

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 102
5294090

BETWEEN FARHAN OSMAN
Applicant

AND GREENLEA PREMIER
MEATS LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Catherine Hay for Applicant
Katherine Burson for Respondent

Investigation Meeting: 19 January 2011

Submissions Received: 9 February 2011 from Applicant
9 February 2011 from Respondent

Determination: 16 March 2011

DETERMINATION OF THE AUTHORITY

- A Mr Osman was dismissed on 25 June 2009.**
- B Mr Osman was not an employee after 25 June 2009 and therefore was not dismissed on or about 27 October 2009.**
- C Mr Osman did not raise a personal grievance within the requisite 90-day period and therefore his claim of unjustified dismissal is barred by operation of section 114 of the Employment Relations Act 2000.**

[1] Greenlea Premier Meats Limited (Greenlea) is an export meat processing company exporting chilled and frozen beef world wide. Greenlea is a Halal listed plant which requires the services of Muslim Halal slaughtermen to perform their

religious duties. This allows Greenlea to export to many countries that require Halal certification.

[2] As with other plants in the meat industry, Greenlea operates on the basis of “seasons”. When the plant is operating it is known as the “season”. When the plant is not operating it is known as the “off season”.

[3] As with other meat plants, Greenlea lays off the majority of its workforce at the end of each season. Workers are entitled at that time to work for any other employer, or in some cases, apply to receive an unemployment benefit.

[4] Mr Farhan Osman was employed by Greenlea for the 2008/2009 season and commenced his employment on 1 September 2008. This was Mr Osman’s fourth season working for Greenlea after starting work in his first season as a boning room worker. Mr Osman was laid off at the end of the season when the night shift processing was reduced. This was on 25 June 2009.

[5] Mr Osman expected to be reemployed for the 2009/2010 season but says he was told on 27 October 2009 that no positions were available. Mr Osman says this amounted to an unjustified dismissal and claims remedies.

[6] Greenlea denies the claims and says it attempted to contact Mr Osman to offer him work for the 2009/2010 season in early December 2009 but was not successful. Greenlea says if there was a dismissal it occurred at the end of the previous season and not at the commencement of the new season. On that basis the personal grievance has not been raised inside the 90-day period required by the Employment Relations Act (the Act). Greenlea does not consent to a personal grievance being raised outside the 90-day period.

[7] The issues for the Authority are:

- When was Mr Osman dismissed?
- Did he raise a personal grievance pursuant to the Act?
- If Mr Osman did raise a personal grievance in accordance with the Act was his dismissal unjustified?

- If Mr Osman was unjustifiably dismissed, what, if any, remedies should be awarded.

Relevant terms and conditions of employment

[8] Mr Osman's employment was subject to the terms and conditions set out in the Greenlea Premier Meats Limited, Morrinsville Site Collective Agreement 2006-2009 (the CEA).

[9] Clause 6 of the CEA set out the terms of engagement:

- (a) **Security of Employment:** All Employees covered by this Agreement are seasonal Employees. As such, they are guaranteed ongoing security of employment, subject to any redundancies and seasonal lay-off and re-engagement.
- (b) **Lay-Off & Re-Engagement:** Seasonal lay-off and re-engagement shall be implemented according to each Employee's suitability based on his/her employment record and length of service, required skills, competencies and work flexibility.
- (c) **Cessation of Night Shift:** At the cessation of night shift operation, seasonal layoffs shall occur from both shifts. Such layoff shall be implemented according to each Employee's suitability based on his/her employment record and length of service, required skills, competencies and work flexibility. The balance of the Employees will be consolidated into a single day shift.
...
- (e) **Continuity of Sick and Bereavement Leave:** For the purposes of sick and bereavement leave entitlements, service, including seasonal layoff's, shall be treated as continuous. For the period that workers are laid off, except as provided in this agreement or by law, there shall be no accrual of entitlements, nor entitlement to payment for sickness, domestic or bereavement leave during layoff.

Halal Meat

[10] Halal Meat is meat that is permitted under the Islamic Law that fulfils certain slaughtering requirements. The accepted standard for the handling of meat destined for Muslim markets is to use electric stunning before the animal is slaughtered.

[11] There are also religious obligations with respect to Halal slaughter which requires the slaughterman to be a practicing Muslim who is mentally sound and knowledgeable of the Shariia of Islam and Islamic slaughtering procedures. The slaughterman must invoke the name of almighty Allah, "Bismillah-Allahu-Akbar" each time an animal is slaughtered and must refrain from idle talk whilst making the Halal cut.

[12] The New Zealand Halal Standards sets out the process for the selection of Halal slaughtermen for all organisations participating in the Meat Industry Association

(MIA) recruitment regime. For Greenlea this process was to be a new process for the 2009/2010 season.

[13] The new process included a requirement that each Muslim applicant be interviewed by the Halal Certifying Authority. This is to ensure the person is religiously suitable to undertake Halal slaughter.

[14] From 2009 those interviews were to be undertaken annually, including those who may have previously been employed by a meat company. The interviews were to be conducted by representatives from the MIA, New Zealand Islamic Meat Management (NZIMM), and FIANZ. It was intended that the successful candidates would then be allocated to the meat company for the season.

[15] As I understand the evidence from the investigation meeting, it seems this intended model of recruitment was not followed in its entirety. It seems that Greenlea selected the Halal slaughtermen to work in its plant, and they were interviewed by NZIMM shortly after they were offered and accepted employment at Greenlea.

When was Mr Osman dismissed?

[16] Mr Osman says he was dismissed between 27 October and 14 December 2009 after Greenlea failed to offer him new employment for the 2009/2010 season.

[17] The Authority was referred to a number of cases by both parties regarding this aspect of its determination. The judgment of the Full Court in *New Zealand Meat Workers' Union Inc v Alliance Group Limited*¹ considers the question of continuous employment with respect to the Holidays Act 2003, within the framework of seasonal employment in the meat industry. The question for the Court was whether seasonal employees commenced work in a new season as new employees or continuing employees.

[18] The Court considered a number of cases on the subject of continuous employment and held that the cases:

...demonstrate an acceptance of the proposition that, if there is no longer any work or any right to payment and the workers are sent home, the employment has in fact ceased.²

[19] The Court went on to find that:

¹ [2006] ERNZ 664.

² Ibid at [104].

...for all relevant purposes, the employment of members of the union employed by the defendant should be regarded as having been terminated when they are laid off for the season. Those employees are then free to engage in any other employment, including employment with competitors, or to apply for the unemployment benefit. The defendant is also freed from the obligation to pay the employees...³

[20] There were a number of factors which the Court found persuasive in reaching its conclusions including:

- That the majority of employees were laid off on a seasonal basis with those laid off either finding alternative employment or, receiving the unemployment benefit;
- Superannuation contributions were put on hold during the off season, and union subscriptions were not paid;
- The usual practice at the beginning of the new season was that individual workers would be notified of their start up date, and given a set time to confirm they would be returning.
- The collective agreement explicitly recognised that employment was seasonal and provided a mechanism for deciding which employees to lay off and re-employ first.

[21] Mr Osman's employment had similarities, for example:

- At the end of each season, the majority of workers are laid off. At this point they are paid out any accrued annual leave owing to them.
- During the off season Greenlea stops making compulsory employer contributions to KiwiSaver and the workers stop paying union subscriptions.
- The workers can take up alternative employment during the off season and some receive the unemployment benefit if they can not find work. The evidence shows that Mr Osman applied for the unemployment benefit.
- The practice at Greenlea is to notify workers of their start date and provide them with a period within which to confirm.

³ Ibid at [107].

- The collective agreement expressly recognises that employment is seasonal with the security of ongoing employment subject to re-engagement.

[22] I find that on 25 June 2009 when Mr Osman was laid off at the end of the season, his employment terminated by way of dismissal. Mr Osman had a period of 90 days from 25 June 2009 in which to raise a personal grievance.

[23] For completeness I have considered whether the failure on Greenlea to offer employment to Mr Osman during the period 27 October to 14 December 2009 could give rise to a personal grievance for unjustified dismissal.

[24] In order to have a claim Mr Osman would have to be considered an employee pursuant to section 6 of the Act. I am satisfied that during the period in question Mr Osman was not a person doing any work for hire or reward for Greenlea.

[25] However, section 6 includes in its definition of employee "...a person intending to work". In order to meet the test of a person intending to work, there must have been at least an offer and acceptance of work.

[26] The evidence of both parties is that there was no offer of work. Mr Osman's evidence is that when he enquired he was told he would receive a call when the night shift started. This evidence was consistent with the evidence of Mr Paul Yeandle, the Production Manager at Morrinsville.

[27] Mr Yeandle told the Authority that he intended to offer Mr Osman employment for the new season once the plant was operating at full production on the night shift. Production for the new season commenced on 27 October 2009 but with half manning only. Mr Yeandle spoke to Mr Osman some time after 27 October 2009 and explained to him that he would be in contact once a decision had been made to recommence full manning. The decision was made at the end of November to recommence full manning on or about 7 December 2009, however Greenlea had been unable to make any contact with Mr Osman and proceeded to employ other Halal slaughtermen.

[28] I am satisfied that during the off season period Mr Osman was not an employee as defined by the Act. Mr Osman's employment terminated on 25 June 2009 and there was no offer and/or acceptance of employment after that date which would

establish an employment relationship between Mr Osman and Greenlea. It follows that Mr Osman was not dismissed on or after 27 October 2009.

90 day issue

[29] Given my finding that Mr Osman was dismissed on 25 June 2009 the 90-day period pursuant to section 114 of the Act, expired on 22 September 2009. Mr Osman did not raise a personal grievance until 26 January 2010, however, this grievance was raised on the basis that the dismissal had occurred on 27 October 2009 when the plant commenced operating on half manning levels.

[30] I have found Mr Osman was not dismissed on or after 27 October 2009. Given my findings, Mr Osman is barred by the operation of section 114 of the Act from pursuing a personal grievance.

Costs

[31] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Greenlea may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Osman will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[32] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority