IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 115
5539229

	BETWEEN	MICHAEL PATEY Applicant
	AND	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Simon Mitchell, Counsel for Applicant Tim Cleary, Counsel for Respondent
Investigation Meeting:	2 July 2015 at Napier
Submissions Received:	At the investigation meeting
Determination:	24 November 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Michael Patey, claims he was unjustifiably dismissed by the respondent, Silver Fern Farms Limited (Silver Fern), on an unspecified date in late October 2014. The dismissal is said to be the result of Silver Ferns' decision not to reengage Mr Patey as a seasonal employee.

[2] Silver Fern denies dismissing Mr Patey as the seasonal layoff meant there was no employment relationship from which he could be dismissed and there was not, in the circumstances, an obligation to reengage him.

Background

[3] Mr Patey was employed on a seasonal basis at Silver Fern's Pacific Plant which is situated at Whakatu near Hastings. His terms of employment were specified

in the Pacific Collective Agreement 2013 to 2016. The parties were Silver Fern and the New Zealand Meat Workers Union (the Union).

[4] The agreements coverage is limited to members of the Union employed by Silver Fern at the Pacific Plant. Contained therein, and pertinent to this grievance, is clause 28. It reads:

> ***Security of Employment***
> *All employees covered by this agreement are guaranteed that when they are seasonally laid off they will be re-employed in accordance with the seniority provisions specified in clause 30*[1] *and on all terms, conditions and pay rates contained in this agreement.*

[5] On 20 June 2014, and upon completion of the season, Mr Patey was laid off. He was subsequently offered work at Silver Fern's Waitoa Plant (located between Morrinsville and Te Aroha in the Waikato) and commenced in July 2014. While there his terms and conditions were governed by a different collective employment agreement (albeit one with the same parties – the Union and Silver Fern).

[6] Mr Patey's employment at Waitoa came to an end when he was dismissed for being abusive to a supervisor. He says his abusive comment was a reaction to a negative comment the supervisor made to him toward the end of a stressful day. Mr Patey goes on to say he was not overly worried about the dismissal as he was finding it stressful being away from his family and of the view that notwithstanding the dismissal he would return to Pacific upon the commencement of the new season.

[7] Just prior to commencement of the new season Mr Patey reported to the Pacific Plant and met with the Production Manager, Shaun O'Neill.

[8] Mr O'Neill says he became aware of temporary vacancies at both Waitoa and Paeroa before the 2014 layoff. He says he met both shifts to advise work was available for those who sought it. He says he specifically warned employees there was no guarantee they would return to Pacific if they were dismissed from these jobs. Mr Patey says he attended neither meeting and Silver Fern can not assert otherwise.

[9] Mr O'Neill goes on to say he became aware of two incidents at Waitoa involving Mr Patey. The first was an altercation with another Pacific employee which resulted in both being disciplined (here it should be noted Mr Patey appears to have

[1] The reference to clause 30 is a typographical error – it should read clause 29

been issued this warning on the same day he was dismissed). The other incident was that involving the alleged abuse which resulted in Mr Patey's dismissal. Mr O'Neill says he therefore determined Mr Patey would not be considered for reengagement at Pacific.

[10] Mr O'Neill advised the Union of his decision. The Union challenged it and Mr O'Neill confirmed the decision in a subsequent letter. The ensuing dispute has not been resolved and, as a result, the present investigation occurred.

Submissions

[11] On behalf of Mr Patey it is argued there is a clear and absolute obligation to re-engage in these circumstances. While Mr Mitchell accepts the nature of a meat worker's employment in the off season is not entirely settled he asserts the authorities suggest the employment is terminated during the off season subject to a right of re-engagement at the commencement of the new season. Here he refers to various decisions of the Employment Court including *New Zealand Meat Workers etc Union Incorporated v. Richmond Limited.*[2] Quoting Judge Palmer Mr Mitchell emphasises what he submits is a finding the employer has an obligation to re-employ.[3]

[12] With respect to the question of whether or not events at Waitoa overrode the obligation to re-employ Mr Mitchell submits the answer is no. In doing so he submits there is nothing in either the Pacific employment agreement or its seniority provision to suggest actions in one plant will determine what happens at the home plant. He goes on to note that while there is a provision that allows dispensations to work at other plants the only thing it provides for as transferable between the two is leave.

[13] Mr Mitchell then submits there is nothing to suggest disciplinary action at one plant will count against the employee at another plant and that the separate agreement(s) effectively recognises a different employment arrangement applies. In what may be considered a summation he says:

> *The Respondent has chosen to engage employees at different times under different agreements. These agreements define misconduct in different ways – they have different provisions as to layoff, with employees having different seniority numbers under each agreement. The disciplinary processes are different. Employees are given new employee number under each agreement.*

[2] [1992] 3 ERNZ 643
[3] n.2 above at page 700.

> *Nowhere is it suggested that actions at one plant under one agreement, are relevant to your employment at another plant under another agreement. This is how the Respondent has operated. It would appear that the Applicant is alone in being denied re-engagement at Pacific due to actions at Waitoa.*

[14] Mr Mitchell then notes Mr Patey was not the only employee who had disciplinary issues while engaged at other plants during the 2014 off season but he was the only one who was not re-engaged. He correctly submits that while Mr O'Neill accepts this disparity occurred when answering questions there was no real justification therefore.

[15] For Silver Fern Mr Cleary also relies on the fact employees who are seasonally laid off are to be treated as terminated though he uses the more recent case of *NZMRTU v. AFFCO New Zealand Limited*[4].

[16] He notes Mr Patey was engaged at Waitoa under a separate collective agreement and was dismissed for serious misconduct under that agreement before submitting this means Mr Patey was no longer in the same category of Pacific employees who seek to be re-engaged (using that word as used in Affco above). He notes Mr Patey did not challenge the Waitoa dismissal but instead *asserts a right to work at Pacific by virtue, it is assumed, of a separate employment relationship created by the Pacific Collective Agreement*.

[17] Mr Cleary then submits:

> *However, there is no separate employment relationship as defined in s.4(2) of the Employment Relations Act 2000 (the Act). The parties have remained in the same relationship throughout both at Pacific and Waitoa. There is nothing in the Pacific collective agreement preserving the rights to re-engagement where the employee has been dismissed for serious misconduct (whether at Pacific or elsewhere).*

[18] Mr Cleary goes on to submit that Mr Patey's claim must therefore be treated as something other than a personal grievance and states the disparity argument Mr Mitchell has offered cannot be used as there is no challenge to treatment during employment.

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[4] [2015] NZMC 94 at paragraphs 50-69

Determination

[19] Having considered what were the comprehensive submissions of both parties I have to say I had a preference for those proffered by Mr Mitchell. In doing so I agreed with Mr Cleary's submission that Mr Patey's claim must be treated as something other than a personal grievance.

[20] The issue Mr Patey challenges is the failure to re-employ. It therefore follows that at the time he was not employed and that was, according to the cases relied upon by both Counsel, a correct interpretation at the time. It therefore follows he was not an employee and incapable of taking a personal grievance.[5]

[21] This is therefore more akin to a dispute and, as Mr Mitchell argues, the Pacific agreement gives what was essentially a guarantee of re-employment in the circumstances which prevailed at the time Mr Patey sought to return. There was nothing in the applicable agreement which overrode that in the event Mr Patey was employed by, and dismissed from, another of Silver Fern's plants. Indeed the only thing addressed when staff worked temporarily in other plants was the taking of leave.

[22] Unfortunately for Mr Patey everything changed last week when the Employment Court released its decision in *New Zealand Meat Workers & Related Trades Union Inc & Others v AFFCO New Zealand Limited*.[6]

[23] At paragraph 174 the Court concludes employment does not come to an end by reason of seasonal closure and what was previously referred to as re-employment is now termed a re-engagement.[7]

[24] Mr Patey's problem then becomes that he was dismissed by Silver Fern in the context of what is now considered to have been an on-going employment relationship. That dismissal has not been challenged and the employer never changed, even if the applicable agreement did. In such circumstances the only available conclusion appears to be that Mr Patey has been dismissed and, in the absence of a challenge, justifiably so.

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[5] Section 102 of the Employment Relations Act 2000
[6] [2015] NZEmpC 204 at [174]
[7] Above n 6 at [179]

[25] The problem with this is neither party had an opportunity to comment or consider such a scenario – it was not in their contemplation at the time of the investigation.

[26] I must therefore declare my conclusion Mr Patey was justifiably dismissed in circumstances where he no longer has any form of recourse a tentative one. I invite the parties, especially Mr Patey, to consider whether or not they wish to re-open the investigation (even if limited to further submissions) so as to consider the now significantly altered circumstances.

[27] If either party seeks a re-opening or Mr Patey is to contemplate a section 114 application regarding the dismissal this is to be done by Friday 11 December.

[28] In the event neither occurs Mr Patey's claim will be dismissed.

[29] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority