

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 24  
5577392

BETWEEN WILLIAM ALEXANDER  
(SANDY) BUTTERFIELD  
Applicant

AND ALLIANCE GROUP LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Mary-Jane Thomas, Counsel for the Applicant  
Shaun Brookes and Peter Chemis, Counsel for the Respondent

Investigation meeting: On the papers

Submissions: 14 and 25 November 2016

Determination: 13 February 2016

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**PRELIMINARY DETERMINATION (NO. 2) OF THE AUTHORITY**

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- A. I decline to strike out or dismiss Sandy Butterfield's claims.**
- B. The parties must inform the Authority within 14 days of the date of this determination whether they consent to attending further mediation. If not, the Authority will set down an investigation meeting as soon as possible.**
- C. I reserve costs until after the substantive claims have been determined.**

**Employment relationship problem**

[1] On 21 August 2015, Mr Butterfield lodged an application with the Authority that he had been unjustifiably disadvantaged and unjustifiably dismissed. Mr Butterfield is a member of The New Zealand Meat Workers' and Related Trades

Union Incorporated (NZMWU) and covered by the Collective Employment Agreement (CEA) between it and Alliance Group Limited 2014-2016.

[2] In response, Alliance Group Limited (Alliance) replied, on 2 September 2015, that Mr Butterfield was not an employee at the relevant times, largely because it was the off-season and he was not re-engaged. Therefore, it argued that the Authority did not have jurisdiction to deal with the matter. Alliance applied to have Mr Butterfield's claim struck out for lack of jurisdiction.

[3] The parties agreed I could decide the jurisdictional issue/s on the papers.

[4] I issued a determination, on 8 March 2016, that the Authority retained jurisdiction to consider Mr Butterfield's claim.<sup>1</sup> I made that determination partly as the result of the Employment Court 2015 decision *New Zealand Meat Workers & Related Trades Union Incorporated and Others v AFFCO New Zealand Limited*<sup>2</sup>. In that decision the Employment Court found that the seasonal meatworkers were engaged on employment agreements of indefinite duration, with the result that the employment was not terminated during the off-season.

[5] I sent the parties to mediation. Mediation did not resolve the issues. Ms Thomas notified me that Mr Butterfield wished to proceed with his claim.

[6] On 6 October 2016, the Court of Appeal issued its decision *AFFCO New Zealand Limited v New Zealand Meat Workers & Related Trades Union Incorporated and Others*, which decided that the Employment Court:

...erred in finding that AFFCO engaged the seasonal meatworkers on employment agreements of indefinite duration with the result that the employment was not terminated when they were laid off at the end of the killing season.

[7] That decision led me to ask Ms Thomas and Alliance's counsel to make further written submissions on the issue of whether Mr Butterfield was an employee at the time Alliance made its decision not to re-engage him.

[8] Again, the parties have agreed that I can determine the issue on the papers. I have received written submissions from both parties.

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<sup>1</sup> [2016] NZERA Christchurch 24. The factual situation behind Mr Butterfield's claims is set out in that determination.

<sup>2</sup> [2015] NZEmpC 204.

## The relevant clauses of the CEA

[9] The relevant clauses of the CEA are:

### **2 Intent**

*The intention of this Agreement is to:*

- (a) Safeguard the safety, health and welfare of the workers.*
- (b) Provide for conditions of employment which are fair and equitable to workers that are employed, and the employer, and which safeguards their various interests while providing maximum possible security of employment in a seasonal industry...*

### **32 Seniority**

- (a) Every worker, except in the circumstances specified in clause 32(g)(ii) shall acquire and retain, as agreed at the plants, seniority according to the date of their commencement of employment.*
- (b) Seniority will operate on a department and/or group basis, except where otherwise agreed upon.*
- (c) The employer acknowledges the benefits of a stable, competent workforce which is familiar with and trained in the employer's requirements. Employees seasonally laid off the previous season will be offered the first opportunity of re-employment at respective plants for the new season and the first opportunity of re-employment prior to the engagement of new employees, subject to:
 
  - (i) Re-employment being consistent with individual plant's requirements and a satisfactory work record.*
  - (ii) Departmental and positional skills/experience requirements and a satisfactory work record.*
 Lay-offs and re-employment will be based on departmental and/or plant seniority.*
- (d) A seniority list will be prepared for each department or group and handed to the worker representative each season, prior to the commencement of seasonal lay-offs.*
- (e) At the commencement of each season, the management shall furnish the worker representative of the department or group with a list of new workers.*
- (f) The relative seniority standing of workers with the same department and/or group seniority shall be determined by the practice now in effect at each plant.
 
  - (i) seasonal management lay-offs shall not break seniority rights;*
  - (ii) absences due to sickness or injury supported by a medical certificate shall not break seniority rights, providing the worker has not been employed elsewhere during the period of absence, unless so directed by the Accident Compensation Corporation.**
- (g) Seniority shall be broken in the following circumstances:
 
  - (i) Voluntarily leaving or being discharged from their employment...*
  - (j) Nothing in this clause shall affect any right which the employer has in terms of clause 34 of this Agreement...**

### 34 *Management*

*Subject to the special provisions of this Agreement, the employer shall retain and have full power to manage and control their own business and the conduct of their workers in connection therewith, and to make reasonable rules and regulations not inconsistent with the provisions of this Agreement relating to the management thereof, and to the hiring,*

#### **The Applicant's submissions**

[10] Ms Thomas submits that even if seasonal workers are not employees during the off-season, the CEA created ongoing and enforceable contractual rights and duties. She argues this by analogy to the 2016 AFFCO case. In that case, the Court of Appeal decided that the contractual and legislative context required the word "employees" in s 82 of the Act to include the seasonal workers. That allowed the Court of Appeal to decide that the workers had been unlawfully locked out.

[11] Ms Thomas submits that any contractual rights between Mr Butterfield and Alliance can only be employment rights, and that his right to raise grievances remains in respect of Alliance's alleged breaches of his rights.

[12] Ms Thomas submits that it would be wrong if Mr Butterfield lost the right to raise a personal grievance for Alliance's actions during the off-season, because Alliance would be able to circumvent the requirement for a proper disciplinary process and ignore the contractual obligations it continued to owe Mr Butterfield.

[13] She also submits that it was counter-intuitive for Alliance to have undertaken an investigation that related to Mr Butterfield's employment, yet to assert it should not be held to fundamental employment law principles.

[14] Ms Thomas submitted that Alliance cannot rely on clause 34 of the collective agreement to take Mr Butterfield's claim outside the Authority's jurisdiction because:

- Clause 34 does not dominate or dispense with all other rights and obligations. It only applies to the ability to make "reasonable rules and regulations not inconsistent with the provisions of this Agreement".
- The purpose of Clause 34 is to retain the respondent's power but it does not dispense with the totality of Mr Butterfield's rights. "Even reduced rights can be enforced."

#### **The respondent's submissions**

[15] In the 2016 AFFCO case, the Court of Appeal confirmed that the industry standard is that the employment of seasonal workers terminates at the end of each season. At that

point, they are no longer employees. There would need to be clear evidence of the parties' intention to depart from the industry standard.

[16] The inclusion of seniority clauses in the CEA is indicative of the meat workers' employment being seasonally terminated. If their employment was not terminated at the end of each season, no seniority clauses would be necessary.

[17] Mr Butterfield's employment was terminated at the end of the 2013/2014 killing season and he had not been offered, and accepted, work as an employee prior to the 2014/2015 season commencing. In *AFFCO*, the Court of Appeal said that an employee's subjective intention to return is irrelevant, if they have not had an offer to return. Therefore, Mr Butterfield was not "a person intending to work".

[18] Alliance also submits that cause 32(c), about opportunities for re-employment, must be read subject to Alliance's management rights preserved in clause 34. In other words, Alliance considers clause 34 gave it the right not to offer to re-employ Mr Butterfield.

### **Determination**

[19] The Authority has exclusive jurisdiction under s 161(c) of the Employment Relations Act 2000 (the Act) to make determinations about whether a person is an employee or not.

[20] Section 6 of the Act defines the meaning of "employee" in the Act, "unless the context otherwise requires" as a person:

employed by an employer to do any work for hire or reward under a contract of service

[21] The term "employee" in the Act includes "a person intending to work". Section 5 of the Act defines a "person intending to work" as:

...a person who has been offered, and accepted, work as an employee;

[22] A "person intending to work" does not describe a meat worker in the off-season. According to the Court of Appeal, in the 2016 *AFFCO* decision, Mr Butterfield would have had to have received an offer of re-engagement and accepted it before he became a person intending to work.

[23] Clause 12A of Schedule 2 of the Act gives the Authority the power to dismiss a matter, or defence, it considers to be frivolous or vexatious. That power is known as the power to strike out proceedings.

[24] I need to consider whether to strike out Mr Butterfield's proceedings on the basis that he was not an employee at the relevant time, or, alternatively, whether I have jurisdiction to deal with his claim.

[25] I disagree with Alliance that clause 34 of the CEA can over-ride the seniority re-engagement provisions in clause 32. It does not expressly say that it does, therefore, it does not.

[26] I signalled, in my March 2016 determination, that I considered the seniority provisions may be contractual provisions of the CEA that meant that Mr Butterfield's right to re-engagement could not be ended by Alliance.

[27] In addition, Section 103(1)(b) of the Act expressly makes the unjustified disadvantage personal grievance available to an employee after the employment has ended in relation to conditions that survive the termination of the employment. I consider, at very least, Mr Butterfield is able to have his personal grievance of unjustified disadvantage determined by the Authority. In addition, I am not prepared to decide, at this preliminary stage, that he has no right to raise a grievance of unjustified dismissal, considering the facts of this case.

[28] Even if the above analysis is incorrect, I do not consider I can strike out Mr Butterfield's claims. In the Employment Court case of *Lumsden v Sky City Management Limited*<sup>3</sup> Judge Inglis sets out the Authority's very restricted ability to strike out claims, or to dismiss them as frivolous or vexatious, without a substantive investigation:

Relevantly, Parliament has chosen to limit the circumstances in which the Authority may dismiss a proceeding without investigating it under cl 12A, to matters which are either frivolous or vexatious. There is, for example, no reference to dismissal of a matter which discloses no reasonably arguable cause of action or defence. While the dismissal of cases with little or no merit appears to have been contemplated at a relatively early stage of the legislative process, the wording did not find its way into the section or clauses as enacted. The rationale for limiting the scope for dismissal may well reflect the special characteristics of this jurisdiction and the underlying policy thrust of the Act, empowering employees to

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<sup>3</sup> [2015] NZEmpC 225, Judge Inglis, December 2016

pursue claims and have them determined on their substantive merits, without undue regard to legalities, and in an efficient, non-technical manner. Dismissing claims without full investigation on broad grounds relating to an assessment of legal merits does not sit comfortably with this.

I conclude that the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step, and not one to be taken lightly. It cuts a claim off at the knees and, because of its draconian effects and having regard to the scheme and purpose of the legislation, is to be reserved for clear cut cases. This is not one of them.<sup>4</sup> (*footnotes omitted*)

[29] Mr Butterfield's claims are not frivolous or vexatious, and as such, are not within the category of clear-cut cases that may be dismissed without determination. In addition, I consider that the authority has jurisdiction to consider his claims. His claims may proceed.

[30] It may be that further mediation will be useful. The parties should discuss this and let the Authority know within 14 days of this determination if they are willing to go back to mediation. However, if not then I will set down a date for an investigation meeting as soon as possible.

#### **Costs**

[31] Costs are reserved until after the substantive matters have been resolved.

Christine Hickey  
Member of the Employment Relations Authority

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<sup>4</sup> Ibid. Paragraphs [38]-[40]