

IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 144
ARC 67/11

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

BETWEEN NEW ZEALAND MEAT WORKERS &
RELATED TRADES UNION INC
Plaintiff

AND AFFCO NEW ZEALAND LIMITED
Defendant

Hearing: 27 - 29 September 2011
(heard at Tauranga)
12 October 2011
(heard at Whangarei)

Appearances: Simon Mitchell, counsel for the plaintiff
Graeme Malone and Rachel Webster, counsel for the defendant

Judgment: 2 November 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The terms and conditions of employment of meat process workers employed by the defendant (AFFCO) under the AFFCO New Zealand Core Employment Agreement (the collective agreement) include a provision relating to seniority. Over the years the “seniority clause”, as it is commonly referred to, has been the subject of several decisions of both this Court and the Court of Appeal.¹ In essence, the seniority clause requires AFFCO to maintain a seniority list in respect of each meat

¹ See *New Zealand Meat Workers Union of Aotearoa Inc v AFFCO New Zealand Ltd* [2011] NZEmpC 32; *New Zealand Meat Workers' Union Inc v Alliance Group Ltd* [2006] ERNZ 664; *New Zealand Meat Workers etc Union Inc v Richmond Ltd* [1992] 3 ERNZ 643; *NZ Meat Processors etc IUOW v Alliance Freezing Company (Southland) Ltd* (1990) ERNZ Sel Cas 834, [1991] 1 NZLR 143 (CA).

processing plant, ranking workers covered by the collective agreement on either a site or departmental basis according to the commencement date of their employment. The seniority list determines the order in which workers are laid off at the end of a season and re-engaged at the commencement of the next season.

[2] The issue before the Court is whether, in addition to regulating the lay-off and re-engagement of labour, the seniority clause also determines how labour is utilised on a day-to-day basis at the various meat processing plants operated by AFFCO. In particular, in the context of the present case, whether training for higher positions at a plant or in a particular department is to be offered to workers in accordance with their seniority. The union argues that that is indeed the position. AFFCO contends that the seniority provision relates only to lay-offs and re-engagement.

Background

[3] The Court was told that six of the eight AFFCO plants in the North Island are affected by this case. The current dispute apparently commenced on 4 August 2011. On that date the union initiated proceedings in the Employment Relations Authority (the Authority) claiming that the company was breaching its obligations under the seniority clause by having supervisors at the Moerewa plant in North Auckland train employees out of seniority. The dispute was referred to mediation but apparently remained unresolved.

[4] On 8 August 2011, another dispute over training arose at Rangiuru in the Bay of Plenty, which is AFFCO's largest plant. On 29 August 2011, the company issued proceedings in this Court seeking an urgent injunction against the union and the workers involved in the Rangiuru dispute. It was alleged that the workers named as second defendant, acting on instructions from the union, which was named as first defendant, had refused to undertake the training duties required of them. For their part, the defendants contended that they were required to undertake training duties only if staff were proffered for training in accordance with their seniority. AFFCO alleged that the actions of the defendants constituted an unlawful strike and on that basis sought the injunction.

[5] An urgent fixture was convened for 9 September 2011 to deal with the injunction application. After the hearing had progressed to a certain point, it became clear that, as the dispute relating to the Moerewa plant was still before the Authority, it would be preferable to have the matter before the Authority referred directly to the Court and dealt with under urgency so that all aspects of the dispute between the parties in relation to training could be dealt with at one substantive hearing. Counsel agreed and the injunction hearing was adjourned sine die. On 13 September 2011, following a joint application by the parties, the Authority ordered the removal of the entire matter to the Court.²

The pleadings

[6] The case for the plaintiff revolves around the wording of the seniority clause which is cl 30 of the current collective agreement and, in particular, subclause (f). The provision reads as follows:

30. SENIORITY

- a) All workers shall acquire and retain, as agreed at the site, seniority according to the date of commencement of their employment.
- b) Seniority will operate on a departmental [and/ or] site basis except where otherwise agreed.
- c) Consistent with departmental needs and the individual's competency, lay-off and re-employment shall be based on departmental and/ or site seniority.
- d) A seniority list shall be prepared for each department and/ or site and be made available to the delegate each season prior to the commencement of seasonal lay-off.
- e) At the commencement of each season a list of new workers shall be made available to the delegate.
- f) *The relative seniority standing of workers within the same department and/ or site seniority shall be determined by the practice now in effect at each site.*
 - i) *Seasonal management lay-off shall not break seniority rights.*
 - ii) *Absence due to sickness or injury supported by a medical certificate shall not break seniority rights providing the worker has not been employed elsewhere during the period of absence*

² [2011] NZERA Auckland 396.

unless so directed by the Company or the Accident Compensation Corporation.

- g) Seniority shall be broken in the following circumstances:
 - i) Voluntary leaving or being discharged from employment.
 - ii) Failure to return to work from a lay-off after being notified by management and being given five working days notice as per the Company's customary procedure; in exceptional circumstances and upon the request of the delegate additional time to report shall not be unreasonably refused.
- h) When a department or part of a department is closed down permanently, such workers, subject to suitability, shall on the basis of their existing seniority be offered vacancies in any other department. Seniority in their new department shall be determined within the practice at each site.
- i) Any dispute regarding seniority shall be settled between the Company and the Union and if no agreement is reached shall be decided within the "disputes" clause of this agreement.
- j) Any local agreements now applying at sites shall not be considered inconsistent with this clause.

(Emphasis added)

[7] The plaintiff in its statement of claim seeks a finding from the Court that cl 30(f) of the collective agreement applies to the operation of the plants and not just to re-engagement and lay-offs so that, in the absence of certain disqualifying factors, seniority determines who will be trained for more senior positions. The two disqualifying factors identified in the statement of claim are:

- i. The next employee in seniority does not want the new position; or
- ii. The next employee is not competent to perform the new position.

[8] In its statement of defence, AFFCO denies the allegation that seniority determines who will be trained and states that, "seniority does not apply to training but to the timing and of lay-off and re-engagement of employees."

Principles of construction

[9] As noted in a recent decision of this Court, *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v AMCOR Packaging (New Zealand) Ltd*,³ the leading authority on contract interpretation is the decision of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.⁴ Although that decision related to the construction of a commercial contract, the Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*⁵ made it clear that *Vector* had equal application to the interpretation of employment agreements. The Court is required to apply a principled approach to the interpretation of employment agreements and any dispute as to meanings must be determined objectively.

[10] *Silver Fern Farms* dealt with issues about the interpretation of two collective employment agreements affecting annual holiday entitlements in the meat processing industry. The Court of Appeal referred to certain passages from *Vector* which it considered helpful and relevant to the issue of contractual interpretation:

[36] For present purposes, the summary provided by McGrath J in *Vector*⁶ of Lord Hoffmann's five principles of interpretation in his judgment on behalf of the majority in *Investors Compensation Scheme Ltd v West Bromwich Building Society* is helpful:

... In summary, Lord Hoffmann said that interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business commonsense.

[37] Tipping J also provided analysis relevant to the present case when he said:⁷

The foregoing analysis recognises that, generally speaking, issues of contractual interpretation arise in three circumstances: mistake; ambiguity; and special meaning. A mistake can represent either a drafting error or a linguistic error. Errors of this kind are primarily the subject of rectification.

³ [2011] NZEmpC 135.

⁴ [2010] NZSC 5, [2010] 2 NZLR 444.

⁵ [2010] NZCA 317.

⁶ At [61].

⁷ At [33].

But if clear drafting or linguistic error, combined with equal clarity as to what was intended, can be remedied by way of interpretation, and in that respect context can and should be taken into account. An ambiguity arises when the language used is capable of more than one meaning, either on its face or in context, and the court must decide which of the possible meanings the parties intended their words to bear. A special meaning exists when the words used, even after the contractual context is brought to account, are linguistically still capable of only one meaning or are wholly obscure; but it is nevertheless evidence from the objective context that the parties, by custom, usage or agreement, meant their words to bear a meaning which is linguistically impossible (for example, black means white), or represents a specialised and generally unfamiliar usage.

[11] There is a further passage in the judgment of Justice Tipping under the heading "Legal principles" which has particular relevance to the facts and evidence in the case before me:

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[12] Another relevant principle of construction recognised in *Vector* and noted in *Silver Fern Farms* at [26] is that material extrinsic to a contract can be used to clarify the meaning of an agreement, whether or not the terms used are ambiguous. As Justice Tipping observed, at [22] of *Vector*:

This is because a meaning that may appear to the court to be plain and unambiguous, devoid of external context, may not ultimately, in context, be what a reasonable person aware of all the relevant circumstances would consider the parties intended their words to mean.

[13] Finally, and again of particular relevance to the interpretation of a provision in a collective employment agreement, is the observation made by the Court of Appeal in *Silver Fern Farms* at [43] that it was appropriate for the Judge in the

Employment Court to take into account undisputed evidence as to the terms of prior instruments or agreements.

The facts

[14] There was evidence that a seniority clause in virtually identical language to the one in question has been a condition of employment in the meat processing industry for many years. A copy of the Meat Processors', Packers, Preservers', Freezing Works Employees – Composite Award in the whole of New Zealand (Except Westland) dated 3 August 1989 was produced in evidence but it appears from volume 77 of the Book of Awards that the seniority clause first appeared in the awards as cl 28 of the Meat Processors', Packers', and Preservers Freezing Works Award dated 9 February 1977.⁸ The only difference of any significance is that the 1977 version included a subclause which provided:⁹

- (j) Nothing in this clause shall affect any right which the employer has in terms of clause 30 of the agreement.

Clause 30 dealt with the powers of employers to manage and control their own business and the conduct of their employees.

[15] For completeness, I should also refer to cl 29(b) of the current collective agreement which, with minor variations in the wording, has in previous decisions of the courts invariably been linked with the seniority clause. It reads:

- b) When engaging workers at the commencement of each season priority shall be given to the employment of those workers who have been competent and satisfactory workers at that particular site during the previous season and who are ready, willing and able to commence work when required. Incompetent and or unsatisfactory workers shall be dealt with through the disciplinary procedures laid down in clauses 32, 33 and 34.

The equivalent of cl 29(b) in the 1977 award was cl 27(g) and in the 1989 award it was cl 28(g).

⁸ [1977] 1 BA 185.

⁹ At 202.

[16] The plaintiff called evidence from 11 witnesses and there were 10 witnesses called on behalf of the defendant. No objection was taken to the evidence presented but it related in the main to the historical significance or otherwise of seniority in relation to training. In general terms, the evidence called on behalf of the union was to the effect that seniority played a dominant if not crucial role in the selection of workers for training purposes whereas the evidence called on behalf of AFFCO suggested that seniority, if it was a factor at all, was one consideration only with competence, ability and attitude being more relevant factors.

[17] There was also evidence to the effect that the reason why matters have only recently come to a head in relation to training is because since early August 2011 AFFCO has required union workers to train workers employed under individual employment contracts (IECs) out of seniority. In other words, union witnesses claimed that the company had required them to train workers on IECs, some of whom had only been with the company for a matter of months, for positions which would normally be allocated to more senior workers covered by the collective agreement. Some of the union witnesses hypothesised that these developments were part of a deliberate strategy by the company so that it would have a trained workforce of IEC employees in place in the event of industrial difficulties arising during negotiations for a new agreement after the current collective agreement expires on 31 December 2011. The AFFCO witnesses did not deny those allegations but insisted that the collective agreement does not provide for seniority in respect of training.

[18] Mr Mitchell, counsel for the plaintiff, acknowledged that the Court was “faced with starkly different evidence”. Counsel indicated that the relevance of the evidence called was that it enabled the Court to ascertain how the seniority clause had operated in practice and how it operated in practice was a “critical factor in determining its proper interpretation”.

Submissions

[19] In relation specifically to cl 30(f), Mr Mitchell submitted:

40. Clause 30(f) must mean something. The Defendant's submission must mean that it is a further provision meaning seniority determines layoff and re-engagement.
41. The Defendant's submission would mean that Clause 30(f) is meaningless. That is, that seniority would not determine relative standing within the same department. Further, if Clause 30(f) only relates to re-engagement and layoff, then the clause is redundant.
42. It would seem remarkable that having clearly set out at Clause 30(c) that seniority determined layoff and re-engagement, that the parties would then include another clause at 30(f) which states this in a different way.
43. The submission of the Defendant means that Clause 30(f) has no meaning at all.
44. It is important to note that Clause 30(f) also contains (i) and (ii). These determine that a layoff, does not affect your departmental seniority. ... The inclusion of (i), supports a contention that Clause 30(f) has a different meaning and [that] there is a seniority applicable, that is not the same as shed seniority. That of course is the seniority that applies within your department. Any other interpretation, means that Clause 30(f) is redundant and in effect meaningless. This seems most unlikely.

[20] Mr Malone, counsel for AFFCO, contended that cl 30 had always been seen as applying only to lay-offs and re-engagement and not to training or appointments to more senior positions. He submitted that, if read as a whole, it is clear that cl 30 is concerned only with lay-offs and re-engagement. In relation to cl 30(f), Mr Malone submitted that the subclause, "provides the method by which it can be determined whether seniority at any particular plant under sub clause b) is to be on a plant basis or a site basis or both and if both, in which order." Counsel continued:

38. Without sub clause f) it would not be possible to determine which method applied. An employee's seniority standing that was higher on a site basis than a departmental basis would create confusion as to whether he was to be laid off before others with lower site seniority and higher departmental seniority. In addition the employer would be free each year to change the method by which seniority applied; i.e. site only or departmental only or plant then Department or vice versa at its will. Sub clause f) is therefore designed and necessary to identify the specific method by which seniority operates pursuant to sub-clauses a) and b) at any particular site.

Discussion

[21] It was not specifically argued before me that the language of cl 30(f) was ambiguous and I do not accept that it is. It must be borne in mind that when the

seniority clause was first incorporated into the old awards in 1977, it provided in subclause (b) that: "Seniority will operate on a departmental and/or group basis except where otherwise agreed upon"¹⁰ but without further definition there was nothing to indicate precisely how that seniority was to be determined. Subclause (f) provided the answer to this conundrum by explaining that relative seniority would be determined by the practice then in effect at each works. The exclusions referred to in paragraphs i) and ii) of subclause (f), which provide that seniority would not be lost through seasonal lay-off or authorised absences through sickness or injury, clearly apply to the seniority clause as a whole rather than to some other aspect of employment such as training.

[22] The wording of the original seniority clause, with slight modification, has been retained at the rollover of each subsequent award, contract and collective agreement, no doubt to emphasise the fact that it is the relative seniority standing of workers at the commencement date of each new instrument or agreement that determines seniority. In that context, subclause (f) makes perfect commercial sense. There is no issue of estoppel or special meaning. There is no mention of *training* anywhere in cl 30 (emphasis added). If the parties had intended seniority to be the determining factor when it came to training entitlements then one would expect to find either a direct or implicit reference to that effect somewhere in the clause. But there is none.

[23] As *Vector* emphasised, having reached those conclusions, the Court should not readily accept that there is any error in the contractual text but it is still necessary as a cross-check to consider any objective extrinsic evidence relating to the background circumstances in order to ensure that the meaning which appears plain and unambiguous on its face has not been modified by context.

[24] As I indicated at [16] above, most of the evidence before the court was subjective in the sense that it related to post-agreement conduct with the witnesses for each party giving evidence in support of that parties' case based upon their subjective personal experiences and understandings of the significance (if any) of seniority in the training process. That evidence was sharply divergent. In *Vector Justice Tipping* noted at [30] that in *Gibbons Holdings Ltd v Wholesale Distributors*

¹⁰ At 201.

Ltd.,¹¹ he had suggested that in order to be admissible, post-contract conduct should be shared or mutual. He said: "I saw that as a way of emphasising the need to exclude evidence which demonstrated only a party's subjective intention or understanding as to meaning." His Honour went on to record:

[31] There is no logical reason why the same approach should not be taken to both post-contract and pre-contract evidence. The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear. ...

As noted in [11] above, evidence is not relevant in a contractual interpretation dispute if it does no more than tend to prove what individual parties subjectively intended or understood the words to mean. To that extent, I did not find much of the sharply divergent evidence in the present case particularly helpful or relevant in the interpretation exercise the Court is required to carry out.

[25] There was, however, some evidence of a more objective nature. Thus, for example, AFFCO's Industrial Relations Manager, Mr Graeme Cox, referred to certain specific provisions relating to training which existed in the old awards including, as it turns out, the award current at the time the seniority clause was first introduced in 1977. One such provision required the employer to employ experienced slaughtermen to teach learner mutton and lamb slaughtermen¹² and another provision stipulated how preference was to be given for learner beef slaughtermen.¹³ In that same context there was a reference to preference being given to "such other workers as may be agreed upon between the employer and the union concerned".¹⁴ That particular reference may be of background relevance to the present dispute because there was significant evidence to indicate that historically, in some plants, the union delegate has invariably been consulted by management in relation to the selection of candidates for training.

[26] The 1977 award also referred to the provisions of the Meat Regulations 1969. Those regulations provide that no slaughtering may occur except in accordance with

¹¹ [2007] NZSC 37, [2008] 1 NZLR 277.

¹² [1977] 1 BA 197.

¹³ At 198.

¹⁴ At 198.

the Slaughter of Stock, Game, and Poultry Regulations 1969.¹⁵ Regulation 17 of those slaughtering regulations, under the heading: "Only competent persons to carry out slaughtering", required workers engaged in slaughtering to be either competent or under the "close supervision of a competent person who is instructing him in the correct methods." None of the provisions referred to in [25] or in this paragraph have continued as an express condition of employment under the current collective agreement but they are relevant to the interpretation exercise in the sense that they illustrate the context or factual circumstances that were likely to be operating on the parties' minds when the seniority clause was first introduced some 34 years ago. In other words, there were already certain provisions relating to training in the award and in the regulations and so ostensibly there would have been no necessity to incorporate any additional such provisions in the seniority clause.

[27] I also consider it relevant in any consideration of the meaning and commercial sense of the seniority clause in question to recognise that over the years the courts have addressed the application of the clause only in terms of the seasonal engagement of workers in the freezing industry. There has never been any suggestion in the reported cases that the provision has wider application, specifically in relation to training. Thus in *NZ Meat Processors etc IUOW v Alliance Freezing Company (Southland) Ltd*,¹⁶ Justice Richardson, delivering the judgment of the Court of Appeal, stated:¹⁷

The seasonal engagement of workers is reflected in clause 29(g) [now cl 29(b)] of the General Conditions and clause 30, [the same terms as at [6] above] which contains detailed provisions as to seniority. ... The award is designed for a seasonal industry. The seasonal engagement of workers is a basic premise underlying the award. That is clear from clause 29(g), clause 30 and the leave provisions earlier referred to. Thus clause 30(c) providing for lay offs and reemployment to be based on departmental and/or group seniority, and clause 30(d) requiring a seniority list to be prepared for each department or group prior to the commencement of seasonal lay offs, necessarily govern the position of general services department workers.

There is no indication in that authoritative statement to suggest that the seniority clause applies to any situation other than lay-offs and re-employment.

¹⁵ Meat Regulations 1969, reg 76.

¹⁶ (1990) ERNZ Sel Cas 834, [1991] 1 NZLR 143 (CA).

¹⁷ At 839-841 and 147-150.

Conclusions

[28] For the reasons stated, I conclude that the plaintiff's application for the findings sought in the statement of claim cannot succeed. The meaning of the clause in question is clear and unambiguous. It contains detailed provisions as to seniority in relation to the seasonal engagement of workers in the meat industry and it has no application to issues relating to training or training entitlement.

[29] No doubt because the case relates to the interpretation of a provision in a collective employment agreement, the defendant, quite responsibly, has not sought costs.



A D Ford

Judge

Judgment signed at 11.30 am on 2 November 2011