

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 324  
5413267

BETWEEN

CURTIS WEBBER  
Applicant

AND

AFFCO NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Simon Mitchell, Counsel for the Applicant  
Rachel Webster, Counsel for the Respondent

Investigation Meeting: On the papers

Determination: 30 July 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. The objection of AFFCO New Zealand Limited to Simon Mitchell acting on behalf of Curtis Webber in this matter, and to the New Zealand Meat Workers Union supporting Mr Webber in this matter, is dismissed.**
- B. Costs in relation to this interlocutory matter are reserved.**

**Employment relationship problem**

[1] AFFCO New Zealand Limited (AFFCO) employed Curtis Webber at its Rangiora meat processing plant during the period from 2007 until it dismissed him in early 2013. Mr Webber was a member of the New Zealand Meat Workers Union (the Union). In February 2014, Auckland barrister Simon Mitchell, who has frequently acted for the Union, lodged an application to the Authority on Mr Webber's behalf.

[2] The application identified three employment relationship problems on which resolution by the Authority was sought: firstly, a wage arrears claim concerning overtime payments between March 2007 and February 2013; secondly, a personal grievance about how Mr Webber was treated by a manager on 2 and 9 August 2012 (raised as a grievance on 10 August 2012) and, thirdly, a personal grievance about his dismissal on 18 February 2013. Mr Webber was dismissed because he was said to have threatened a manager during a discussion on 16 January 2013.

[3] In its statement in reply AFFCO objected to Mr Mitchell acting for Mr Webber. It noted that Mr Webber's address on his application to the Authority was recorded as being care of the Union. AFFCO said union involvement in Mr Webber's application to the Authority would be a breach of an agreement made on 22 May 2012 between AFFCO and the Union (the settlement agreement) because one term of that agreement provided for full and final settlement of "*all grievances and disputes between them*". AFFCO also said Mr Mitchell was "*was not in a position to act for Mr Webber on this matter*" as it conflicted with the position of "*his pre-existing client*", the Union.

[4] Mr Mitchell acted for the Union at the time the settlement agreement was made. He has acted for the Union on many occasions – both previously and since – in this Authority and in the Employment Court.

[5] The objection AFFCO raised about the involvement of Mr Mitchell and the apparent involvement of the Union in Mr Webber's application was agreed to be a preliminary matter to be determined on the basis of written submissions to be lodged by counsel.

### **The issue for resolution**

[6] Those written submissions effectively narrowed the issue for resolution to whether the settlement agreement "*precluded*" the Union supporting Mr Webber's claim – including by arranging for and paying for Mr Mitchell to represent him – on the portion of Mr Webber's wage claim that predated 22 May 2012 (being the date of the settlement agreement).

[7] AFFCO's submissions stated that it did not assert Mr Webber could not bring his wage claim due to the settlement agreement, only that the Union could not be involved in supporting such a claim. More particularly, it referred to the part of Mr Webber's wage claim for the period from 15 March 2007 to 22 May 2012 as the matter that the Union could not be involved with as that period pre-dated the settlement agreement. It submitted the Union was confirmed to be in breach of the agreement because Mr Mitchell accepted the Union had arranged for him to be instructed to represent Mr Webber and did not deny the Union was meeting his fees to provide that representation to Mr Webber.

[8] While I considered counsels' written submissions closely I have not set them out in detail. I have expressed conclusions on the two decisive aspects of the issue requiring resolution – that is, firstly, the scope of the settlement agreement and, secondly, Mr Webber's right to representation.<sup>1</sup>

### **The scope of the settlement agreement**

[9] The context of the settlement agreement can be readily understood and interpreted from a plain reading of its terms, set out in six clauses over two pages. It was made at a time when strikes and lockouts were occurring during the course of collective bargaining by AFFCO and the Union. Those terms provided the basis on which that industrial action by the workers and their employer would end. The parties to the agreement were stated to be AFFCO and the Union.

[10] Clause 4 required interpretation to resolve the preliminary issue raised by AFFCO. It read (with two phrases underlined for emphasis by me, not in the original):

*The parties agree that this settlement is (subject to ratification of the Core Agreement) a full and final settlement of all grievances and disputes between them and they shall each, upon signing of the Core Agreement, immediately withdraw (on the basis that they have been fully and finally settled) all court cases/proceedings, Employment Relations Authority cases/proceedings and/or other grievances/disputes they have in relation to one another or employment matters generally including, but not limited to those grievances and disputes listed in the attached document. This obligation does not require the withdrawal of those cases/proceedings taken by individuals against Affco on personal grievances or wage claims resulting from the decision of New Zealand Meat Workers Union of Aotearoa Inc v AFFCO New Zealand Limited [2011] NZEmpC 32.*

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<sup>1</sup> Section 174 of the Employment Relations Act 2000 (the Act).

[11] The “*attached document*” referred to in clause 4 was a single page headed “*Grievances & Disputes to be Withdrawn*”. It listed as “*fully and finally settled*” some eleven matters identified with an Authority or Employment Court file number that either the Union or AFFCO was to withdraw, along with two other matters that the Union undertook not to file or proceed with any further.

[12] The Employment Court decision referred to in clause 4 concerned the operation of the seniority system for seasonal lay-offs and re-engagements.

[13] AFFCO submitted that it paid “*substantial consideration*” (being a one-off payment to be distributed to the workers who were on strike or locked out) in return for an intended “*clean slate*” (with the one specified exception) from the date of the settlement agreement.

[14] In AFFCO’s submission clause 4 was “*intended as a full settlement of all grievances that the Union was acting on at the time*” and the clearly stated exception would otherwise have been unnecessary if the settlement had not been “*intended to apply to grievances its members had raised prior to that date*”. I have underlined part of those two descriptions of the asserted intention of the clause to highlight the different basis of each assertion. Neither description, I have concluded, applied to the circumstances of Mr Webber’s current application before the Authority.

[15] Firstly, it was not clear that the Union was acting for Mr Webber in relation to his wage claim at the time that the settlement agreement was made. Attached to his application to the Authority was a copy of a letter to AFFCO from Te Puke barrister Megan Leaf, dated 11 July 2012, that said Mr Webber had, for the last five months, requested a review of whether he was being the correct overtime rate. A letter of response to Ms Leaf from Ms Webster, dated 31 July 2012, referred to having written to Ms Leaf on 13 March 2012. That 13 March letter appears to have been in response to a letter from Ms Leaf dated 12 March raising an issue about how AFFCO had dealt with a request from Mr Webber for long service leave and asking for records to do with his overtime entitlements. The net effect of that correspondence was that it appeared clear that – as AFFCO’s counsel Ms Webster knew at the time – Ms Leaf was acting for Mr Webber on his overtime wage arrears dispute during the period from March to July 2012. Ms Leaf was his representative on that matter, not the

Union. As a result it was not a grievance that the Union was “*acting on at the time*” of the 22 May settlement agreement. A letter from AFFCO’s Human Resources Manager Graeme Cox to Ms Leaf dated 15 February 2013 implied she was still acting for Mr Webber in the week that he was dismissed (because it asked when she was available to attend a disciplinary meeting with Mr Webber). Mr Mitchell did not appear to become involved in representing Mr Webster until some time later in 2013, possibly around September.

[16] Secondly – as a matter of interpreting not only the terms agreed between AFFCO and the Union but also the statutory provisions allowing workers to pursue personal grievances and wage arrears disputes – the settlement agreement did not extinguish all and any grievances or disputes of all and any employees existing on 22 May 2012. Clause 4 expressly stated that the settlement applied to the parties – that was AFFCO, a registered company, and the Union, an incorporated society registered as a union under the Act. It plainly applied only to the grievances and disputes of those two legal entities. The wording of the clause clearly identified the scope of its application by describing those grievances and disputes as being those “*between them*” and “*in relation to one another*”. If it were otherwise, and was supposed to extinguish any grievance and dispute of each and every worker at the time, clear and express words would have been necessary to remove the rights of those workers – who were both AFFCO’s employees and the Union’s members – to pursue matters that, by their very nature and statutory definition, were personal and individual.<sup>2</sup> The exception stated in the settlement agreement – referring to grievances arising out of the 2011 Court decision – recognised the company-wide or workforce-wide impact of such matters rather than indicating all and any *other* personal or individual matters were settled and to be withdrawn. The result, I considered, was contrary to AFFCO’s submission that the settlement applied to all individual grievances raised by all union members prior to that date. Rather it applied only to those grievances and disputes to which the Union was a party.

### **The right to representation**

[17] In a Minute to counsel I had suggested interpretation of s236 and s238 of the Act would form part of resolving the preliminary issue raised by AFFCO. Neither

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<sup>2</sup> See sections 102, 129(1) and 131(1) of the Act.

counsel addressed that point in submissions. I considered it relevant for the following reasons.

[18] Section 236(1) of the Act confers on any employee the right to choose any other person to represent him or her for the purpose of pursuing rights under the Act “*to do anything or take any action ... in the Authority*”. Section 238 of the Act states such provisions “*have effect despite any provision to the contrary in any contract or agreement*”.

[19] Such strongly stated statutory protections could not be set aside without clear evidence that they did not or could not apply in a particular situation. I found no such evidence here. Just as AFFCO was entitled to be represented by in-house or external counsel of its choice, Mr Webber was entitled to be represented by his choice of counsel (including counsel provided with the assistance of his union, as a benefit of his union membership). Section 238 of the Act would prevent, I considered, any provision of the settlement agreement between AFFCO and the Union being interpreted or applied in a way that removed Mr Webber’s representation right under s236(1) of the Act.

[20] On my interpretation of the terms of the settlement agreement I did not identify any conflict of interest in Mr Mitchell acting for the Union, on other matters, and for Mr Webber in relation to Mr Webber’s personal and individual application to the Authority.

### **Costs**

[21] Costs in respect of this interlocutory matter are reserved.

Robin Arthur  
Member of the Employment Relations Authority