Employment Court of New Zealand

Stewart v AFFCO New Zealand Limited [2021] NZEmpC 215 (7 December 2021)

Last Updated: 10 December 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2021] NZEmpC 215
EMPC 239/2021

IN THE MATTER OF	an application for an injunction
BETWEEN	JAMES STEWART Plaintiff
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing:	23 November 2021 (Heard at Wellington)
Appearances:	J Stewart, in person G Malone and R Robertson, counsel for the defendant
Judgment:	7 December 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr James Stewart has worked for AFFCO New Zealand Ltd (AFFCO) for a long time.

[2] He says that in July 2021 he was illegally locked out at the time of AFFCO's annual shutdown. This was because he declined to sign a fixed-term individual employment agreement (IEA), or join the New Zealand Meat Workers and Related Trades Union Inc (the Union), and thus become subject to a relevant collective employment agreement (CEA).

[3] Mr Stewart asserts he was subject to permanent terms and conditions of employment, and he could not be compelled to comply with either of AFFCO's options. He therefore brought a claim to the Court, alleging that he was a permanent employee illegally locked out. He sought an injunction to restrain the lockout.

[4] AFFCO says Mr Stewart was a fixed-term seasonal employee, properly laid off at the end of the 2020/2021 season, that it was entitled to make the offer it did, and that he is not entitled to relief.

Key facts

[5] Mr Stewart has worked at AFFCO's Imlay site for 19 of the last 21 years. The first period when he did so was from 2000 to 2011. Then he worked continuously from late 2013 until mid-2021.

[6] As is usual in the meat industry, when one slaughtering season ends, certain workers may be laid off until the new season starts.

[7] In Mr Stewart's second period of employment he was seasonally terminated once in 2014. As a result of not having

worked 2011 to 2013, he was at a low point on the seniority list which was used to determine the order of re-employment.

[8] Thereafter, he was continuously employed even through the seasonal downturns of the years 2015 to 2020, without being affected by lay-offs to which other staff were subject.

[9] This was because Mr Stewart worked in the freezer department, which continued operations all year round. By contrast, other employees, for instance in the slaughter and associated departments, were laid off during the shutdown period.

[10] Mr Stewart said he was accustomed to organising a holiday programme where some workers who had accumulated holiday leave used them so as to allow workers who would otherwise be laid off could undertake more work.

[11] He said that ordinarily after using holiday leave by agreement, he would return to work. The implication of this evidence is that in such a situation, he was not being laid off, but was taking annual leave at a time which could assist other workers, by agreement with AFFCO.

[12] Evidence was placed before the Court as to the IEAs which were either signed by Mr Stewart or were offered to him.

[13] For present purposes, it is appropriate to analyse the position from 2017. In that year, Mr Stewart signed a fixed-term IEA and associated schedule, agreeing to employment as a seasonal worker for the 2017/2018 season.

[14] At the conclusion of that season, Mr Stewart took annual leave during a shutdown period. His leave period was from 18 June to 1 July 2018. He then resumed work.

[15] Mr Stewart then continued to work, during and after the shutdown period which ended on 9 July 2021. Then, on 18 July 2018, he signed a fixed-term IEA, again agreeing to be a seasonal worker for the 2018/2019 season.

[16] In May of 2019, Mr Stewart raised issues with management as to certain entitlements. He was concerned as to the extent of leave employees could be required to take in a shutdown period under the Holidays Act 2003 (the HA), and as to the adequacy of the shutdown notice given to other workers.

[17] Mr Stewart then took leave from 17 to 30 June 2019, which was within the seasonal shutdown period for that year.

[18] Following his return, he was provided with a fixed-term IEA for employment as a seasonal worker for the 2019/2020 season. He did not sign the document, or an associated schedule which contained terms and conditions of employment for work at the Imlay plant. He considered the documents contained provisions that were contrary to mandatory provisions of the HA.

[19] Notwithstanding his decision not to sign the documents, the employment relationship continued. Mr Stewart continued to work, and AFFCO continued to pay him for his services.

[20] During the seasonal shutdown period in mid-2020, the same pattern recurred. Mr Stewart took annual leave, then returned to work.

[21] On 17 July 2020, following his return, he was asked to sign a fixed-term IEA relating to the 2020/2021 season. He declined to do so, believing that there were, what he described as “flaws” and/or “illegalities”. He said these were similar to the problems that had featured in the 2019/2020 IEA, which he had also declined to sign. He sent an email that day to the Plant Manager, Mr David Berry, saying that he would not be signing the document in its current form, and noting that he had instituted an employment relationship problem in the Employment Relations Authority regarding his concerns about some of the provisions in the offered documents.

[22] The Court was advised that the Authority held an investigation meeting into these issues in November 2020, but the Authority’s determination has yet to issue.

[23] On 24 August 2020, AFFCO’s National Human Resources Manager, Mr Dane Gerrard, sent a communication to workers at Imlay as to a proposed rate review, and as to availability provisions. AFFCO wished the recipients to sign an attached schedule, which would bring about variations to the 2020/2021 IEA.

[24] On 26 August 2020, Mr Stewart sent an email to the Payroll Officer, Ms Stone, copied to his Supervisor, Mr Smith, and to Mr Berry, stating that he was not willing to sign the new schedule. His reasons focused on what he considered was the inadequacy of compensation under an availability provision. He stated that he therefore rejected the offer and asked that his pay not be increased as was proposed in the schedule. He told the Court that he continued to work under rates which had applied previously.

[25] There were further exchanges between Mr Stewart and Mr Berry in the run-up to the plant’s shutdown in mid-2021.

[26] On 6 May 2021, Mr Stewart wrote to Mr Berry stating that AFFCO had again not provided proper notice for the upcoming lay-offs of certain employees.

[27] Then Mr Berry requested a meeting to discuss the forthcoming “holiday program”. The meeting took place on 31 May 2021.

[28] Mr Berry said that by this time, the Imlay freezers were full, and AFFCO was struggling to get offsite coverage to hold processed meat. The freezer department was accordingly working six-day weeks to keep up with the demand, with the occasional Sunday and public holiday shifts to get through all of the processing that was required.

[29] Mr Berry said that in light of these issues, he made it clear to Mr Stewart that AFFCO could not accommodate large amounts of time off, and freezer employees would be required to work later into the season.

[30] Mr Berry says that at the meeting he also confirmed Mr Stewart was required to sign and return the document that had previously been given to him. This was a reference, he said, to the schedule which varied the IEA that had been given to Mr Stewart in 2020.

[31] Mr Berry also said he told Mr Stewart that if he did not want to be bound by the terms of the proposed IEA, he could consider going on to the applicable CEA, by becoming a member of the Union; or raise any points within the IEA that he wished to negotiate.

[32] Mr Stewart’s position on this issue was that he had already indicated in writing that he did not accept the terms and conditions of the documents given to him in 2020. He said that there was no discussion at the meeting as to the documents for the 2021/2022 season because these had not yet been produced; it is his evidence that he did not see these documents until 5 July 2021.

[33] The other issue of contention relates to whether Mr Berry told Mr Stewart that the seasonal workers’ employment would be terminated at the point where they elected to have their season end by taking their accrued and outstanding leave. He said that

statement was made because, as explained earlier, he did not want to have to deal with accrued leave issues in the following season.

[34] Mr Stewart denies that this statement was made. He also says that he declined to take accrued leave, and that this is confirmed by the fact Mr Berry agreed that he would take only a seven-day entitlement.

[35] Confirmation that it had been agreed he should take seven days of leave only is confirmed by what happened next. After discussion with Mr Stewart’s supervisor as to when the leave would be taken, it was agreed it would commence on 24 June 2021, and that he would return to work on 5 July 2021. The start of the leave period would be at the commencement of the lay-off period, which would still be running when he returned.

[36] His staff leave notification recorded these dates and said nothing about his seasonal work status being terminated upon returning. The document was signed by Mr Stewart on 21 June 2021; on the same day, it was approved by Mr Smith, his Supervisor, and Mr Berry. There is no evidence that at the time, a notice of lay-off was given to Mr Stewart, as had been the case for slaughtermen and others.

[37] Two further items were introduced in evidence which Mr Stewart said are relevant to the issue of his status. These were notices prepared by AFFCO which were placed on a relevant staff noticeboard. One of those related to responsibilities Mr Stewart held as a member of the Imlay Emergency Evacuation Team for “2021/2022”. The document was issued in June 2021. It showed him as being a “Departmental Wardens” for the freezer department, on nightshifts.

[38] A second notice related to first aid responsibilities for which he had been trained. The notice suggested that he held responsibilities as a “First Aider”, for the freezer department. This notice was intended to have effect “as of June 2021”.

[39] Mr Stewart said both these notices confirmed that his employment was intended to continue. This evidence was not challenged by Mr Berry or in AFFCO’s submissions.

[40] Returning to the divergence between Mr Berry and Mr Stewart as to what was said at the meeting about whether Mr Stewart would be seasonally terminated as from the end of his period of leave, I prefer Mr Stewart’s evidence.

[41] First, the leave application form which he completed, and which Mr Berry countersigned, did not refer to his employment ending.

[42] Second, he did not take accrued leave at the time; rather, it was paid in lieu after he was locked out, as will be explained shortly. Mr Berry may have intended that some workers’ employment would be seasonally terminated after they had taken their accrued and outstanding leave. However, that is not what happened in Mr Stewart’s case.

[43] Third, Mr Stewart’s evidence was accurate, and in some respects Mr Berry’s was not. Mr Berry, for example, suggested

Mr Stewart had not raised any issues with regard to the 2020 documentation, when plainly that was not the case having regard to the emails sent by Mr Stewart to Mr Berry in July and August 2020, in which he made it plain he would not be signing those documents.

[44] Fourth, the 2021 shutdown holiday programme, which was published on a staff noticeboard, showed which workers were to be laid off. Mr Stewart was not one of them. Rather, his leave was recorded; a week of dayshift work was then rostered (being the week of 5 July 2021); and, thereafter, he was assigned to nightshift slaughter work.

[45] Fifth, I accept Mr Stewart's evidence that the notices AFFCO published in relation to particular responsibilities plainly point to AFFCO regarding his status as being ongoing.

[46] Lastly, a notice of lay-off was published in respect of other employees, but no such notice was given or published in respect of Mr Stewart at any time.

[47] The totality of this evidence suggests that AFFCO was expecting Mr Stewart's employment to continue, and that his employment would not end after taking leave.

[48] The day before Mr Stewart was due to take his seven days of leave, that is, 23 June 2021, he sent an email to Mr Berry and Mr Smith, the subject heading being "Improper terminations". He referred in this email to the fact that he understood freezer staff were being seasonally terminated as they took their holidays, and that they were being required to take accrued leave, even if they wished to keep such leave. Mr Stewart said that he had previously indicated that an employer could not compel the taking of accrued leave.

[49] Then he stated:

I am also reminding you that I am no longer a seasonal worker, but as I mentioned in our meeting on Monday 31st May that because the last time a 1 year seasonal contract (ie. a fixed term contract with an expiry) was concluded between myself and AFFCO was in 2018 that my employment status is that of a permanent employee and I cannot be seasonally terminated.

I have as you know agreed to use up the holiday leave that I am already entitled to take during this period of seasonal reduction in work, today being my last day of work before using 7 days of annual leave as the company can insist I do (*Holidays Act* s 32). This in no way entitles you as the employer to terminate me and pay out all leave. So I will be returning to work as shown on the holiday program posted for our department on ... Monday the 5th of July.

The whole idea of terminating people in order to clear away holiday entitlements is both undermining the purpose of that Act and at odds with the custom of the department over countless years that only those who were not kept on for continuing work were terminated (as an example if memory serves I don't believe I have been terminated since 2014 after returning to AFFCO, and not at all in my previous time working in this department from 2006-2011)

...

[50] No response was given by AFFCO to this email.

[51] Mr Stewart's annual leave commenced on 24 June 2021. As noted, this was within the period of the seasonal shutdown, which commenced on 28 June 2021 and ran to 12 July 2021.

[52] On 5 July 2021, Mr Stewart returned to the workplace expecting to carry out the work which he had previously been scheduled to perform. He arrived at 6.45 am. He was unable to obtain fingerprint access at the gate of the plant. He was uncertain as to whether he was being locked out, or whether the mechanism was not reading his

print correctly. He accordingly entered the plant through the main office by signing in. Then he commenced work.

[53] After approximately an hour of work, his supervisor asked him to see Mr Berry. At about 8.00 am he did so. Mr Berry provided Mr Stewart with a copy of what he said was the 2021/2022 IEA, and told him he could not continue working until either he had signed a new contract or joined the Union so as to be covered by the applicable CEA. He also said he would not be the only person of whom this request would be made.

[54] Mr Berry acknowledges that, in this conversation, Mr Stewart maintained he was a permanent employee. He says that as they could not agree on this issue, he asked him to leave the site. He also gave Mr Stewart a copy of the documentation he had been asked to sign.

[55] Later that day, Mr Stewart sent Mr Berry an email, recording what had happened earlier, stating that he did not want his accrued holiday leave to be paid out, and that he believed he was being locked out until he signed a new contract or joined the Union. He said this was illegal and he reserved the right to take action in the Court.

[56] Mr Stewart said he would be willing to sign a contract if he was happy with its contents. He went on to say that there had been a mistake with a copy of the contract he had been given, because the version which was provided related to the 2020/2021 season, instead of the next season, but the schedule which addressed pay rates and ordinary hours and so on was dated 2021 and applied to the season which was about to start. He asked for confirmation about whether he had been given the contract which it was intended he would sign.

[57] The next day, Mr Berry said that he had been advised the 2020/2021 version had not changed, so the document with which Mr Stewart had been provided was correct. Mr Stewart maintained his position as to his status.

[58] On 7 July 2021, Mr Stewart emailed Mr Berry to enquire about his accrued entitlements which he needed since he had been locked out. Mr Berry then discovered that an administrative error had resulted in termination payments not being processed. This was because the necessary paperwork had not been provided. Mr Stewart requested that he be given these entitlements, since an application to the Court meant it could be some time before his status was clarified. An appropriate authority was given, and the entitlements were paid.

Submissions

[59] Mr Stewart submitted that by 5 July 2021, he had become a permanent employee.

[60] He argued that the last IEA he signed was for the 2018/2019 season. It contained a term that stated it would come into effect on 9 July 2018 and remain in force until terminated due to the seasonal reductions of the season for which he had been employed.

[61] This restriction did not constitute a "genuine reason" for the purposes of s 66(2) of the Employment Relations Act 2000 (the Act), because work continued to be provided to him, for which he was paid, for two further seasons.

[62] In effect, Mr Stewart argued that AFFCO waived the fixed-term provisions of the document; and that he became a permanent employee in mid-2019, who was unlawfully locked out on 5 July 2021.

[63] Next, Mr Stewart submitted that the provisions of the Act relating to lawful and unlawful lockouts required consideration. Implicit in his submission was the argument that even if he was on a fixed-term agreement, there was a qualifying lockout under s 82. It was not one which was lawful in light of the provisions of s 86 of the Act, because notice of lockout had not been given. He and AFFCO were not bargaining for a collective agreement, and the step was arguably taken for an improper purpose, that is, because he had brought a personal grievance against AFFCO.

[64] Counsel for AFFCO, Mr Malone, submitted that Mr Stewart was not a permanent employee. He said that Mr Stewart's failure to sign the employment agreements with which he was provided in 2019 and 2020 did not change his status. He had accepted employment as a seasonal worker in 2018, and when he recommenced work in July 2019, he knew he was being offered employment for the following season on the same basis.

[65] Mr Malone argued that while Mr Stewart may have objected to lay-offs being given with insufficient notice under the HA, he did not object to working on a seasonal basis. In continuing to work, he must be taken to have accepted that fact.

[66] With reference to s 66(2) of the Act, Mr Malone submitted that there was a "genuine reason" which applied, namely, fluctuating seasonal demands which could not be predicted.

[67] Turning to the issues about the application of the lockout provisions of the Act, it was first submitted that Mr Stewart was not an employee within the meaning of s 82. The IEAs which applied in this case were not intended to run between seasons. Moreover, there was no requirement to re-employ a worker who had worked under a previous IEA on the same terms as had existed in the previous year.

[68] The parties had agreed to a provision which stated that although priority would be given to a previous season's employee who was ready, willing, and able to commence work when required and who had completed the employer's induction process, if any, that person nonetheless had to sign an acceptance of the offered terms and conditions of employment.

[69] Because that had not occurred, Mr Stewart's employment was discontinuous. The circumstances were akin to those which had arisen in *New Zealand Meat Workers etc Union Inc v Richmond Ltd*.1 In that case, the majority of the Court held that the workers were not employed under continuous contracts of employment so that they were "employees" in the off-season; their employment was discontinuous.

1 *New Zealand Meat Workers etc Union Inc v Richmond Ltd* [1992] NZEmpC 218; [1992] 3 ERNZ 643 (EmpC).

[70] Mr Malone also submitted that AFFCO was not aiming to force Mr Stewart to accept any particular terms of employment, but was instead meeting its obligations to provide a copy of an intended agreement under discussion, and the opportunity to seek independent advice as to its terms.2

[71] Finally, Mr Malone acknowledged that if the Court did not accept these submissions, it was open to conclude that a lockout of a single employee had occurred, a proposition which is well established: *Conference of the Methodist Church of New Zealand v Gray*.3

[72] From these submissions I distil these issues:

(a) What were Mr Stewart's terms and conditions of employment as at 5 July 2021; if permanent, was he illegally locked out?
(b) Alternatively, if on a fixed-term IEA, was Mr Stewart illegally locked out?

Issue one: terms and conditions as at 5 July 2021

[73] The last signed IEA was that of 2018/2019. Clause 2.4 stated:

NATURE AND TERM OF AGREEMENT

This agreement shall come into effect from the [9th of July 2018] and shall remain in force until terminated due to the particular seasonal reductions of the season that you have been employed for.

[74] Clause 4.3 defined a seasonal employee in these terms:

An employee who is engaged for a particular season or period of time determined by the duration of that season. A Seasonal employee who works beyond the season or agreement date becomes a casual employee. Note at or near the end of the season there may be insufficient work to provide ongoing employment as a seasonal employee but sufficient work to be able to offer some work as a casual employee.

2. Employment Relations Act 2000, s 63A. Mr Malone referred also to the related obligations in s 64 of the Act.
3. *Conference of the Methodist Church of New Zealand v Gray* [1996] NZCA 407; [1996] 1 ERNZ 48 (CA) at 54 and 77; see also *Hawtin v Skellerup Industrial Ltd* [1992] 2 ERNZ 500 (EmpC) at 539.

[75] Clause 6 contained a range of provisions that governed the employment of seasonal employees, including:

6.1 Seasonal Employees shall be given five (5) calendar days' notice of seasonal lay off such notice to be given on or before 10.00 am on the first day of such period.

[76] Clause 16 was one of several provisions dealing with leave entitlements. It stated that the provisions of the HA and its amendments applied to employees covered by the agreement.

[77] Clause 22 described security of employment, as follows:

22.1 The employer acknowledges the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required.
22.2 When engaging employees at the commencement of each season, priority at each plant shall be given to previous season's employees at that plant subject to Clause 6 [seasonal employment] and Clause 7 [departmental flexibility], who are ready able and willing to commence work when required, who complete the employer's induction process, if any, and who sign acceptance of the offered terms and conditions of employment.
22.3 The employee acknowledges that as restarts usually involve reasonably large numbers of employees being required within a short time frame that the employer is not required to discuss or consult with the employee over its decision to restart the employee or any particular employee or employees.

[78] Clause 23 sets out provisions relating to termination of employment. It stated that employment could only be terminated in accordance with the provisions of the clause. Except for casual employees, five days' notice of termination was to be given by either party, or five days' pay could be given or forfeited in lieu of notice.

[79] Then the clause stated:

23.3 The employer shall only dismiss an employee for cause and/or work availability. The employee accepts however that cause may arise from the employee's actions or situation; e.g. misconduct, abandonment, poor performance, failure to undertake extra work, personality conflict; or may arise from actions or situations affecting the employer; e.g. downturn in work, redundancy, restructuring of shifts and/or for economic reasons.

[80] Turning to the facts, I have already described the pattern of events which occurred from mid-2018 onwards.

[81] In summary, the IEA and schedule signed on 18 July 2018 were the last such pair of documents to which express agreement was given by both parties, as confirmed by their signatures.

[82] In both mid-2019 and mid-2020, Mr Stewart declined to sign the offered documents, but the employment relationship continued without objection from AFFCO. He was not laid off at the end of either season. Rather, AFFCO continued to offer him work, and continued to pay him for his services.

[83] Mr Berry suggested that Mr Stewart had not offered any objections in respect of the documents offered to him for the 2020/2021 season, but as I have found, that evidence is incorrect, having regard to the two emails Mr Stewart sent to him in July and August 2020. He transparently confirmed his stance. AFFCO did not object. It continued to employ him.

[84] Accordingly, I do not accept AFFCO's submission that because it had offered to employ him on a particular basis in each of the two seasons for which he did not sign an IEA, it must be assumed that he had agreed that those documents would apply in each season. At the very least, AFFCO must, or should, have been aware during the 2020/2021 season that Mr Stewart declined to accept the provisions contained in the documents he had refused to sign.

[85] I turn to the provisions of s 66, on which Mr Stewart bases his case. It relevantly provides:

66 Fixed term employment

(1) An employee and an employer may agree that the employment of the employee will end—

(a) at the close of a specified date or period; or
(b) on the occurrence of a specified event; or
(c) at the conclusion of a specified project.

(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—

(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
(b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.

(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):

(a) to exclude or limit the rights of the employee under this Act:
(b) to establish the suitability of the employee for permanent employment:
(c) to exclude or limit the rights of an employee under the Holidays Act 2003.

(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—

(a) the way in which the employment will end; and
(b) the reasons for ending the employment in that way.

(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.
(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—

(a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or
(b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.

[86] In *Varney v Tasman Regional Sports Trust*,4 Chief Judge Goddard considered the situation where employment continued beyond its stated expiry without any concluded agreement about the basis on which it was continuing.

[87] He referred to and analysed s 66, noting that a fixed-term employment agreement must provide genuine reasons based on reasonable grounds for specifying that limitation. In that instance, a fixed-term agreement had been allowed to continue as if nothing had happened, and without there being any agreement, when it ended, that it would continue for a period for a genuine reason. Apparently, the employee was working under an indeterminate employment agreement. Effectively, the

4 *Varney v Tasman Regional Sports Trust,* EmpC CC15/04, 23 July 2004.

employer had waived the expiry of the original “fixed-term” and had not negotiated a new fixed-term agreement.

> [88] The consequences of letting a fixed-term employment agreement expire without treating the employment as being at an end was also illustrated by *Electrotech Controls Ltd v Rarere*.5 There, Judge Shaw stated:
>
> [27] In the absence of either party giving any thought to the terms of an agreement which overruns its expiry date, the parties must be assumed to continue to be bound by the existing terms of the agreement. However, having passed its end date it cannot be a fixed-term agreement unless the s 66 ... requirements for mutual agreement based on genuine reasons are met with both parties consenting to a new fixed-term.
>
> [89] I find that these observations apply here. By continuing to employ Mr Stewart notwithstanding his refusal to sign or agree to the terms offered in mid-2019 and mid-2020, AFFCO waived its rights both to hold Mr Stewart to a fixed-term as provided for in cl 2.4, to serve on him a seasonal layoff notice under cl 6.1, and to insist on the requirements as to re-engagement of a seasonal worker under cl 22.2.
>
> [90] Although AFFCO was entitled to insist on the provisions as to time being respected so that it had no obligation to re-employ him in the following season, it waived those rights by continuing to employ Mr Stewart.
>
> [91] In the absence of either a variation to the signed document extending the time restrictions, or entering another IEA which contained those restrictions, Mr Stewart’s employment terms under the document became open-ended and permanent. Accordingly, as from mid-2019, there was not compliance with s 66(2) or s 66(4).
>
> [92] For completeness, I address a point not discussed by either party. Clause 4.3 provides that a seasonal employee who worked beyond “the season or agreement date” become a casual employee.6

5 *Electrotech Controls Ltd v Rarere* [2007] ERNZ 586 (EmpC).

6 See para [74] above.

> [93] Neither at the time, nor subsequently, was it suggested Mr Stewart had become a casual employee. In any event, that was not the reality of the circumstances. The evidence suggested he worked continuously from mid-2018, when he signed the IEA and schedule referred to earlier.7 He did so as a full-time and permanent employee.
>
> [94] There was, as Mr Stewart submitted, a provision in the IEA which allowed for dismissal “for cause and/or work availability”.8 Neither at the time, nor subsequently, was it suggested Mr Stewart had become a casual employee. In reality, that was not the case. The evidence suggests that he worked continuously from mid-2018 onwards, when he signed the IEA and the schedule referred to earlier.9 He did so as a full-time and permanent employee.
>
> [95] Neither of these grounds of termination applied. By sending Mr Stewart away from the workplace on 5 July 2021, AFFCO was in breach of Mr Stewart’s permanent employment agreement.
>
> [96] Turning to s 82 of the Act, it is plain that the circumstances of 5 July 2021 constituted a lockout. Section 82 provides as follows:

82 Meaning of lockout

> (1) In this Act, **lockout** means an act that—
>
> (a) is the act of an employer—
> (i) in closing the employer’s place of business, or suspending or discontinuing the employer’s business or any branch of that business; or
> (ii) in discontinuing the employment of any employees; or
> (iii) in breaking some or all of the employer’s employment agreements; or
> (iv) in refusing or failing to engage employees for any work for which the employer usually employs employees; and
> (b) is done with a view to compelling employees, or to aid another employer in compelling employees, to—
> (i) accept terms of employment; or
> (ii) comply with demands made by the employer.
>
> ...

7 See paras [73] following.

8 See para [79] above; cl 23.3.

9 See para [73] following.

[97] There are two requirements under the section. First, there must be a qualifying act of the employer under s 82(1)(a). Here, that requirement is met because AFFCO discontinued Mr Stewart's employment: s 82(1)(a)(ii); and/or broke a relevant employment agreement: s 82(1)(a)(iii); and/or refused to engage him for work for which AFFCO usually employed employees: s 82(1)(a)(iv).

[98] Second, that step must be taken with a view to compelling the employee to accept terms of employment; s 82(1)(b) of the Act. That threshold is also met. Mr Stewart was told that he could not continue to work for AFFCO unless he signed the 2021/2022 fixed-term IEA, or became a member of the Union so that he would be covered by the applicable CEA. Mr Stewart considered both these options would be less advantageous. First, he was now employed on permanent terms, so that a fixed-term IEA would be less advantageous. Mr Stewart also considered the document offered to him contained a legal flaw, which he had drawn to Mr Berry's attention more than once. Second, he wished to work under an IEA, and not under a CEA which would also be time limited.

[99] The lockout was not a lawful one under the qualifying provisions of s 83 of the Act; there was no applicable bargaining that would bind Mr Stewart.

[100] I am not satisfied that the lockout was unlawful because it related to a personal grievance, and thus fell within the ambit of s 86(1)(c). Whilst the Court was told Mr Stewart has advanced a personal grievance as to his concerns over various issues, including as to the correct application of provisions under the HA, and that these remain to be determined by the Authority, I have no basis for concluding that he was locked out on 5 July 2021 because of these claims.

[101] In the result, I am satisfied Mr Stewart was unlawfully locked out.

Issue two: circumstances if Mr Stewart had been on a fixed-term contract

[102] The second issue raised by the parties' submissions related to the potential application of s 82 of the Act, and proceeded on the footing that Mr Stewart, as a seasonal worker, had been employed on a fixed-term basis.

[103] I have held otherwise, so that the application of s 82 to a person working on AFFCO's fixed-term IEA does not, strictly speaking, require consideration.

[104] However, I make some brief observations, in deference to the submissions made by the parties.

[105] The leading authority on s 82 is *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*.10

[106] The Supreme Court said this:11

In a seasonal employment situation where employment is terminated at the end of the season and re-engagement occurs at the beginning of the new season, there may be terms of employment that carry over beyond termination, as in the present case. The Act recognises om other contexts that an employer may breach such a term, even after employment has ended.12 If such a continuing obligation was breached by an employer and the employer's act was intended to compel the particular worker and/or similarly placed workers to accept new and less advantageous terms of employment, there is no linguistic reason that "employees" in s 82(1)(b) should not be read as applying to those workers. Moreover, we consider that this interpretation conforms with the legislative purpose. We see no substantive difference in this context between seasonal workers who have a permanent employment clause and seasonal workers such as the second respondents who do not.

[107] If Mr Stewart had been employed under AFFCO's 2020/2021 IEA on a fixed-term basis, and if a proper notice of seasonal layoff had been given to him, there were some provisions that would have carried over beyond termination.

[108] They included terms providing for the carrying over of sick leave entitlements from one year to another,13 and the provisions relating to the definition of "continuous service", which were included so that long-service leave relating to a period of employment over a number of years could be calculated.14

10. *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212, [2017] ERNZ 617.

11 See para [76] above.

12 Employment Relations Act 2000, s 103(1)(b).

13 Clause 18.

14 Clause 22.

[109] But these provisions do not, in and of themselves, relate to re-employment in a subsequent season.

[110] The parties' agreement as to re-employment was expressed in cl 22.2.15 The clause contained several conditions for re-engagement: the employee had to be ready, able and willing to commence work when required, to complete the employer's induction process, if any, and to sign acceptance "of the offered terms and conditions of employment".

[111] It is the final words of this provision which are significant. The clause did not guarantee re-employment on any particular basis.

[112] This may be contrasted with the carry-over provision which the Supreme Court considered important in the case which was before it. It described this clause as a "significant example" of a continuing provision:16

Re-engagement is dependent upon employees completing the employer's induction process and signed acceptance of terms of employment (being any terms applying in addition to those set out in this Agreement and applicable Site agreements).

[113] The Court stated this provision was important, because it seemed to identify the terms that would apply on re-engagement, that is, the previously applicable terms, subject to any others that might be mutually agreed. The Court went on to say that, if interpreted in this way, the clause limited the employer's ability, upon re-engagement, to require workers to accept individual employment agreements that contained less advantageous terms.

[114] Earlier in its discussion, the Supreme Court analysed various previous authorities relating to the issue of discontinuous or continuous employment for seasonal workers.17 One of these was the case relied on by Mr Malone in this case, *New Zealand Meat Workers etc Union Inc v Richmond Ltd*.18

15 See para [77] above.

16. *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 10, at [70].

17 At [39]—[45].

18 *New Zealand Meat Workers etc Union Inc v Richmond Ltd,* above n 1.

[115] After its survey of the authorities, the Court concluded that they were firmly based on the view that seasonal employment in the meat industry was discontinuous, and that this was an important part of the background against which the collective agreement in that instance had been negotiated. However, the Court went on to observe that this was not to say that parties could not negotiate different arrangements

– citing an example where this had occurred.19

[116] AFFCO's fixed-term agreement for the 2020/2021 season, if it had been operative between the company and Mr Stewart, was not one which limited AFFCO's ability to re-engage by requiring workers to accept an IEA that contained any particular terms and conditions of employment, whether or not they were less advantageous.

[117] In short, if there had been a valid termination of that fixed-term agreement by the giving of an appropriate notice of lay-off, the definition of lockout in s 82(1)(a) would not have been satisfied because Mr Stewart would not have been an employee for the purposes of the definition in s 82(1)(a) of the Act.

[118] Accordingly, had Mr Stewart been retained on such a fixed-term agreement as at 5 July 2021, I would not have found that the statutory definition of lockout was met.

Result

[119] Mr Stewart was as at 5 July 2021 a permanent employee. He was illegally locked out as from that date.

[120] Mr Malone confirmed that if the Court made this finding, AFFCO would offer immediate re-engagement, and then consult with Mr Stewart as to his claimed losses.

[121] In those circumstances, it is unnecessary to consider the topic of remedies at this stage. I do, however, reserve leave to the parties to return to the Court on reasonable notice, if remedies have not been agreed by 31 January 2022.

19. *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc,* above n 10, at [45]; *Hughes v Riverlands Eltham Ltd* EmpC WEC58/96, 18 September 1996.

[122] I reserve costs. Since the proceeding has not been completed, I will not consider these at the present time, although I observe that Mr Stewart is the successful party. It may be that the parties can, in any event, resolve this issue between themselves, if indeed Mr Stewart has incurred costs for the purposes of his claim.

B A Corkill Judge

Judgment signed at 3.00 pm on 7 December 2021
