IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 204
EMPC 152/2015

IN THE MATTER OF	an application for declarations, injunctions and compliance orders
BETWEEN	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INC First Plaintiff
AND	ROBERTA KEREWAI RATU AND OTHERS Second Plaintiffs
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing:	5 and 6 October 2015 (Heard at Auckland)
Court:	Chief Judge G L Colgan Judge M E Perkins Judge A D Ford
Appearances:	P Cranney and SR Mitchell, counsel for plaintiffs P Wicks QC and G Malone, counsel for defendant
Judgment:	18 November 2015

JUDGMENT OF THE FULL COURT

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Introduction

[1] By agreement between the parties, this judgment decides two of the plaintiffs' six causes of action in proceedings challenging the defendant's recent and ongoing engagement of meatworkers at its plants at Rangiuru (Bay of Plenty), Imlay (Whanganui) and Feilding (Manawatu). The issue also affects AFFCO New Zealand Limited's (AFFCO's) plant at Wairoa (East Coast North Island) and, at the date of hearing at least, was also likely to affect the company's two remaining North Island plants at Horotiu (Waikato) and Moerewa (Northland).

[2] The first cause of action decided by this judgment is the plaintiffs' claim that the defendant unlawfully locked out the second plaintiffs by refusing to re-engage them in employment at the start of the 2015/2016 killing season otherwise than on AFFCO's terms and conditions of employment set out in new individual employment agreements. The plaintiffs' other cause of action for decision now is their contention that AFFCO breached statutory obligations of good faith in collective bargaining contained in s 32 of the Employment Relations Act 2000 (the Act).

[3] The proceeding commenced in June 2015 in relation, then, to AFFCO's Rangiuru plant. In a judgment issued on 17 June 2015, following a hearing convened urgently, the Court declined to restrain, by interlocutory injunction, what the plaintiffs then contended in their sole cause of action was an unlawful lockout of

the individual second plaintiffs.[1] The Court held that although the plaintiffs had an arguable cause of action, balance of convenience and overall justice factors then favoured the defendant. Despite an early substantive hearing having been offered to the parties, it was not until the week beginning 5 October 2015 that this was able to take place.

[4] To complete the picture, there is a separate albeit associated case scheduled to be heard very shortly. This proceeding deals with AFFCO's application to the Employment Relations Authority (now removed to the Court for hearing at first instance) for an order declaring that collective bargaining between the Union and AFFCO has now concluded.[2] This application relies on new legislative provisions including s 50K of the Act. Counsel agree that the resolution of some of those issues will be affected by our judgment in this case.

The facts

[5] We find the following relevant facts in this case from four sources. First, the parties, less than a week before the hearing, filed an agreed statement of relevant facts which we will set out below. These proved to be incomplete and less than satisfactory in a number of respects as it turned out and potentially to the plaintiffs' disadvantage. Second, we have relied upon some concessions made by counsel for the parties during the hearing, principally for the defendant, when propositions were put by the Bench to counsel. Third, we rely on factual findings made by the Chief Judge in Interlocutory Judgment (No 2) following the injunction proceedings heard on 16 June 2015 on affidavit evidence.[3] Finally, the parties have submitted a substantial volume of relevant documents to the Court, the admissibility of which is accepted and from which we have derived certain factual findings and have drawn inferences.

[6] The following is the parties' agreed statement of relevant facts:

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[1] *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd (No 2)* [2015] NZEmpC 94.
[2] *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2015] NZERA Auckland 253.
[3] *New Zealand Meat Workers*, above n 1.

1. The defendant is a meat processing company,

2 The defendant operates meat-processing plants at Rangiuru, Imlay, Manawatu, Wairoa, Moerewa and Horotiu.

3. The defendant also operates a Fellmongery at Wiri and a Tannery at Napier.

4. The first plaintiff is a union.

5. The first plaintiff and the defendant were parties to a collective agreement which came into force on 1 May 2012 and expired on 31 December 2013 but which continued in force until 31 December 2014 pursuant to s53 of the Employment Relations Act 2000.

6. The parties are in dispute about the accuracy of the list of plaintiffs. The persons listed in attachment A are agreed to be representative plaintiffs who are union members who were employed last season.

7, On 17 April 2015 the Rangiuru plant closed for the season and re-opened on 22 June 2015.

8. On various dates from 2 June 2015 the defendant informed all persons who had worked at the Rangiuru plant the previous season and been laid off of its intention to reopen from 22 June 2015 and invited them to attend introduction presentations for a new intended individual employment agreement at the plant commencing on 8 June 2015.

9. At the introduction presentations each person attending was provided with an information document and a proposed individual employment agreement.

10. On 9 June 2015 the first plaintiff filed proceedings in the Employment Court alleging an unlawful lockout and seeking an interim injunction.

11. On 17 June 2015 the Employment Court declined interim relief on balance of convenience grounds.

12. Following the judgment almost all the members of the union at Rangiuru signed the individual employment agreement that had been proffered by the defendant without seeking any changes to the same and were engaged for employment from 22 June 2015.

13. On 5 June 2015 the Imlay plant closed for the season and re-opened on 5 August 2015.

14. On or around 16 June 2015, the defendant invited all persons who had worked at the Imlay plant at Wanganui the previous season and been laid off to attend introduction presentations for a new intended individual employment agreement.

15. At the introduction presentations each person attending was provided with an information document and a proposed individual employment agreement.

16. Most members of the union at Imlay did not seek any meetings with the company, through their union representatives or otherwise, to discuss the proffered IEA but signed the individual employment agreement that had been proffered by the defendant without seeking any changes to the same and were engaged for employment.

17. On 1 July 2015 the Manawatu plant closed for the season and re-opened on 5 August 2015.

18. The same process was used at the defendant's Manawatu plant.

19. In undertaking the process of proffered IEAs a small number of persons asked for changes to the IEAs and their requests were considered and some were granted as well as requests for extra time for consideration. For example:

    19.1 At the interim injunction hearing it agreed to allow all Union members at Rangiuru extra time for consideration of the IEA; and

    19.2 A small number of others also requested further time, which was granted and some requested being able to start later which was also granted;

    19.3 Five people were granted a travel allowance at their request;

    19.4 A person was granted their request not to work Mondays;

    19.5 A person was allowed to retain extra accumulated sick leave at his request;

    19.6 A small number of others were granted their requests to work only specific shifts; i.e. either night shift or day shift.

[7] Also agreed between the parties is the application to them in practice of ss 53 and 61(2) of the Act prior to employees being laid off at the end of the last season. This means that from 31 December 2014 to the end of the 2014/2015 season (for example mid-April at Rangiuru), the second plaintiffs were employed under individual employment agreements (what we will call ieas) based on the expired collective agreement. There were no additional terms and conditions added to that as was possible under s 61(1). In the case of the plaintiffs, they say that s 53 continued and continues to apply to the second plaintiffs, both during the recent off-season and even now. That is irrespective of whether they have signed ieas under protest or are

still holding out against doing so. The defendant cannot, of course, argue that its obtaining of individual meatworkers' agreements to the ieas was pursuant to s 61(2)(b) because its case is that the 'based on' content of the ieas ceased with the laying off, at the end of the last season, of the second plaintiffs.

[8] The slaughtering and (at least initial) processing of livestock has traditionally been a seasonal industry in New Zealand. Depending on a number of factors, "the season" during which plants are operational commences as early as June each year although, as this judgment illustrates, some plants may open as late as October. 'Shut-downs' signalling the start of the 'off-season' may begin as early as the following April and may be as short as a couple of months. Their duration is variable both as between individual plants and reflecting particular conditions from year to year affecting those individual plants. So far as the employment of meatworkers (slaughterers and processors) is concerned, employees are 'laid off' at different times towards the end of, at, or following the conclusion of each season and are 're-engaged' before, at, or after the commencement of the next new season. Production at plants winds down towards the end of a season and winds up from the commencement of the next season.

[9] We will use the original example in this case of AFFCO's Rangiuru meat works to illustrate how this procedure occurred in practice in 2015 including, especially, how AFFCO dealt with and planned to deal with the engagement of labour at its other North Island plants for the current or forthcoming (2015/2016) season.

[10] The first plaintiff, the New Zealand Meat Workers & Related Trades Union Inc (the Union), was the union party to a collective agreement (to which we refer as "the expired collective agreement") with the defendant, known as the AFFCO New Zealand Core Employment Agreement. The expired collective agreement was entered into on 29 May 2012 and its specified currency was from 1 May 2012 to 31 December 2013. The expired collective agreement covered:

> ... employees of AFFCO New Zealand Limited in New Zealand carrying out processing and associated work at the Company's North Island meat and ancillary processing sites at Moerewa, Wiri, Horotiu, Rangiuru, Wairoa, Imlay, Manawatu, and Napier.

[11] In particular, the expired collective agreement bound, in addition to the parties:

> The employees who are employed by AFFCO New Zealand Limited; and
> i) are or become members of the Union; and
> ii) whose work comes within the coverage clause of this agreement.

[12] Many, at least, of the second plaintiffs were covered by the expired agreement. This judgment will apply to those persons who are parties named as second plaintiffs in the litigation, who were covered by the expired collective agreement and were laid off from one of the respective plants at the end of the 2014-2015 season.

[13] The expired collective agreement is a 'core agreement' in that some matters that are usually dealt with in such collective agreements are contained in a number of 'shed' or, as they are now called, 'site' agreements between the Union and AFFCO, reflecting the particular circumstances of employment at the different plants. That having been mentioned, the case does not concern the content of those site agreements but focuses on the core (expired) collective agreement, its contents, and its recent and current status.

[14] Using the example of Rangiuru as set out above, meatworkers (including both union members and non-members who appear to have been at least a substantial minority, if not a majority, of the workforce) were laid off from the plant in mid-April 2015. Those meatworkers who indicated their willingness to be contacted about work in the following season, left their contact details with AFFCO at the end of the previous season. They expected, at least in most cases, to be contacted before the commencement of the current season to be offered further work following the traditional induction process at AFFCO plants. Their expectations of being re-engaged were also subject both to satisfying a number of criteria (including seniority), and to sufficient work being available.

[15] As already noted, it is common ground that the status of the collective agreement changed after its expiry on 31 December 2013. Pursuant to s 53 of the Act, it continued in force (the Union or the employer having initiated collective bargaining for a replacement collective agreement before its expiry) for the period of

up to 12 months whilst bargaining continued. It is also common ground that although collective bargaining had commenced during the currency of the collective agreement, this had not made substantial progress by the time of the expiry of the statutory 12-month extension of the collective agreement on 31 December 2014. Indeed that was the position also when the Rangiuru season ceased on 17 April 2015.

[16] We are not aware of, and it is irrelevant to this decision to know, the particular issues which have brought about this stalemate in collective bargaining. It is sufficient to say that AFFCO seeks some significant changes to fundamental and longstanding terms and conditions of collective arrangements between these parties (remuneration, time worked, removal of guarantees of minimum weekly income and the like), and the Union and its members have stoutly resisted these changes. Despite protracted bargaining having taken place over a long period, which was still continuing both when the matter was before the Court in June this year and at the recent substantive hearing, no party had, at least by June 2015, sought even the assistance of a mediator to assist the parties in bargaining, let alone applied for facilitated bargaining under the legislation. It appears that neither AFFCO nor the Union was willing to progress bargaining in these ways, at least to that time.

[17] In early June 2015, AFFCO wrote to the persons who had worked at the Rangiuru plant during the previous season and had indicated their wish to re-commence work there. It is agreed that the plant manager's letter to second plaintiff Roberta Ratu dated 2 June 2015 was typical of that initial correspondence. That letter said materially:

> As a Previous Seasonal Employee desiring to return to the AFFCO Rangiuru Plant for the new 2015/2016 season commencing on Monday June 22nd 2015, we wish to advise:
>
> Should the above be your intention then this is an important request that you must follow. We welcome your unpaid attendance to an introduction presentation at the AFFCO Rangiuru Plant for a new intended Individual Employment Agreement (IEA) 2015/2016 season. The IEA has been changed from that of the previous season for all workers and these changes need to be brought to your attention. There will be optional terms to choose from.
>
> A copy of the new IEA will be provided during your attendance, and explained at the presentation. You will be given time to seek advice on the IEA and the company will also attend individual meetings with employees

> who wish to discuss the agreement. Should you desire you can register for a time and date for an individual meeting or with an advisor (your option), between Wednesday 10th June and Monday 15th June at the plant. This opportunity to register for an individual meeting will be provided for after the presentation or can be phoned in later but needs to be between these dates.
>
> Your introduction presentation time is on: 4pm Monday 8th June and should this date not be suitable an alternative date will be available by phoning the plant on [telephone number].
>
> Thank you and welcome if your intention is to consider this invitation. Presentation duration is approximately 1 hour.

[18] At the introductory presentation meetings referred to in the second paragraph of the letter above, the second plaintiffs received a handout which, before setting out some options or choices about remuneration, sick leave and redundancy provisions, said: "All other clauses of the IEA [the forms of IEA proffered by the AFFCO at that meeting] apply to all employees regardless of whether they choose Schedule A or Schedule B." The handout then included detail of the following events prescribed by AFFCO as follows:

- **Wednesday 10th June to Monday 15th June:** Individual meetings for those that have requested them.
- **Monday 15th June:** Last day for the individual meetings on the IEA.
- **Tuesday 16th June:** Final date to have an IEA completed and signed off and pick up employment induction papers to read (to be returned on the first day of your employment start date). We hope most will complete their consideration and sign their IEA before this date.
- **Wednesday 17th June:** Management will advise those persons who are to start on the first opening day of Monday 22nd June, beginning 6.30am.
- **Monday 22nd June:** First hour will include inductions HR and Health & Safety briefs. Please bring with you the induction papers given to you for signing when returning.

[19] The body of the presentation handout emphasised that what was described as "the IEA" was to "the intended IEA". The second plaintiffs were advised that the presentations (on 8 and 9 June 2015) would last approximately an hour but that further time would be available if they required individual meetings to raise any issues that they wished AFFCO to consider and respond to, saying that a time for such a meeting would need to be booked.

[20] The presentation handout then continued:

> This is not an Induction Meeting for Employment. It is to introduce the IEA. As advised, time after this presentation will be available for individual meetings. You are welcome to bring a support person/representative to your individual meeting. If unsure you should take the opportunity to meet with the company. Registration for these individual meetings, which will take place between Wednesday 10th June and Monday 15th June, can be made at the reception office or by phoning the plant on (07) 573 0034 between 8.00am and 5.00pm.
>
> If after you have read and considered the IEA and taken such advice as you wish, you are happy with the same and do not want any meeting then you should sign the IEA and return it to reception as soon as possible but no later than 16th June, and preferably before.
>
> The company requires a signed employment agreement to be entered into with each employee before they commence work. None of the previous expired IEAs (including IEA's based on the expired Collective Agreement) continued automatically past the layoff season end. All employers are required to offer an intended Employment Agreement in writing and to have an employment agreement signed by both the employer and employee.
>
> The company asks you to read the IEA thoroughly as some of the provisions of the IEA have changed from those offered in previous seasons. You are reminded that you are entitled to seek independent advice about the IEA.

[21] At the introductory presentation meetings on 8 and 9 June 2015, a form of iea running to 17 pages was distributed for completion by the second plaintiffs. In addition to that standard or generic AFFCO individual agreement, there was a two-page "Rangiuru Schedule 'A' – 2015/2016" containing details such as hours of work, shift work, remuneration "Manning & Tally", training, house rules and mechanisation. There was also a detailed schedule (Appendix A) of production hours in respect of which AFFCO reserved a right to change operating days to meet operational requirements and to specify staggered start and finish times in all departments. These differed from what were described as the "indicative" start and finish times which spanned periods beginning as early as 6.20 am for the first shift and ending at 1.10 am for the second shift. There was also attached, as Appendix B, a detailed schedule of "potential hourly earnings based on a carcass rate for the particular chain speed" described as "Payment Levels and Throughputs (E&OE)". This Appendix B ran to six pages.

[22] Also attached to AFFCO's form of iea was the alternative "Rangiuru Schedule 'B' – 2015/2016" containing similar, but different, information to that

contained in Schedule 'A' and running to about the same descriptive length. The second plaintiffs were required to elect one of Schedules 'A' or 'B' to apply in their individual cases for the 2015/2016 season.

[23] Although the Union, when it learnt from its members in early June of this process and AFFCO's documentation, objected on behalf of its members, those objections were effectively ignored by AFFCO. The company had, by then, signed up and continued to sign up a number of employees on the new ieas, including some union members. As the Court's Interlocutory Judgment (No 2) confirms, time was then running out for both parties; the company was arranging to have stock for killing and processing at Rangiuru on or shortly after 22 June 2015. Those employees who had been laid off were running out of money, whether from savings made over the previous season or because alternative casual work was coming to an end. AFFCO's specified timeframes were short and there is no evidence, as we would have expected if this had happened, that the Union had been forewarned of these significant changes to the usual process of re-engagement at the start of the season or involved in its formulation or management. That was despite AFFCO being aware that a significant number of employees were union members and despite the fact that it was then in collective bargaining with the Union for a replacement collective agreement that was intended, at least by the Union, to operate in respect of the coming season.

[24] Although not affecting significantly the issues for decision in this case, there were some hiccups for AFFCO along the way to the opening of the Rangiuru plant on or about 22 June 2015. On 8 June 2015, the Union had written, through its counsel, to AFFCO asserting that the company's processes, actual and prospective, amounted to an unlawful lockout. Mr Mitchell, on behalf of the plaintiffs, also alleged in his letter of 8 June 2015 that AFFCO's actions amounted to its undermining of the bargaining for a collective agreement. Mr Mitchell advised AFFCO that the Union was preparing papers for an interim injunction application and asked it to confirm its willingness to refrain from those actions "... and re-engage union members on terms and conditions of employment based on the expired Collective."

[25] AFFCO replied by email on the following day, 9 June 2015. With considerable supporting submissions, it denied all of Mr Mitchell's assertions.

[26] On 18 June 2015, the day after this Court declined to grant the plaintiff's interlocutory injunctive relief, the Union wrote to AFFCO referring to the significant number of ieas that the second plaintiffs had signed and returned to the company that morning. Its letter said that the Union considered that these had been "procured by unlawful means, unlawful methods and in breach of the collective and individual bargaining rights of members" and that "the legality of the agreements and the way in which they were obtained, will continue to be the subject of legal challenge." This caused AFFCO to require the Union to produce written authorities from those whom it purported to represent in individual bargaining but this request was effectively ignored by the Union. This, in turn, brought about AFFCO's refusal to allow those second plaintiffs, who had signed ieas, to begin work on 22 June 2015 unless and until the challenge to the lawfulness of those ieas being entered into was withdrawn.

[27] The stalemate triggered by the Union's letter, alleging unlawfulness of the fact and means of entry into the ieas, was soon resolved by the Union withdrawing its 18 June 2015 letter on 22 June 2015 and by AFFCO subsequently acknowledging that the employees' rights under the then existing proceeding (including their challenges to the propriety of AFFCO's conduct in relation to the ieas) would not be prejudiced thereby.

[28] In addition, at the suggestion of the Court in the hearing on 16 June 2015, AFFCO withdrew or modified a number of the terms in its ieas which were patently unlawful or unenforceable. It also obtained variations to those ieas already signed by that time, so that they conformed with what AFFCO then acknowledged to be the legal position, and also to ensure conformity with other ieas about to be signed in amended form. As the agreed statement of facts acknowledges, some variations of to the standard ieas were settled with individual employees.

[29] A similar process for re-engaging employees at the other plants has been pursued subsequently by AFFCO and, at the recent hearing, it indicated its intention

to do so also in respect of the two plants (Moerewa and Horotiu) then still to re-start for the new season. It appears that at the Wairoa plant in particular, a number of members of the Union have held out against signing the company's forms of iea and so have not been engaged at that plant which has, nevertheless, opened and is operating.

Continuous or discontinuous employment

[30] In addition to the two causes of action outlined already (unlawful lockout and breach of good faith requirements during collective bargaining under s 32), there is a major and contentious issue that affects the unlawful lockout claim. That is the question whether the second plaintiffs had and continued to have, in law, continuous employment of indefinite duration (the plaintiffs' case) or were no longer employees of AFFCO after being laid off at the end of the 2014/2015 season and so are or were applicants for new employment for the new season 2015/2016 (AFFCO's position).

[31] In its strategic decisions, changing significantly previous longstanding practice for the re-engagement of meatworkers for a new season, AFFCO relied upon its assertion that the second plaintiffs were not its employees under any employment agreement with it during their seasonal lay-offs. AFFCO conveyed this view to the employees from the earliest communications sent to what it categorised as prospective new employees. Examples of these have been outlined above in relation to the Rangiuru plant. AFFCO relied on what it asserted confidently was almost 30 years of case law confirming that this was the position generally in the meat industry and which historical position it says is now no different to the parties' circumstances in 2015.

[32] Contrary to this, the plaintiffs argue that the previous case law was, variously, wrongly decided, has been misinterpreted or is distinguishable. They also submit that the terms of the now expired collective agreement and the current legislation differ so significantly from the relevant circumstances in the previous cases, that the Court should find that the second plaintiffs were and continue to be employees of AFFCO under ieas based on the expired collective agreement. Put simply, the plaintiffs say that a seasonal lay-off in these circumstances is not a dismissal or other

termination of employment, whether agreed to by the employees or not. Rather, they say it is a defined although variable period in which the services of those employees are not required by AFFCO (and for which they are not paid) but at the end of which time those employees have contractual rights of re-engagement on continuing contractual conditions for the following season.[4]

The expired collective agreement

[33] Although Mr Cranney, counsel for the plaintiffs, advanced a number of alternative arguments, which he submitted supported this position, and with which we will deal, we consider that the starting point for determining this issue in this case is the terms of the contractual arrangements between the parties up to the point at which the second plaintiffs were laid off. The defendant accepts that the second plaintiffs were employees of AFFCO, at least until that time. It is also common ground that, during the 2014/2015 season, the second plaintiffs were employed initially on the terms of the expired collective agreement, albeit pursuant to its statutory extension of coverage for one year after its expiry date. Subsequently, from 1 January 2015, at least until their lay-offs, they were employed on ieas based on that expired collective agreement. We will now analyse the expired collective agreement to determine the nature of the ieas based on it, with effect after 1 January 2015.

[34] There are elements in the expired collective agreement which point in favour of both sides' contentions in this regard. That is unsurprising given the nature of the document and its history. Although no previous collective instruments between these particular parties were produced in evidence, it is not disputed that the expired collective agreement is the latest in a series of collective instruments between AFFCO and the Union containing terms and conditions of employment at AFFCO plants. In common with most other collective instruments, this bears the hallmarks of both non-lawyer drafting, and of a roll-over of many of the terms and conditions of the predecessor document(s) together with additions and alterations bargained for and settled as part of each successor collective instrument. This leads to a not always coherent and consistent statement of the complex arrangements of

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[4] See Employment Relations Act 2000, s 61(2)(a).

meatworkers in a range of different plants, albeit owned and operated by the same company.

[35] As we have said, it is unsurprising that there are, therefore, terms of the expired collective agreement that favour each party's interpretation of whether it provides for continuous or discontinuous employment. It is significant, also, that its term covered at least one season and off-season so that the parties did not contemplate that the agreement would expire coincidentally with the seasonal shut-downs and lay-offs of employees of the individual plants. Its term began in May during what would have been an off-season for some plants and, for others, during the killing season. Its expiry (31 December 2013) fell when all affected plants were probably working. As would have been known to the parties, so too did the expiry of the 12-month statutory extension and the reversion thereafter to ieas based on what would then be the expired collective agreement unless, of course, a replacement had been negotiated and settled in the meantime.

[36] The following is our analysis of the provisions of the expired collective agreement that are relevant to our consideration of whether this employment was continuous between seasons or discontinuous in the sense of being applicable only to seasonal engagement.

[37] The general intent of the collective agreement was set out in a number of paragraphs under cl 9. These included materially:

> d) … the wish of the parties is to create a cooperative and participatory climate of industrial relations based on mutual respect and trust between all levels of management, the employees and their Union organisation and which recognises their interdependence.
>
> e) The Company and the employees and their Union agree it is in their mutual interests to operate efficient, competitive, and profitable sites and that consultation and worker involvement are vital to the success of the operation.

[38] Although not addressing the issue directly, the interpretive emphasis upon such factors as the creation of a cooperative and participatory climate of industrial relations and the parties' mutual interest in operating efficiently, competitively and

profitably (including by consulting and involving workers), tend to point more to a continuous employment model than a discontinuous one.

[39] Clause 10 ("Purpose of Agreement") sets out a number of responsibilities to which the parties have committed themselves, including:

> i) Improving the working environment and working relationships;
> ii) Continually improving process and practices;
> iii) Increasing worker skill levels;
> iv) Managing change through consultation and cooperation. Such consultation may not result in agreement and that the Company may still implement changes even where agreement is not reached. For the avoidance of doubt when managing change the parties shall not act inconsistently with the provisions of this Agreement;
> v) A fair and equitable wage.
>
> ...
>
> e) Subject to the provisions of this agreement, the employer shall retain and have full power to manage and control its own business and the conduct of its employees in connection therewith, and to make reasonable rules and regulations not inconsistent with the provisions of this agreement relating to the management thereof and to the hiring, conduct, duties and dismissal of persons in their employment.

[40] As with cl 9, elements of cl 10 such as the commitment to continually improving process and practices, increasing worker skill levels, and managing change through consultation and cooperation, tend to favour an intention to create a long-term and continuous working relationship rather than a discontinuous and seasonal one. On the other hand, the parties' commitment, that the employer shall retain and have full power to manage and control its own business and the conduct of its employees, may tend to indicate agreement to allow AFFCO to treat employment as discontinuous. However, that is not the only meaning to be read into cl 10: it may relate, or at least relate also, to the day-to-day operational requirements of its plants.

[41] Under cl 17 ("Payment of Wages") (e) provided:

> Where employees are laid off, they shall be paid holiday pay on the day they are laid off; the pay for the week they are laid off will be paid within two banking days.

[42] The arrangements for the payment of holiday pay at lay-off tends to favour the defendant's case of discontinuous employment.

[43] Clause 19 ("Superannuation") provided for membership by employees of the Meat Industry Superannuation Scheme (MISS) with defined contributions thereto payable by employees and matched by the company.

[44] Specific provision of membership of a superannuation scheme, including matching contributory payments by the employer, tends to reflect an intention that employment is continuous.

[45] The expired collective agreement (Section 5: "Leave") provided at cl 21 ("Public Holidays") that employees would receive all the usual public holidays provided for in the Holidays Act 2003 irrespective of whether these fell within the off-season. These public holiday provisions, including allowances for public holidays falling in the off-season, tend to favour continuous rather than discontinuous employment.

[46] As for annual holidays, cl 22 provided that employees were to have annual holidays of four weeks, "… or in the case of seasonal workers a payment equivalent to 8% of gross seasonal earnings." A 'special holiday' was provided for under cl 22(c) of the collective agreement as follows:

> After six years continuous service with the Company employees shall be entitled to an extra week's holiday (**this clause does not apply to any** employee **employed after 1st June 2006**). (original emphasis)

[47] The payment out of holiday pay, in the case of seasonal workers, tends to favour discontinuous employment although the special holiday provisions under cl 22(c) arising after six years' continuous service, tends to point the other way; that is in favour of the Union's position that employment does not end at the close of each season.

[48] Clause 23 made provision for long service leave in the form of special holidays based on multiples of weeks after "the completion of [a minimum number of] years and before the completion of [a specified maximum of] years of continuous

service with the Company." Special holidays based on a similar formula were also provided for.

[49] Clause 23(d) defined "continuous service" as follows:

> "Continuous service" shall also mean service by any seasonal employee employed by the Company for a period of at least two calendar months in each consecutive season. Where the Company can only offer employment for less than two calendar months, this lesser period shall suffice, provided the employee has not refused an employment offer earlier in the season.

[50] The definition of continuous service, however, also affects the interpretation of cl 22 above. It appears to set a relatively low bar of two calendar months in each consecutive season which, in turn, begs the question whether there may be discontinuity of employment within seasons, as well as between them. Even then, employment for a period of less than two calendar months may still qualify as continuous service in some circumstances. This clause (23) also points more to continuous than to discontinuous employment.

[51] As to paid sick leave, up to 40 hours per year was allowed by the expired collective agreement. Clause 24(c) provided:

> Sick leave entitlement may accumulate to a maximum of 340 hours provided the employee's periods of service with the Company are in consecutive seasons. For the purpose of this clause, a "season" is the period from 1 October in any one-year to 30 September in the next year.

[52] Although cl 24(c) appears initially to allow for sick leave entitlements under a regime of discontinuous employment, the clause's definition of "season" being a whole calendar year, tends to point the other way; that is towards continuous employment. As we note elsewhere, sick leave may accumulate up to an entitlement of 340 hours which also points to continuous employment.

[53] Clause 24(g) provided, in relation to sickness:

> ... where employees are absent from work due to non-work injury or sickness for a period of one month, their employment may be terminated until such time as they are medically certified as fit to resume work. Upon being certified as fit to resume their normal work such workers shall be re-employed according to their seniority without loss of service related

> entitlements, apart from redundancy as provided for in Appendix A subclause 2 (d).

[54] Clause 24(g) appears to deal with continuity of service in situations of sickness inducing absences of more than one month. These may result in termination of employment, at least for such period as employees are incapacitated. However, upon proof of fitness to resume work, sick employees are "re-employed" according to their seniority without loss of service-related entitlements except for redundancy. In the sense that the agreement contemplates what it calls termination of employment for extended periods of sickness, but does not use the same words to describe seasonal lay-offs, that is an indication of continuous employment.

[55] Clause 27 ("Parental Leave") of the expired collective agreement provided materially:

> … In cases where female employees are not eligible for leave under the [Parental Leave and Employment Protection] Act [1987], due to seasonal lay-off, a break in service for a period not exceeding six months for maternity reasons shall not affect continuity of service in regard to sick leave and long service leave. Re-employment after leave shall be dependent on employment being available at the work place and as provided for in clause 30.

[56] The provisions of cl 27 indicate, initially, an intention that employment will be discontinuous, although reference to "re-employment" of female employees after parental leave is, to be congruent with the parental leave legislation, more consistent with a notion of continuous employment during which there has been an unpaid break.

[57] "Section 6: Terms of Employment" of the expired collective agreement began with cl 29 ("Seasonal Employment"). This provided materially:

> a) Seasonal employees are employed for a season and shall be given five (5) calendar days' notice of seasonal lay off such notice to be given on or before 10.00 am of the first day of such period.
>
> b) Seasonal employment will not necessarily finish on the same day for all employees; for example a night shift may start later and finish earlier; or where two day shifts are running, they will revert to one day shift when demand drops off, or some areas of work may finish before others and or numbers employed in any department may decrease as the season starts or draws to a close.

c) All things being equal, layoffs and re-employment will be based on departmental and/or site (as appropriate) seniority and will operate on a last on first off basis, subject to the experience, employment record, competency and skills of the individuals, also the need to maintain an efficient, balanced workforce. (The Department Supervisor shall consult with the Union Delegate prior to lay-offs of employees before making a recommendation to the Plant Manager).

d) The employee acknowledges that the nature of the industry is such that available stock numbers change rapidly and as a result a decision to cease or lower production and give notice of a layoff is made within a tight time frame. As a result the employee agrees that:

i) A notice of lay-off may be rolled over or extended by the employer;
ii) Depending on stock availability, factory and processing requirements there may be inter-season lay-offs for periods affecting all or some staff. Selection of staff will be on the basis advised for end of season lay-offs.

e) Upon termination at the end of the season the employee is responsible for keeping the employer advised of their current address and phone number if they wish to be contacted for employment at the commencement of the next season.

[58] The opening reference to seasonal employees being employed for a season and being given notice of a seasonal lay-off, tends to indicate, at least on first examination, an intention that the employment of seasonal employees is discontinuous. Determination of that question will, however, turn on what was intended by the phrase "are employed" in cl 29(a). Did it mean that such employees were employed, in effect, for a fixed term (being the season) following which any employment for a subsequent season would be under a new and separate employment agreement? Alternatively, does the phrase "are employed" in cl 29(a) mean, in effect, that employees are provided with work and expected to perform it for a season so that the off-season lay-off is a period during which the seasonal employee remains as such but the work-wage part of the bargain is suspended? The subsequent sub-clauses of cl 29 do not assist in determining that question: rather, they can be interpreted and applied consistently with either of the interpretations to be given to cl 29(a).

[59] The only other provision in cl 29 that may be relevant to determining the continuity question is sub-cl (d). This refers to what the parties have described as "inter-season lay-offs" but which, counsel were agreed, should probably read "intra-

season lay-offs". This provision relates to the situation where there is a temporary unavailability of stock, work in processing, or otherwise in the factory, so that there may be an ad hoc and temporary lay-off of staff in much the same way as the seasonal lay-off occurs. There is no suggestion that, in these circumstances, employment of seasonal employees is discontinuous in the same way as AFFCO argues for in relation to the off-season. That, in turn, tends to point consistently towards a conclusion that lay-offs are not dismissals (terminations of employment at the employer's initiative) or the mutually agreed ends of fixed term employment but, rather, a period of suspension of work but following which there is an expectation of its resumption. On balance, cl 29 favours continuous rather than discontinuous employment.

[60] At the heart of the plaintiffs' argument is cl 30 ("Security of Employment") of the expired collective employment agreement. This provided:

> a) The employer acknowledges the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required.
>
> b) 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).

[61] Clause 30(a) is an object or interpretive guideline sub-clause. In our view it supports an interpretation of the seasonal elements of the agreement which favours a workforce that is substantially, if not completely, re-engaged for the next season following a seasonal lay-off. It also tends, thereby, to favour the interpretation of the employment relationship and the contracts of employment as ones that are continuous rather than discontinuous. Because, as we discuss subsequently, the Court previously found that the equivalent of cl 30(a) in an earlier award[5] favoured an interpretation of discontinuous employment, we need to emphasise that the employer's acknowledgement of the value of a stable, competent and trained workforce familiar with processing methods and procedures required favours more a regime of continuous employment than it does one in which employees are only

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[5] By transitional legislative provisions, deemed to be a collective contract.

engaged for a season. In this regard we have distinguished the judgment of the full Court in 2006 which we analyse later.

[62] Clause 30(b) inclines similarly towards consistency or continuity of employment. The reference to re-engagement being dependent on the completion of an induction process, even on the defendant's case, cannot be a reference to an induction as might be received by an entirely new employee being someone who had not ever been engaged by AFFCO or at a particular plant previously. We interpret the reference to "induction" to be largely a familiarisation and updating process for employees who have been absent from the plant for a couple of, or even several, months and to reflect operational plant changes that may have been implemented by the employer over the off-season. In some cases, especially if more employees than previously are required, or a greater than anticipated number of the previous season's workforce does not return for re-engagement, such inductions would clearly need to be more extensive than for re-engaging employees as we have just described. But on balance, this sub-clause points more to a relationship of continuous employment rather than to one of dismissal followed by re-engagement as might be expected of a truly new employee or at least a previous one who has been absent for a substantially longer period than the off-season.

[63] Clause 30(b) contemplates, in addition to completion of an induction process, the signed acceptance of terms of employment. These are, however, defined as "any terms applying *in addition to* those set out in this Agreement and applicable Site agreements" (our emphasis). This definition of "signed acceptances of terms of employment" contemplates that individual terms and conditions of employment may change at the commencement of a season. However, any additional individual terms and conditions of employment must meet two criteria. First, they must be in addition to the terms and conditions set out in the collective agreement (whether that is still operative as such or whether it is the basis of individual agreements after the collective agreement has expired). Second, any new additional terms and conditions sought by the employer must be agreed to by the individual employees. Such terms and conditions must also be "in addition to those set out in [the collective agreement]", so cannot be in conflict with those collective terms and conditions or in

substitution for them. This analysis likewise favours continuity of employment from season to season.

[64] These important considerations of "Security of Employment", as cl 30 is headed, point in our assessment to an intention to create a relationship of continuous rather than discontinuous employment between seasons.

[65] "Seniority" is an important element of employment in meat works and particularly as it affects lay-offs and re-engagements. Clause 31 ("Seniority") of the expired collective agreement provided materially:

> a) Employees shall have seniority in accordance with the date of their commencement of employment with the Company and in accordance with the provisions of this Agreement.
>
> b) All things being equal, layoffs and re-employment will be based on departmental and/or site (as appropriate) seniority and will operate on a last on first off basis, subject to the experience, employment record, competency and skills of the individuals, also the need to maintain an efficient, balanced workforce. (The Department Supervisor shall consult with the Union Delegate prior to lay-offs of employees before making a recommendation to the Plant Manager.)
>
> c) 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 end of season lay-off and again at re-engagement at the commencement of the season.
>
> d) Approved absences due to sickness or injury shall not break seniority providing the employee has not been employed elsewhere during the period of absence (unless so directed by the Accident Compensation Corporation).
>
> e) Seniority shall be broken in the following circumstances:
>
> i) Where an employee voluntarily leaves the company or is dismissed;
> ii) Where an employee fails to return from a seasonal layoff.
>
> ...
>
> h) While seniority shall be taken into account in determining layoff and re-engagement final suitability shall be as determined by the employer subject to clause 31b).

[66] The first indication of continuity of employment, as opposed to discontinuity, appears in cl 31(a). That is the reference to seniority being calculated "in accordance with the date of ... commencement of employment with the Company and in accordance with the provisions of this Agreement." The date of commencement

means the date on which the employee first began work for the company, not the date of the last seasonal re-engagement. That is because seniority is used to calculate, among other things, the sequence of employee re-engagement for a season. So, the reference to "commencement of employment" points more to a continuity of that status from season to season rather than a discontinuity which would be consistent with the defendant's case.

[67] That conclusion is reinforced by cl 31(e) which deals with breaks in seniority. In particular, sub-cl (e)(ii) defines, as one of the circumstances in which seniority ceases to apply ("shall be broken") is where "an employee fails to return from a seasonal layoff". If the defendant's contention of discontinuity of employment were to be correct, it would be unnecessary to include in the definition of circumstances in which seniority is broken, a failure to return from a seasonal lay-off. That is because it would amount under sub-cl (e)(i) to a voluntary leaving, in effect a resignation as it is contrasted with a dismissal under sub-cl (e)(i).

[68] Clause 32 ("Casual Work") of the expired collective agreement provided expressly for the employment of casual employees "to meet operational requirements" but with such employees having "no guarantee of work for any period".

[69] Subclause (b) recorded that:

> Casual employees may work over a number of months without a change in status. Written confirmation from the employer is required before a casual employee becomes a seasonal employee.

[70] It follows that seasonal employees have a more secure status than casual employees, although the defendant's case for seasonality of employment, followed by an absence of an employment relationship, seems more akin to casual employment. Therefore, when compared to casual employment, seasonal employment contemplates continuous rather than discontinuous employment.

[71] Clause 37 of the expired collective agreement ("Redundancy (Notice)") referred to the operational provisions relating to redundancy as being contained in Appendix A.

[72] Those redundancy provisions at Appendix A to the expired collective agreement included the following:

1. **DEFINITION**

Redundancy shall be defined to mean where:

a) An employee's employment is terminated by the Company due to the employee's services becoming surplus to the needs of the Company; or

b) In the case of a seasonal employee, the employee's seasonal employment is being made unavailable by the Company, the unavailability being attributable to the fact that the employee will be surplus to the needs of the Company; or

...

d) Redundancy does not include a situation involving a seasonal lay-off, casual employment or the completion of a fixed term engagement.

...

2. **COVERAGE**

...

b) It shall apply to all employees who are currently employed, seasonally laid off, or on approved leave. Subject to sub-clause 2(c) below, it shall also apply to employees who, at the time of redundancy are medically certificated as injured or ill.

3. **SELECTION**

a) Re-deployment and natural attrition shall be adopted in preference to redundancy and therefore in order to avoid or minimise jobs losses where employees are relocated within the same plant they shall be treated as follows, each case shall be treated on its own merits.

i) They shall receive for the balance of the season in which relocation occurred and the subsequent two seasons, seasonal earnings not less than they would have received had the relocation not occurred. Any adjustment required shall be made at the end of each season or as mutually agreed.

ii) They shall be employed in their new department subject to the conditions, hours of work and wage rates of that department.

iii) If an employee is required to change from one shift to another, any cases of hardship as a result of the proposed change will be reviewed on a case by case basis.

b) It is accepted that the Company must retain a workforce with the necessary skills and experience and this shall be

determined by consultation between the Company and Union after the number of volunteers have been determined but for the avoidance of doubt the Company's decision shall be final.

c) Volunteers who are employees shall be accepted in descending order of departmental/site seniority according to site practice.

d) Should the number of volunteers not meet the requirements, selection of the remainder shall be on the basis of last on first off subject to the experience, employment record, competency and skills of the employee.

[73] Also relevant was cl 8 of Appendix A as follows:

> **8. RE-EMPLOYMENT**
>
> Employees compulsorily made redundant, where practicable will receive prior consideration at the employer's discretion for future employment with the Company.

[74] The starting point for this examination of the expired agreement's redundancy provisions is Appendix A1(d). This provides that the definition of "redundancy" "does not include a situation involving a seasonal lay-off …". The definitions of "redundancy" in Appendix A1(a) and (b) are therefore inapplicable including, particularly, (b) which deals with seasonal employees.

[75] However, that definition of 'redundancy' in Appendix A set out above is confused by the reference in cl 2 ("Coverage") to the redundancy provisions applying "… to all employees who are currently employed, seasonally laid off, or on approved leave." We will assume that the specific provision under cl 2 ("Coverage") prevails over the more general, albeit inconsistent, apparent exclusion of redundancy under the definition clause (cl 1). That being so, the agreement's provisions for redundancy cover employees both during the season ("who are currently employed") and who are "seasonally laid off". It follows that if a seasonally laid off employee is entitled to the benefits of the redundancy provisions of the collective agreement in the same way as he or she would be if working during the season, this points to continuous rather than discontinuous employment. It would be a very unusual circumstance in which an employee who had worked previously for an employer, even if hoping to do so again in the future, would nevertheless be entitled to

redundancy compensation if a redundancy situation arose after that employee's employment had been terminated (the defendant's case). At the very least, we would expect that to be dealt with clearly and expressly if the defendant's argument for discontinuity of employment is correct.

[76] Clause 2 of Appendix A is also relevant in the sense that it distinguishes as "employees" those who are "currently employed" and those who are "seasonally laid off". Both classes are, however, treated as employees under that clause of the Appendix which points also to employment of a continuous rather than a discontinuous nature.

[77] So, too, does cl 3(a)(i) of Appendix A. This requires the employer, when redeploying or relocating an employee within the same plant, to pay seasonal earnings which are not less than they would have received had the relocation not occurred. That payment is specified to be not only for the balance of the season in which relocation occurred, but also for "the subsequent two seasons". That, too, points to a regime of continuous employment rather than, as the defendant contends for, discontinuous employment.

[78] Finally, cl 8 ("Re-employment") of Appendix A provides that, where practicable, employees made redundant "compulsorily" (that is against their wishes) "will receive prior consideration at the employer's discretion for further employment with the Company". Although this may not be a strong provision for redundant employees because of the inclusion of the phrase "at the employer's discretion", in our view it nevertheless points to what it describes as "future employment with the Company" rather than seasonal re-engagement. It follows from this, in our assessment, that a seasonal worker laid off is not seeking "future employment with the Company" by wishing to be re-engaged at the end of the off-season as might be a redundant employee under this provision but is, rather, asserting a (conditional) right to re-engagement as a continuously employed employee.

[79] The provisions of the expired collective agreement upon which the defendant relies especially are cl 29(a) (that seasonal employees are employed for a season) and cl 29(e) (that, upon termination of the end of the season, the employee is

responsible for keeping the employer advised of their current address and phone number if they wish to be contacted for employment at the end of the next season). The defendant also relies particularly on cl 30(b) (re-engagement dependent, among other things, on signed acceptance of terms of employment); cl 31(b) (criteria applying to re-employment to include previous experience, competency and skills); and cl 31(h) (that while seniority will be taken into account in determining lay-offs and re-engagements, final suitability will be determined by the employer).

[80] The defendant also relies on cl 1(b) and (d) of Appendix A for its contention that employment is not continuous. It says, also, that the redundancy provisions in Appendix A generally do not purport to create a separate employment relationship beyond the main terms of the expired collective agreement. Indeed, the defendant says that in Appendix A, the expired collective agreement does not expressly or explicitly recognise continuity of employment and indeed cls 1(a) and (d) point to the reverse situation. Mr Wicks QC, counsel for the defendant, submitted that the effect of Appendix A is to provide for defined contractual rights in certain circumstances where employees from past seasons are not offered employment for a new season: counsel submitted that there is nothing in Appendix A to say that such employees must be offered employment on the same terms and conditions as previously.

[81] We agree with Mr Wicks's submission criticising the fanciful suggestion by counsel for the plaintiffs that an individual worker not wanting to, or refusing, to be re-engaged for the following season, would or could face disciplinary action by the employer under cl 33(c)(i) or (iv). Mr Cranney was driven to concede that this might be a logical consequence of a finding of continuous employment. We agree with the defendant so far as that submission goes, but conclude that such a worker would simply be found to have abandoned his or her employment during the off-season, thereby bringing that relationship to a close when he or she failed or refused to put himself or herself forward for re-engagement. In those circumstances, there can really be no question that disciplinary action under cl 33 or otherwise could eventuate because such a person would not then be an employee. That is not, however, the position of the second plaintiffs who wish to be re-engaged at the relevant plants.

[82] The defendant says that the expired collective agreement's definition of "continuous service" is only required because a seasonal lay-off constitutes a termination of employment: otherwise, such a term would be unnecessary.

[83] Although not exclusively, these provisions in the expired collective agreement favour the plaintiffs' position of continuity of employment between seasons rather than the defendant's, which is that each seasonal lay-off is, in effect, termination of employment or dismissal with re-engagement for the following season being fresh employment, albeit with the same employer. Although important considerations in the determination of this question, these contractual interpretations are not the only factor.

[84] A realistic analysis of the working arrangements in practice is also required, not least because of the emphasis in s 6 of the Act (in determining whether the second plaintiffs are employees) upon the real nature of the relationship between them and AFFCO.

The context in which the expired collective agreement was agreed and operated

[85] The foregoing analysis of the identified terms and conditions of employment of the second plaintiffs at the conclusion of the past season, both individually and as parts of the whole collective agreement, reveal indicia about the nature of the second plaintiffs' relationship with AFFCO that point both ways, but principally in favour of continuous employment. Relevant, also, is the context in which that collective agreement operated and the work was performed. As with many agreements and instruments, their interpretation and application must take account of the context in which they were entered and operated.

[86] The defendant's North Island plants are at least significant, if not in several cases the predominant or even sole, workplaces in towns, particularly for people who are trained and experienced slaughter and process butchers. At the plant at Moerewa in Northland, for example, AFFCO is the major employer, not only in Moerewa but in and around the adjacent town of Kawakawa as well. The Rangiuru plant in the Bay of Plenty is a major employer of residents and of freezing workers in and around

the town of Te Puke. In Wairoa, the relationship between the AFFCO plant and the community generally, is integral: Wairoa is a single meat works town. The dependence upon the AFFCO plants of long-term employees and their families is arguably less at plants such as Horotiu near Hamilton, Imlay in Whanganui, and Manawatu in Feilding, although at all plants there is a strong element of inter-generational meat works employment. In many cases several members of a household work at, and depend for family income on, the AFFCO plant.

[87] Next, the evidence establishes that, although not fixed, the off-season at most of AFFCO's plants is for about two months per year. As was noted in Interlocutory Judgment (No 2), employees use that time differently: some obtain short-term seasonal work in horticulture: others may take an extended break and live off accumulated earnings. It seems possible that others may obtain ad hoc work at the AFFCO plants on maintenance or renovation projects or further processing of accumulated stock from the previous season. However, such inter-seasonal activity is built around, and in anticipation of, work at the AFFCO plant during the next season.

[88] Most, if not all, of the work performed by the second plaintiffs is semi-skilled in the sense that it is learnt on the job, but experience brings with it attributes of speed and skill which increase both the quantity and quality of production, and the collective earnings of colleagues at a plant. The work is cooperative and team-based, remuneration being determined at least in substantial part by the production rates achieved over specified periods.

[89] The skills attained by employees are really not usable otherwise than at meat works and alternative positions are probably difficult to come by unless workers are not prepared to travel considerable distances or to move to another town.

[90] Section 6 of the Act which addresses how working relationships may be found to be between employees and employers, requires the application of what has been described as a 'reality test'.[6] That is no less relevant where, as in this case, the Court must determine whether, at particular times (during the off-seasons), the

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[6] *Bryson v Three Foot Six Ltd* [2005] ERNZ 372 (SC).

second plaintiffs were or were not employees of AFFCO. So the broader context in which the contractual provisions between the parties operate is important not only as an interpretive principle at common law but because it is also required by s 6. We address the statutory consideration in more detail subsequently in this judgment.

Differences between the expired collective agreement and AFFCO's new ieas

[91] The first point made by the plaintiffs is that the new iea abolishes completely the longstanding concept and significance of "seniority". Clause 6.3 of the new ieas deals with seasonal shut-downs and does not refer, as the expired collective agreement did, to the order of laying off of employees which is determinable, at least in part, by reference to seniority. Rather, this order of laying off under the new ieas is determined by company management in a way which is ultimately unfettered and at the company's discretion. Selection for seasonal re-engagement is to be determined the same way.

[92] The defendant rejects this analysis but we agree with the plaintiffs that, as a very significant element of protection of employment for employees, seniority is removed largely, if not completely, under the new ieas, including from the start of the 2015/2016 season.

[93] Next, the plaintiffs say that cl 2.4 of the new ieas causes them to be fixed term agreements, unlike the previous expired collective agreement or the individual agreements based on it. The defendant accepts that the new agreements are for a fixed term but says that this is as a result of employment being seasonal by its very nature as it always has been. We accept that, to the extent that there may have been any doubt about whether the previous seasonal basis of employment was fixed term or not, it is now more certainly fixed term by the addition of cl 2.4 of the ieas which provides materially:

> This agreement shall come into effect from the [date of season start to be inserted] and shall remain in force until terminated due to the particular seasonal reductions of the season that you have been employed for.

[94] Next, the plaintiffs say that despite the preservation of all of the previous season's employee disciplinary warnings and the consequences of them, the new ieas are expressed to completely supersede all previous contracts, agreements or understandings, whether written or oral: cl 2.1. This contention was not addressed directly by the defendant but the plaintiffs' position appears to be correct in that cl 2.1 provides:

> This is an individual employment agreement made pursuant to section 65 of the Employment Relations Act 2000. It is a condition of this agreement that it shall supersede all and any previous terms and conditions or understandings contained in any previous employment contract, understanding or agreement between the Employer and the Employee either written or verbal.

[95] In this sense, the employer's form of iea seeks to preserve for AFFCO at least one advantageous element of the previous regime for the employer's benefit but to isolate engagement for the current season from some previous terms and conditions that were beneficial to the employees.

[96] Next, the plaintiffs say that in reference to end-of-season lay-offs, AFFCO is now entitled to choose whether, but is not required, to discuss the prospective seasonal lay-off with the employee. This is at cl 6.6 which provides materially:

> The employee acknowledges that the nature of the industry is such that available stock numbers change rapidly and as a result a decision to cease or lower production and give notice of a layoff is made within a tight time frame. As a result the employee agrees that:
>
> (a) A notice of lay-off may be rolled over or extended by the employer;
>
> (b) Depending on stock availability, factory and processing requirements there may be inter-season lay-offs for periods affecting all or some staff. Selection of staff will be on the same basis as set out in Clause 6.3 [referred to above in our analysis of this section].
>
> (c) As lay-offs usually involve reasonably large numbers of employees being laid off the employer may choose to, but is not required to, discuss the lay off with employees. However, the required notice period, as provided in Clause 6.1, will be provided in all instances.

[97] The notice period referred to under cl 6.1 is five calendar days' notice of seasonal lay-off to be given on or before 10 am on the first day of such period.

[98] Next, the plaintiffs say that the new ieas increase the maximum ordinary hours of work and authorise AFFCO to reduce or increase an employee's hours of

work at will, although with any changes of these to be "posted on a staff notice board": cls 8.1-8.2. The defendant says, however, that its ability to change hours of work under cl 8.2 is the same as it was in the expired collective agreement, for example at cl 11(c). We agree with the plaintiffs that the new ieas go beyond the previous relevant position.

[99] Next, the plaintiffs say that cl 8.2 prohibits employees from starting or finishing at any times other than the employer's posted times without permission. This clause provides:

> While your employment is hourly, your normal hours of work are as specified on the attached schedule. These hours may be varied from time to time at the employer's discretion to meet customer demands or other Operational requirements. Any changes will be posted on a staff notice board. You must not start or finish work at any other time without the employer's express permission.

[100] Next, the plaintiffs say that the employer now requires employees to work shifts if they are instructed to do so: cl 8.3. The defendant says that a similar, if not identical, requirement to work shifts if instructed was also in the expired collective agreement at cl 11(b) and in the relevant site agreements of each plant.

[101] Next, the plaintiffs say that cl 11.1 of the new ieas contains a requirement that meal breaks are to be taken "as and when the demands of business allow" and permits AFFCO, if it wishes, to remove two 15-minute breaks and consolidate them into a single 30-minute break. This difference has not been challenged by the defendant.

[102] Next, the plaintiffs say that the new ieas contain a clause requiring that the hours of work are to be in addition to the paid meal breaks: cl 11.6. This, too, is not challenged by the defendant, as is the plaintiffs' assertion of the further change that the new ieas provide at cl 12.1 for a minimum hourly rate of pay rather than, as previously, a minimum weekly rate of pay. As to the abolition of the minimum weekly pay, the defendant concedes that this has been changed but points out that the new forms of iea provide for guaranteed minimum remuneration for those now wishing to work short weeks and include an option of electing not to be available for such weeks.

[103] In answer to the plaintiffs' contention that the new forms of iea do not refer at all to union rights, the defendant contends that that was the position also under the "based on" ieas on which the second plaintiffs were employed at the time of the 2015 seasonal lay-off. It says that case law establishes that such union or collective rights (including reduction of union fees, access of union delegates to the plant etc) expire with the expiry of the collective agreement.

[104] Finally, the plaintiffs point to the new ieas' ability for the employer to dismiss an employee for redundancy if there are "irreconcilable differences" under cl 24.4. The defendant accepts that this change from the previous expired collective agreement position has been made.

[105] AFFCO's new standard ieas on the terms of which it has insisted that the second plaintiffs be re-engaged for the current new season are both significantly different to those of the expired collective agreement, and are, in effect, contain the same terms and conditions for which AFFCO is bargaining collectively for a new collective agreement.

[106] The significance of this analysis also lies in the defendant's claim to compliance with it, as regards the new ieas, with s 61(2) of the Act. This provides:

> (2) If the applicable collective agreement expires or the employee resigns from the union that is bound by the agreement,—
> (a) the employee is employed under an individual employment agreement based on the collective agreement and any additional terms and conditions agreed under subsection (1); and
> (b) the employee and employer may, by mutual agreement, vary that individual employment agreement as they think fit.

[107] Are the defendant's new ieas based on the expired collective agreement, albeit with additions, pursuant to s 61(2)? The plaintiffs describe these documents as "dramatically different" although that analysis is rejected by the defendant. If we find that the expired collective agreement continued to apply beyond the end of the 2014/2015 season, might the position still not be saved for the defendant by s 61(2)?

[108] In the foregoing circumstances, we find that AFFCO's new form of iea is not in compliance with s 61(2). It does not add to the terms of the expired collective

agreement, but in many instances contradicts the expired collective agreement's terms and conditions. In any event, we did not understand the defendant to contend that these new ieas comply with s 61(2): rather, it states its position on the expired collective agreement ceasing to have effect (through 'based-on' ieas) at the end of the 2014/2015 season.

Statutory definitions of "employee" and "employer"

[109] First, the plaintiffs submit, correctly, that whether someone is an employee at a particular time is determined or at least significantly influenced by s 6 of the Act. Introduced in 2000, the 15-year old definition has remained materially unaltered, at least for the purpose of this case. In order to assess the current position, it is necessary to examine the definition of employee (or its equivalent) under the legislation in place when each of those earlier cases upon which the defendant relies, and which we address subsequently, was decided. The material tests now under s 6 include:

> ... unless the context otherwise requires, **employee**—
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
> (b) includes—
> ...
> (ii) a person intending to work; ...

[110] Section 5 of the Act defines a "person intending to work" as "a person who has been offered, and accepted, work as an employee".

[111] Although much of the case law under s 6 has focused on whether someone is an employee, as opposed to being in another form of contractual or other relationship with a person for whom the former performs work, the section nevertheless assists to determine the question in this case. The question is whether the second plaintiffs were employees of the defendant after their seasonal lay-offs and when seeking re-engagement with the defendant for the new season. Section 6(2) is, therefore, important. It provides that in determining whether a person is employed by another person under a contract of service,[7] the Court must determine "the real nature of the

[7] There is no question that, when employed, the second plaintiffs were under contracts of service. The question is whether contracts of employment defined the relationship during the off-season.

relationship between them". Under subs (3) the Court must consider "all relevant matters" including any that may indicate the parties' intentions and is not to treat as a determining matter any statement by those persons that describes the nature of their relationship.

[112] It is open to the plaintiffs to argue that the definitions of these terms (including, in the case of an employee under s 6) are not exclusive. In common with definitions in many statutes, s 5 of the Act is prefaced by the words: "In this Act, unless the context otherwise requires …". A relatively rare but significant example of the application of that qualifying phrase to the same definitions, was part of a judgment of the Court of Appeal in *Tucker Wool Processors Ltd v Harrison*.[8] In that case, the Court of Appeal concluded that the context required that persons who were engaged in collective bargaining for a collective contract, but had not been offered and accepted employment, should nevertheless, for the purposes of the collective bargaining provisions of the Act, be considered to be employees of an employer. Although that was a case of interpreting the meaning of words elsewhere in the statute than are in issue in this case, there is nothing in that opening phrase of s 5 which confines the context to any particular part of the statute. In this case, the words "employee" (and variations thereof) and "employer" under s 82 are equally open to examination for an extended meaning as were those in the *Tucker Wood Processors* case.

[113] JF Burrows and RI Carter address the use of the phrase in definitions sections "unless the context otherwise requires" in the following way.[9]

> This indicates that, particularly in a long Act where the word in question appears several times, there may be occasions where it does not bear its defined meaning. This usage is productive of uncertainty, and has been criticised by the Law Commission, but it does provide a useful flexibility, including when a term has a different meaning assigned to it by another Act.
>
> A statutory definition is only displaced where there are strong indications to the contrary in the context. That is particularly so where the definition is of the stipulative kind that extends the meaning of the word.

[8] *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894.

[9] JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 438-439.

[114] Citing the judgment of the (then) Supreme Court in *Auckland City Corporation v Guardian Trust and Executors Co of New Zealand Ltd*,[10] the text notes that the case concerned the statutory definition of "owner" in the Municipal Corporations Act 1920 as "a person entitled to the rack rent". This was found to be an inapplicable definition in another section of the Act that provided that the owner of the property must pay a contribution when the property was "bettered" by the expenditure of public funds. The authors explain:[11]

> The statutory definition of "owner" was displaced by the injustice its application would cause; the underlying purpose of the provision; other subsections which envisaged that there might be more than one owner; and the history of the section which had been plucked from other legislation where its context was quite different.

[115] Can it be said that the "context" of the use of the words "employee" and "employer" in s 82 of the Act defining a lockout requires a different meaning to that provided in ss 5 and 6? Does the context of bargaining (especially collectively) mean that the words "employer" and "employee" and the plurals of those referred to in s 82(1), mean not only persons who have currently an employment relationship under s 4(2)(a) of the Act but also persons who have had previous relationships of seasonal employment and who are both wishing to engage in a further seasonal employment relationship after a seasonal lay-off? In that analysis, the reality of both the applicable history between the parties, and the relevant contents of the collective and/or ieas which governed their previous relationship as defined by ss 5 and 6 of the Act, will be relevant. This question applies particularly to s 82(1)(a)(iv):

> … the act of an employer —
>
> …
>
> (iv) in refusing or failing to engage employees for any work for which the employer usually employs employees; and
>
> (b) … with a view to compelling employees … to
>
> (i) accept terms of employment; or
>
> (ii) comply with demands made by the employer.

[116] We conclude that, at least in s 82(1)(a)(iv), the words "employees" and "employer" may extend to cover persons who are subject to a current employment agreement or who have not yet been offered and accepted employment. This

[10] *Auckland City Corporation v Guardian Trust and Executors Co of New Zealand Ltd* [1931] NZLR 914.

[11] Burrows, above n 9, at 439.

meaning accommodates such seasonal employees as the second plaintiffs, even if the defendant is correct that there is no ongoing employment relationship in the off-season.

[117] Although this is a test to be established only where there are "strong indications" requiring such an extended meaning (see Burrows and Carter above), we consider that these exist in this case. To define these words narrowly, as the defendant urges us to do, would be to create "an injustice" as the Court of Appeal described it in *Auckland City Corporation v Guardian Trust.*

The status and effect of previous cases about seasonal employment in meat works

[118] An apparently strong argument for the defendant is its reliance on several cases determined authoritatively over a substantial period, most if not all of which appear to have decided this issue of continuity/discontinuity of employment in favour of the defendant's position. That was recognised in the Court's interlocutory judgment in this proceeding.[12] Although the continued applicability of these cases was held to be arguable, the Court noted that the plaintiffs would have their work cut out to persuade the Court to differ from this line of cases. The plaintiffs have, therefore, focused on a critique of those cases and how they say these differ from this one, so that they do not dictate its outcome. We will deal with those previous cases in chronological order, at least so far as summarising their relevant circumstances and their conclusions.

[119] As a general opening statement on the significance of earlier cases, we are bound by judgments of the Court of Appeal in cases where the ratio decidendi is the same. We are not bound, however, by earlier judgments of the Employment Court or its predecessor including judgments of full courts: these are other judgments of other Judges but, while persuasive in the case of full Court judgments, are not binding. Nevertheless, as employers, employees, and their respective representatives will have to come rely upon principles contained in these judgments over many years to govern their employment relationships, any departure from their ratio decidendi will be rarely made and on a strictly principled basis.

[12] *New Zealand Meat Workers (No 2)*, above n 1.

Analysis of the 1987 *Alliance* case

[120] The first case was *New Zealand Meat Processors, Packers, etc IUOW v Alliance Freezing Co (Southland) Ltd* (the 1987 *Alliance* case).[13] It was decided under the statutory regime of the Industrial Relations Act 1973. The question at issue was whether the employer could lawfully suspend some employees when others (slaughterers) refused to present themselves for work. The Arbitration Court held that the existence of a contract of employment was fundamental to action being classified as a strike. The Court found that there was then no relationship of employment during the off-season so that a refusal by slaughterers to return to work for the following season could not amount to a strike and, therefore, the employer could not suspend statutorily other workers.

[121] The Arbitration Court's 1987 *Alliance* judgment also dealt with the employment situation of slaughtermen as seasonal workers, although then employed under the relevant award dated 6 October 1986 (86 B.A. 10907). That judgment included the following passage:[14]

> We accept that the currency of the award does not of itself establish the existence of such contracts in the present case. We accept that each of the slaughtermen was free at the commencement of the new season to refuse or fail to accept engagement; ...

[122] In relation to the question whether there was a contract or contracts of employment in existence before the commencement of the season, the Arbitration Court in the 1987 *Alliance* judgment found:[15]

> ... The practice in the present case was that the individual slaughterman was given an assurance that work would be offered to him in each new season in a certain clearly determined order. If the individual slaughterman chose not to avail himself of the offer, however, it seems to us the effect was that an employment contract did not come [into] being. Having accepted that a contract of employment is fundamental to a strike we have examined the evidence and the submissions in order to discern if possible the incidents of an employment contract in the off-season relationship of these slaughtermen and their employer. That relationship is contemplated in the award. The award is part of the contract of employment when one exists. But the award

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[13] *New Zealand Meat Processors, Packers, etc IUOW v Alliance Freezing Co (Southland) Ltd* [1987] NZILR 537.
[14] At 543.
[15] At 543.

> does not create a contract of employment, nor does it create by itself continuance of the employer/employee relationship during the off-season if no work is offered or done. We hold that there was on the evidence before us no binding relationship at all in the off-season between the employer and any individual slaughterman, even assuming that the obligations assumed by the employer under the seniority list are enforceable. ...

[123] This conclusion was reinforced by the Arbitration Court's finding that the wording of the then cl 29(g) of the award was based on a premise that the employer, at the commencement of each season, offered a fresh employment contract to each slaughterman.[16] That clause provided materially:

> (g) Subject to the provisions of clause 32 of this agreement the employer shall when engaging labour at the commencement of each season give prior consideration to applications for work who have in his opinion been competent and satisfactory employees at that particular freezing works during the previous season and who are ready, willing and able to commence employment when the employer requires.

Analysis of the 1990 *Alliance* case

[124] Next in time is the judgment of the Court of Appeal in *NZ Meat Processors etc IUOW v Alliance Freezing Company (Southland) Ltd* (the 1990 *Alliance* case).[17] The issue dealt with by the Court of Appeal was whether employees had so-called "permanent" employment notwithstanding the provisions of a relevant award. It has been argued and held subsequently that it was implicit in the Court of Appeal's judgment in the 1990 *Alliance* case that a seasonal lay-off amounted to a termination of the employment of a meatworker who had been employed during a particular season. The judgment has been said to be authority for the proposition that seasonal employment cannot comprise permanent employment of an uninterrupted nature because a lay-off of a seasonal worker comprises a termination of his or her contract of employment pending re-employment at the commencement of the following season.

[125] The 1990 *Alliance* case was an appeal by case stated against a decision of the Labour Court which had decided that a meat company employer had not acted

[16] At 543-544.

[17] *NZ Meat Processors etc IUOW v Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143; (1990) ERNZ Sel Cas 834; [1990] 2 NZILR 1071.

unjustifiably and/or discriminated against a group of general service department workers. Those workers had formerly been seasonal workers but had transferred to a plant's General Services Department in the expectation of having what was described as "all year round work". That expectation was based on past practice and what they said was a promise given to them by their employing foreman. At the end of the season, however, those workers were laid off on the basis that there was insufficient work to occupy them over the off-season. The questions for the Court of Appeal were, first, whether the workers' contracts of employment contained an express or implied term assuring them of "all year round" employment; and, second, whether the workers' lay-offs were justified and fair.

[126] The Court of Appeal concluded that the provisions of the then applicable award were inconsistent with the co-existence of a contractual provision of permanent employment. In these circumstances, the award prevailed regardless of whether the result was more or less favourable to the particular workers. Applying the decision in *G N Hale & Sons Ltd v Wellington etc Caretakers etc IUOW*,[18] the Court also concluded that there was acceptable economic justification for the lay-offs and the employer had handled these in a fair and reasonable manner.[19]

Analysis of the *Richmond* case

[127] *New Zealand Meat Workers IUW v Richmond* (the *Richmond* case) is a long decision of a full Court,[20] consisting of three judgments, two delivered by the members of the majority (Judges Finnigan and Palmer) and a dissent delivered by Chief Judge Goddard. The Union applied both for a declaration that the employer locked out workers unlawfully at its plants, and for permanent injunctive relief including from re-engaging those workers on terms that breached their allegedly continuing individual employment contracts. At the close of the 1990/1991 season the workers had been on individual employment contracts based on a deemed expired collective contract which had previously been an award. This position (with similarities to that before us) was then pursuant to s 19(4) of the Employment

[18] *G N Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151; (1990) ERNZ Sel Cas 843; [1990] 2 NZILR 1079.
[19] The 1990 *Alliance* case, above n 17, at 842.
[20] *New Zealand Meat Workers IUW v Richmond Ltd* [1992] 3 ERNZ 643.

Contracts Act 1991. Negotiations between the parties for a new collective employment contract had broken down over the issue of whether there should be separate plant collective contracts or a company-wide collective contract. Workers were called back to work at the start of the new season in accordance with the seniority provisions which had been part of their individual employment contracts over the previous season. They were presented with the employer's terms of re-hire as a condition precedent to their commencing work in the new season. At two plants the employer refused to re-hire workers unless they accepted its terms and conditions of employment contained in its proposed new plant collective contract and unless they rescinded the Union's authority to represent them in negotiations.

[128] The findings in the *Richmond* case which are important for this case are summarised at [4] and [7] of the holdings in the ERNZ[21] headnote to the judgment: that is that the contracts of employment did not continue during off-season suspension and adherence to seniority lists represented a continuing future obligation arising out of an individual employment contract which was terminated at the end of the season. Those summaries are not, of course, the judgment or the reasons for it, so these will need to be identified and analysed in each of the three judgments delivered and, more particularly, in the two judgments of the majority representing the decision of the Court.

[129] Dealing first with the dissenting judgment of Chief Judge Goddard and ignoring, for the purpose of this analysis, the Chief Judge's "sharp disagreement" with some of the majority's factual findings, we will concentrate on his Honour's conclusions of law in which he described himself also as being "in sharp disagreement ... [about] certain of [the majority's] conclusions of law". At page 648 Chief Judge Goddard noted:[22]

> This case touches upon the nature and status of the employment of employees in the meat industry. It is common ground that such employment is seasonal, in the sense that work in a particular season may commence later than in another or finish earlier or be interrupted during the season through insufficiency of work. It is also common ground that on all these occasions the employer is entitled to lay off its staff until work becomes again available or until the next season without being obliged to pay any

[21] Employment Reports of New Zealand.

[22] The *Richmond* case, above n 20, at 648.

> remuneration for the period of the lay-off other than in discharge of accrued entitlements to annual holidays and other leave.

[130] The Chief Judge dealt with the issue with which we are now concerned, what he labelled "Status of Seasonal Lay-off". The Chief Judge's opening remarks on this issue indicate his decision. He said:[23]

> This is the part of the case which would have given me the greatest difficulty, if it had been relevant for me to decide it. Since the other members of the Court do not share that difficulty, I propose to say a little on the subject.
>
> ... Unless I am precluded by authority from so holding, my view would be that a lay-off is normally a temporary cessation of employment as opposed to a termination of employment. My reasons for this conclusion are based equally on the meaning of the expression "lay-off", on its use in the context of the award and its predecessors, on an assessment of the nature of the contracts between employers and employees in the meat industry, and on the intention of the parties to the relevant contracts. ...

[131] Admitting that the evidence was "somewhat sparse", the Chief Judge concluded that the intention of parties to employment contracts in the meat industry had always been to limit an employer's obligations to provide work for an employee during the duration of the season and to those parts of the season during which the employer had insufficient work for the employee. So, the Chief Judge reasoned:[24]

> ... Generally, therefore, employees would expect that from time to time during the season and at the end of the season they might, in conformity with their contract of employment, be temporarily laid off work and then asked to return when the employer was again in a position to provide them with work, in the meantime being entitled to no remuneration for the duration of the lay-off. The only reason which the Court could possibly have for not giving effect to this common intention of the parties is if it is precluded by the award from doing so. I find nothing in the award, nor in any of its predecessors, of which I have considered a sampling going back to the earliest days of awards, to preclude the Court from acting upon the intention of the parties. There is no reason to be found in the awards, in logic or in general legal principle, for imposing on the parties a contract which is different to that which they have made.

[132] Analysing the meaning of the term "lay-off" (upon which counsel in this case before us did not rely), the Chief Judge considered that, especially when this was described by the adjective "seasonal", this involved "... a temporary cessation of the employment relationship and no more than that." Relying on the Shorter Oxford

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[23] At 655-656.

[24] At 656.

Dictionary's definition of a lay-off as "a period during which a workman is temporarily discharged", the Chief Judge acknowledged that American dictionaries did not qualify the expression in this way but, instead, more broadly, as "the act of dismissing employees especially temporarily". But even then, the Chief Judge considered that the American definition did not exclude, and indeed contemplated, a temporary cessation of employment. Its use in statute was traced to s 184(5) of the Labour Relations Act 1987 where it was excluded expressly from the definition of redundancy. The Chief Judge considered that this exclusion was precautionary rather than a recognition that a seasonal lay-off was a termination of employment. He considered that in an appropriate context, this meant "... to effect a temporary reduction in staffing for lack of work with the intention of recalling the worker should business pick up again."

[133] Turning to the 1987 *Alliance* case, Chief Judge Goddard concluded, in effect, that if the earlier judgment was not wrongly decided, it was sufficiently distinguishable in light of subsequent cases for the Judge to assert confidently that it would not have been decided in the same way in 1992.[25]

[134] The next case examined by the Chief Judge in the *Richmond* case was *Gray v Crown Superannuation Fund*.[26] There the Court of Appeal considered whether, under a superannuation trust deed, seasonal workers would be regarded as being in the full-time service of the employer during the normal seasonal lay-off for superannuation purposes. The decision of the case turned principally on the terms of the trust deed. In the *Gray* case, seasonal workers were laid off at the end of the season but it was decided later not to reopen the plant. The question was whether, at the date of that decision, the seasonal workers were in the service of the employer. The Chief Judge noted that there are suggestions in the judgment of the Court of Appeal[27] that it found that the decision not to reopen was the effective cause of the workers losing their jobs. This implied, at least for the purposes of the trust deed, that they still then had jobs to lose, thus favouring a conclusion of continuous employment.[28]

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[25] At 661-663.
[26] *Gray v Crown Superannuation Fund* [1991] 1 NZLR 129.
[27] At 134.
[28] The *Richmond* case, above n 20, at 664.

[135] Referring to the passage at page 150 of the 1990 *Alliance* case that the award was designed for a seasonal industry, that the seasonal engagement of workers was a basic premise underlying the award, and that these and related factors "... are truly inconsistent with the co-existence of a contractual provision for permanent employment", the Chief Judge noted: "It seems to have been assumed rather than decided that the lay-offs amounted to a termination of employment".[29]

[136] The first judgment of the majority in the *Richmond* case is that of Judge Finnigan who noted:[30]

> ... If one were to isolate one single crucial element in the relationship between the employer and the individual workers in each case, it must be that each worker at the commencement of each successive season had, in that case as in the present case, the opportunity and the right to decline without notice the employer's offer of a resumption. (S)he had no obligation to accept the work offered, and no right to be offered the work except as given by (a) a place on a seniority list and (b) the employer's need for workers.

[137] The Judge also noted that in the 1987 *Alliance* case the award was:[31]

> ... a continuing factor in the relationship of the employer and the workers but did not itself create a continuing employment contract. The continuing factors of the relationship in the present case such as the order of seniority ..., the share purchase scheme, the superannuation scheme, holiday pay and gear storage arrangements cannot by themselves in my view supply the essential elements of a continuing and enforceable employment contract.

[138] In his separate majority judgment, Judge Palmer considered that the full Court was obliged to follow the law declared in the 1990 *Alliance* case in the Court of Appeal. Judge Palmer found nothing by which the two cases could be distinguished on essential legal issues and considered that the Court was bound to follow what was then a recent and authoritative judgment of the Court of Appeal.

[139] Much of the judgment of Judge Palmer emphasised both the award-based nature of the terms and conditions of employment, and that seasonal employment was an important feature. In those circumstances, Judge Palmer concluded, for the majority, that the award provisions governed the situation and not, as the plaintiffs in

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[29] At 664.
[30] At 684-685.
[31] At 685.

that case had contended, the history of their employment previously during which they had been engaged continuously for both the season and the off-season. Important to the Court of Appeal's decision in the 1990 *Alliance* case, and emphasised by Judge Palmer in the *Richmond* case,[32] was s 174 of the Labour Relations Act. This provided:

> **174 Awards and agreements to prevail over contracts of service in cases of conflict**
> Every award or agreement shall prevail over any contract of service ... in force on the coming into force of the award or agreement, so far as there is any inconsistency between the award or agreement and the contract; and the contract shall thereafter be construed and have effect as if it had been modified, so far as necessary, in order to conform to the award or agreement.

[140] Included in the Court of Appeal reasoning in the 1990 *Alliance* case was the following passage that Judge Palmer considered significant in the *Richmond* case:[33]

> As a statutory document an award is an extension of the statute and it is not surprising that the legislature has directed that in case of inconsistency the award must prevail, even though in an individual case the employer and the worker may genuinely consider that their respective interests are better served by a different contractual provision. *CMI Screws and Fasteners Limited v The New Zealand Amalgamated Engineering and Related Trades Industrial Union of Workers* (1990) ERNZ Sel Cas 785; [1990] 1 NZILR 433 (CA) is a recent illustration. ...

[141] The reasoning behind the Court of Appeal's judgment in the 1990 *Alliance* case (and on which the majority Judges relied in the *Richmond* case) is encapsulated in the judgment of Richardson J at as follows:[34]

> **Inconsistency between award and assurance**
>
> 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. In order to uphold the claim of unjustifiable termination as advanced for the 6 workers, it would be necessary to disregard those award provisions. They are truly inconsistent with the co-existence of a contractual provision for permanent employment.

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[32] At 694.
[33] The 1990 *Alliance* case, above n 17, at 149, 840-841.
[34] At 150, 841.

[142] Dealing with the significance of seniority and the required seniority lists, Judge Palmer, in the *Richmond* case, held:[35]

> Plainly, ... the observance of this ... the seniority obligation ... by employers pursuant to successive awards, was determinative of the precedence of employment during the season of qualifying workers. The obligation was, of course, a re-employment obligation following seasonal layoffs. The obligation is, I comment, meaningless and inherently inoperable unless the employment of seasonal workers was terminated in the off-season when they were laid off, thus occasioning their ordered re-employment for the succeeding killing season.

[143] Next, Judge Palmer considered significant to this question the legislative changes between the Labour Relations Act and, from 15 May 1991, the Employment Contracts Act 1991. This was relevantly expressed in s 19(4) of the Employment Contracts Act which provided materially:

> **19 Individual employment contracts**
>
> ...
>
> (4) Where an applicable collective employment contract expires, each employee who continues in the employ of the employer shall, unless the employee and the employer agree to a new contract, be bound by an individual employment contract based on the expired collective employment contract.

[144] Judge Palmer emphasised the words within subs (4) "each employee who continues in the employ of the employer". The Judge concluded that s 19(4) of the Employment Contracts Act applied to the circumstances of meatworkers who, after the expiry of the award, continued in the employment of their employers. He held:[36]

> ... At the conclusion of the 1991 killing season when meatworkers were progressively laid off and their seasonal contracts of employment terminated, s 19(4) ceased, I conclude, to have continuing application to such workers. They were no longer employed by their respective employers following their off-season layoffs.

[145] That, however, begs the question whether the employees continued in the employment of the employer. If they did not, then we would agree that both s 19(4) of the Employment Contracts Act and, currently, s 61(2) of the Employment Relations Act would bring employment to an end. That would, however, not have

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[35] The *Richmond* case, above n 20, at 699.

[36] At 701.

been by reason of the cessation of the statutory extension to the expired collective agreement.

[146] Judge Palmer identified what he (for the majority of the Court) considered were significant differences between the legislative regimes under the Labour Relations Act and the Employment Contracts Act affecting the question now for decision. The Judge said:[37]

> ... Because successive awards under the Labour Relations Act remained wholly in force when meatworkers were laid off and subsequently re-employed in the new season, the obligation to re-employ in the ordered precedence materially provided for in the award, meant that industry employers were obliged to offer re-employment to their qualifying workers upon the terms of the award then in force. However, when the Employment Contracts Act came into force and when, shortly following its introduction, the individual employment contracts arising from the application of s 19(4) of the Act were terminated through the seasonal layoffs of affected workers, industry employers were no longer bound, effectively through the re-employment obligation which obliged them at the commencement of the 1991/92 killing season to offer re-employment to qualifying workers according to seniority, to offer such re-employment upon prevailing award terms. It is trite to comment that no award as such existed in the industry providing a collective employment contract.

[147] Judge Palmer then reiterated, however, that because the workers' lay-offs at the end of the previous season had terminated their employment, Richmond was entitled to offer them either new individual employment contracts or collective employment contracts to be mutually concluded between individual employers and their employees. The Judge held: "The form and scope of such contracts were not pre-determined."

[148] We take a different view from that of Judge Palmer (and therefore of the majority) in the *Richmond* case, at least so far as it may be applicable to the case before us. Re-engagement in an order of seniority is not consistent only with a previous dismissal or termination of employment and a prospective new employment relationship. It is at least as applicable to a lay-off amounting to a temporary suspension of work and to the sequence in which employees will recommence work for the new season, as it is in a situation of continuous employment. Seniority governed both the order in which employees were laid off and the order in which

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[37] At 703.

they would be re-engaged commensurate with the progressive nature of the seasonal shut-down and seasonal start-up of meat works. Put simply, those with the highest seniority would, all other things being equal, be the last to be laid off and the first to be re-engaged, thus minimising the duration of the off-season period during which no income would be received from the employer. It is not inherent in the requirement for, or the application in practice of, seniority in these circumstances that it can only apply where there has been a termination of employment at the instigation of the employer and, for the commencement of the new season, where new employment agreements are to be entered into before work commences.

[149] A significant factor in the majority judgments in the *Richmond* case was what the Court found to be the choice of former employees to decline to be re-engaged. The full Court concluded that those former employees had no obligation to accept work offered to them and, as a corollary, no right to be offered that work.

[150] We consider that there was, in the *Richmond* case, an excess of evidence of this factor without consideration of others which distinguish it from employment of indefinite duration. The employees are entitled to resign or even abandon their employment by indicating their wish not to be re-engaged for the following season.

Analysis of *Cruickshank v Alliance Group Ltd*[38]

[151] This was another meat works employment case decided by Judge Palmer a few months after the *Richmond* case. Three nurses employed by a meat industry employer were laid off at the end of the season. The Employment Tribunal had found that, at least in their cases, the seasonal lay-off was a suspension of their employment and not a dismissal but that the relevant award did not allow for such a suspension. The appeal to the Employment Court was confined to the issue whether the employer (Alliance Group Ltd) was entitled in law to lay off the nurses at the end of the season.

[152] The Court followed the recently delivered *Richmond* judgment in concluding that a seasonal lay-off was not a suspension, but a termination of employment, albeit

[38] *Cruickshank v Alliance Group Ltd* [1992] 3 ERNZ 936.

with an obligation to re-employ. Judge Palmer confirmed that the seasonal lay-off was a termination of the employees' contracts of employment at the end of the season. The Court also found that a contract that allowed for a seasonal lay-off was capable in law of comprising a fixed term contract. The employees were declared to be redundant during the off-season as part of Alliance's announcement of significant redundancies of staff and plant closures at a number of its South Island works and at regional offices of the company.

Analysis of the 2006 *Alliance* case[39]

[153] This is the last authoritative judgment on the question, given now more than nine years ago, and which, although arising in the context of other legislation (the Holidays Act), nevertheless focused on the earlier line of cases about the nature of meat works' seasonal employment.

[154] Resolution of the particular dispute turned, in part, on the consequence of whether meatworkers were employed continuously or discontinuously. That was for statutory sick and bereavement leave entitlement purposes under s 63 of the Holidays Act and was whether "new employees" had to wait six months to avail themselves of this entitlement. The contrary argument was that if they were, in law, employees between the lay-off and season re-start, that period of service counted towards the six-month qualifying requirement for sick and bereavement leave.

[155] The arguments advanced on behalf of the Union included that the term 'lay-off' indicated that this status was inherently temporary; that various clauses of the relevant collective agreement were indicative of a continuing employment relationship and inconsistent with an intention to terminate the employment relationship at the end of each season; and that there was nothing inconsistent between employees remaining employed during a seasonal closure, and the requirements of the Holidays Act. The Union also argued that the Court was required to examine the true essence or substance of the relevant relationship, relying on s 6(2) of the Act.

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[39] *New Zealand Meat Workers' Union Inc v Alliance Group Ltd* [2006] ERNZ 664.

[156] The full Court's task was to determine whether seasonal employment of meatworkers constituted "current continuous employment" under s 63 of the Holidays Act. It concluded that even if the work in practice amounted to a continuous employment relationship with a period of suspension over the off-season, this would not have met the definition of "current continuous employment" for leave entitlement purposes. The Court concluded that the relevant collective instruments' provisions under the 1987 and 1990 *Alliance* cases were effectively repeated in the collective agreement of 2006 so that it could not be said that there was an implied term of continuous employment in that latter case.

[157] Following an analysis of the issues and the previous cases, the relevant reasoning of the full Court in the 2006 *Alliance* case begins at [102] of the unanimous single judgment. The full Court considered that it was bound by the previous case law. It said that although the subject matter of the Court of Appeal's decision in the 1990 *Alliance* case was different, it turned on the question of "whether the contended implied term of continuous employment was consistent with the relevant provisions in the award." The full Court held that those provisions of the award applicable in the 1990 *Alliance* case:[40]

> ... are effectively repeated in the collective agreement of the present case. In light of those judgments, the parties to the subsequent collective instruments have continued or adopted materially identical provisions. The issue is therefore effectively the same.

[158] Noting the judgment of the Court of Appeal in *Gray*[41] the full Court in the 2006 *Alliance* case concluded:[42]

> ... The aspect of the decision which has potential significance for this case is the conclusion that seasonal workers could be regarded as having been in continuous employment notwithstanding seasonal layoffs. We agree with [counsel for the employer] that the decision can be distinguished on the grounds that it relied on the particular terms of the superannuation trust deed which differed markedly from those in this case. Further, it appears to have been recognised by the Court of Appeal that, if the parties had not always treated seasonal workers as "full-time" employees, and therefore full members of the superannuation fund, the seasonal lay-off would have been regarded as a termination of their employment. ...

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[40] At [103].
[41] *Gray*, above n 26.
[42] The 2006 *Alliance* case, above n 39, at [105].

[159] The full Court also accepted the submission for the employer that the provisions of the collective agreement relating to seniority that were not present in the earlier award, strengthened the employer's argument that laying off staff for the off-season terminated their employment. It concluded that the reference to "re-employment" meant the entering into of an employment contract with someone who had previously been employed but whose employment contract had terminated. The full Court noted:[43]

> … The amended provisions talk in terms of "re-employment" which we find must mean the entering into of an employment contract with someone who was previously employed but whose employment contract has terminated. That accords with the dictionary definition of re-employ as "employing again". As was said in the earlier cases there would be no need for such a provision, protecting as it does the seniority rights, if the employment remained continuous throughout the off-season.

[160] We disagree that 're-employment' must mean the creation of a new employment relationship; that is not a re-engagement after a period of no work/no pay. What is 're-employment' must be considered and defined by reference also to the nature of the situation which brought it about; that is the seasonal 'lay-off' which was not 'termination of employment' or 'dismissal'. Significant, also, is the nature of lay-offs as including not only inter-seasonal cessations but also intra-seasonal cessations brought about by the same factors of insufficient work.

[161] In the *Richmond* judgment it was significant that awards had continued through the off-season and this underpinned the obligation on the employer, if it decided to re-employ employees, to respect and abide by elements of seniority in that re-engagement. That is to be compared to the present situation where there is no similar or any award underpinning, so that any obligations can only arise under the expired collective agreement.

Comparison of relevant previous collective instruments and expired collective agreement

[162] We have analysed the leading previous cases on which counsel for the defendant relies, to consider their applicability to the circumstances in this case. That comparison would, however, be incomplete without an associated comparison

[43] At [106].

between the relevant collective terms in the instruments upon which those cases were based, and the expired collective agreement on which this case is based.

[163] The relevant previous collective instruments are what we will call "the 1987 award"[44] and "the 1990 award".[45] The 1987 award was the subject of the 1990 *Alliance* case.[46] The 1990 award was the subject of the *Richmond* case.[47]

[164] A number of provisions are identical, or very similar, to the expired collective agreement, such that no particular significance can be attached to their differences. If they have intrinsic significance they have been discussed earlier in this judgment. Those containing no material difference include: holiday pay, where the only difference over time is the exclusion, in the expired agreement, of an extra week after six years continuous service with the same employer;[48] the definition of continuous service which is identical in both awards and virtually identical in the expired agreement;[49] sick leave entitlements which all contain provision to accumulate sick leave entitlement up to a maximum of 340 hours provided the employee's periods of service are in consecutive seasons;[50] The "Management" clause of the awards,[51] giving the employer power to manage and control its own business "subject to the special provisions of this award" which appears in the statement of purpose in the expired agreement at cl 10(c); superannuation, which appears for the first time in the 1990 award and whose wording changes subsequently but without significance here: and dismissals, where the only change is that there is no reference in the expired agreement to final warnings lapsing after two years.[52]

[165] Other provisions, on closer scrutiny, indicate changes which may be interpreted as significant. These include long-service leave, where the structure of

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[44] *New Zealand (except Westland) Meat Processors', Packers', Preservers', Freezing Works Employees – Award* registered 16/6/87, Doc 310 at 5931.

[45] *New Zealand (except Westland) Meat Processors', Packers', Preservers', Freezing Works Employees – Composite Award* registered 12/9/90, Doc 310 at 9981.

[46] The 1990 *Alliance* case, above n 17.

[47] The *Richmond* case, above n 20.

[48] Clause 7(i)(i) in both awards.

[49] Clause 8(d) in both awards; cl 23(d) of the expired collective agreement.

[50] Clause 9 in both awards; expired collective agreement, cl 24(c).

[51] Clauses 32 and 31 respectively of the Awards.

[52] Expired collective agreement, cl 35; cls 29(j) and 28(j) respectively of the Awards.

each clause is closely similar apart from the periods of increment, but where the collective agreement in the 2006 *Alliance* case catered for the possibility of a break in service. In that collective agreement the date of continuous employment was deemed to commence at the date of re-employment.[53] This suggests that a break in employment is to be regarded differently from a seasonal lay-off. This additional wording is absent from the expired agreement.

[166] Both awards dealt materially identically with "Seniority".[54] In both, the employer's right to manage overrode the seniority provision.[55] The expired collective agreement also contains a seniority clause;[56] and adds criteria for re-engagement which were absent from the two awards.[57] This suggests a stronger (than hitherto) power of the company to choose from the workforce regardless of seniority. That power is reinforced with a clause not seen in the awards, which states:[58] "While seniority shall be taken into account in determining layoff and re-engagement final suitability shall be as determined by the employer subject to clause 31(b)."

[167] Nevertheless all three instruments refer to seniority beginning with "their commencement of employment". As it is not logical that seniority could begin with each new season, this wording therefore suggests continuity of employment.

[168] Clause 30 ("Security of Employment") in the expired agreement is particularly significant for this comparison and is absent from the awards. Our research indicates, however, that the operative collective agreement at the time of the 2006 *Alliance* case did contain such a clause. It is recorded in the judgment as having been relied on by the Union as indicative of a continuing relationship.[59] The security of employment clause was also raised by the employer in support of its case in the 2006 *Alliance* case. It submitted, as recorded at [68] of the judgment, that previous seniority provisions had been relied on by the Court of Appeal in the 1990

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[53] Clause 8 in both awards; expired collective agreement, cl 23; 2006 *Alliance* case at [35(d)].
[54] Clauses 30 and 29 respectively of the Awards.
[55] The relevant award clause read "Nothing in this clause shall affect any right which the employer has in terms of cl 32 [31] of the award."
[56] Expired collective agreement, cl 31(a).
[57] Clause 31(b).
[58] Clause 31(h) .
[59] The 2006 *Alliance* case, above n 39, at [35]-[36].

Alliance case and had been carried through into collective agreements although the particular clause in 2006 had not been present in the previous awards. The employer's argument in the 2006 *Alliance* case was that the word "re-employment" supported its case that there was no employment relationship between seasons.

[169] The full Court in the 2006 *Alliance* judgment accepted that this argument lent strength to the view that "laying off staff for the off-season terminates their employment".[60] The relevant clause in that case was as follows:

> The employer acknowledges the benefits of a stable, competent workforce which is familiar with and trained in the employer's requirements. Employees seasonally laid off the previous season will be offered the first opportunity of re-employment at respective plants for the new season and the first opportunity of re-employment prior to the engagement of new employees, subject to:
>
> (i) Re-employment being consistent with individual plant's requirements and departmental needs and the individual's competency; and
>
> (ii) Departmental and positional skills/experience requirements and a satisfactory work record. Layoffs and re-employment will be based on departmental and/or plant seniority.

[170] Clause 30 of the expired collective agreement currently under consideration largely adopted the first sentence (above) but omitted the second which was the subject of discussion by the Court in the 2006 case. The expired collective agreement also substituted as the condition for re-engagement that:

> 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).

[171] By contrast, the expired collective agreement at issue in this case defines redundancy, under Appendix A, in two different ways depending upon whether a worker is "an employee" or "a seasonal employee". Although this difference may appear to suggest a lack of continuity of employment as argued for by the defendant, the differentiation between these two classes of employees impresses us as being, on the one hand, employees who work and are paid for the whole year and, on the other

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[60] At [106].

hand, employees who work only for the season (and are paid for that) but who are, nevertheless, persons who are still employed by AFFCO over the off-season.

[172] As is to be expected, there are some old award provisions which have been carried through to the expired collective agreement in this case in materially similar, if not identical, terms and there are some comparative provisions which are quite different. The latter tend to be those which we have found to be significant in our analysis of the expired collective agreement earlier in this judgment. On balance, therefore, the comparison supports the plaintiffs' argument distinguishing the earlier judgments.

[173] There are true and significant distinctions between the current case and those decided by reference to an award. Although the 2006 *Alliance* case was not itself decided by reference to an award, it nevertheless relied significantly on earlier cases that were. Not only is a collective agreement a different statutory creature, but the terms and conditions of both (ie collective agreements and awards) differ in material provisions.

Continuous or discontinuous employment - decision

[174] In these circumstances, and particularly upon analysis of the expired collective agreement, the off-season impresses us to constitute a period of employment during which an employee will generally not be called upon to, or offered, work and will not be paid. Although usually for a significantly lesser duration than the off-season, such periods occur from time to time during the season as a result of temporary unavailability of stock and the like, but there is no suggestion that during these down-times, the employees cease to be employees and have to be re-engaged when the plant starts up again in the same way as they are at the beginning of each new season. There is no difference in principle between such periods of unavailability of work and nor should there be a difference in how they are treated in the ongoing employment relationship.

[175] The nature of employment generally and its regulation have changed significantly over the last 30 or so years in New Zealand, including at times when a

number of the cases which concluded that seasonal meat industry work was discontinuous, were decided. Some of those cases go back to the period when industry-wide awards were made by the Court's predecessor. These governed a large number, perhaps all, of the meat industry companies in New Zealand. Awards were quasi-statutory or regulatory instruments and did not take much, if any, account of the particular employment relationships between individual companies and their employees or, especially, particular plants owned by those separate companies and their employment practices.

[176] By contrast now, not only is there a combination of collective agreements and ieas entered into by meat companies but, as this case illustrates, there are differences between plants owned by individual companies which are illustrated by separate site agreements.

[177] In these circumstances, we consider that it is appropriate to determine this question of continuity or discontinuity of employment by reference primarily to the contractual terms and conditions in each particular case and the conduct of the working relationships in practice.

[178] In the case of AFFCO's North Island plants and on the evidence of the three directly concerned in this proceeding but which we understand to be typical of all of AFFCO's plants, we have concluded that employees such as the second plaintiffs are engaged by AFFCO on employment agreements of indefinite duration. Their employment is not terminated at the end of each season and new employment entirely is not entered into between the parties for the following season. To maintain, as AFFCO does, that its recent current arrangements for the employment of meatworkers reflect those traditional patterns reinforced by court decision in the past, is now an artificial, unrealistic and strained account of the reality of the situation at its plants and under current employment law.

[179] That is not to say that the work is not seasonal: clearly it is. The off-season is, however, a period during which it is agreed that the employees will not perform work and will not be paid but will have, nevertheless, an expectation that they will be re-engaged (although termed "re-employed") subject to the fulfilment of

conditions relating to the date or dates on which that occurs, their seniority and their satisfactory performance during the previous season.

[180] That some employees from the previous season may choose not to put themselves forward for re-engagement in the next is not, in principle or practice, unique to seasonal or truly discontinuous employment. An employee may elect, on the provision of sufficient notice to the employer, not to continue in employment and many contractual relationships end in this way. Even abandonment of employment by employees without notice is recognised as a circumstance in which an employer is entitled to treat the employment agreement as being at an end. That is in principle no different to an employee expressing a wish not to continue to work for AFFCO either by not providing the company with his or her contact details for the off-season or, even if the employee has done so, by failing to take up the opportunity to present himself or herself for re-engagement when notified. That was, however, not the situation with the second plaintiffs in this case who wished to continue working for the company for which many had worked for very many years.

Fixed term employment?

[181] An alternative argument advanced for the plaintiffs postulates that if there was no employment relationship between the second plaintiffs and the defendant until the parties had executed AFFCO's standard iea (with or without any minor variations), then the ieas purport to be a fixed term agreement but do not meet the statutory requirements for these under s 66 of the Act. It follows, say the plaintiffs, that pursuant to s 66(5) the employment agreements of those second plaintiffs who signed them with the defendant to start work in the current season are not validly for a fixed term and so are properly to be regarded as employment agreements of indefinite duration.

[182] The problem with this argument is that even if it is so, any such non-compliance with s 66 will not be engaged until the end of the 2015/2016 season when AFFCO purports to end those ieas at the conclusion of the season. We apprehend that the relief sought by the plaintiffs is immediate and retrospective as well as prospective.

[183] Therefore, more significantly for the immediate purposes of this case, the invalid fixed term agreement argument applies to the ieas that the second plaintiffs were on between 31 December 2014, when the statutorily extended currency of the collective agreement expired, and the end of the last season. There is no argument that, for that period, the second plaintiffs employed by AFFCO were on these individual 'based-on' agreements. The argument is that if these last-season individual agreements were of a fixed term nature (as the defendant contends they were) but did not comply with the requirements of s 66, they were deemed in law to be of a continuing nature. The argument is then that the lay-offs earlier this year were not the expiry of a fixed term agreement but, rather, a suspensory arrangement by which the employment relationship nevertheless continued and was operable at the times that AFFCO sought to engage employees for the current season. In those circumstances, the argument is that the second plaintiffs were in law being asked to agree to variations of their ieas of indefinite duration but did not do so, at least willingly, but were nevertheless entitled to resume work for the current season. The argument also extends to the plaintiffs' position that those employees were unlawfully locked out.

[184] Resolution of this argument is not assisted decisively by s 61(2) by which the second plaintiffs' employment was continued after 1 January 2015. Arguably, it is only if the expired collective agreement was (validly) for a fixed term that s 61(2) would deem the ensuing 'based-on' ieas to be likewise for the same valid fixed term, unless additional terms and conditions are agreed under s 61(1) and (2)(b). The expired collective agreement was, in a sense, for a fixed term but this is a statutory requirement of all collective agreements: see s 54(3)(a)(v). The focus of this issue must be in relation to the new ieas upon which re-engagement was made conditional for starting work for the 2015/2016 season. Section 66 may be applicable to them, but it is premature to assess their lawfulness at this point for the reasons we have already set out.

The scheme of the Act - collective bargaining

[185] Finally, it is appropriate to stand back from the intensely factual detail of our foregoing analysis and consider the legislative objectives affecting the issues in this case.

[186] Section 3 ("Object of this Act") includes that it is to be interpreted and applied:

> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
>
> ...
>
> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
>
> (iii) by promoting collective bargaining; and
>
> (iv) by protecting the integrity of individual choice; ...
>
> ...
>
> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention ... 98 on the Right to Organise and Bargain Collectively.

[187] Section 31 sets out the object of Part 5 of the Act ("Collective bargaining") under which relevant sections for consideration in this case fall. It provides:

> **31 Object of this Part**
>
> The object of this Part is—
>
> (a) to provide the core requirements of the duty of good faith in relation to collective bargaining; and
>
> ...
>
> (d) to promote orderly collective bargaining; ...

[188] These are important guiding principles which illustrate that since the days of awards under which many of the earlier cases relied on by the defendant were decided, Parliament has emphasised expressly the promotion and protection of orderly collective bargaining to be conducted in good faith. Employment in the meat industry as this case has illustrated is particularly apposite to the application of these employment law principles, and especially in the case of strikes and lockouts.

[189] Because s 3(b) refers to it, International Labour Organisation Convention 98 (Right to Organise and Collective Bargaining Convention, 1949) with which Parliament expects the relevant parts of the Act to be in accord, provides at Article 1:

> 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
>
> 2. Such protection shall apply more particularly in respect of acts calculated to—
>
>   (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
>
>   (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

[190] Article 2 of Convention 98 provides:

> 1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

[191] Article 3 says:

> Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

[192] Article 4 is as follows:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

[193] The Convention expects signatory nations to have legislation meeting these requirements. Provisions in the Act dealing with matters of collective bargaining (including indirectly, as some of the relevant statutory provisions at issue in this case do) must be interpreted, where possible, according to the spirit of the Convention.

Lockout cause of action - decision

[194] This decision of the plaintiffs' lockout cause of action is made first on the basis that the second plaintiffs were employees of the defendant when seeking to be re-engaged at the end of their seasonal lay-off. That is for the reasons just set out by

us concluding that the second plaintiffs' employment was continuous and not discontinuous.

[195] Alternatively, we have concluded that even if the second plaintiffs were not employees of AFFCO after the end of the 2014/2015 season, they were nevertheless locked out unlawfully when required to agree to ieas as stipulated for by AFFCO to begin work for the new 2015/2016 season.

[196] The plaintiffs have, therefore, succeeded in establishing that the second plaintiffs were employees and the defendant was their employer as those terms are used in s 82 of the Act which defines a lockout.

[197] Combined with its actions in current collective bargaining for a collective agreement with which the Union did not agree, AFFCO's refusal to re-engage the second plaintiffs amounted to a lockout under s 82 of the Act. They were the acts of the employer of those employees in refusing or failing to engage those employees for work for which the employer usually employed employees, with a view to compelling those employees to accept terms of employment or, alternatively, to comply with the employer's demands (s 82(1)(a)(iv) and (b)).

[198] AFFCO was prepared to accommodate the second plaintiffs on some minor issues, and to withdraw particularly egregious and arguably unlawful provisions. However, the evidence persuades us that AFFCO was intent upon achieving its outcomes in difficult collective bargaining, by purporting to re-engage the employees for the coming season effectively on its desired collective terms and conditions of employment, but contained in ieas rather than a collective agreement.

[199] The lockout was unlawful. The company accepts that the lockout did not relate to bargaining for a collective agreement that would bind each of the employees concerned (s 83(b)(i)). It related to individual bargaining for ieas with the second plaintiffs. Although the defendant has conceded this exclusory factor, we may otherwise have had some doubts that the lockout was unrelated to the collective bargaining but both parties agree that this is so. It was, without doubt, unlawful in

that it was imposed without the required notice to the employees. The defendant's actions purported to be a lockout, but we find that this was an unlawful lockout.

Good faith bargaining cause of action - decision

[200] Section 32(1)(d)(ii) of the Act provides, in relation to bargaining for a collective agreement:

> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:
>
> ...
>
> (d) the union and the employer—
>
> ...
>
> (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise;
>
> (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; ...

[201] We conclude also that AFFCO's actions in engaging or attempting to engage the second plaintiffs in re-employment under its form of ieas for the 2015/2016 season, amounted to a breach of s 32(1)(d)(ii) and (iii). AFFCO acted in bad faith (that is in breach of its duty of good faith under ss 32(1) and 4 of the Act) in several respects.

[202] First, by failing or refusing to involve the Union representing the second plaintiffs in the collective bargaining of its intention to do so, AFFCO's direct approaches to the second plaintiffs as employees represented by the Union amounted to bad faith.[61] The execution of its strategy by AFFCO in the period leading up to and including the communications with employees directly on and after 8 June 2015 was, directly or indirectly, likely to mislead or deceive the Union and the second plaintiffs. That misleading conduct concerned AFFCO's intentions both in the collective bargaining and for employment in the 2015/2016 season. More particularly, pursuant to s 4(1A)(b), AFFCO's actions were not active and

[61] The lack of evidence about this does not enable us to conclude whether the absence of communication by AFFCO to the Union about its IEA bargaining strategy was a failure or a refusal. That it was either is sufficient, however, to conclude that the section was breached.

constructive in maintaining a productive employment relationship with the Union and the second plaintiffs and it was not, as required, communicative with the plaintiffs.

[203] We further decide, based on our conclusion of continuing employment during the off-season, and while collective bargaining was in progress, that the employer's strategy was a proposal to make a decision that would, or was likely to, have an adverse effect on the continuation of employment of those employees. As such, AFFCO failed in its obligation under s 4(1A)(c) to provide the plaintiffs with access to relevant information about that strategy and an effective opportunity to comment on that information before it put it into effect at quite short notice and, even then, without advice of it to the Union.

[204] These acts or omissions also failed to recognise the role or authority of the Union as the entity chosen by the relevant employees to be their representative or advocate in the collective bargaining and in matters relating to their employment generally.

[205] The defendant also breached s 32(1)(d)(ii). In the course of current collective bargaining AFFCO bargained directly with the individual employees about matters relating to the terms and conditions of their employment. Those employees were represented by the Union which was not given an opportunity to agree to AFFCO doing so. That opportunity might have permitted the defendant to bargain directly with the second plaintiffs over the terms and conditions of their employment for the start of the following season, although it seems inherently unlikely. Nevertheless, AFFCO was obliged to consult fully and openly with the Union about this but failed or refused to do so.

[206] The defendant cannot, as it sought to in submissions, avoid the application of s 32 by asserting that it was only required to comply with s 63A of the Act which it said it did. Sections 32 and 63A are not in conflict and both must be complied with in appropriate cases such as this. It does not matter, in our view, that s 63A may have been enacted subsequently to s 32 and so, as Mr Wicks submitted, overrides or trumps s 32. It is a fundamental principle of statutory interpretation that provisions

in an enactment should be read and interpreted in a complementary manner rather than one in which they may be found to be in conflict and in which, therefore, one must prevail over the other.[62] In this case, AFFCO acted as it did in purporting to do so lawfully, by engaging the second plaintiffs on ieas. In doing so, however, it breached its statutory obligations of good faith. In particular, it breached the requirement not to bargain for those individual terms and conditions of employment directly with the employees at the same time as being in collective bargaining in which those employees were represented by the Union. So, in these circumstances, the provisions of s 63A do not come into play, at least without prior compliance with s 32, which there was not. AFFCO cannot be heard to contend that because it complied with the rules of individual bargaining (s 63A), it is thereby exempt from the prohibition on undertaking collective bargaining under s 32, or that any non-compliance with s 32 is immaterial.

[207] The terms and conditions of AFFCO's standard or generic form of iea, agreement to which in substance it insisted upon before work was provided, were essentially its claims to, or demands for, those terms and conditions for which it was bargaining collectively with the Union. AFFCO sought to short-circuit collective bargaining by seeking to achieve its objectives therein by insisting upon them as a condition of re-engaging individual employees for the current season.

[208] We do not accept Mr Wicks's submissions that AFFCO's dealings with the individuals (in June at Rangiuru for example) were not bargaining with them but amounted simply to what counsel categorised as "the initiation of bargaining". That is not a term of art in respect of individual bargaining, as it is under s 42 in respect of collective bargaining. In reality, however, what AFFCO did went well beyond any initiation. As the evidence discloses, it purported to invite the second plaintiffs to bargain with it and even bargained in respect of some relatively minor individual matters with which some individuals disagreed. AFFCO bargained with the second plaintiffs in the sense of specifying its preferred individual terms and conditions of employment, albeit about which it said it was prepared to negotiate and indeed about

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[62] Oliver Jones ed, FAR Bennion *Bennion on Statutory Interpretation: a Code* (6th ed, LexisNexis Butterworths, London, 2013) at 738-739: "It is a principle of legal policy that the law should be coherent and self-consistent. … The Court should therefore strive to avoid adopting a construction which involves accepting that on the point in question the law is not coherent and self-consistent".

which it did negotiate, and by entering into variations in limited respects and in some individual cases. These were matters relating to the terms and conditions of employment of the second plaintiffs, being those whom the Union was representing in the current collective bargaining. It was, however, undertaken without the knowledge (at the outset at least), let alone agreement, of the Union as the law required.

[209] Alternatively, we conclude that those actions of AFFCO undermined, or were at least likely to undermine, the collective bargaining and/or the authority of the Union in that bargaining. Once AFFCO had sufficient employees on its desired terms and conditions of employment recorded in individual agreements, there was no point in it continuing with the collective bargaining: it had been undermined by AFFCO to the point of ineffectiveness, at least until now. That is illustrated by AFFCO's lack of interest in further collective bargaining since these events occurred. Its plants are operating and employees are engaged on the terms and conditions it decided, albeit on ieas. Rendering ineffective and, from AFFCO's perspective, unnecessary, collective bargaining for a collective agreement, is clearly the undermining of that process. So, too, were AFFCO's strategies, in this regard, to undermine the authority of the Union in that bargaining. From being the entity authorised to represent its second plaintiff members in collective bargaining for a collective agreement, the Union's role in that collective bargaining has been undermined. That has been by a strategy that has seen many union members compelled to bargain individually with AFFCO, and to accept re-engagement substantially on its terms if those employees were to have continued employment.

[210] For the foregoing reasons, we find the plaintiffs' first and sixth causes of action proven. Its other causes of action will be for subsequent trial before a single Judge if that is still required.

Remedies

[211] Apart from declaring, as we have in this judgment, that AFFCO has breached those statutory provisions referred to in the plaintiffs' first and sixth causes of action, the plaintiffs submit that, in all the circumstances, AFFCO should be required by the

Court, even now, to restore the second plaintiffs to the situations in which they would have been, had those breaches not occurred. The plaintiffs claim compliance orders against the defendant. Whilst in principle we agree that this may also be an appropriate remedy, especially if AFFCO is unprepared to put right its wrongdoing, the precise form of compliance orders and the identities of the persons to whom they will relate is not entirely clear, as it needs to be. Nor has the case been made that AFFCO will not, even now, put right the wrongs it has committed.

[212] We deal with the problems currently inherent in coercive remedies sought. First, the precise identity of which second plaintiffs may be entitled to relief is in dispute. That caused the parties to agree, for the purpose of the hearing, that the reduced number of second plaintiffs identified in attachment A to counsel's agreed statement of facts were, without doubt, members of the Union at all relevant times, and employees of AFFCO at the end of the 2014/2015 season who wished to be re-engaged for the current season, at least initially on ieas based on the expired collective agreement. There may be others in the same category whose situations are yet to be clarified but who may be entitled to the same relief.

[213] Next, there are at least three plants whose unionised employees are not represented at all in this proceeding. Those are the plants at Wairoa, Moerewa and Horotiu, but in respect of which AFFCO has either adopted the same strategy as at the other plants, or was intending to do so. Therefore, unless the parties are now able to agree upon the identities of all those persons to whom this proceeding and its outcome will relate, it is premature to make precise compliance orders covering those other plants. The issues in this litigation cover union members at all plants and their solution should be similarly comprehensive.

[214] Next, despite having been directed by the Court to mediation,[63] no advice has been provided to us about the outcome of that mediation. It may be sufficient that we make declarations and give directions to further mediation in the expectation that the defendant, as a good corporate citizen, will acknowledge its responsibilities in law and put things right. That is the statutorily desirable and mandated manner of

[63] *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 93.

the resolution of employment disputes. It should be given a chance to work, even at this late stage, with the parties not only at arm's-length but apparently committed to further combat.

[215] It is appropriate to record, also in this regard, that the Court undertook efforts to arrange for private mediation (that is, not MBIE-arranged mediation), but that there has not been, even now, any indication from either party about that proposal, as we would have expected even of parties locked in litigation.

[216] The next complicating factor is that the parties will shortly be back before the Court in the separate but related issue (under file EMPC 245/2015) of whether AFFCO may obtain a declaration that collective bargaining has ended. Even a cursory reading of the relevant new legislation to apply to that case reveals that this may involve a reference to facilitated collective bargaining as a prelude to making any such order. If directed by the Court, that should provide the parties with an opportunity, assisted by an Employment Relations Authority Member, to settle their collective bargaining which would, in turn, resolve the question of the terms and conditions of the employment of the second plaintiffs, both prospectively and even retrospectively to the start of the current season.

[217] Finally, recognising that people can and do change their minds over a period, there may be some employees (union members) who are now sufficiently content with their terms and conditions of employment that they wish to stay with these. That also brings in the question of the non-unionised employees at AFFCO's plants who were on the same terms and conditions of employment but are not the subject of this litigation. As was referred to in the interlocutory injunction judgment, there may be real issues about AFFCO operating plants with teams of employees on different terms and conditions. These will need to be explored and resolved by the company and the Union.

[218] For all these reasons, we have provided the relevant declarations sought by the plaintiffs and reserve the other remedies of compliance orders for later determination by a single Judge if that is required. This can be sought by application

on reasonable notice if the parties cannot resolve these questions of the practical application of the Court's judgment between themselves.

[219] Finally, we direct the parties, whether jointly or individually (the Union in the case of all plaintiffs) to file memoranda within the next seven days addressing their compliance with the Court's earlier directions to mediation, the outcome of such mediation, and whether the Court should not exercise its power under s 188(2) of the Act to direct further mediation in the matter of this proceeding. Those memoranda must also deal with the proposals for Court-assisted private mediation set out above.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 11 am on Wednesday 18 November 2015