituted a repudiation or a deemed resignation.

Was the dismissal unjustified?

[38] The respondent's position is that Messrs Mikara resigned by taking up other employment during the lockout. The company denies it dismissed any of the applicants.

[39] The company says there was a repudiation when they did not return to work on the date specified after the lockout was lifted.

[40] Messrs Mikara did not resign when they undertook employment with AFFCO. Nor did the applicants not repudiate their employment when they did not return to work on Friday 14 December.

[41] In those circumstances the company dismissed the applicants. The possible justification would have been abandonment. The respondent does not rely on that. Even if it did, abandonment would not help the respondent because the applicants contacted the employer and made known their intention to return.

[42] Mr Wackrow should have made appropriate inquiries about the intention to return to work and the reasons why they were saying that they would not be able to return to work as requested. None of those things were done. Ms Tutaki's situation would have been able to be clarified. Mr Wackrow could have ascertained that she had not taken up work with AFFCO. The dismissals are therefore unjustified.

Remedies

[43] The company does not oppose reinstatement. I therefore order that the applicants be reinstated to their employment with Crusader Meats NZ Limited.

[44] The applicants gave evidence about the effects that the termination of their employment had had on them. They are entitled to be compensated for that. I set the compensation at $3,000 for each applicant.

[45] They have also sought reimbursement of lost wages. It should be a simple matter for the parties to calculate this. If there are any problems regarding this leave is reserved to return to the Authority.

Contribution

[46] The applicants contributed to the situation that gave rise to the personal grievance by failing to return to their employment on the date specified by the employer following the lifting of the lockout. I accept the level of that contribution at 25%. The remedies are to be reduced accordingly.

Costs

[47] The parties are unable to agree on this matter. The applicants should file a memorandum within 28 days of the date of this determination. The respondent should

then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority