IN THE COURT OF APPEAL OF NEW ZEALAND

CA700/2015
[2016] NZCA 482

BETWEEN	AFFCO NEW ZEALAND LIMITED Appellant
AND	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED AND ORS Respondent

Hearing:	21 July 2016
Court:	Ellen France P, Harrison and Toogood JJ
Counsel:	P F Wicks QC and G P Malone for Appellant P Cranney and S R Mitchell for Respondent P R Jagose and J W Upson for Intervener, Meat Industry Association New Zealand Inc
Judgment:	6 October 2016 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] The Employment Relations Act 2000 prohibits an employer from unlawfully locking an employee out of employment.[1] A lockout is unlawful where the employer refuses or fails to engage employees for any work for which the employer usually employs employees with a view to compelling employees to accept terms of employment or comply with the employer's demands. The apparent statutory prerequisite for a lockout is the existence of an employment relationship between the employer and employees. The issue arising for our determination is whether at the time of alleged lockouts at meat processing plants the employer and seasonal workers were in an employment relationship or, if not, the relationship was of such a nature that the lockout provisions nevertheless applied.

[2] The meat processing industry is of a seasonal nature. Meatworks traditionally operate during a variable killing season of between six and 10 months' duration. During the off season, meat processors are not obliged to pay slaughter and processing personnel and others associated with seasonal operations. Those who

[1] All references to statutory provisions are to this Act unless otherwise stated.

work to the end of a season with the intention of applying for re-employment in the new season are free to find employment elsewhere while the plants are closed. There is a settled body of authority that the employment relationship does not continue through the off season.

[3] The New Zealand Meat Workers and Related Trades Union Inc (the NZMU or the union) claims that AFFCO New Zealand Ltd unlawfully locked out meatworkers from its processing plants in the central and upper North Island. The company and the meatworkers had been parties to a collective employment agreement which expired on 31 December 2013. But the terms of the expired agreement continued by operation of statute for a further year as individual agreements between the company and each worker. Before the 2015/2016 season commenced AFFCO advised the workers that it would not re-engage them for work unless they accepted its terms and conditions of employment set out in new individual agreements. The union alleges that the company's actions were taken for a coercive purpose.

[4] A Full Court of the Employment Court issued declarations that AFFCO's actions amounted to an unlawful lockout of its workers.[2] It found that the company and the meatworkers were in a continuous employment relationship which endured through the off season. Alternatively, the Court found that AFFCO's actions amounted to a refusal to engage prospective employees who are also protected against an employer's coercive conduct.

[5] This Court granted AFFCO leave to appeal against the decision under s 214 on the questions of whether the Employment Court erred in law in finding that the company:[3]

(a) engaged the seasonal meatworkers on employment agreements of indefinite duration with the result that employment was not terminated when they were laid off at the end of the killing season;

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2 *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2015) 10 NZELC 79-057 [EC judgment].

3 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 121.

(b) unlawfully locked out the workers in terms of s 82(1)(a)(iv) even if there was no employment relationship between AFFCO and the meatworkers in the off season; and

(c) presented a new form of individual employment agreement that did not comply with the Act.

[6] In view of its importance for the industry we granted Meat Industry Association New Zealand Inc (the MIA) leave to intervene on the first question.[4] Also, counsel did not address oral argument to the third question. The parties apparently agreed there were some issues with the Court's finding that the new form of individual agreement presented by AFFCO was not statutorily compliant. In any event, given our conclusion on the second question, it is unnecessary for us to decide the third question.

Statutory framework

[7] We start by identifying the relevant statutory provisions. A lockout is defined by s 82 as meaning:

> **82 Meaning of lockout**
>
> (1) In this Act, lockout means an act that—
>
> (a) is 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) is done with a view to compelling employees, or to aid another employer in compelling employees, to—
>
> (i) accept terms of employment; or
>
> (ii) comply with demands made by the employer.
>
> …

[4] The MIA is a voluntary trade association representing meat processors, marketers and exporters. It is composed of about fifty corporate members and affiliates including AFFCO.

[8] The Act includes this non-exclusive definition of employee:

> **6 Meaning of employee**
>
> (1) In this Act, 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—
>
> (i) a home worker; or
>
> (ii) a person intending to work; …

[9] By s 5, a "person intending to work" is defined as "a person who has been offered, and accepted, work as an employee".

[10] As noted, a lockout requires proof of two elements: (a) an act by the employer in refusing or failing to engage employees for any work "for which the employer usually employs employees"; and (b) the act must be carried out with a view to compelling employees to accept terms of employment or comply with demands. Mr Wicks QC for AFFCO accepts, as he did in the Employment Court, that the second element was satisfied here. The contest relates to the first element: do the seasonal meatworkers fall within the meaning of employees as it is used in s 82(1)(a)(iv)?

[11] Also significant in the legislative context is s 3, which sets out the object of New Zealand's current employment regime:

> **3 Object of this Act**
>
> The object of this Act is—
>
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
>
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
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> (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; and

(v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and

(vi) by reducing the need for judicial intervention; and

…

(Our emphasis.)

[12] Finally, without reciting the provisions in full, ss 31 and 32 affirm the statutory objective of compliance with the duty of good faith in relation to collective bargaining and, in particular, the obligations on a union and employer to use their best endeavours to enter into an arrangement — as soon as possible after initiating bargaining — which provides a process for conducting the bargaining efficiently and effectively.

Facts

[13] The relevant facts are agreed and can be stated shortly.

[14] The collective agreement between AFFCO and the seasonal meatworkers at its plants came into force on 1 May 2012 and expired on 31 December 2013.[5] However, because the parties had initiated bargaining for a replacement collective agreement before its expiry, the existing agreement continued in force for a period of 12 months while bargaining continued — that is, until 31 December 2014.[6] The parties had not made substantial progress by that date. The company employed the meatworkers for the balance of the 2014/2015 season under individual employment agreements based on the expired collective agreement without any additional or different terms of conditions.

[15] AFFCO's meat processing plants affected by the present appeal are at Rangiuru, Imlay, Manawatu, Wairoa, Moerewa and Horotiu.[7] By way of example,

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5 In this respect we should recite what is perhaps obvious to some — meat processing companies also employ permanent or non-seasonal workers.

6 Employment Relations Act 2000, ss 53 and 61(2).

7 EC judgment, above n 2, at [1].

the Rangiuru plant closed for the season on 17 April 2015. From 2 June 2015 the company wrote to workers who had been employed at the plant during the previous season and had indicated a wish to recommence work there for the 2015/2016 season. AFFCO advised the workers of its intention to reopen the plant from 22 June 2015 and invited them to attend introduction presentations for a new intended individual employment agreement at the plant with effect from 8 June 2015.

[16] Each person who attended the introduction presentations was provided with an information document and a proposed individual employment agreement. The presentation materials advised of AFFCO's requirement that each employee sign an employment agreement before commencing work; and that none of the previous employment agreements, including those based on the expired collective agreement, continued automatically past the end of the last off season. The workers were advised of their right to independent advice about the new individual agreements. The relevant provisions of the new 17-page individual agreements are summarised in the Employment Court's decision.[8]

[17] On 9 June 2015 the NZMU applied to the Employment Court for substantive declaratory relief on the ground of AFFCO's unlawful lockout of its workers. On 17 June 2015 the Court declined an application by the union for interim relief on balance of convenience grounds.[9] Following the judgment almost all union members at Rangiuru signed the new individual agreements without seeking any changes to those which had been offered. They did so without prejudice to their rights. AFFCO then engaged them for employment for the 2015/2016 killing season commencing on 22 June 2015.

[18] The NZMU's second amended statement of claim pleaded six causes of action. In the event, it succeeded on the sixth. In summary, the union alleged that:

(a) the seasonal workers are employees within the statutory definition and are usually engaged by AFFCO for work for which it usually employs them;

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8 At [21]–[22].

9 *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 94, (2015) 10 NZELC 79-056.

(b) the workers are also employees within the extended statutory meaning of a "person intending to work" under ss 5 and 6;

(c) the workers are AFFCO's employees within the meaning of the expired collective agreement and, even if not, *they have rights under the expired agreement including job security and re-engagement rights*;

(d) AFFCO proposed to discontinue their employment or break their employment agreements — namely the individual agreements based on the expired collective agreement — and refused or failed to engage them for work for which it normally employs them;

(e) AFFCO's discontinuance or refusal or failure to engage was done with a view to compelling the workers to accept the company's terms of employment and comply with its demands; and

(f) the lockout was unlawful for a number of reasons, including that it did not relate to bargaining for a collective agreement which would bind each of the employees concerned (s 83(b)(i)) and did not comply with the statutory notice requirements (s 91).

(Our emphasis.)

Employment Court

[19] The Employment Court opened its assessment of the NZMU's substantive claim of an unlawful lockout by observing that it was affected by the issue of whether the workers had continuous employment of indefinite duration.[10] Alternatively, the question was whether they were no longer AFFCO employees after being laid off at the end of the 2014/2015 season and were thus applicants for new employment for the succeeding 2015/2016 season.

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10 EC judgment, above n 2, at [30].

[20] The Court articulated the union's argument as being that during the off season the workers were and continued to be AFFCO employees under individual agreements based on the expired collective agreement pursuant to s 61(2)(a). That is because a seasonal lay-off is not a dismissal or other termination of employment; instead it is a defined although variable period in which the company does not require the services of those employees and for which they are not paid. Nevertheless, at the end of that off season the workers have contractual rights of re-engagement on continuing terms and conditions for the following season.

[21] The Court's reasoning was undertaken in a series of unconnected stages. First, the terms and conditions of the collective agreement were scrutinised extensively on the starting premise that each party could identify terms favouring continuous or discontinuous employment.[11] However, the Court's analysis was inconclusive. It found that while the contractual provisions generally favoured continuity, the provisions were not decisive or indeed the only relevant factor.[12]

[22] Second, the Court reviewed the contractual context taking into account the specific factors that (a) AFFCO's plants are at least significant and often predominant or sole workplaces in provincial towns, particularly for people trained and experienced in slaughtering and processing butchery;[13] (b) the off season at most AFFCO plants is for about two months a year;[14] (c) most if not all of the work performed is semi-skilled in the sense that it is learned on the job but experience brings attributes of speed and skill which increase both the quantity and quality of production;[15] (d) the skills attained by employees are not usable elsewhere;[16] and (e) a "reality test" is required when evaluating working relationships between employees and employers.[17]

[23] Third, following its comparison of the expired collective agreement and AFFCO's new individual agreements and conclusion that the company's new form

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11 At [33]–[84].
12 At [83].
13 At [86].
14 At [87].
15 At [88].
16 At [89].
17 At [90], citing *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

did not comply with the Act,[18] the Court addressed the statutory definitions of "employee" and "employer".[19] The Court found that the statutory terms of s 82(1)(a)(iv) may extend to cover workers who are not only subject to a current employment agreement but to those who have not yet been offered employment even if there is no ongoing employment relationship in the off season.[20] We interpolate to note that this step in the Court's reasoning did not appear to relate directly to the continuity argument but to the NZMU's alternative argument.

[24] Fourth, following its introductory acknowledgement of the weight of authority favouring discontinuity, the Court surveyed the authorities in detail.[21] Ultimately, however, the Court did not appear to derive assistance from the case law. Decisions favouring discontinuity were distinguished on the ground that:

> [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 [the Labour Court]. 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.
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> [176] By contrast now, not only is there a combination of collective agreements and [individual employment agreements] 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.

[25] Fifth, the Court compared the provisions of the collective agreement with analogous provisions found in the industry awards at issue in the previous cases and found there were differences in material provisions.[22]

[26] Sixth and finally, the Court determined the continuity question by a general reference to the relevant contractual terms and the conduct of the working

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18 At [91]–[108].
19 At [109]–[117].
20 At [116].
21 At [118]–[161].
22 At [162]–[173].

relationships in practice.[23] Its conclusion was that AFFCO engaged meatworkers on employment agreements of indefinite duration,[24] noting that:

> [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.
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> …
>
> [178] … To maintain, as AFFCO does, that its recent current arrangements for the employment of meatworkers reflect those traditional patterns reinforced by court decisions 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.

[27] The Court acknowledged that the work undertaken was of a seasonal nature.[25] The off season was, however, a period when by agreement the workers will not be paid or perform work. They will enjoy an expectation of re-engagement despite the clear contractual reference to being "re-employed". And the fact that some workers may not elect "to put themselves forward for re-engagement" in the next season was simply a decision to terminate the employment relationship.[26] Nothing was said about workers accepting alternative employment during the off season; the Court noted earlier in the judgment that many meatworkers take up interim positions with different employers pending the commencement of slaughter — often in the horticulture industry — whereas others live off accumulated earnings.[27]

[28] The Court issued declarations on the NZMU's sixth cause of action that:

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23 At [177].
24 At [178].
25 At [179]–[180].
26 At [180].
27 At [87].

(a) AFFCO unlawfully locked out the meatworkers who were covered by the expired collective agreement and were laid off from their respective plants at the end of the 2014/2015 season;

(b) AFFCO procured individual employment agreements by way of unlawful lockouts on the basis that the meatworkers were AFFCO's employees when offered work for the 2015/2016 season; and

(c) alternatively, even if the workers were not otherwise AFFCO employees, they were locked out unlawfully.

First question

(a) Jurisdiction

[29] By s 214(1) this Court has jurisdiction to hear appeals from decisions of the Employment Court on questions of law except on the construction of a collective or individual employment agreement. However, our intervention is justified if we are satisfied that the Employment Court has erred in its reasoning process adopted to justify its conclusion or has applied an incorrect principle of contractual interpretation.[28] In determining whether the Court has erred in this way it is material that parties in that jurisdiction are entitled to a consistent approach to construction of largely similar contractual instruments.[29]

[30] As noted, the parties' relationships were governed by individual agreements based on a collective agreement when the employees were laid off at Rangiuru in April 2015. Our focus must be on the terms of the collective agreement. We agree with the Employment Court that:

> [34] … 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

[28] *Bryson v Three Foot Six Ltd*, above n 17, at [24]; *Secretary of Education v Yates* [2004] 2 ERNZ 313 (CA) at [20]–[21]; *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131 at [23]. But note that leave to appeal the latter decision of this Court has been granted: *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2016] NZSC 84.

[29] *Service and Food Workers Union Nga Ringa Tota v Cerebos Gregg's Ltd* [2012] NZCA 25, (2012) 9 NZELR 226 at [46].

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

(b) Principles of contractual interpretation

[31] The Employment Court was required to apply these principles when determining the question of whether the collective agreement provided for continuity of the seasonal workers' employment:

(a) Contracts of employment are subject to the same rules of interpretation as apply to all contracts.[30] The express terms are the central focus of an interpretative assessment. However, that exercise cannot be isolated from a contextual inquiry which is a necessary element of the interpretative process.[31] Contracts are not made in a vacuum. And there is no presumption in favour of an ordinary meaning.

(b) The interpretative process is thus of an integrated nature. A court must consider the contractual terms within the context in which they were settled including all the facts and circumstances known to and likely to be operating on the parties' minds: what the reasonable and properly informed person being apprised of all the background material would consider relevant in determining the meaning to which the parties intended to be legally bound.[32] Within that inquiry, knowledge includes the genesis of the transaction and the market or industry in which the parties are operating.[33]

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30 *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, (2010) 7 NZELR 650.

31 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63].

32 *Vector Gas Ltd v Bay of Plenty Energy* [2010] NZSC 5, [2010] 2 NZLR 444 at [19] per Tipping J.

33 *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL) at 995–996 per Lord Wilberforce.

(c) Integration of relevant case law into the contractual context is a logical extension of the current emphasis on business commonsense as a guide to interpretation.[34] While decisions on disputes between certain parties cannot determine the interpretation of contracts made between other parties at a later date,[35] the earlier decisions may well be persuasive where the provisions at issue in a later contract use similar language, in a similar trade and in similar circumstances.[36] Earlier judicial authority and practice on the construction of similar contracts is relevant where the words used in a particular contract cannot properly be understood without reference to meanings ascribed to them in previous judgments.[37]

(c) Context

[32] Applying those principles to the present case, the central feature of the context and genesis of the collective agreement is the body of case law which has determined disputes about continuity of employment in the meat industry. Parties engaged in bargaining for a collective employment agreement must be presumed to have knowledge of decisions on interpretation of relevant provisions in earlier contractual instruments or awards. The precedential weight of such decisions is not the result of the ordinary application of the doctrine of stare decisis; it is, rather, that the notoriety of earlier decisions is likely to assume factual authority in the minds of the bargaining parties such that it is presumed to have private legal authority through the law of contract.

[33] Mr Cranney for NZMU submitted that the previous case law is largely irrelevant to the interpretative inquiry, which he says should be confined to the four corners of this collective agreement. However, the Employment Court acknowledged the strength of AFFCO's argument based on the earlier authorities favouring discontinuity and the parties' development of a reliance upon principles

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34 See generally Kim Lewison *The Interpretation of Contracts* (6th ed, Sweet & Maxwell, London, 2015) at [4.07].

35 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) at 256 per Lord Morris.

36 *Enterprise Inns Plc v Forest Hill Tavern Public House Ltd* [2010] EWHC 2368 (Ch) at [22].

37 *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1999] AC 266 (HL) at 274 per Lord Hoffman.

contained in those judgments to govern their employment relations.[38] These comments, together with the Court's observation that it would depart from this authority rarely and then only on a strictly principled basis, were made in its survey of the leading decisions. We are satisfied that the real significance of earlier statements of principle lies within the contextual framework, not within a separate analysis of whether the authorities remain good law. We agree with Mr Jagose for the MIA that it is irrelevant to the contextual inquiry whether or not the earlier decisions are correct. In accepting that submission, we are not suggesting, however, that those cases might have been wrongly decided.

[34] It is unnecessary for us to replicate the Employment Court's survey of the authorities. We need concern ourselves with three decisions only. In *New Zealand Meat Processors, etc, IUW v Alliance Freezing Co (Southland) Ltd* (*Alliance* 1990) this Court was asked to determine the legal effect of an "all year round" employment assurance in a contractual provision.[39] The Court held that the contract could not prevail over a statutory award. Its provisions were "truly inconsistent with the co-existence of a contractual provision for permanent employment" of six workers at Alliance's Lorneville plant.[40] Among the relevant factors supporting the finding of seasonal engagement were the award's provisions for lay-offs, re-employment to be based on departmental and/or group seniority, and a requirement of a seniority list to be prepared for each department or group prior to commencement of seasonal lay-offs.

[35] The Employment Court acknowledged *Alliance* 1990's ratio that "a seasonal lay-off amounted to a termination of the employment of a meatworker who had been employed during a particular season".[41] However, it later distinguished *Alliance* 1990 and other authorities on the ground that there were "true and significant distinctions between the current case and those decided by reference to an award".[42]

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38 EC judgment, above n 2, at [118]–[119].

39 *New Zealand Meat Processors, etc, IUW v Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143 (CA) [*Alliance* 1990] at 144–145.

40 At 150.

41 EC judgment, above n 2, at [124].

42 At [173].

[36] The two other relevant decisions are of the Full Court of the Employment Court. In *New Zealand Meat Workers IUW v Richmond Ltd* (*Richmond*) a majority found, following *Alliance* 1990, that a meatworker's contract of employment is terminated when he or she is laid off at the end of a killing season.[43] A new contract of employment is entered into when the worker is re-employed at the commencement of the succeeding killing season. The employer is subject to an obligation to offer new employment to a qualifying meatworker at the start of the next killing season. We note the Employment Court's disagreement in the present case with the majority's judgment in *Richmond* that the obligation of re-engagement in order of seniority was consistent only with a previous dismissal or termination of employment and a prospective new employment.[44]

[37] In *New Zealand Meat Workers' Union Inc v Alliance Group Ltd* (*Alliance* 2006) the Full Court followed *Richmond*, noting that the relevant provisions of the award at issue in *Alliance* 1990 were effectively repeated in the collective agreement at issue and that the parties had continued or adopted materially identical provisions.[45] It found the reference to "re-employment" was to entering into an employment contract with a previous worker whose employment had been terminated; it articulated the important point that such a provision would be unnecessary, given its protection of seniority rights, if the employment remains continuous through the off season.[46] Again, the Employment Court in this case expressed its disagreement with the Full Court's finding in *Alliance* 2006 even though, we repeat, the relevant award provisions were materially the same as in *Alliance* 1990.[47]

[38] We agree with Messrs Wicks and Jagose that the Employment Court erred in its treatment of these authorities. They affirm the industry standard of termination of the employment relationship between meat processor and seasonal worker at the end

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43 *New Zealand Meat Workers IUW v Richmond Ltd* [1992] 3 ERNZ 643 (EmpC) [*Richmond*] at 692.

44 EC judgment, above n 2, at [148]–[150].

45 *New Zealand Meat Workers' Union Inc v Alliance Group Ltd* [2006] ERNZ 664 (EmpC) [*Alliance* 2006] at [103].

46 At [106].

47 EC judgment, above n 2, at [160].

of each killing season.[48] They provided the relevant background of discontinuity against which this collective agreement was negotiated. The parties must be assumed to have bargained on that understanding of the law: NZMU was in fact a party to the three leading decisions which establish the discontinuity principle.

[39] The Employment Court interpreted the relevant contractual provisions in isolation from this decisive background factor and instead treated socio-economic factors as the relevant context. We agree with Mr Jagose that the Court's approach created a false dichotomy: by progressing directly to a detailed clause-by-clause dissection to determine whether each provision on its own was consistent with continuity or discontinuity, the Court omitted to undertake an integrated analysis by reference to settled authority. This exercise was essential if the Court was to be properly informed of the meanings of critical phrases to which the parties intended to be bound and place itself in a position to determine the facts and circumstances likely to be operating on their collective minds. The Court's later and extensive analysis of the leading cases was undertaken in a vacuum unrelated to this interpretative inquiry.

(d) Collective agreement

[40] The Court's failure to adopt this correct starting point of contractual interpretation led it into material error, as is illustrated by its analysis of cls 29, 30 and 31 and Appendix A of the collective agreement.[49]

(i) Clause 29

[41] Clause 29 is, as Mr Wicks submits, of critical importance:

> **29. SEASONAL EMPLOYMENT**
>
> 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.

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48 *Alliance* 1990, above n 39, at 150; *Richmond*, above n 43, at 692; *Alliance* 2006, above n 45, at [102]–[104].

49 EC judgment, above n 2, at [57]–[80].

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).

....

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.

(Our emphasis.)

[42] Clause 29(a) is unequivocal in echoing the words of this Court in *Alliance* 1990: seasonal employees are employed for a season. "Re-employment" is just what the Employment Court said it means in *Richmond* — it could only mean employing a worker again after earlier terminating the worker's employment with the prospect of a new employment relationship. References to "re-engagement" elsewhere in the agreement must be taken to have a synonymous meaning.[50] And, again, in *Alliance* 1990 this Court gave weight to a near identical provision — that "layoffs and re-employment will be based on departmental and/or group seniority" — as being inconsistent with a contractual provision for continuous employment.[51]

[43] Finally, cl 29(e) emphasises that "upon termination at the end of the season" the employee is responsible for certain actions. It is not apparent to us why the Employment Court did not discuss this phrase. In its context the word "termination" must refer to termination of employment. The ordinary meaning of the word is the act of bringing something to an end or discontinuing it. We agree with Mr Wicks that it could not be more explicit in emphasising the coincidence between the end of

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50 See [43] of this judgment.
51 *Alliance* 1990, above n 39, at 148.

the killing season and the end of the employment relationship. Against this analysis the Court was wrong to treat cl 29 as favouring continuity.

(ii) Clauses 30 and 31

[44] We add that cls 30 and 31 reinforce the effect of cl 29. The former refers to security of employment and provisions relating to "re-engagement" once an employee has completed the induction process and signed and accepted terms of employment; the latter refers to seniority and again to "re-employment" being based on that criterion. The Employment Court regarded it as significant, and indicative of continuous employment, that cl 30 refers to seniority beginning with "their commencement of employment". The Court said that, as it is not logical that seniority could begin with each new season, the clause suggests continuity of employment.[52] But read against an established background of discontinuous employment, the expression must be taken to refer to the date at which the employee first began to work for the employer. Emphasis is given in cl 31(c) to preparation of a seniority list being made available "prior to the commencement of end of season lay-off and again at re-engagement at the commencement of the season".

(iii) Appendix A

[45] We agree with Mr Wicks that the Employment Court also erred in its approach to construction of the redundancy provisions in Appendix A to the collective agreement. It materially states:

> **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
>
> …

[52] EC judgment, above n 2, at [167].

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.

[46] The Court noted that cl 1(d) excludes redundancy for a seasonal lay-off. But then it said that the definition of redundancy was confused by the reference to coverage in cl 2, and observed that:[53]

> … if a seasonally laid off employee is entitled to the benefits of the redundancy provisions … in the same way as he or she would be if working during the season, this points to continuous rather than discontinuous employment.

[47] Mr Cranney sought to support the Employment Court's construction. But, applying the correct principles of interpretation, Appendix A does not create confusion or inconsistency when it is read in the context of an established regime of termination of employment at the end of a killing season and the expectation of re-employment at the beginning of the next season. Clause 1(b) extends the application of the redundancy provisions to a seasonal employee who would not be covered otherwise by them if his or her services became redundant during the period of non-employment in the off season. An example would be the closure of a killing chain by an employer during the off season. A long-serving seasonal employee whose services became surplus as a result, and for whom work at the start of the next season was no longer available, would not otherwise be entitled to redundancy compensation.

[48] Clause 1(d) recognises that the employment of a seasonally laid-off employee terminates at the end of the season and provides that termination at the end of the season does not create a redundancy situation requiring payment of compensation.

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[53] At [75].

Clause 2(b) simply refers to the different situation envisaged by cl 1(b) where the company does not offer re-employment to the seasonal worker because he or she has become surplus to the company's needs. If that event occurs, the worker will be entitled to redundancy. As Mr Wicks pointed out, cl 1 essentially replicates the definition of redundancy found in s 184(5)(a)(ii) of the now repealed Labour Relations Act 1987. When read in its entirety, Appendix A was simply extending the redundancy provisions to include seasonal workers by using language which was common to those workers who have continuity and those who do not.

(e) Conclusion

[49] AFFCO, the union and the workers are deeply embedded in an industry with a long history of collective bargaining and legal disputes, many of which have been resolved in the courts. In the light of this background, a reasonable and properly informed third party would look for clear evidence of the parties' intention to depart from the industry standard of interseasonal termination of employment recognised by earlier decisions. For example, in *Hughes v Riverlands Eltham Ltd* the Employment Court considered a collective employment agreement containing this express provision:[54]

> Although the work available to many employees is of a seasonal nature, for the purposes of continuity of employment, *all employees shall be deemed to be permanently employed* by the employer pursuant to the terms of this contract, although some may not be required to attend work nor be entitled to receive any remuneration during seasonal lay-off. Therefore, the employer shall continue to engage every employee in each season, subject only to the provisions for termination and redundancy.
>
> (Our emphasis.)

This clause indicates a clear intention for workers performing seasonal tasks to enjoy continuity of employment between periods of active engagement. It conveys in unequivocal language to a reasonable and properly informed third party — and therefore the courts — that the contracting parties did not intend to be bound by the authorities.

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[54] *Hughes v Riverlands Eltham Ltd* EmpC Wellington W38/96, 18 September 1996 at 3.

[50] Conversely, the collective agreement in the present case contains clauses that are explicable only if the parties intended to terminate employment at the end of each season. For example, the extended definition of "continuous service" in cl 23(d) would be unnecessary if employment continued during the off season. The clause provides that service for at least two calendar months in each consecutive season can count towards long service leave, or less than two months provided the employee has not refused an employment offer earlier in the season. It expressly permits the fiction of continuity for the limited purpose of calculating a special holiday entitlement that would otherwise be defeated by the industry standard of interseasonal termination. The Employment Court said this clause "points more to continuous than to discontinuous employment".[55] However, when construed in context, the clause points more to discontinuity than continuity.

[51] We note also that the Court's decision omits to take into account certain other elements which are fundamental to the existence of an employment agreement. For example, the Court accepted that a seasonal worker does not perform any services for the employer during the off season; and that the employer is not bound to pay wages in this period. As Mr Wicks observed, the judgment under appeal creates a commercial anomaly in extending through the off season AFFCO's obligations under cl 16 to make minimum weekly payments, despite the seasonal workers' undisputed freedom to take employment elsewhere during the off season. Another example is the mutual obligation imposed on parties to a continuous employment relationship to give notice of termination of employment. As Mr Wicks emphasised, that obligation is absent here. The only inference is that the parties intended termination to occur mechanically at the end of the period of seasonal employment, subject to surviving rights to be offered employment for the next season.

[52] We reject Mr Cranney's submission, which found favour with the Employment Court, that the earlier authorities are of little assistance because they were decided in a different era, in different circumstances and on materially different employment instruments. When the relevant provisions of this collective agreement are considered against the context of settled authority, we are satisfied that the result favours discontinuity. The fact that the leading cases were decided in a different era

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[55] EC judgment, above n 2, at [50].

cannot of itself diminish or affect their authority. The core circumstance was identical: whether the seasonal workers enjoyed continuity of employment through the off season.

[53] Furthermore, the relevant employment provisions considered in the leading cases were materially the same or similar to these provisions. In *Alliance* 2006 the Full Court of the Employment Court considered a negotiated collective employment agreement containing terms derived from centrally-bargained award provisions. The Court was right to find there was no proper basis to distinguish *Alliance* 1990 simply because that case concerned an award. The latter decision was not only binding in this case; it was also an integral feature of the background matrix.

[54] The first question must be answered in the affirmative: the Employment Court erred in finding that AFFCO engaged the seasonal meatworkers on employment agreements of indefinite duration.

Second question

[55] Our answer to the first question is not, however, decisive of this appeal. The question remains whether the Employment Court correctly found that AFFCO unlawfully locked out its workers even if they were not in an employment relationship during the off season.

(a) Prospective employees

[56] Mr Cranney originally sought to uphold the Employment Court's finding on this question by maintaining an argument that AFFCO's seasonal workers fell within the extended definition of an employee as persons intending to work.[56] We agree with Mr Wicks that the extended definition does not apply to prospective workers who intend to work but are not formally employed.

[57] In *Tucker Wool Processors Ltd v Harrison* a Full Court of this Court held that an identical extended definition under the Employment Contracts Act 1991 was restricted to those who have formally entered into an employment agreement but are

[56] Employment Relations Act, s 6(1)(b)(ii).

yet to begin work.[57] The Employment Court in this case apparently regarded *Tucker Wool Processors Ltd* as authority for the proposition that a worker who had not been offered and accepted employment could fall within the definition of an employee.[58] But the statutory definition prescribes the formal ingredients for common law agreement. AFFCO's seasonal meatworkers had not agreed in June 2015 to return for the next killing season and nor were they obliged to return. Their subjective intention to do so is irrelevant.

(b) "Unless the context requires otherwise"

[58] However, before us Mr Cranney focussed on the qualifying words "unless the context requires otherwise" as used in s 6. The question is whether the context requires the definition of employees to extend to seasonal workers who are not parties to a continuous contract of service with AFFCO. The Employment Court touched on this point without developing it further when asking rhetorically within its continuity inquiry whether the "context" of the use of the words "employee" and "employer" in s 82 requires a different meaning to that provided in ss 5 and 6.[59]

[59] We see no error in the Employment Court's approach. Notwithstanding that seasonal workers were not employed during the off season, the collective agreement created ongoing and enforceable contractual rights and duties. Among them, as we have already addressed, were the workers' redundancy rights and AFFCO's obligation to re-employ according to seniority. In Mr Cranney's submission, the context requires former or seasonal workers to be considered as "employees" within the s 82 meaning of a lockout where the employer owes an existing contractual obligation to make an offer of re-employment; and where it refuses to do so with a view to compelling their acceptance of new terms and for the purpose of defeating ongoing collective bargaining.

[60] We agree with Mr Cranney. It is commonplace for contracts to impose obligations on employees which subsist beyond the working relationship, such as

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57 *Tucker Wool Processors Ltd v Harrison* [1999] 3 NZLR 576 (CA) at [38]–[39].
58 EC judgment, above n 2, at [110]–[112].
59 At [115].

provisions for confidentiality and restraint of trade. Likewise, an employer can assume obligations that fetter its future conduct.

[61] In *Wellington Area Health Board v Wellington Hotel, Hospital, Restaurant and Related Trades Union* this Court upheld the then Labour Court's finding that the terms of a redundancy agreement became terms of the contract of employment which endured following termination of the obligations to perform and pay for work done.[60] Therefore a breach of the obligation to offer employment would give rise to a personal grievance just as any breach of the terms of that contract prior to termination of the respective obligations. And, within the context of the meat industry itself, the Employment Court has accepted that collective agreements can create contractual obligations which subsist between seasons of active employment.[61] Indeed, Mr Wicks accepted in argument on the first question that the collective agreement imposed ongoing duties on AFFCO which survived termination of the contract of seasonal employment.

(c) Collective agreement

[62] A further review of the operative clauses to the expired collective agreement confirms the Employment Court's conclusion:

(a) Each employee is assigned seniority in accordance with the date of his or her commencement of employment. The parties are agreed that means the day the employee first began working for AFFCO — not the start of his or her most recent season. The employer is obliged to draw up a seniority list for each department or site and provide it to the relevant union delegate both at the commencement and end of each season.

(b) By cl 31(h) AFFCO is to determine suitability for re-employment subject only to cl 31(b), which states that the presumptive obligation to re-employ on the basis of seniority is qualified by the words "all

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60 *Wellington Area Health Board v Wellington Hotel, Hospital, Restaurant and Related Trades Union* [1992] 3 NZLR 658 (CA) at 660–661.

61 *Richmond*, above n 43, at 700; *Cruikshank v Alliance Group Ltd* [1992] 3 ERNZ 936 (EmpC) at 949–950.

things being equal". AFFCO may take into account experience, employment record, competency and skills of individual workers as well as the need to maintain a balanced and efficient workforce, subject to mandatory consultation with the union delegate.

(c) By cl 31(g), the workers have a right for "any dispute" to be determined under the contractual dispute provisions. We agree with Mr Cranney that this includes any alleged breach of the re-employment obligation.

(d) Other provisions survive seasonal termination, including records of disciplinary action, calculation of continuous service for the purposes of long service leave and calculations of continuous service for sick leave. As mentioned above, Appendix A provides comprehensive off season redundancy rights if AFFCO fails to make seasonal employment available.

(d) Lockout

[63] Stripped of words not relevant to this case, s 82 provides that:[62]

> … lockout means an act that … is the act of an employer … in breaking some or all of the employer's employment agreements; or … in refusing or failing to engage employees for any work for which the employer usually employs employees; and … is done with a view to compelling employees … to accept terms of employment; or … comply with demands made by the employer.

When it is accepted that seasonal workers are employees to whom continuing obligations are owed during the off season, including an obligation to re-employ them at the start of the new season, the application of s 82 to such employees is obvious, notwithstanding that they fall outside the default definition in s 6(1). The context requires such an interpretation.

[64] We are satisfied that AFFCO's conduct in June 2015 effectively defeated the existing rights of its seasonal employees to re-employment on the terms set out in the

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[62] See [7] of this judgment.

collective agreement and incorporated within the individual agreements. Here, as the Employment Court noted,[63] the new employment agreement offered by AFFCO abolishes completely the long-standing concept and significance of seniority, whereas by cl 31(b) of the collective agreement lay-offs and re-employment are presumptively based on departmental or site seniority. The new agreement removes all references to seniority, providing instead that final suitability for termination and re-employment will be decided by AFFCO without any obligation to consult.

[65] It is within this context that s 3(a)(ii) and (iii) assume particular importance. The Act's object is to build productive employment relations through the promotion of good faith in all aspects of the employment relationship by, among other things, acknowledging and addressing the inherent inequality of power in employment relationships and promoting collective bargaining. In *Capital Coast Health Ltd v New Zealand Medical Laboratory Workers Union Inc* this Court emphasised the central importance of collective negotiations to industrial relations in New Zealand, noting that once the process is underway with the participation of an authorised representative it may not be conducted directly with any represented party.[64]

[66] It is obvious that AFFCO's objective was to undermine or compromise the parallel process of negotiating a collective agreement which was then underway with the union. The company's purpose was to fragment the future bargaining strength of the workforce by isolating individual workers. By this means it took advantage of the inherent inequality of its relationship with the seasonal workers who were members of its captive workforce and to whom it owed existing duties to offer re-employment. In this respect we rely on the Employment Court's factual finding that:

> [86] [AFFCO'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

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63 EC judgment, above n 2, at [91]–[92].

64 *Capital Coast Health Ltd v New Zealand Medical Laboratory Workers Union Inc* [1996] 1 NZLR 7 (CA) at 19.

> 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.

[67] In this context the relationship had at least some of the hallmarks of a formal employment relationship. We are satisfied that the collective bargaining regime was designed to redress the inequality inherent in these particular circumstances. The application of the lockout provisions to the seasonal employees is consistent with that view and with the approach this Court took in *Tucker Wool Processors Ltd*.[65]

[68] We add our rejection of Mr Wicks' submission that extending the meaning of a lockout to seasonal workers with an existing right to re-employment would produce an absurd result — namely, that former employees who do not accept an offer would fall within the corresponding meaning of "strike" as an act of a number of employees "in refusing or failing to accept employment for work in which they are usually employed".[66] This example is not a necessary corollary of our interpretation of the statutory provisions relevant to this case and cannot foreclose the extended meaning of lockout required by the context. In the present case AFFCO has no right under the collective agreement to compel former employees to accept re-employment, and it is difficult to see how such a right could be compatible with the current legislative regime.

[69] Mr Cranney cited *Ross v Moston*, an old decision of the Court of Arbitration in which Stringer J held that the statutory definition of a strike turns on the "legal character and consequences" of the workers' joint conduct; it is immaterial whether or not the actual cessation of work involves a breach of contract.[67] Likewise, the legal character and consequences of an employer's conduct is crucial to the interpretation of the meaning of lockout under the Act, which does in fact involve an apparent breach of contract. As we have emphasised, the collective agreement created a right to apply for re-employment, with a correlative duty on AFFCO to

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65 *Tucker Wool Processors Ltd v Harrison*, above n 58.
66 Employment Relations Act, s 81(1)(a)(iv).
67 *Ross v Moston* [1917] GLR 87 at 87.

offer re-employment subject to certain conditions. That is the operative element to the present context.

(e) Conclusion

[70] It follows that we are satisfied the contractual and legislative context requires the word "employees" in s 82 to include the seasonal workers in this case. The unlawful lockout provisions must extend to and protect former employees — in this case, seasonal workers — who enjoy existing contractual rights to an offer of re-employment from a party refusing to engage them unless they accept new terms of employment inconsistent with those existing rights. It is the enduring nature of the seasonal workers' entitlements and the employer's obligations which survive outside of a current employment relationship that provide the necessary contextual justification for extending the scope of the unlawful lockout provision in this case.

[71] In the result, the meaning of a lockout in s 82 extends to the acts of AFFCO in refusing or failing to engage seasonal workers for any work for which it usually engages them where it is done with the purpose, as it was here, of compelling them to accept its terms of employment. Accordingly, we answer the second question in the negative.

Result

[72] We answer the two questions of law as follows:

(a) The Employment Court erred in finding that AFFCO engaged the seasonal meatworkers on employment agreements of indefinite duration with the result that employment was not terminated when they were laid off at the end of the killing season.

(b) The Employment Court did not err in finding that AFFCO unlawfully locked out the workers in terms of s 82(1)(a)(iv) even if there was no employment relationship between AFFCO and the meatworkers in the off season.

[73] In the result the appeal is dismissed.

[74] In the normal course costs follow the event. However, the primary thrust of argument before us was on the first question on which AFFCO was successful. The NZMU succeeded on the second question but on an argument which was not fully articulated until the appeal was heard. In our judgment each party should bear their own costs. The MIA did not seek costs. There will be no order as to costs.

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