**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI**
**TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 99
3091296

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| | BETWEEN | JAMES PARTICK STEWART<br>Applicant |
| | AND | AFFCO NEW ZEALAND LIMITED<br>Respondent |

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| Member of Authority: | Michael Loftus |
| Representatives: | Applicant in Person<br>Tom Jarman and Graeme Malone, counsel for Respondent |
| Investigation Meeting: | 5 October 2020 at Whanganui |
| Submissions Received: | 13 November and 22 December 2020 from the Applicant<br>7 December 2020 from the Respondent with further input up to 6 August 2021 |
| Date of Determination: | 18 March 2022 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, James Stewart is a long standing employee who has levelled a number of accusations which, he says, have seen him unjustifiably disadvantaged by his employer, AFFCO New Zealand Limited (AFFCO). They are that:

(a) AFFCO failed to provide suitable protective clothing;

(b) He has been disadvantaged by reason of his employment agreement containing shift provisions that are not compliant with ss 67C, 67D, 67G and 67H of the Employment Relations Act 2000 (the Act) and not paid properly as a result;

(c) He has been disadvantaged by reason of AFFCO's failure to have an availability provision complaint with s 67D of the Act;

(d) AFFCO has improperly reduced overtime payments by virtue of the way it uses piece rate payments though this claim was first enunciated at the investigation meeting;

(e) AFFCO has shown a lack of goodwill when entering into its employment agreements and therefore failed to bargain with Mr Stewart in good faith; and

(f) AFFCO has shown a lack of goodwill when addressing the employment relationship problems.

[2] AFFCO denies the claims have any validity.

**The Authority's investigation**

[3] The Authority's investigation was conducted face to face with the witnesses speaking to their briefs and a considerable amount of documentation tabled prior. Evidence was heard from Mr Stewart along with a supporting witness. For AFFCO the main witness was the relevant plant manager, Dave Berry, though others addressed the protective clothing issue.

[4] Submissions were exchanged later and a further issue arose cornering media comment about AFFCO's attitude to health and safety which might be relevant to the protective clothing claim. This led to further input from the parties.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[6] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

**Discussion**

***Failure to provide adequate protective clothing***

[7] Mr Stewart says the clothing issued to staff was, for a considerable period of time, "totally unsuited", with overalls covering the lower body only. This meant a severe loss of body heat especially when working in extremely cold places such as freezers as Mr Stewart does.

[8] As already said AFFCO denies the claim and in doing so refers to a 2019 audit by Worksafe and the fact no remedial action was required. It says all freezer staff have access to high visibility polar fleece jerseys, thermal under clothing, thermal socks and thermal overalls which are all rated to -50 celsius when the freezers are at about -20 degrees. Notwithstanding that, AFFCO adds it seeks continuous improvement and to that end actively engages with staff to trial alternates though it is said they often preferred the older styles.

[9] When giving oral evidence Mr Stewart rejected the idea AFFCO consults with staff about these issues and alleges it tries to deflect worker complaints by placating them with trials of alternate protective clothing. That said he also accepted the issues have been largely addressed, though claims that was only as a result of AFFCO being spurred into action by the initial raising of Mr Stewart's personal grievance. In saying "largely" Mr Stewart claims issues remain with respect to gloves though he also says the trials through which AFFCO is trying to deflect staff dissatisfaction primarily relate to gloves and boots.

[10] For a claim of disadvantage to succeed two things need occur. The first is that the applicant establish a prima facie case for the respondent to answer and to that there are two steps. The first is to establish an event or action occurred and the second is to show it operated to the applicant's disadvantage. Should that occur we move to the second stage which is that the respondent justifies its actions. The claim will only succeed should it fail to do so.

[11] The evidence makes it difficult to conclude Mr Stewart has managed to establish he has been subjected to an action that might possibly disadvantage him. The claim is AFFCO has failed to provide suitable clothing thus putting its employees at both risk and discomfort with him alleging, in oral evidence, that while subjective he considers he is in pain and still shivering some three hours after being in the freezers. He also says others face similar problems and his hurt is amplified by seeing others in a similar predicament.

[12] In his statement of problem, however, Mr Stewart recognises new overalls were being provided and says he couldn't believe how warm they were and it took some adjusting to wear them. Interestingly one of the witnesses Mr Stewart called to support his claims also commented that some of the clothing got too hot. Having conceded the bulk of the issues had been addressed Mr Stewart said those remaining relates to gloves. That said, he also said it was those, along with boots, that were the subject of current trials but rather than accept AFFCO's proposition this meant it was continuously trying to improve the protective clothing's effectiveness, he complained the trials were an attempt to deflect staff dissatisfaction.

[13] The final point is the extent to which the issues have actually been raised. In oral evidence Mr Stewart said concerns about the clothing was not raised in any significant way until he did so in 2019. He also accepts it was then when the new improved clothing was introduced. This evidence was reiterated in Mr Stewart's submission where he said …*there have been efforts, perhaps not formal in approach to ask for better gear. And I do acknowledge that no one up until this point has really rocked the boat in order to effect changes.*

[14] This last point highlights the final impediment to this claim. Assuming there had been a failure on AFFCO's part and it had operated to Mr Stewart's disadvantage, AFFCO would still have had to be put on notice and given a chance to address it. It would be difficult to find their actions unjustified until they had knowledge of the problem and then failed to address it. By Mr Stewart's own evidence the issues were addressed when first raised. That is a proper reaction and would remove any chance AFFCO's action could be considered unjustified.

[15] For these reasons this claim fails.

***Shift Provisions***

[16] The claim, as initially made, was that Mr Stewart's shift provision was inconsistent with four provisions of the Act but that is not what was pursued in evidence or submission. There the claim was explained as being concerned with the fact shifts were being either cancelled at relatively short notice such as a day or so from commencement or even more problematically, after commencement and the way this occurred was contrary to the provisions of s 67G of the Act. It may well be ss 67C, 67D and 67H were originally mentioned due to their inclusion in s 103(1)(h) but none were mentioned during the investigation at least in this context.

[17] Section 67G provides that where an employee is required to work shifts as Mr Stewart is, the employer must not cancel a shift unless the employment agreement specifies a reasonable period of notice that must be given before the cancellation or provide for reasonable compensation if that notice is not given. That a failure to comply might constitute a personal grievance is expressly stated in the Act.[1]

[18] The relevant provision in Mr Stewart's last signed IEA falls well short in that it simply provides *Ordinary hours are not guaranteed in any week and may be reduced in any week depending on stock availability, factory and processing requirements.* Obviously this gives neither a notice period nor compensation if a shift is cancelled absent such notice. All that is arguably done in that respect is that the agreement provides a minimum payment of 4 hours once an employee arrives to attend scheduled work.

[19] AFFCO's defence is the issue is irrelevant as the entitlement to payment would hardly ever arise though, in one respect, this is predicated on the content of a subsequent agreement it offered but which Mr Stewart did not sign. That agreement provides that where a shift is cancelled for reasons within AFFCO's direct control it shall give 48 hours' notice of cancellation. Causes within AFFCO's control are defined as planned upgrades and maintenance. The clause also provides that where cancellation arises from issues outside AFFCO's control such as *customer demand, environment, supply factors, urgent maintenance or breakdown* and it is not practical to give 48 hours' notice then staff shall be notified *not later than the end of their first rest break in the day immediately preceding the cancelled shift*. Finally the clause provides:

> *Where a shift is to be cancelled for urgent maintenance or breakdowns or other cause where it is not practically able for the company to give reasonable notice (e.g. accident/MPI requirement) the Company shall not be required to give any specific period of notice, but shall advise the employee as soon as reasonably practicable, and shall pay the four hour payment in Clause 9.6 if the employee does not receive notice and as a result attends work.*

[20] When addressing the shift provisions AFFCO's evidence was given by Mr Berry. He said if cancelled prior to commencement there was no pay and nor did this raise an issue. That was because the required notice was always given for any event defined as being in AFFCO's control. Where cancellation occurred within 48 hours it was inevitably due to a lack of stock which could be considered either customer demand or a supply factor and as they were defined

[1] Section 103(h) of the Employment Relations Act 2000

as being issues beyond AFFCO's control the notice period was reduced though he also conceded there would be no pay unless the chain had actually started at the commencement of the shift. That, I would add, appears to suggest the new clause is itself being breached as it requires notice in such circumstances prior the first rest break on the day prior but that is not an issue I need decide as it did not apply to Mr Stewart.

[21] Once the chain is started Mr Berry's evidence is the minimum payment of four hours required by the agreement is paid and that is not disputed. The issue is what then happens. It is Mr Berry's evidence staff are given a choice after four hours – go home or remain and perform other work such as attending to hygiene requirements. He says that as work is always available an employee who chooses to go has abrogated any right to payment as the loss is a result of their having voluntarily exercised a choice.

[22] The employees who gave evidence have a different view, saying alternate work is frequently unavailable and two situations often arise. One is that there is staff are simply instructed they must leave and few are willing to question that due to a fear of retribution. The second is that staff who remain face the unpleasant prospect of an enforced but idle stay which improperly entices them to go. Here I must also note Mr Berry was unable to deny these claims and said there were often no supervisors present so staff actually had no person to get instructions from. Bear in mind here that Mr Stewart predominantly worked the twilight shift which went well into the night. Mr Berry also said that while employees could "seek redress" the next day, few were confident enough to do so.

[23] I must say I found this last evidence unsatisfactory but again I do not have to resolve the issue for two reasons. One is this is not a wage arrears claim but a disadvantage claim brought pursuant to s103(1)(h).

[24] Secondly, and more importantly, I have already found the clause that applied to Mr Stewart falls well short of the requirements of s 67G so this claim succeeds in any event. Add to that the evidence makes it clear shifts are cancelled or shortened without compensation I conclude there is a breach by which Mr Stewart is disadvantaged.

***Availability provision***

[25] Section 67D of the Act provides an availability provision is one under which the performance of work is conditional on the employer making work available and the employee must then be available to accept any work the employer provides. An availability provision is only permitted where the agreement also guarantees a certain number of hours will be worked within specified parameters.

[26] The provisions with which Mr Stewart takes issue read:

> *6.10 As a result of uncertain livestock flows and the seasonal nature of the industry, the employee agrees to be available to work for the hours as outlined in this agreement and overtime as reasonably required by the employer and will be paid as prescribes [sic] in clauses 8 and 9 of this agreement.*
>
> *6.11 As a result of animal welfare and operational requirements, and the seasonal nature of the industry, the employee agrees to not partake in any secondary employment that will conflict with their ability to fulfil the requirements outlined in this agreement.*
>
> *9.3 Given the seasonal nature of the industry, the employee accepts that s/he may be required to work extra hours both during the week and on weekends as required by the employer and agrees to work such extra hours as are required.*
>
> *9.4 The employer shall notify all employees required to undertake weekend overtime work not later than the end of their work period on the Thursday before. Notwithstanding the above, where unforeseen circumstances necessitate Saturday work, and such notification is not possible, agreement to work shall not be unreasonably withheld.*

[27] It is clear clauses 6.10 and 6.11 fulfil the definitional requirements of s 67D and constitute an availability provision though there is no specified compensation as required by s 67D(3)(b) of the Act. Here though a potential issue arises which is that the mischief the section was originally aimed at addressing was the use of provisions that gave employees no guarantee of work or minimum hours but required they remain available should they be required. That is not the case here and not what Mr Stewart is trying to address. His issue is the linkage with clause 9 and the requirement he be available should AFFCO require he work overtime.

[28] In this regard Mr Stewart also cites the subsequent agreements which he has refused to sign but which he correctly asserts attempt to address the issues he raised. These end with the addition of an allowance in the 2020 agreement but ultimately this is irrelevant to the claims before me. Mr Stewart is still subject to the 2018 agreement which clearly fails to comply with the Act's requirements as despite the fact the original mischief was somewhat different the

words now read widely enough to include the requirement employees are available to work overtime especially to the extent they cannot seek alternate employment without AFFCO's permission so they can fulfil that requirement.

[29] That this provision constituted an availability provision was conceded by AFFCO but its defence relies on fact the Act also states that in the absence of a compliant availability provision it cannot enforce the requirement. It claims that in this case all overtime has been performed voluntarily and there is no evidence it has never tried to enforce a refusal or that Mr Stewart suffered a disadvantage such as receipt of a warning.

[30] The evidence supports this submission. Mr Stewart never suggested, when giving his evidence that he had been either required to work overtime with no option of refusal nor had he suffered a disadvantage for not doing so. Instead when giving evidence he kept returning to his assertion the clause was deficient and the compensation offered in subsequent agreement inadequate. That theme was repeated in his reply submissions where he discussed the adequacy of compensation and here I note that in his statement of problem he claimed $4 for each hour he was required to remain available. That is somewhat more then AFFCO offered in the 2020 agreement.

[31] Returning to the issue, as already said, for there to be a disadvantage there must be an act which operates to the applicant's disadvantage and which is then unjustified. That there as an act that could potentially disadvantage Mr Stewart is established. His agreement contained a non-compliant availability clause.

[32] Did it however actually disadvantage him? The answer is no as there is no evidence AFFCO tried to enforce it and no evidence of any disadvantageous outcome. The real issue here is that there is a significant disagreement about the level of appropriate compensation but that is not an issue the Authority can resolve as it would constitute the fixing of term which is precluded by the Act[2] except in specific circumstances which do not apply here.[3]

[33] For these reasons this claim also fails.

[2] Section 161(2) of the Employment Relations Act 2000
[3] An application under s 50J of the Employment Relations Act 2000

***Overtime payments***

[34] Mr Stewart claims AFFCO is improperly designating a portion of his pay as either piece rate or a production bonus in order to reduce overtime payments when such is payable. When explaining this is became apparent this was a new issue that had not been pleaded earlier and that was conceded by Mr Stewart. It was also apparent the real issue was in the nature of a wage arrears claim as opposed to a personal grievance.

[35] The clause in question reads:

> *Unless otherwise specified, overtime shall be paid at 1.5 times (1.5T) the employee's ordinary hourly production rate. The multiplier is not applied to production bonuses/piece rates which will continue to be paid at the normal rate for the same.*

[36] Essentially what Mr Stewart is saying is that his pay, excluding overtime, never fluctuates and it therefore follows that his ordinary rate of pay is one that includes all the components there-of. As such components include the production bonuses and piece rates and as they are part of the ordinary rate the overtime loading should apply to them.

[37] AFFCO accepts that while Mr Stewart's description of his pay is accurate and overtime aside it is consistent, it is denied he has any possible claim. That is because the overtime payments are being made in accordance with Mr Stewart's employment agreement and provided that is so and statutory requirements, particularly those in the Minimum Wage Act 1983, are complied with there can be no claim. Here it should be noted there is no suggestion any minimum wage requirements have been breached.

[38] AFFCO's position is one with which I agree particularly as Mr Stewart, when giving evidence, accepted the current pay structure was agreed to in bargaining. He advised that occurred in 2002 with the union accepting after what effectively remain the current provision was voted on by its members. He also accepted the current approach saw what he describes as "true" piece rates abandoned, with the result being what is effectively a set rate of pay.

[39] It is these admissions that poses the first, and most serious, of a number of impediments to the claim succeeding as the overtime provision was either then retained or subsequently inserted with the current structure either known or in place. That leads to a conclusion that irrespective of how it works the piece rate component remains identified as such and the clause

expressly states it is not subject to the T1.5 loading. Overtime is therefore paid in accordance with an agreement knowingly and willingly entered into.

[40] A second impediment is that this is effectively a wage arrears claim and does not lend itself to resolution through the personal grievance process.

[41] The third impediment is this was not, as Mr Stewart concedes, pleaded and it is not, given the point above, amenable to inclusion via the application of s 122 of the Act. A respondent is entitled to know the claims it faces and have them properly before it. That has not occurred here.

[42] For these reasons this claim fails.

***Bargaining in good faith***

[43] Mr Stewart's claim in this respect is that AFFCO offers standard form agreements at the commencement of each season. He says that doing so imposes upon the company an obligation to ensure the content is compliant with various requirements and legislation – his actual words were "get things right". He goes on to say that he has raised what he asserts are multiple issues but claims AFFCO simply hands the document back unaltered and fails to respond to the issues and faults he has raised. Mr Stewart says that by acting this way AFFCO has failed to negotiate in good faith.

[44] When discussing this Mr Stewart gave various examples of the deficiencies he says AFFCO refused to negotiate. One of the those was the overtime payment issue I have just addressed which explains how it was discussed without being pleaded. Other items identified at the investigation were the availability provision, particularly that in the proposed 2020 agreement, and payment for overtime. Both of these have also been discussed above.

[45] A further item noted in the statement of problem was the provision relating to seasonal lay-off though when asked Mr Stewart did not include that amidst those he wished to pursue at the investigation. It was not discussed and, in any event, now appears to have been addressed by the Employment Court.[4]

[4] *Stewart v AFFCO Limited* [2021] NZEmpC 215

[46] Mr Stewart then went on to say his real issue was that he wanted a declaration in his favour as he believed he should be compensated for the losses he had suffered as a result and that is reflected in the remedies sought in his statement of problem where he seeks compensation for being available at the rate of $4 an hour from 1 April 2016 on. He says he has set his price and wants no more than a declaration he was right so he could go forth and "handle it."

[47] AFFCO's position is it is open to approaches from workers who wish to discuss their terms though other than perhaps wages change might be difficult as there are issues with disparate terms amidst a workforce of some 300 especially as the core items have been the subject of collective negotiation. In any event it says it did respond in a way that indicated a willingness to at least discuss the issues though in doing so suggested the claims were broad and non-specific. Further detail was requested and there is correspondence to that effect.

[48] Again the claim faces difficulties if only because it has been taken as a personal grievance. As Mr Stewart conceded the issues with which he takes issue, other than that of the clothing, are really more in the nature of a dispute even though specific section of the Act allow failures to be treated as grievances. AFFCO is entitled to its position that it has complied with the various requirements with which Mr Stewart has said it has failed and if wrong it will then face the consequences when that matter has been determined.

[49] Even if that were not the case a breach of the duty of good faith does not constitute a ground of grievance in s 103 of the Act. Furthermore, and even if that were not the case, the remedy for a breach is a penalty.[5] None was sought with Mr Stewart seeking no more than declaration to give him some bargaining power. That is not a remedy in the Act's contemplation and not one I would be willing to grant in any event.

[50] For these reasons this claim also fails

***Response to employment relationship problems***

[51] Mr Stewart claims AFFCO's response, or more correctly in his view, the lack of an adequate response constitutes another breach of the duty of good faith. In particular the documentation refers to a lack of adequate engagement and a refusal to attend mediation though he did not speak to this in the investigation nor did he challenge Mr Berry's evidence his "door

[5] Section 4A of the Employment Relations Act 2000

is always open." With respect to the mediation Mr Stewart argues the failure impeded his right of access to the Authority as his agreement states this could only occur if and only if mediation had occurred and failed.

[52] AFFCO's response is essentially that outlined in [47] above, namely that it did respond to issues raised by Mr Stewart even if it could be argued it did so reluctantly and slowly. As to mediation the simple fact is it is not compulsory though a failure to attend may have cost implications. I also have to comment the failure could not preclude Mr Stewart proceeding to the Authority as if his interpretation is correct the effect would be to deprive him of a statutory right and that is not permissible.

[53] In any event, I need not reach any conclusion on the factual disputes. That is because the claim is the alleged failures constituted a second breach of the duty of good faith. For the same reasons the first such claim failed (paragraphs 48 and 49 above) this must also do so.

**Remedies**

[54] Mr Stewart has established he has a personal grievance, albeit with only one of the six claims he raised, namely that AFFCO has failed to include a provision that complies with s 67G of the Act in his employment agreement.

[55] By way of remedies for this breach he seeks wages lost had shifts not been cancelled and $15,000 as compensation pursuant to s 123(1)(c)(i) of the Act.

[56] Looking at lost ages firs1t. While Mr Stewart included in his documentation a schedule of various finishing times between July 2019 and September 2020 it is incomplete with respect to the claim as tabled – namely recompense from the time s 67G weas enacted. There is also no quantification and little explanation with a further issue being that most of the data appears to relate to the shortening of shifts as opposed to cancellation which means the loss, if there actually is one, may not be due to a breach of s 67G which only deal with cancellation. Shortening might be a matter for an arrears claim but it does not appear to be at issue here.

[57] Furthermore, there was no discussion about this given the investigation concentrated on trying to establish exactly what Mr Stewart was claiming, how that might fit within the concept of a personal grievance and liability. It follows there is insufficient evidence to conclude anything is due under this head and I leave it to the parties to attempt resolution.

Should they fail to do so leave is reserved for them to return to the Authority for a determination as to what, if anything, might be due under s 123(1)(b). As one last note of caution I have to say to Mr Stewart that the remedies he sought in respect to all grievances pleased can only be considered grossly excessive and he should take this missive into account when considering his position.

[58] Turning now to compensation and while far greater sums were sought as compensation for other contended breaches; namely suffering from cold and the good faith failures this cause of action is included in a final claim of $15,000 for the residual actions. On some of those Mr Stewart has been unsuccessful. Furthermore, he gave no evidence as to the extent of his hurt and how much might be attributable to this failure.

[59] That said a failure there was and some hurt must emanate especially given Mr Stewarts's attempts to have the matter addressed and what is clearly a long period of conflict between himself and AFFCO.

[60] Having consider all the issues I consider an average award of compensation, namely $8,000, appropriate.

**Conclusion and Orders**

[61] Mr Stewart has established he has a personal grievance on the grounds AFFCO failed to include a provision that complies with s 67G of the Act in his employment agreement. His other claims fail.

[62] As a remedy for his successful grievance, I order AFFCO New Zealand Limited pay Mr Stewart $8,000 (eight thousand dollars) as compensation pursuant to s 123(1)(c)(i) of the Act. Payment is to be made no later than Thursday 14 April 2022.

[63] I also ask the parties consider whether or not wages might also be due and ask they discuss the matter. Should they be unable to resolve it leave is reserved for a return to the Authority to have the matter determined.

[64] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves though it must be noted that as a self-represented litigant Mr Stewart's are likely to be very limited. Conversely he has been successful with respect to establishing a personal grievance if not to the extent he sought which, applying *Coomer v JA McCallum and Son*

*Limited*,[6] would suggest AFFCO may struggle to attain costs. It follows my initial view is costs should lie where they fall but if this is not the case and either seeks an Authority determination that party should lodge, and then should serve on the other, a memorandum on costs within 14 days of the issue of this determination. From the date of service of the other party will then have 14 days to lodge any reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Michael Loftus
**Member of the Employment Relations Authority**

[6] [2017] NZEmpC 156