

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 306
3091296

BETWEEN JAMES PARTICK STEWART
Applicant

AND AFFCO NEW ZEALAND
LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person
Max Williams, counsel for Respondent

Investigation Meeting On the papers

Submissions Received: 24 June 2020 from Respondent
1 July 2020 from Applicant

Determination: 6 August 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, James Stewart, has claimed he has been unjustifiably disadvantaged by the respondent, AFFCO New Zealand Limited (AFFCO).

[2] Mr Stewart's claims number seven and included therein are allegations that:

- a. AFFCO has included in the applicable employment agreement provisions which are incompatible with the requirements of section 67D (availability) of the Employment Relations Act 2000 (the Act);
and

- b. Mr Stewart has been disadvantaged as result of AFFCO's failure to provide suitable Personal Protective Equipment ("PPE") for work performed in freezers.

[3] It is AFFCO's view the Authority's jurisdiction prevents it from addressing these two claims and it is that this determination addresses.

Discussion

Availability provision

[4] Aside from the fact AFFCO denies the provision at issue fails to comply with the Act it submits *the Authority has no jurisdiction to make any determination or orders in regards to the applicant's allegation regarding the inclusion of a compliant 'availability provision'*.

[5] In summary, and after considerable submission, the argument comes down to two points. The first is that the facts simply do not support the possibility of the claim succeeding given that although the employment agreement states employees may be required to work additional hours and that employees will then agree to do so, the reality is that *the employee's consent to working such additional hours is in essence fluid and subject to retraction at any time*. It follows that in practise this is not a situation in which the arrangement as practised by AFFCO actually constitutes a situation to which s 67D applies.

[6] AFFCO goes on to say that even if an availability provision was required an employee could decline work if it was not compliant (s 67E and *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited*¹).

[7] Having considered the submissions I conclude both of these argument rely on assertions of fact, not law, and the only way a conclusion can be reached is to allow both parties to put their view of the facts and have them tested. Indeed I note the Court, in *Fraser v McDonalds*,² said it was not prepared to consider the validity of an availability provision in a factual vacuum. I also note *Fraser v Macdonald* was determined on the basis of the words of that agreement.

¹ *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited* [2019] NZEmpC 47

² *Fraser v McDonald's Restaurants (New Zealand) Limited* [2017] NZEmpC 95 at [14]

[8] The second argument is that even if it is established there has been a breach, the Court concluded in *Fraser v McDonalds* that it was not capable of making an award for reimbursement when the matter was brought as a personal grievance.³

[9] While that is correct it did not stop the Court continuing in *Fraser* and if a breach is established it might open the door for a more appropriate claim and remedy.

[10] For these reasons, and the fact an investigation considering at least five of Mr Stewarts claims will proceed in any event, I decline the request I strike out this matter for lack of jurisdiction at this stage. It may be the argument eventually succeeds but a conclusion in that regard needs to be better informed.

Personal Protective Equipment claim

[11] AFFCO's argument against this claim progressing is that it is precluded as *the allegation of insufficient PPE for cold-work contains no specific detail as to when the unjustified disadvantage is alleged to have arisen* and there is therefore no detail to suggest Mr Stewart raised a valid personal grievance in regards to this allegation within the 90 day timeframe required under s114 of the Act.

[12] In particular it is submitted *the ... Statement of Problem does not identify the date on which this alleged personal grievance arose (e.g. the date on which he believes that he suffered an unjustified disadvantage as a result of the alleged failure of the Respondent to provide appropriate PPE).*

[13] It is submitted that while AFFCO accepts an employee may raise a personal grievance for health and safety related disadvantages there still needs to be compliance with s 114 and here there is no evidence that is the case.

[14] While AFFCO may prove to be correct and it transpires this grievance was not properly raised it is difficult to say so on the evidence I have to date. Mr Stewart indicates in the application that his complaint was finally addressed in September 2019 and prior to that, 20 August 2019, there is an e-mail he sent to a manager advising he was commencing a personal grievance action and one of the grounds was this issue, albeit expressed in an unspecific way lacking adequate detail.

[15] That said, there was a subsequent e-mail two days later which provides more detail. It is arguable this matter was therefore properly raised given two other points.

³ N 2 above at [13]

[16] The first is Mr Stewart says he has been raising this issue in a variety of ways for years. Given the law states a disadvantage may arise from a repetitive course of action⁴ and this was not addressed till after Mr Stewart potentially advised a formal grievance in respect to it, there is a chance earlier exchanges enunciated the issues sufficiently. As yet I do not have a complete picture of the evidence in this regard with the briefs being intended to provide that. Mr Stewart's brief may therefore provide further evidence to which AFFCO can then respond to.

[17] Given an investigation will proceed in any event I believe it appropriate Mr Stewart be allowed to proffer his evidence in this respect. If, having done so, AFFCO believes the 90 day argument remains it can make submission accordingly at the time but I conclude it is, given an incomplete picture of the evidence, too early to deprive Mr Stewart of the opportunity to pursue the claim.

Conclusion and orders

[18] For the above reasons I decline the request I conclude the Authority has no jurisdiction in respect to these two claims at this point. While it may transpire AFFCO is correct both assertions have a factual element that needs further investigation and that can only occur by allowing Mr Stewart to enunciate and evidence his claims via his briefs.

[19] AFFCO can then reply and/or again argue a lack of jurisdiction.

[20] Costs are reserved but I consider they are best dealt with after determination of the substantive grievance..

Michael Loftus
Member of the Employment Relations Authority

⁴ *Premier Events v Beattie (no 3)* [2012] ERNZ 257 at [14]