

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 108  
5620455

BETWEEN            JOHN ONEPU ROSSITER  
                                 Applicant

AND                    AFFCO NEW ZEALAND  
                                 LIMITED  
                                 Respondent

Member of Authority:    Trish MacKinnon

Representatives:         Simon Mitchell, Counsel for Applicant  
                                 Graeme Malone, Counsel for Respondent

Investigation Meeting:    On the papers

Submissions Received:    19 May 2016, from Applicant  
                                 30 May 2016, from Respondent

Determination:            30 August 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant lodged a statement of problem in the Authority on 13 April 2016 claiming to have been dismissed by AFFCO New Zealand Limited (AFFCO) when it failed to engage him for the 2015/2016 season.

[2]     Mr Rossiter had been employed at AFFCO's Wairoa freezing works on an individual employment agreement (IEA), based on the terms of the expired collective agreement between the New Zealand Meat Workers & Associated Trades Union Inc (the Union) and AFFCO until the conclusion of the 2014/2015 season.

[3]     He claims that, before the 2015/2016 season began, AFFCO advised him he was not an employee and was required to sign a new IEA if he wished to commence

work. On the basis of that advice he signed a new IEA. On becoming aware that other members of the Union had not agreed to sign a new IEA, he advised AFFCO he was not happy with the IEA and did not wish to be covered by it. He did not return to work under the IEA and has not been called back to work by AFFCO either on the terms of the IEA or any other terms.

[4] Mr Rossiter seeks reinstatement to his employment, lost wages, compensation for humiliation, loss of dignity and injury to feelings, and costs.

[5] AFFCO has not lodged a Statement in Reply to Mr Rossiter's application but has applied to the Authority for a stay of those proceedings. It relies on the following grounds:

- (a) The proceedings rely on a judgment of the Employment Court delivered on 11 February 2016<sup>1</sup> which was itself based on an earlier full bench judgment of the Employment Court delivered on 18 November 2015<sup>2</sup>. It raises issues relating to the status of a person who had previously been employed by AFFCO under an IEA based on the expired collective agreement between the New Zealand Meat Workers & Associated Trades Union and AFFCO dated 29 May 2012 and as to AFFCO's conduct in re-engaging employees. It also raises matters relating to the application of seniority to shifts, the rights of employees employed on individual employment agreements based on the expired collective agreement to be placed on specific shifts and as to whether certain employees were locked out. These are matters that have been the subject of the two separate Employment Court judgments referred to above, which are currently before the Court of Appeal.
- (b) To continue with the current proceedings until such time as AFFCO's appeal of the Employment Court judgments have been heard and determined would be an abuse of process and cause prejudice to AFFCO.

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<sup>1</sup> New Zealand Meat Workers & Related Trades Union Inc v. AFFCO New Zealand Ltd [2016] NZEmpC 7

<sup>2</sup> New Zealand Meat Workers & Related Trades Union Inc v. AFFCO New Zealand Ltd [2015] NZEmpC 204

[6] Mr Rossiter opposes the application for a stay of proceedings, asserting that it is entirely misconceived. He asks that his application proceed in the normal way pending the outcome of the Court of Appeal proceedings.

[7] The parties agreed that this matter should be dealt with by the Authority as a preliminary matter on the papers by way of submissions respectively for each party.

### **Submissions of the parties**

[8] AFFCO acknowledges that Mr Rossiter's application to the Authority, while relying on the two Employment Court judgments referred to above, is a separate application and proceeding and so is not an attempt to enforce the proceedings in which those judgments were given nor a continuation of them. Accordingly, AFFCO acknowledges it is unable to apply for a stay of the proceedings pursuant to Rule 12 of the Court of Appeal (Civil) Rules (CA Rules) although it submits the principles applying to such an application remain relevant.

[9] AFFCO notes the Authority has jurisdiction to order a stay of proceedings pursuant to its power under s.173 of the Employment Relations Act 2000 (the Act) to determine its own procedure provided that it:

- (a) Complies with the principles of natural justice; and
- (b) Acts in a manner that is reasonable, having regard to its investigative role.

[10] AFFCO submits that in determining whether to stay the proceedings, the Authority should have regard both to the principles that would apply to a stay of proceedings or execution under Rule 12 of the CA Rules, and, insofar as necessary, those that would apply under Rule 15.1 of the High Court Rules. An application under Rule 12 of the CA Rules requires the balancing of the competing rights of the party who obtained the judgment appealed from against the need to preserve the appellant's position against the event of the appeal succeeding<sup>3</sup>. Factors to be taken into account in the balancing exercise include:

- (i) *Whether the appeal may be rendered nugatory by the lack of a stay;*

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<sup>3</sup> *Duncan v. Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87

- (ii) *The bona fides of the applicant as to the prosecution of the appeal;*
- (iii) *Whether the successful party will be injuriously affected by the stay;*
- (iv) *The effect on third parties;*
- (v) *The novelty and importance of questions involved;*
- (vi) *The public interest in the proceeding; and*
- (vii) *The overall balance of convenient.*

[11] AFFCO submits that the factors in (ii), (iii), (iv), (v), (vi) and (vii) are relevant factors in the present case that weigh strongly in favour of granting a stay of proceedings. It notes the promptness with which AFFCO pursued its applications for leave to appeal the Employment Court judgments and intended to pursue the appeals with all diligence currently.

[12] Regarding factor (v), AFFCO submits that the issues raised under its appeal before the Court of Appeal raise very important questions of law given that the primary finding of continuous employment, in the judgment of the Full Court of the Employment Court, is at odds with the manner in which the industry has operated for over 30 years and is contrary also to judgments dating back to the 1980s. It further submits that a significant degree of public interest is involved beyond the interests of the parties themselves due to the implications of the Full Bench judgment on the meat processing industry as a whole as well as other seasonal industries.

[13] With regard to the overall balance of convenience, AFFCO submits this also favours granting a stay because:

- (a) To continue with the proceeding forces the parties further expense and time in dealing with a matter upon which a judgment cannot be given with any confidence until the outcome of the appeals is known; and
- (b) To preserve the position of the parties, if a decision were given on the present application, it would be necessary to file a further appeal against the same, when such appeal would be unnecessary if the Authority instead awaited the outcome of AFFCO's appeals.

[14] Rule 15.1 of the High Court Rules allows proceedings to be stayed if the proceeding:

- (a) Discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

- (b) Is likely to cause prejudice or delay; or
- (c) Is frivolous or vexatious; or
- (d) Is otherwise an abuse of the process of the Court.

[15] AFFCO relies on the factors in (b) and (d) as relevant in the current case and as factors that weigh strongly in favour of granting a stay. It says both AFFCO and Mr Rossiter will suffer prejudice if the application is not stayed and that to continue with the proceeding prior to determination of AFFCO's appeal of the Full Bench judgment and the application for leave to appeal the second judgment would involve an abuse of process.

[16] Submissions on behalf of Mr Rossiter acknowledge that in part he relies on the Full Court decision for his claim before the Authority. However, he submits the unlawfulness of AFFCO's actions can be substantiated as breaches of good faith, and the issue of whether Mr Rossiter was or was not an employee is not determinative of the matter. It is submitted that what is important is that the actions of the company were unlawful and that it was a breach of good faith for AFFCO to rely on a signature unlawfully obtained from Mr Rossiter and to stop him returning to work.

[17] Counsel for Mr Rossiter submits that he has no standing in the proceedings currently subject to an appeal before the Court of Appeal. He says a stay of this proceeding will have no real impact on the outcome of that appeal. The appeal relied on by AFFCO for its application for a stay affects hundreds of workers across many plants. In contrast, Mr Rossiter's is a very small issue. He submits there will be serious consequences to Mr Rossiter if his application does not progress. Mr Rossiter is seeking reinstatement and there is no need for further delay. Mr Rossiter is a third party to the appeal currently before the Court of Appeal. He is a very small part of the overall issue.

[18] Counsel submits the Authority is unable to determine the novelty and importance of questions involved nor can it determine the public interest in the proceeding. With regard to the overall balance of convenience, counsel for Mr Rossiter submits if he is reinstated he will be in the same position as all the other workers affected by the Employment Court judgment currently under appeal. In the meantime, AFFCO will receive the benefit of his work.

[19] Counsel for Mr Rossiter denies his application to the Authority is an abuse of process or likely to cause prejudice to the respondent if the Authority determines the matter. He submits it is not manifestly unfair or likely to bring the administration of justice into disrepute to require the Authority to have regard to the Full Court decision, which is currently the subject of appeal.

[20] Counsel submits Mr Rossiter is out of work and is seeking to return to his position. He should not be delayed while the Court of Appeal, with its inevitable delays and possibility of further appeal, hears the matter.

### **Jurisdiction**

[21] The Authority has the power under ss 160 and 173 of the Act to determine its own procedure. This includes the power to stay a proceeding in appropriate circumstances, provided that, in doing so, it complies with the principles of natural justice and acts in a manner that is reasonable having regard to its investigative role.

### **Determination**

[22] Counsel for each party has referred to various principles and elements of the CA Rule 15 and High Court Rule 12 as supporting, respectively, their application for, or opposition to, a stay of proceedings. I have carefully considered those submissions. Having done so, I am persuaded it is appropriate to stay Mr Rossiter's proceedings until such time as the Court of Appeal has determined the appeals of the Employment Court judgments currently before it.

[23] I have taken particular note of Mr Rossiter's acknowledgement that his application to the Authority relies, in part, on the Full Court's judgment. In my view he underestimates the extent of that reliance. I find his claim cannot be determined without reference to that judgment in relation to continuity of employment and seniority issues. Mr Rossiter's claim is underpinned by an assumption that his employment was ongoing between the 2014/2015 and 2015/2016 seasons. Whether employment of seasonal workers is ongoing is core to the appeal of Full Court judgement.

[24] In these circumstances I agree with counsel for AFFCO that an application of CA Rule 15 favours the proceedings being stayed. The importance and novelty of the questions, the public interest in them and the overall balance of convenience favour

Mr Rossiter's proceedings being put on hold until such time as the Court of Appeal has determined the appeals pertinent to his claims.

[25] I accept the submission of counsel for AFFCO that it would be an abuse of process for the Authority to continue with its investigation of Mr Rossiter's claims until the Court of Appeal has determined those appeals.

[26] Accordingly the application of AFFCO New Zealand Limited for a stay of the current proceedings in the Authority is granted.

### **Costs**

[27] Costs are reserved.

Trish MacKinnon  
Member of the Employment Relations Authority