

to work for AsureQuality, but despite being offered employment with it elsewhere he does not want to leave Wairoa.

Issues

[3] AFFCO has challenged the Authority's jurisdiction to make any orders for Mr Thompson to return to its Wairoa site as he was not an AFFCO employee.

[4] Mr Thompson has claimed that the Authority does have jurisdiction and that jurisdiction comes from clause 1 Schedule 2 of the Employment Relations Act 2000 and s.161 of the Act. In addition, it has been submitted on Mr Thompson's behalf that the he has a right of entry (explicit or implied) under the Animal Products Act 1999.

[5] It was further submitted that if Mr Thompson does have the right of entry under the Animal Products Act, AFFCO cannot exclude him and the employment relationship problem would be at an end.

[6] Mr Thompson's representative has raised an argument with regard to s.13 of the Trespass Act 1980 which, it was submitted, precludes AFFCO trespassing/banning Mr Thompson from the site. In the alternative, it was submitted that Mr Thompson can invoke the Contracts Privity Act for relief in regard to an arrangement between AFFCO and AsureQuality. The applicant denied that his employment with AsureQuality has been frustrated.

[7] For completeness, clause 1 of Schedule 2 of the Employment Relations Act provides:

- (1) *The Authority may, in performing its role, deal with any question related to the employment relationship, including –*
 - (a) *Any question connected with an employment agreement, being a question that arises in the course of any investigation by the Authority;*
 - (b) *Any question connected with the construction of this Act or any other Act, being a question that arises in the course of any investigation by the Authority.*
- (2) *Subclause (1)(b) has effect in relation to a question even though that question concerns the meaning of this Act (being the Act under which the Authority is constituted) or of an Act under which the Authority operates in a particular case.*

[8] The Authority's jurisdiction is also provided under s.161:

Jurisdiction

- (1) *The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including –*
- (a) *Disputes about the interpretation, application, or operation of an employment agreement;*
 - (b) *Matters related to a breach of an employment agreement ...*
 - (r) *Any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort)* (emphasis added)

[9] S 162 of the Act provides:

“Application of law relating to contracts

Subject to sections 163 and 164, the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment of law relating to contracts, including-

- (a) *the Contracts Privity Act;*
- (b) *...”*

[10] I was referred to *Pain Management Systems (NZ) Ltd v. McCullum* (unreported, Pankhurst J, 14 August 2001, High Court, Christchurch, CP72/01) and *B E M Grange Ltd v. Parker* [2005] 1 ERNZ 343. In *Grange*, the Court held:

[66] *These various points are in our view compelling indicators that Parliament did not intend to extend the Authority’s existing jurisdiction so dramatically as is suggested by the first defendant. We express our essential agreement, at greater length, with the analysis of Pankhurst J that “relating to” in the definition of “employment relationship problem” must be read in a limited way to mean any cause of action, the essential character of which is to be found entirely within the employment relationship itself. This would not encompass claims arising from tortious conduct even if arising between an employer and employee, since the relationship merely provides the factual setting for the cause of action; the duty arises independently.*

[11] Next, the Contracts Privity Act 1982 provides:

2. *Interpretation*

In this Act, unless the context otherwise requires, - benefit includes –

- (a) *Any advantage; and*
- (b) *Any immunity; and*
- (c) *Any limitation or other qualification of –*
 - (i) *An obligation of which a person (other than a party to the deed or contract) is or may be subject; or*
 - (ii) *A right to which a person (other than a party to the deed or contract) is or may be entitled; and*
- (d) *Any extension or other improvement of a right or rights to which a person (other than a party to the deed or contract) is or may be entitled ...*

4. Deeds or contracts for the benefits of third parties

Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:

Provided that this section will not apply to a promise which, on a proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person. ...

8. Enforcement by beneficiary

The obligation imposed on a promisor by section 4 may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed of contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer.

[12] Section 87 of the Animal Products Act provides:

87. Power of entry

- (1) *An animal product officer may at any reasonable time, for the purpose of determining whether or not any person is complying with this Act or any animal material or animal product or associated thing is in compliance with the requirements of this Act, without a warrant to enter any place (other than a dwelling house or marae) ...*
- (4) *An animal product officer may, pursuant to and in accordance with the conditions of a search warrant issued under section 94, enter any place (including a dwelling house or a marae) specified in the warrant, at any time that is reasonable in the circumstances*

[13] Under the Animal Products Act 1999, an *animal product officer* or *officer* means: *a person appointed as an animal product officer under section 78, and includes the Director-General*. Section 78 provides:

78. *Appointment of animal product officers*

- (1) *The Director-General may from time to time appoint persons as animal product officers for the purposes of this Act.*
- (2) *Persons appointed under subsection (1) must be employed under the State Sector Act 1988.*
- (3) *An animal product officer may be authorised, on his or her appointment, to exercise all the powers and functions conferred on animal product officers under this Act, or only those powers and functions specified in the officer's instrument of appointment or subsequent written notice from the Director-General to the officer.*

[14] A further provision under the Animal Products Act 1999 provides:

79. *Appointment of official assessors*

- (1) *The Director-General may from time to time appoint official assessors for the purpose of carrying out such routine examinations of animal material and products as may be required for the purposes of this Act, and particularly for the purpose of enabling official assurances to be given under this Act. Persons appointed under this subsection must be employed under the State Sector Act 1988.*
- (2) *The Minister may from time to time appoint as official assessors for the purposes of this section persons employed in a State enterprise within the meaning of the State Owned Enterprises Act 1986 or within a Crown entity as defined in the Public Finance Act 1989, for the purpose of carrying out routine examinations of animal material and products for the purposes of this Act, and particularly for the purpose of enabling official assurances to be given under this Act.*
- (3) *An official assessor may be authorised, on his or her appointment, to exercise all of the powers and functions conferred on official assessors under this Act, or only those powers and functions specified in the assessor's instrument of appointment or subsequent written notice from the Director-General to the assessor.*
- (4) *No person is to be treated as employed in the State Services for the purposes of the State Sector Act 1988, or in the government service for the purposes*

of the Government Superannuation Fund Act 1956, by reason only of the person's appointment under subsection (2).

- (5) *The Minister may at any time suspend or revoke an appointment made under this section.*

[15] “*Official assessor*” is defined under the Animal Products Act and means: “*a person appointed as an official assessor under s.79*”. This is Mr Thompson’s position.

[16] Section 13 of the Trespass Act provides:

13. *Savings*

Nothing in this Act shall derogate from anything that any person is authorised to do by or under any other enactment or by law, or restrict the provisions of any of the following enactments and instruments:

- (a) *Section 42 of the Mining Act 1971;*
- (b) *Section 97 of the Civil Aviation Act 1990;*
- (c) *Any enactment or instrument conferring a right of entry on any land.*

[17] I will refer to an unsigned contract called a contract for services by AsureQuality. That contract was handed to AFFCO by AsureQuality but not signed by AFFCO. The relevant clauses referred to read as follows:

6.2 *The client will provide AsureQuality and its personnel with such access to the Client’s plant, premises, staff and records as is reasonably necessary to ensure AsureQuality to carry out its obligations, or to exercise its rights under this contract.*

15.2 *Nothing in this contract confers or may be taken to confer a benefit on any third party under the Contracts Privity Act 1982.*

[18] Mr Thompson was appointed to his employment with AsureQuality by way of a letter dated 24 October 1995. That letter started:

I am pleased to offer you a position as a permanent meat inspector at Wairoa, based at AFFCO Wairoa, effective from November 1, 1995.

...

[19] He was also employed by AsureQuality under the terms of employment contained in a collective employment agreement covering meat services staff at the Wairoa plant.

The facts

[20] Ben Thompson was employed by AsureQuality at Affco's Wairoa meat plant site. He is a meat inspector and known officially under the Animal Products Act 1999 as an *official assessor*. Under the terms of his employment he could not be required to work away from AFFCO Wairoa (on a relief basis), without his consent.

[21] In February 2009 he was involved in an incident at work with two AFFCO employees. After a disciplinary investigation AsureQuality found that Mr Thompson did not commit serious misconduct and decided not to take any disciplinary action. That could not be said for AFFCO. It dismissed one of its employees involved and the other was subjected to disciplinary action.

[22] AFFCO initially banned Mr Thompson from its site and threatened to trespass him. No action was taken by AFFCO on the latter, but the ban remains in effect.

[23] AsureQuality and AFFCO were involved in a number of steps to resolve Mr Thompson's return to the site. These included discussions, meetings, consideration on the unsigned contract for services between AFFCO and AsureQuality, mediation and the engagement of the Food Safety Authority to conduct an investigation and report.

[24] At the same time as the above was taking place AsureQuality negotiated with Mr Thompson and they discussed relocation to another meat plant not operated by AFFCO and, as an alternative, terms on which the employment could terminate.

[25] In December 2009 AsureQuality advised Mr Thompson that AFFCO's ban meant that his employment was frustrated when there was no conclusion reached on the options available to work around the ban. Mr Thompson was put on notice of his employment being termination for frustration.

[26] In the meantime until the present application in the Employment Relations Authority is dealt with Mr Thompson has agreed to take leave without pay. The matter remains unresolved and it falls on the Authority to make a determination.

Determination

[27] I will deal with each of the issues as follows.

Jurisdiction

[28] An employment relationship problem can include a third party: in what is commonly known as a triangular employment relationship. There is such a relationship in this employment relationship problem with AFFCO because the work was being carried out on its site at Wairoa and it has some control over its premises. However, the causes of action to resolve the employment relationship problem may be problematical in this case. That is because any cause of action to resolve an employment relationship problem involving a third party may be restricted to an aiding and abetting of an alleged breach action (s134 (2) of the Employment Relations Act). There is no complaint of this nature in these proceedings.

[29] There is no jurisdiction for the Authority to resolve the cause of action in regard to AFFCO that relates to the right of entry and trespass. First there is no issue about a trespass order because there is none. In any event the Authority has no direct or indirect authority to resolve such a problem under the Employment Relations Act and AFFCO is not and was not Mr Thompson's employer. There was no employment relationship between the two, except that Mr Thompson worked at AFFCO's premises.

[30] Secondly the right of access under the Animal Protection Act 1999 is founded on the relationship between AFFCO andASUREQuality, not in an employment sense in regard to Mr Thompson's position, although it is a statutory position. The definitions and positions under the Animal Protection Act are statutory matters relating to ASUREQuality and its relationship with AFFCO. In any event the Animal Protection Act does not provide an express power of the right of entry to "*official assessors*" (Mr Thompson's role as a meat inspector): see section 87 of the Animal Protection Act. Also, official assessors are not included in the specific powers of entry under the Animal Protection Act: see ss87, 88, 91(1) and 94. Thus, there is no power to imply a right of entry specifically for *official assessors* on a personal level.

The Contracts Privity Act 1982

[31] The Contracts Privity Act has been raised because of the existence of the unsigned contract offered to AFFCO by AsureQuality. The effect of the Contracts Privity Act means that where a contract includes a benefit on a person, designated by name, description, or reference to a class, and on the proper construction of the contract, it is intended to create, in respect of the benefit, an obligation enforceable at the suit of that person, then although that person is not a party to the contract they may enforce it. First the contract has been called a contract for service, which it is not. It is unsigned and AFFCO has not agreed with all the proposed terms although it has paid for the service. Section 162 relates to “*any matter related to an employment agreement*”. It is certainly not settled that the applicant’s claims in respect of the contract for services relate to his employment agreement with AsureQuality because the contract for services has never been signed or agreed to by AFFCO, and it relates to a contract for services. Any right of entry therefore relates to AsureQuality in regard to its statutory responsibilities and there seems to be no question that AsureQuality’s right of entry in respect of its personnel has not been impeded. Mr Thompson’s situation applies to his employment relationship with AsureQuality given he has been banned by AFFCO in entirely separate matters relating to how AFFCO considered his involvement in the matter that has caused the problem. AsureQuality’s issue with him is an employment one, not the statutory provision for services required under the Animal Protection Act. It is entirely open to AFFCO and AsureQuality to rely on findings made by the Food Safety Authority that has ruled that AFFCO is entitled to ban people, including Mr Thompson from its Wairoa meat plant.

[32] Finally, Clause 6.2 of the contract does not purport to provide a benefit to Mr Thompson, I hold. If there is any benefit, the right of access is granted to AsureQuality, to allow it to perform its duties and not to ensure that AsureQuality’s employees are to carry out their obligations to Assure or under the Animal Protection Act. Also Clause 15.2 of the contract expressly excludes operation of the Contracts Privity Act on a third party. This clause means that s 4 of the Contracts Privity Act, which does not apply: and thus, Mr Thompson can not invoke the Contracts Privity Act 1988, I hold.

Frustration of employment with AsureQuality

[33] Next I turn to the argument of frustration in employment. This is somewhat different to the usual arguments around frustration because there is still an employment relationship in as much as Mr Thompson has agreed to take special leave. Also, the usual arguments around frustration relate to an employer justifying the end of an employment relationship faced with a personal grievance claim. That is not the case in these proceedings.

[34] Mr Thompson's terms of employment are very clear. His role is at AFFCO Wairoa, based at Wairoa. He would not be required to work away from AFFCO Wairoa without his consent. There is no relief work available. He has been banned from the AFFCO Wairoa site. AFFCO will not permit Mr Thompson to return to the site, even although his own employer has decided his involvement in the altercation with AFFCO's two employees was not enough to discipline him for.

[35] AsureQuality has taken steps to resolve Mr Thompson's return to work with AFFCO Wairoa, but to no avail. This has included the investigation by the Food Safety Authority. There have been discussions, meetings and mediation. Mr Thompson has been advised by AsureQuality that AFFCO's stance of banning him from its site at Wairoa means his employment is frustrated. AsureQuality intends to terminate his employment on that basis.

[36] The circumstances prevent a decision on whether or not the employment has been frustrated yet. This is because Mr Thompson remains on special leave and is still employed. He does deserve an opportunity to have some further discussions with his employer about his future and if necessary any arrangements around the ending of his employment that may include further input on the letter he was sent by AsureQuality. In this situation there may still be scope between the parties to vary the employment arrangements on where he works, although Mr Thompson's clear wish to remain in Wairoa may make achieving any arrangements problematical. The fact he cannot return to work at AFFCO Wairoa does present him with a problem and an obstacle about his future if there are no other arrangements agreed to. The circumstances, if the decision is made to terminate his employment may well mean a likely outcome is for the employer to decide his continuation will be frustrated.

[37] The applicant's claims are dismissed.

[38] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority