IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 135
5452546

	BETWEEN	PAUL SEVERINSEN, JIM PULLINS, RICHARD STEELE, ROSS WAKLING, KERRY BOURKE, BARRY HINGA, LEE KARAMAINA, ERIC HULENA, PAUL MASTERS and JASON RANGI Applicants
	AND	AFFCO NEW ZEALAND LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	J Unsworth for Applicants R Webster for Respondent
Investigation Meeting:	8 October 2014 at Wanganui
Submissions Received:	10 October 2014
Determination:	19 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This case is specifically about the nature of the obligations on the respondent (AFFCO) to seasonal workers such as Mr Severinsen and the other applicants (who have departmental seniority) when their department does not operate during a season, or operates fitfully at least. This involves an assessment of what the nature of these seasonal workers' employment is (especially whether their employment is specific to a department) and what obligations AFFCO has to such workers when it does not

open the particular department or it is open for a very short period compared with past practice.

[2] The applicants claim that they should have been made redundant and paid redundancy compensation after their seasonal work in AFFCO's Imlay plant's fellmongery was significantly reduced over a number of seasons. They also seek back pay for periods when they worked in other departments, as they claim that they should have been paid make-up pay, because their pay in the fellmongery was higher.

[3] AFFCO considers that the applicants' employment was never surplus to its needs and even if it had been they would have been re-deployed within the Imlay plant. It also considers that no back pay is owing because had they not been working in other departments their earnings would be nil, as there was no work for them in the fellmongery.

Factual discussion

[4] AFFCO has had collective contracts and collective agreements applying to all of its meat processing plants for over 20 years. One of those plants is at Imlay, where the applicants have been employed as seasonal employees in the fellmongery. At Imlay seniority operates on a departmental basis.

[5] The parties are covered by an AFFCO-wide collective agreement (known as the core); together with an Imlay site agreement.

[6] In Section 2: Objectives, the core collective makes it clear that the agreement *specifies the terms and conditions of employment common to all employees covered* by it. In clause 9 Intent, the following may be relevant:

> *…(e) The company and the employees and their union agree it is in their mutual interest to operate efficient, competitive, in profitable sites and that consultation and worker involvement are vital to the success of the operation.*
>
> *(f) The parties to this agreement are committed to safeguarding the safety, health and welfare of the employees in providing conditions of employment and payments which are fair and equitable to employees and the company, and which safeguard their various interests while providing maximum possible continuity and security of employment.*

[7] Clause 10 (Purpose of Agreement) may also be relevant in respect of the following subclause:

> *(d) All employees may be transferred within and/or across departments and do any task within their ability at the discretion of the company and dependant on the company's operational requirements. Employees may be transferred from department to department to ensure the smooth and efficient operation of the work and shall be paid the rate applicable to the job, except where transferring temporarily at the request of the company when the employee shall be paid no less than the normal daily earnings applicable to their department of origin.*

[8] Under Section 6: Terms of Employment it is made clear that employment is seasonal. Thus all employees other than casual employees covered by the agreement are seasonal employees.

[9] Clause 30 deals with security of employment, but I note that this does not apply to casual employees, who are dealt with under clause 32. It states:

> *30.1 The employer acknowledges the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required.*
>
> *30.2 Re-engagement is dependent on employees completing the employer's induction process and signed acceptance of terms of employment (being any terms applying in addition to those set out in applicable collective agreements).*

[10] Clause 31 deals with seniority and states:

> *(a) Employees will have seniority in accordance with the date of their commencement of employment with the company and in accordance with the provisions of this agreement.*
>
> *(b) All things being equal, layoffs and re-employment will be based on departmental and/or site (as appropriate) seniority and will operate on a last on first off basis, subject to the experience, employment record, competency and skills of the individuals, also the need to maintain an efficient, balanced workforce. …*
>
> *(c) A seniority list shall be prepared for each department and/or site and be made available to the delegate each season prior to the commencement of end of season lay-off and again at re-engagement at the commencement of the season.*
>
> *…*

> *(g) Any dispute will be dealt with under the dispute provisions in clause 54 of this agreement.*
>
> *(h) While seniority shall be taken into account in determining layoff and re-engagement final suitability shall be as determined by the employer subject to clause 31(b).*

[11] Appendix A provides for redundancy provisions. The relevant definition is contained in clause 1 where it is stated:

> *(b) In the case of a seasonal employee, the employee's seasonal employment is being made unavailable by the company, the unavailability being attributable to the fact the employee will be surplus to the needs of the company.*

[12] Clause 3 deals with selection. It states:

> *(a) Redeployment and natural attrition shall be adopted in preference to redundancy and therefore in order to avoid or minimise job losses where employees are relocated in the same plant they shall be treated as follows, each case shall be treated on its own merits.*
>
> > *(i) They shall receive for the balance of the season in which relocation occurred and the subsequent two seasons, seasonal earnings not less than they would have received had the relocation not occurred. Any adjustment required shall be made at the end of each season or as mutually agreed.*
> > *(ii) They shall be employed in their new employment subject to the conditions, hours of work and wage rates of that department. …*
>
> *(b) It is accepted that the company must retain a workforce with the necessary skills and experience and this shall be determined by consultation between the company and union after the number of volunteers have been determined but for the avoidance of doubt the company's decision shall be final …*
>
> *(d) Should the number of volunteers not meet the requirements, selection of the remainder shall be on the basis of last on first off subject to the experience, employment record, competency and skills of the employee.*

[13] Compensation is also provided for as an option where re-deployment and attrition is not sufficient to resolve matters.

[14] Apart from setting particular rates for base rates, production rates and other bonus payments, the only relevant part of the Imlay plant agreement is clause 1.1 relating to coverage. It states:

> *This document shall cover employees of AFFCO New Zealand Limited carrying out processing and associated work of the company meat and ancillary processing site at Imlay, but does not include engineering and maintenance and clerical workers, managers, forepersons or supervisors.*

[15] Evidence was given by the Union Secretary and the Plant Manager, together with three of the 10 affected workers (who it was agreed presented a reasonable cross-section of all the applicants).

[16] This dispute has arisen following a major elongated industrial dispute, where work was not made available to union members for many weeks, over the terms of a new collective employment agreement in 2012 and the applicants' subsequent return to work in May of that year. As a result of the industrial issues, no skins were processed at Imlay during the dispute, but in fact were processed at one of AFFCO's other plants at Wiri.

[17] Once the dispute was resolved, however, the bulk of the skins continued to be processed at Wiri. Any work required at Imlay on skins before their transfer to Wiri has been completed by supervisory staff. After the return to work, the plant shut down as usual in June 2012.

[18] After the plant reopened in July 2012, only six of the applicants were re-engaged into employment in the fellmongery. This was because of the continued shift of skins to Wiri. Two of the applicants were re-engaged in October, with the final two not being re-engaged until December 2012. Over time they were required to work in other departments to supplement their hours of work to a full 40 hours. However, the union first raised these issues (and in particular the claim to back pay under clause 10d) with AFFCO in November. By 29 April 2013 all of the applicants had been laid off.

[19] The fellmongery remained shut until October 2013, but even on its re-opening only two of the applicants were offered work there. Their engagement in 2013 coincided with the commencement of a second shift, which meant that there were more skins to be processed. I do not accept that a major purpose of the re-opening was to avoid legal action by the applicants.

[20] While a new rate of pay was agreed the work was sporadic. However, it appears that those two employees were not required to work in other departments,

although AFFCO did attempt to make them do so, as they would not agree to it. On the other hand, the meat workers were never disciplined for their failure to accept work in other departments.

[21] At the time of the investigation meeting, the fellmongery had not reopened in 2014, as it was AFFCO's evidence that there was insufficient demand for unsalted skins. I accept that here has been a shift in demand for pelts. The main market in China appears to want salted skins, which Imlay does not have the facility to process, but AFFCO's Wiri plant does. In addition, there have been declining livestock numbers for slaughter. Furthermore, the fellmongery building is old and may struggle to meet earthquake standards in the longer term.

[22] I note that the decision about processing of skins at Imlay is not made by the plant manager but by head office. For many of the meat workers still trying to get work in the fellmongery the whole process must have been very frustrating, because they received no contact from AFFCO until such time as AFFCO needed to engage them at the commencement of the season, whenever that may be. Furthermore, AFFCO's consultation with its staff and the union about the future of the fellmongery, when it might open for the season and other such matters has been singularly lacking. In addition, it seems ironic that AFFCO has had to recruit heavily for new staff and yet these fellmongery staff have been kept from work.

[23] The parties also provided an agreed statement of facts as set out below:

> 1. *As there are ten applicants in this matter the Authority has agreed that all ten are not required to give evidence to establish the claim.*
>
> 2. *It is anticipated that 3 or 4 of the Applicants, together with the Union Secretary, will give evidence to establish the claim.*
>
> 3. *In consenting to this approach the Respondent has requested that there be on record information concerning each of the Applicants detailing:*
>   - *Work since May 2012*
>   - *Areas of work*
>   - *Work offered but declined*
>
> 4. *The information is detailed below:*
>
> ***Barry Hinga***
> *25 May 2012 until 7 June 2012*
> - *48.25 hours in the fellmongery*
>
> *2 October 2012 until 5 April 2013*

- *518.55 hours in the fellmongery*
- *24 hours in mutton/lamb slaughter*
- *365.5 hours in the mutton/lamb yards*

Refused work in other departments:
- *23 August 2012*
- *10 October 2012*

Has been offered seasonal employment since 5 April 2013 layoff but declined such offer.

Kerry Bourke
25 May 2012 to 14 June 2012
- *65.5 hours in the fellmongery*

30 July 2012 until 5 April 2013
- *822.21 hours in fellmongery*
- *0.75 hours in calf offals*
- *159.55 hours in calf slaughter*
- *47 hours in mutton/lamb offals*
- *57.5 hours in mutton/lamb slaughter*
- *4.5 hours in mutton/lamb yards*
- *116 hours in rendering*
- *29 hours in trades*

- *Requested transfer to rendering on 17 September 2012. When offered transfer in December 2012/January 2013 declined the transfer.*

Refused work in other departments:
- *23 August 2012*
- *10 October 2012*
- *Resigned 5 October 2013.*

Paul Masters
29 May 2012 until 14 June 2012
- *65.26 hours in fellmongery*

19 July 2012 until 5 April 2013
- *522.05 hours fellmongery*
- *3.75 hours calf offals*
- *261.3 hours calf slaughter*
- *105.25 hours mutton/lamb offals*
- *150.25 hours mutton/lamb slaughter*

- *Declined an offer to work in other departments on 10 October 2012*

- *Resigned 17 May 2013*

- *Applied for re-employment late 2013.*

8 January 2014 to 28 March 2014
- *366.75 hours in mutton/lamb slaughter*

Refused work in other departments:
- *23 August 2012*

- *10 October 2012*
- *19 & 22 March 2013*

Jim Pullins
25 May 2012 until 14 June 2012
- *64.5 hours in fellmongery*

16 July 2012 until 5 April 2013
- *498.2 hours fellmongery*
- *2.75 hours calf offals*
- *291.95 hours calf slaughter*
- *229.25 hours mutton/lamb offals*
- *93.5 hours mutton/lamb slaughter*

6 October 2013 until 28 March 2014
- *823.8 hours fellmongery*

Refused work in other departments:
- *23 August 2012*
- *10 October 2012*
- *18, 23, 24 & 31 October 2013*
- *1 & 4 November 2013*

Paul Severinson
25 May 2012 until 14 June 2012
- *66.5 hours fellmongery*

16 July 2012
- *3.5 hours in calf slaughter and 1 hour in fellmongery*
- *Re-engaged for the calf season but only worked 1 day and then was covered by medical certificates for the rest of the season.*

15 January 2013 until 5 April 2013
- *250.55 hours in fellmongery*

9 October 2013 until 28 March 2014
- *854.58 hours fellmongery*

Refused work in other departments:
- *23 August 2012*
- *10 October 2012*
- *3 April 2013*
- *18, 22, 23 & 31 October 2013*
- *1 & 4 November 2013*

Jason Rangi
29 May 2012 until 12 June 2012
- *45.5 hours fellmongery*

12 October 2012 until 5 April 2013
- *284.05 hours of fellmongery*
- *10 hours calf offals*
- *1.25 hours calf slaughter*
- *4.5 hours calf yards*

- *5.75 hours mutton/lamb offals*
- *193.25 hours mutton/lamb slaughter*
- *35.5 hours mutton/lamb yards*

18 October 2013 to 9 April 2014
- *4.25 hours calf slaughter*
- *823 hours mutton/lamb slaughter*

3 June 2014 to 6 June 2014
- *29 hours in mutton slaughter*

Refused work in other departments:
- *23 August 2012*
- *10 October 2012*
- *3 April 2013*

Lee Karamaina
29 May 2012 until 8 June 2012
- *37.5 hours fellmongery*

3 December 2012 until 5 April 2013
- *382.8 hours fellmongery*
- *48.5 hours mutton/lamb yards*

9 October 2013 until 28 March 2014
- *733.5 hours mutton/lamb offals*

Refused work in other departments:
- *23 August 2012*
- *10 October 2012*
- *8 & 22 March 2013*

Eric Hulena
29 May 2012 until 14 June 2012
- *59.25 hours in the fellmongery*

2 October 2012 until 6 May 2013
- *73.5 hours in fellmongery*
- *1031.34 hours in mutton/lamb slaughter*
- *40.75 hours in mutton/lamb yards*

18 September 2013 until 13 June 2014
- *7.75 hours in calf offals*
- *10.25 hours in calf slaughter*
- *40 hours in mutton/lamb offals*
- *971.75 hours in mutton/lamb slaughter*
- *7.25 hours in mutton/lamb yards*

Refused work in other departments:
- *23 August 2012*
- *10 October 2012*
- *21 March 2013*

Richard Steele
29 May 2012 until 14 June 2012

- *52.25 hours fellmongery*

16 July 2012 until 5 April 2013
- *545.8 hours fellmongery*
- *269.15 hours calf slaughter*
- *236.25 hours mutton/lamb slaughter*

14 October 2013 until 1 April 2014
- *692 hours mutton/lamb offals*
- *17 hours mutton/lamb slaughter*

Refused work in other departments:
- *23 August 2012*
- *10 & 15 October 2012*
- *19 March 2013*

Ross Wakeling
25 May 2012 until 14 June 2013
- *70.75 hours fellmongery*

16 July 2012 until 5 April 2013
- *363 hours fellmongery*
- *243.75 hours calf slaughter*
- *148.5 hours mutton/lamb offals*
- *18.75 hours mutton/lamb slaughter*

- *declined an offer to work in other departments on 10 October 2012 and 15 October 2012*

21 October 2013 until 27 March 2014
- *1.75 hours calf offals*
- *722 hours mutton/lamb offals*
- *50.25 hours mutton/lamb slaughter*

Refused work in other departments:
- *23 August 2012*
- *2 & 10 October 2012*
- *3 April 2013*

The law

[24] Seniority provisions in the meat freezing industry have been the subject of a number of Employment Court and Court of Appeal decisions. Fundamentally, the issues revolve around the tension between the fact that the seasonal employment of meat workers terminates at the end of each season and the fact that there remains an obligation on employers to re-employ them the next season usually on the basis of their seniority from the past season.

[25] In essence, awards and other collective agreements applying to freezing workers have, since 1977 at least, been for seasonal employment, but with an

obligation on employers to re-engage labour for the next season in accordance with the parties' seniority clause. When contained in an award or collective agreement, such provisions even override undertakings to employees of permanent employment, if that is inconsistent with the terms and conditions in a collective agreement. Inconsistent means not being able to stand together (*NZ Meat Processors etc IUW v. Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143).

[26] In *NZ Meat Processers Etc IUOW v. Alliance Freezing Co (Southland) Ltd* [1991] 1 ERNZ 1213 (the Sockburn case) the issue of eligibility for redundancy compensation after workers who had accepted jobs in a new cutting room, which processed already cut frozen meat into consumer cuts from their previous positions in the lamb cutting room on night shift, was addressed. When the portion cutting room was subsequently closed, the workers were offered and accepted work on the night cutting shift cutting lamb. As a result of this they lost their seniority, because the Sockburn plant operated departmental seniority. At 1216 Horn CJ found:

> *The workers' usual seasonal employment was made available by the employer even though the workers'* position *or* usual position *was superfluous to the needs of the employer. The loss of positions in the portion cutting room was due to the managerial decision, doubtless rightly taken, to increase the speed of the seasonal kill resulting in the need for increased chilling space.*

[27] Horn CJ went on to conclude at 1217:

> *Reasonable flexibility is required on the part of the employee. If the position disappeared but the worker was directed or offered another position, it was a matter of fact or degree whether a new position comes within the implied terms or was it so different as to lead to the conclusion that the contract of employment had been severed? …*
>
> *There was a reduction in pay due to differing incentive payments but it seems to me, again in this seasonal industry, the alternative positions were suitable. As counsel for the respondent said, there is a clear theme that a worker cannot be said to be redundant unless his employment has been terminated. If their continued employment has changed shape, then it will be a matter of fact and degree as to whether or not a person is said to be redundant.*
>
> *In the present case there is certainly loss of a position. Is there loss of employment, to that issue I now turn. Were the positions fundamentally different, is the essentially seasonal nature of this industry a fundamental factor in considering the redundancy agreement requiring a different approach from a non-seasonal industry? I note that clause 2(g) of the award gives certain priority of employment rights at the commencement of each season to competent and satisfactory workers at that freezing works during the previous season, subject, however, to the power of management contained in*

clause 31 of the award. I was referred to NZ Meat Processers etc Union v. Alliance Freezing Co *[1991] 1 NZLR 143. The Court of Appeal said at p.160:*

> *"The award is designed for a seasonal industry. A seasonal engagement of workers is a basic premise underlying the award. That is clear from clause 29(g), (now 28(g)), clause 30 (now 29) and the lead provisions earlier referred to."*

The "renumbering" is mine.

It does not appear in the present case that the workers were promised or engaged on the basis of a guaranteed year-round employment although on the facts it seems clear that they could expect to work during a longer period than the normal killing season.

Counsel for the respondent lays some emphasis upon the statement in the Group Rentals *case supra at p.259:*

> *"Depending on the circumstances of any particular case, it is proper to say that the redeployment of staff (where needed) following a reorganisation is not necessarily a redundancy."*

When comparing, however, similarities between contract rates of pay in the portion cutting room and rates of pay in the night shift cutting room the financial advantage was in the portion cutting room.

In the present case the workers are not superfluous to the needs of the employer but have lost their particular positions. They have been offered and accepted other positions in their employment. The workers' priority for redeployment in this seasonal industry are recognised by clause 28(g) of the award.

Apart from the inherent right to manage discussed in GN Hale & Son Ltd v. Wellington etc Caretakers' Union *[1991] 1 NZLR 151, there is also in this case the specific right in clause 31 of the award. Further, clause 29(h) of the award quoted above requires the employer to offer vacancies in other departments. This happens in the present case.*

After considering the various factors which I have endeavoured to summarise above, and considering the full and careful submissions of counsel, I have reached the following conclusions:

1. *That the issues must be looked at in the context of a seasonal and particular industry.*

2. *That the award provisions are clearly designed for seasonal engagement and operation.*

3. *That the portion cutting room work, although it would be longer than most departments, is still of a seasonal nature.*

4. *That employment in terms of the award has not been terminated.*

> 5. *That the workers' usual* seasonal employment, *but not their immediately previous* positions, *has been made available to the workers in accordance with the terms of the award.*
>
> 6. *That the right to manage provision, as well as the general law, enables in this instance, the respondent to close down departments and then, in the usual seasonal course, to offer employment with a different department.*
>
> 7. *That although the contract rates are less in the night shift cutting room, there is no essential difference in the nature of the work.*
>
> 8. *That clause 15 of the award does suggest, if only by inference or indirection, that workers may be required to undertake other work covered by the award as an alternative to redundancy.*
>
> *I am not holding that in every case a worker, whose position has vanished because the particular branch of the workplace has been closed, and who has been offered then, or later, alternative employment, is disentitled to a redundancy payment. What I am holding is that in the seasonal type industry such as the present one, the worker's employment or his employment rights have not been terminated. The usual season engagement or re-engagement processes follow. Seasonal basis is the underlying factor.*

[28] As was held by Judge Palmer in *New Zealand Meat Workers' Union v. Richmond Ltd* [1992] 3 ERNZ 643 at 692 (as part of the majority):

> *The scheme of successive awards governing employment within the industry are founded upon the fundamental explicit premise that employment is seasonal. In my concluded view the contracts of employment of particular meat workers are lawfully terminated when they are laid off by their employers at the conclusion of each season. Meat workers, I hold, who are laid off at the conclusion of the season, are re-employed at particular plants at the commencement of the succeeding season according to the production needs of their particular employers and consonant with the seniority principle which is, in its application, effectively determinative of ordered re-employment within the industry. In my view the contract of employment of a meat worker who has been seasonally laid off does not thereafter legally continue to subsist through off-seasonal suspension followed by subsequent activation occasioned by re-employment of such a worker at the commencement of the succeeding season. Employment continuity is not, I conclude, maintained in this particular way. It is not the case, I hold, that an employment contract which is discontinuous in fact because of an off-season layoff is in law contractually uninterrupted. To the contrary, in my concluded view a meatworker's contract of employment is terminated when he or she – as the case may be – is laid off and a new contract of employment entered into when a particular worker is re-employed at the commencement of the succeeding killing season.*

[29] In the *New Zealand Meat Workers' Union Inc v. Alliance Group Ltd* [2006] ERNZ 664 a full bench of the Employment Court revisited these issues in the context of entitlement to holiday pay. In para.[12] the Full Court noted:

> *…Seniority lists are maintained which rank the workers in order of their initial start date in the department or, in the case of Mataura, their initial start date at the plant. These seniority lists determine the order in which workers are called in at the beginning of each season and the order in which they are laid off at the end of the season. The higher the seniority, the longer the season, and hence the greater an employee's earnings will be. As a general rule, work for the new season is offered to workers who worked at the plant in the previous season before it is offered to others. The seniority list is also sometimes used to determine who is offered off-season work.*

[30] The Full Court confirmed the principles of *Richmond* stating:

> *The cases also 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.*

[31] Also significant is the judgment in *South Pacific Meats Ltd v. Mohammed* [2012] NZEmpC 96 where it was held that even without a seniority clause, it would be at odds with the underlying purpose of clause 3 to interpret it as enabling the re-engagement of a longstanding day worker to a less lucrative night shift position over a worker with no employment history with the company, absent any countervailing factors relating to competency nor would such an interpretation be consistent with the parties' past practice.

[32] For the sake of completeness I recite the relevant part of clause 3 of that collective agreement, as it is quite different to the clause at issue here:

> *3.2 Where demand drops off before the close down for the season such that not all employees are required the employer may terminate the employment of staff on a progressive basis. In selecting employees to be terminated, the employer shall take into consideration the skills required to operate a balanced workforce. All things being equal the company will observe the principle of first on last off.*
>
> *…*
>
> *3.7 It is agreed that … the plants operates in a seasonal industry. As a result staffing levels need to change during the season to match the required production levels. In selecting employees to be seasonally laid off or re-engaged the following criteria will be considered:*

> 1. *The original starting date of the employee provided they have been continuously employed during the season.*
>
> 2. *Competency to perform the work required, including skill levels, physical ability, reliability and adaptability in being able to work in a variety of positions.*
>
> *Selection on this basis shall be made by the plant manager in consultation with the departmental supervisor and plant representatives …*

Determination

[33] As has been explicitly noted in Court judgments seniority can occur on either a plant-wide or department-by-department basis. As is also clear from the above, production needs provide the basis for re-employment pursuant to the seniority clause, whether such re-employment is by way of plant-wide or department-by-department seniority. So where department-by-department seniority exists, then I conclude that what is vital is whether the production needs of the employer are such that staff are needed in each department. Where staff are needed in the department, they must be re-employed in accordance with the seniority system.

[34] A key provision in this case is clause 1(b) of Appendix A. It is clear from this that a redundancy situation only exists where the employees' seasonal employment is being made unavailable by the company, not that the employees' departmental position is being made unavailable. Here I note that the coverage clause in the Imlay site agreement provides strong support to AFFCO's submission that there is no differentiation for meat workers by department, but is of general application and only exempts particular types of work such as engineering, maintenance, clerical and managerial supervision. This is strengthened by the fact that in all other plants there is no departmental seniority, which demonstrates that employment is to be interpreted widely, not department by department. Furthermore, all applicants have expertise and experience working in other departments. It therefore follows that all workers at Imlay covered by the agreement are meat workers and that is their employment categorisation for the purposes of this dispute.

[35] What clause 10d appears to provide for is that following re-employment, and even despite departmental seniority in Imlay, management can transfer staff from department to department depending on AFFCO's operational requirements. Such transfers may even be permanent transfers.

[36] Clause 10(d) appears to also support AFFCO's view that the union members covered by the collective employment agreement are employed as meat workers and not as tally workers or boners or fellmongers as the case may be. The only exception relates to payment, whereby any temporary transfer at AFFCO's request allows staff to maintain their normal daily earnings if they were higher than in the area to which they were being transferred.

[37] However, I also conclude that it is implicit in the seniority process that if employees' seasonal employment is not being offered to them because the department in which they hold seniority is not operating, that such employees will be offered seasonal employment in some other department before AFFCO employs other workers who have no seniority, all other factors being equal. It makes no sense that a seasonal employee would have no more rights to employment in the new season than someone who had never been employed in the previous season. This is simply an issue that naturally flows from the seniority process by implication, being so obvious that it in effect goes without saying.

[38] It follows from the above that the applicants are entitled to be appointed to work in the fellmongery as seasonal employees. Since the major dispute over the terms of the AFFCO collective agreement two years ago, however, the situation in the Imlay fellmongery has changed. For the reasons given in paragraph 21 I accept that the reasons appear to be sound economic ones.

[39] If the decision is made not to reopen the fellmongery in the course of the season, then the applicants here should be recalled on the basis of seniority in that department for seasonal work opportunities in other departments. This would certainly also be possible under clause 10(d) of the collective if the employees had been engaged in the fellmongery, but work dried up. What is not clear from the evidence is whether or not seasonal re-employment offers were made to the applicants consistent with the above analysis. I reserve leave to the parties to deal with any issues that may arise should agreement not be possible. No employee who resigned or refused to take up seasonal employment would be entitled to any compensation, whether by way of non-provision of relocation make-up pay or otherwise. However, the distinction must be made between an offer by AFFCO of seasonal employment and casual employment. Any offer of casual employment is irrelevant where AFFCO

has an obligation to offer seasonal employment and has in fact employed many, many new seasonal employees over the relevant period.

[40] Thus clearly seasonal employees such as these fellmongery workers who have declined an offer of seasonal work in other departments have no comeback against AFFCO from that point on. The situation is quite different, for the reasons given above, for those who have declined casual employment. The agreed facts do not provide sufficient detail on the types of work offered in other departments, namely whether seasonal or casual, and for that reason leave is granted for further investigation by the Authority should the parties not be able to agree on how each person's circumstance is to be treated.

[41] It cannot at this point, based on the evidence, be found that the applicants should have been made redundant. In fact, the redundancy clause has not even been triggered. Furthermore, even if an employee's seasonal employment was unavailable because they were genuinely surplus (and hence the redundancy clause triggered), it is clear on the evidence that relocation would occur.

[42] In terms of the back pay claim it is important that until the 2014 season at least, where workers were engaged in the fellmongery department and later transferred, they were transferring temporarily at the request of AFFCO. They were therefore entitled to be paid no less than the normal daily earnings applicable to their role within the fellmongery. The reason for this is that they were engaged on a seasonal basis in the fellmongery and they continued to be employed as meat workers until when they were laid off for the season. Clearly they worked in other departments at the request of AFFCO management, to suit its purposes as well as to keep the applicants in work, and thus the requirements of clause 10d for make-up pay have been made out for the 2012/2013 and 2013/2014 seasons.

[43] It is a disingenuous argument to claim that the pay that someone who has transferred might have lost when being transferred from one department to the next is nil because that department would have closed. This is not what the clause intends. It is intended to provide for continuity of employment to suit AFFCO at rates to suit its staff, i.e. no less than what they were earning before, which is consistent with clause 9f of the agreement. Having made the decision to continue the employment of these generic seasonal workers, rather than lay them off on a seasonal basis, AFFCO is obliged to pay the fellmongery workers at whatever is the higher rate. It is part of the

benefits applying to both AFFCO and the applicants of seasonal employment as meat workers rather than fellmongers, butchers or other such departmental employment. Leave is reserved to revert to the Authority should agreement be unable to be reached on the quantum owing (if any) to each of the applicants.

Costs

[44] Costs are reserved.

G J Wood
Member of the Employment Relations Authority