

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 70
5324838

BETWEEN

DALE ROBINSON
Applicant

AND

AFFCO NEW ZEALAND
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Simon Mitchell for Applicant
Graeme Malone for Respondent

Investigation Meeting: 18 January 2011 at Gisborne

Submissions by 21 March 2011 from Applicant's representative in reply;
and 27 April 2011 on a matter raised by the Authority
for further submissions

Determination: 4 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Dale Robinson is a seasonal worker, with seniority, employed by AFFCO New Zealand Limited (AFFCO) at its Wairoa meat processing plant. He has been employed since 1983. He is also the Union Secretary on site. Upon recommencing his employment in 2010 when Mr Robinson had gone first to the usual place he would work, he was requested to go and see the plant manager, Dean Tucker, who informed him that he was required to work in a labouring position. Mr Robinson objected because he had been employed as a butcher on the slaughter board since 1986.

[2] AFFCO says seniority is departmental and or is site seniority, not by position and it has relied on the core collective employment agreement to place him anywhere. It has denied that Mr Robinson has a personal grievance for unjustified disadvantage. Also, it has denied that there has been any discrimination against Mr Robinson in his

employment due to any of his actions as the union secretary on site. It has therefore denied the remedies claimed by Mr Robinson.

Issues

[3] Is AFFCO entitled to employ Mr Robinson in a labouring position instead of a butcher's position having regard to his seniority?

[4] Was AFFCO's action unjustified, and if so has Mr Robinson been disadvantaged in his employment?

[5] Has AFFCO discriminated against Mr Robinson because of his union activities?

The facts

[6] There is no dispute that Mr Robinson has seniority. In the 2009/2010 season Mr Robinson was employed as a butcher, although he described his position as a senior butcher. There is a dispute about his seniority in as much as Messrs Robinson, Tucker, and Tony Miles, AFFCO's operations manager, dispute the nature of the seniority and the seniority documents relied upon. Mr Robinson says his seniority is 9 out of 74 butchers. He produced a seniority list of butchers (Mr Robinson's document). Mr Tucker says Mr Robinson's site seniority is 49 out of 540 and departmental seniority is 7 out of 137. He subsequently produced documentary lists to support his evidence (AFFCO's document).

[7] The detail around his seniority is not determinative because of the differing documentation, I hold. This is because Messrs Tucker and Miles say they have never seen the document produced by Mr Robinson. Mr Robinson and Graeme Cook, the union secretary, say that Mr Robinson's list would have been confirmed by the departmental supervisor (not called to give any evidence by either party). The AFFCO document was subsequently produced after the investigation meeting and had not been shared with the union previously.

[8] During the previous season Mr Robinson had spent time in attempting with the company to put in writing a shed agreement on terms and conditions applying at Wairoa, without success. He also had time off the job to undertake union matters, including training.

[9] On 27 October 2010 Mr Robinson attended work for the new season and attended a meeting at the plant with Mr Tucker. Mr Robinson took the butcher's delegate with him. He says at that meeting he was told that he would not be offered a position on the chain as a butcher for the season. Instead he would be employed elsewhere in a lesser paid position, which means as a labourer. Mr Robinson says he pointed out he had been a butcher for 27 years. The meeting ended. Mr Robinson sought advice from the union, including Graham Cooke, the union secretary.

[10] On 28 October 2010 there was another meeting, which was attended by Mr Robinson and the plant President, Mary Rodger. Also in attendance were Messrs Tucker and Miles. Mr Miles says he told Mr Robinson that there were operational reasons for the change and efficiencies were required at Wairoa since it was a cost inefficient plant. Mr Tucker supported Mr Miles's recollection of that meeting. During the Authority's investigation they both accepted that their decision had been made before 27 October 2010 and before the commencement of the season. They told me that there was no paper work, documentation and emails about the decision.

[11] Mr Robinson says they told him they did not want the extra cost of paying him the top rate as a butcher for attending negotiations and to put in place a site agreement. Also they told him that the change of position would enable him to be free to attend to union matters, as he would be in a less critical job and it would therefore be easier to replace him for union matters. There have been no negotiations to date on writing up the site terms and Mr Robinson has not been allowed time off when he has requested it to deal with union matters. Mr Tucker more than likely told him not to bother asking for time off, I find because Mr Robinson gave me a number of examples from his diary that were not challenged. Mr Tucker agreed that Mr Robinson has had time off for union matters at the company's request for his involvement, and time off reimbursed by the union.

[12] At the meeting held on 28 October 2010 Mr Robinson says he advised the company he had a personal grievance. His claims for the personal grievance were included in his statement of problem filed in the Authority on 2 November 2010. He claimed his pay has been reduced markedly and he has had financial difficulties, stress and tension and been humiliated having to work on sweat breads and labouring when he had had a prestigious butcher's job on the chain previously.

Determination

[13] Mr Robinson has a personal grievance for unjustified disadvantage action because:

- a. He had started work on 27 October 2010 and gone to his usual place of work on site without any change to previous arrangements, before Mr Tucker, without consultation, informed him of his new position.
- b. Mr Robinson's position as a butcher was an implied term given the length of his service, the number of seasons he had been employed in the same role and he had attended induction without any knowledge of the change. There was an absence of any quantifiable evidence in regard to a restructuring and change process, except for Messrs Tucker's and Mile's decision about Mr Robinson. There were no broader changes for restructuring and cost savings.
- c. A fair and reasonable employer would have consulted Mr Robinson before 27 October 2010 on the change for his input and comment. I do not accept that this date was the first opportunity the company had to consult him and or that it did not have to consult him because it was during the seasonal lay off. If AFFCO wanted to make a change it would have as a fair and reasonable employer consulted Mr Robinson before making a decision because of his length of service and seniority and when he had been engaged as a butcher regularly and continuously in the past. In this regard the issue is not about Mr Robinson being offered the same job, but the recognition of the right to be consulted notwithstanding the job ceasing at the end of the season. Because he

was a seasonal worker he had a reasonable expectation of being consulted. Indeed if AFFCO had any problem about Mr Robinson's trend of attendance for reasons relating to union activities it had a responsibility to raise it with him to be open and communicative under the Employment Relations Act and in terms of the core collective.

- d. The fact that butchers were in the casual pool suggests that there was more time available to consult Mr Robinson than telling him on 27th October and imposing the decision from that date.
- e. The change was substantial because it involved Mr Robinson being demoted from a long standing position on the chain as a butcher and into a lesser paid position. This had never happened before.
- f. The company has not satisfied me that the change was based on any considered and proper analysis of the actual cost to it of Mr Robinson having time off, considering, in hindsight, that there have been no negotiations in regard to writing up the site terms and conditions, the company has called on him to be involved in matters it needed him for and he has not been allowed to have time off for union matters on site at members' requests. The change has been based solely on anticipated time required off relating to union activities, which a fair and reasonable employer would have consulted Mr Robinson and the union over, I hold.
- g. The company never consulted the union on Mr Tucker's decision to do away with the "skill pool", which provided cover on the chain, the introduction of a casual pool that up until the Authority's investigation meeting had butchers in the pool, and the decision not to carry spare labour. A fair and reasonable employer would have consulted in regard to these because they impacted on Mr Robinson's position.

[14] Mr Robinson has been disadvantaged in his employment by the company's decision and action of changing his role without adequate and proper consultation. He is paid at a reduced rate. Also there has been an impact on his role in regard to his

availability to deal with union matters, where he has not been allowed time off on site when requested by him and where there had been no response from AFFCO on site to his requests for time off.

[15] AFFCO has defended its action by relying on the provision of clauses 30 and 38 of the AFFCO core collective employment agreement. The issue where the clause is open to interpretation implies that given the longstanding arrangements that have been in place a fair and reasonable employer would have consulted the union and Mr Robinson because of the impact of the changes on Mr Robinson's employment, even if the company was correct in its interpretation of the seniority arrangements. If AFFCO had followed the correct procedure it might have got what it wanted.

[16] I now turn to the claim for discrimination. Mr Robinson has made the allegation that he has been discriminated against because of his union activities. I accept that he has been discriminated against because:

- a. Mr Robinson is the only union official at Wairoa affected by the decision. The decision was made before he recommenced the new season. There have been no changes made to any delegate roles and their time off.
- b. There was no proper restructuring process and procedure followed by AFFCO and Messrs Tucker's and Miles's decision appears to have had more to do with Mr Robinson's role as the union secretary needing time off and to save costs because he was a butcher and thus paid more than a labourer.
- c. Messrs Tucker and Miles had inadequate detail for their decision, which has been based on anticipated time off and made without any formal procedure, which a fair and reasonable employer would have undertaken by at least involving Mr Robinson and the Union before any decision was made. It does not seem therefore likely that the decision related to any cost saving and restructure to justify the action taken.

- d. There has been a lack of analysis by Messrs Tucker and Miles of the actual costs for the time previously taken off by Mr Robinson. No evidence was produced supporting any analysis made at the time.
- e. Messrs Tucker's and Miles's evidence, about two other butchers being "removed" to lesser paid roles, relate to entirely different reasons. These examples have no relevance to Mr Robinson's claim, I hold, because they apparently related to performance. Indeed Mr Miles has given evidence about what he has been told and conceded that he had no details.
- f. There is no pattern or discernible link between the company's action at Wairoa and elsewhere in its other plants. This solely relates to Mr Robinson because of the evidence that Wairoa was an uneconomic plant.
- g. Unfortunately for Mr Tucker and Mr Miles while the company's reasoning for the decision could be explained as a genuine management decision based on the terms of the core collective including applying clause 30, their reasoning has been masked by these other factors and circumstances involved in the parties' relationship, especially where the company did not consult the union and Mr Robinson in any way before making the decision.

[17] Mr Robinson has done enough to make out his complaint about discrimination. His position at work was changed and there is a causal linkage with his role as a union official and the reasoning relied upon by AFFCO to make savings around his time off and that relates to his role in union activities. AFFCO has not provided an adequate rebuttal of the claim for discrimination. My reasons are as follows:

- a. There had been no negotiations re the site arrangements at least by the time of the Authority's investigation meeting.

- b. The change is directly linked to Mr Robinson's union activities involving his time for such activities having regard to Messrs Tucker's and Miles's evidence. This is especially so given that Mr Tucker did not allow Mr Robinson time off for union activities after the change when he requested it. The cost of that activity was the basis of their decision that was made without consultation.

[18] In conclusion I hold that but for the actions of the applicant as a negotiator and union official, Mr Robinson would not have been moved from his butcher position. I am satisfied he was moved due to his union position. The failure to consult and properly discuss the change means I must conclude that AFFCO's actions were to remove him to a lesser paid position due to his union activities. In deed my finding is supported by AFFCO not providing Mr Robinson with any opportunity to consider any alternatives and options to remain a butcher that might have involved relinquishing his union position if he needed the money more.

Remedies

[19] I now turn to the remedies. Mr Robinson has asked for reinstatement to the butcher's position, compensation, lost wages and costs. The cause of action occurred on 27 October 2010. The statement of problem was filed in the Authority on 2 November 2010 and the investigation meeting was held on 18 January 2010. Mr Robinson is entitled to reinstatement to the position of a butcher. This is because it is not impracticable to reinstate him. The employer had plenty of notice from Mr Robinson about the personal grievance and the remedies, and there was reasonable time for AFFCO to plan for the contingency. It is reasonable to reinstate Mr Robinson because he was not at fault in regard to the decision and the lack of consultation. I have not been satisfied that AFFCO has adequately proved that reinstatement would be impracticable.

[20] Also Mr Robinson is entitled to the lost wages caused by the company's decision to employ him in a lesser role. The amount is gross \$3,915.53 (unchallenged).

[21] Mr Robinson has satisfied me that there was an impact on his feelings and that he was humiliated and suffered from the financial impact of the company's decision. I accept his evidence that the change impacted personally about how he considered others viewed him in the work place working as a labourer. I accept that how he has felt about this and the financial impact on him has led to him suffering from stress and had an emotional impact. I award him \$5,000 compensation under s 123 (1) (c) (i) of the Employment Relations Act.

[22] There was no contribution to the situation by Mr Robinson, I hold. Therefore there is no reduction made to the remedies.

[23] AFFCO New Zealand Limited is to:

- a. Reinstate Mr Robinson to his butcher's position;
- b. Pay Mr Robinson \$3,915.53 lost wages;
- c. Pay Mr Robinson \$5,000 compensation for humiliation loss of dignity and injury to feelings.

[24] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority