IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 7
EMPC 152/2015

IN THE MATTER OF	an application for compliance orders
BETWEEN	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INC First Plaintiff
AND	THE PERSONS LISTED IN SCHEDULE A Second Plaintiffs
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing:	25-27 January 2016 (heard at Auckland)
Appearances:	P Cranney and S Mitchell, counsel for the plaintiffs P Wicks QC and G Malone, counsel for the defendant
Judgment:	11 February 2016

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] On 18 November 2015, a full Court held that AFFCO New Zealand Limited (AFFCO), a meat processing company that operates processing plants at various locations, had unlawfully locked out multiple members of the New Zealand Meat Workers and Related Trades Union Inc (the Union) at certain of its plants, and that it had in numerous respects breached its good faith obligations in bargaining.[1] In reaching this conclusion the Court held that a collective agreement which had come into force on 1 May 2012 and expired on 31 December 2013 continued in force until

[1] *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204 (full Court judgment).

31 December 2014 pursuant to s 53 of the Employment Relations Act 2000 (the Act), but that at the time those persons were seasonally laid off, they were employed on individual employment agreements based on the expired collective agreement and the Wairoa site agreement (known to the parties as "based-on ieas").[2] Accordingly, they were entitled to re-employment at the commencement of the current processing season on the terms and conditions of those based-on ieas.

[2] Now the Union and 164 affected members who normally work at AFFCO's Wairoa plant seek compliance orders.[3] The primary application is for an order compelling AFFCO to re-engage them in the positions in which they would have been employed but for the unlawful lockout and breach of good faith obligations.

[3] They assert that under their based-on ieas, they should have been engaged sequentially in accordance with seniority provisions, which means that many of them should have been placed on a day shift, rather than a night shift as offered. AFFCO says that it wishes to place all affected persons on a night shift and will then consider whether some should be transferred to the day shift; that this offer complies with the terms and conditions of the based-on ieas and would constitute the most efficient shift configuration.

[4] Most if not all of the Union members at the Wairoa plant seeking orders have worked for many years on a day shift. Under the site agreement pertaining to Wairoa, the day shift operates between 5.50 am and 3.30 pm (beef) and 5.50 am and 2.45 pm (lamb). A night shift when commenced operates between 2.50 pm and 12.30 am (beef);[4] or 3.05 pm to 11.55 pm (lamb). The plaintiffs say that employment on a day shift is advantageous because work is available for the entire season; and that employment on a night shift is disadvantageous because it requires many workers to be available at times when they would not routinely work for AFFCO having regard to their seniority, and that a night shift normally operates only at the peak of the season so that there is a reduced opportunity to earn at AFFCO's processing plant.

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2 At [174], [178].

3 Their names are recorded in Schedule A to this judgment.

4 There appears to be a typographical error in the final time for this shift for Beef Freezers in the expired collective agreement, so that it should read 12.30 am rather than 12.30 pm.

[5] That said, the night shift does suit the convenience of some employees; additionally many of the plaintiffs have agreed previously to work on such a shift from time to time, when asked to do so by management.

[6] Currently the day shift currently consists only of persons who have been engaged under independent employment agreements (IEAs) including 67 Union members.

[7] The IEAs include different operational provisions from those contained in the expired core collective agreement which is the foundation of the based-on ieas. The IEAs provide for a standard 480-minute operating day rather than a 450-minute operating day. They provide for two 30-minute breaks rather than two 15-minute smokos and a 30-minute "lunch". The IEAs also state that a standard overtime rate of 1.5 is to be applied to base rate only, rather than the Wairoa site agreement rate of 1.66 on base and piece rates.

[8] Further compliance orders are sought to enforce the payment of compensation for wages lost during the illegal lockout.

[9] The return-to-work issues were the subject of an application for an interim injunction heard urgently on 21 December 2015. In an interlocutory judgment of 23 December 2015 I declined to make an order by way of interim injunction directing AFFCO to re-engage or reinstate the locked out workers at its Wairoa plant.[5] I did however direct an urgent hearing of the substantive issues, to which this judgment relates;[6] it should be read in conjunction with the interlocutory judgment. However, for ease of reference I now repeat some aspects of the background to which I made reference in my earlier decision.

Procedural issues

[10] The judgment of the full Court resolved two only of six causes of action in this particular proceeding. In addition to this proceeding there are others which have

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5 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 233 (Interlocutory injunction judgment).

6 At [60].

yet to be resolved: in one of these (being a proceeding which has been removed to this Court) AFFCO seeks an order declaring that collective bargaining between it and the Union has now concluded, under s 50K of the Act;[7] and in another, the Union seeks an order to fix collective terms and conditions of employment under s 50J of the Act (a proceeding which has also been removed to the Court).[8] At the commencement of the hearing before me, counsel for both parties confirmed that the issues raised in the present application have no correlation to the issues in the proceedings which have yet to be heard concerning bargaining.

[11] On 8 December 2015, Chief Judge Colgan convened a hearing with counsel, in the course of which counsel for the plaintiffs advised that the application for interlocutory relief with regard to employment issues at AFFCO's Wairoa plant would be filed prior to the Christmas break.[9]

[12] In the course of the interlocutory judgment which the Chief Judge issued after hearing counsel, the following was recorded as to the position of workers at the Wairoa plant:[10]

> [2] Other than at the AFFCO Wairoa plant, the other [plants] covered by this proceeding appear to have put in place changes commensurate with the spirit of the full Court's judgment although these may be interim arrangements depending on the outcome of AFFCO's application for leave to appeal to the Court of Appeal with which I deal subsequently in this judgment. The substantial focus of this interlocutory judgment is, therefore, on the position at Wairoa.
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> [3] Although Union members engaged at that plant, and the events which took place affecting it, are not contained within the current proceedings, the oral interlocutory judgment of Judge M E Perkins, issued on 23 September 2015, notes in this regard:
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> > [2] … The other amendments sought are quite substantial and seek to introduce as further plaintiffs, in effect, a further 150 or so workers at the defendant's Wairoa plant. It is claimed that to allow the amendments and effectively join those workers is in the interests of justice and is of no prejudice. …

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7 *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2015] NZERA Auckland 253.

8 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZERA Auckland 389.

9 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 219.

10 The judgment of Judge Perkins referred to in this extract is *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 165.

> [3] In the notice of opposition the defendant argues that the amendments are unnecessary as the full Court's findings on the presently pleaded issues will apply equally to the Wairoa plant and workers and today I am informed would also apply to the Horotiu works. Any remedies granted would also equally apply to those workers. It is further argued that a further amendment so close to the hearing will give rise to prejudice as no evidence relating to the Wairoa plant has been filed as yet and the company will now have insufficient time to investigate and respond, particularly when already working under tight timeframes to prepare for the coming hearing. Further it is argued in the notice of opposition by Mr Wicks today, that there is a real risk that the hearing times allocated will prove insufficient resulting in substantial delays if they have to be adjourned part heard. I agree with all of these submissions.
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> [6] The notice of opposition, in any event, contains what are tantamount or close to implied undertakings on AFFCO's part or at the very least acknowledgments as to any effect on it of the Court's findings on the matters as presently pleaded. … In addition, if the plaintiffs are resolved to pursue action on behalf of the Wairoa Plant workers without awaiting the outcome of the presently pleaded actions then there is nothing to stop them now commencing a further action. …
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> [4] The hearing before the full Court proceeded on this basis and I am, therefore, confident that, in light of these concessions by counsel for AFFCO, the full Court's judgment affects events at that plant and Union members who were/are employed there. It follows that the plaintiffs are entitled to seek consequential remedies in respect of Wairoa without, at this stage at least, applying to amend their pleadings or commencing separate Wairoa-specific proceedings.

[13] The hearing before me proceeded on that basis.

The full Court decision

[14] Since the findings of the full Court are the foundation of the current application for compliance orders, it is necessary to summarise that judgment in more detail.

[15] The first relevant cause of action related to the plaintiffs' claim that AFFCO 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 IEAs.[11] The second cause of

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[11] Above n 1, at [2].

action related to the plaintiffs' contention that AFFCO breached statutory obligations of good faith in collective bargaining.[12]

[16] When re-opening its plants for the 2015/2016 season, AFFCO wrote to employees who had previously worked at those plants, inviting them to an introductory presentation for new intended IEAs. At those meetings a form of IEA was distributed for completion.[13]

[17] When the Union learnt from its members in early June 2015 of AFFCO's processes and documentation, it objected on their behalf. The Court held that those objections were effectively ignored. This was despite AFFCO being aware that a significant number of employees were Union members and despite the fact it was then in collective bargaining which was intended to operate in respect of the coming season.[14]

[18] The Court went on to observe that a similar process for re-engaging employees at the other plants was pursued subsequently by AFFCO. It said:[15]

> 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.

[19] Against this background, the Court made a number of legal findings. It concluded that having regard to a detailed analysis of the expired collective agreement, the Union had correctly submitted that the document provided for continuity of employment between seasons.[16] A consideration of context in which the expired collective agreement was agreed and operated supported this conclusion.[17]

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12 At [2].
13 At [21].
14 At [23].
15 At [29].
16 At [83].
17 At [84] and [85].

[20] Next, the Court analysed the new IEAs and found that the form of these did not comply with s 61(2) of the Act. It did not add to the terms of the expired collective agreement and in many instances contradicted its terms and conditions.[18]

[21] After considering previous leading authorities which had concluded that a seasonal layoff amounted to a termination of the employment of a meat worker who had been employed during a particular season, as well as the content of the award on which most of those decisions were based, the Court determined:[19]

> 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.

[22] For the purposes of the plaintiffs' lock-out cause of action, the Court held that the second plaintiffs were employees of AFFCO when seeking to be re-engaged at the end of their seasonal lay-off, since their employment was continuous and not discontinuous.[20] Alternatively, even if they were not employees after the end of 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 season.[21] They were accordingly employees and employer respectively for the purposes of s 82 of the Act.

[23] Then the full Court found that AFFCO had undermined bargaining and the authority of the Union as follows:

a) AFFCO had failed or refused to involve the Union representing the second plaintiffs in the collective bargaining of its intention to do so, this amounting to bad faith. This strategy meant that there was a likelihood of the Union and the second plaintiffs being mislead or

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18 At [108].
19 At [178].
20 At [194].
21 At [195].

deceived, both as to AFFCO's intentions in the collective bargaining, and for employment in the 2015/2016 season.[22]

b) Pursuant to s 4(1A)(b), AFFCO's actions were not active and constructive in maintaining a productive employment relationship with the Union and the second plaintiffs and was not, as required, communicative with the plaintiffs.[23]

c) AFFCO'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 the affected members, amounting to a failure to AFFCO's obligation under s 4(1A)(c) to provide the plaintiffs with access to relevant information about its strategy and an effective opportunity to comment on that information before the strategy was put into effect at quite short notice and without advice to the Union.[24] Those acts or omissions 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.[25]

d) AFFCO also breached s 32(1)(d)(ii) of the Act by bargaining directly with individual employees about matters relating to their terms and conditions of employment.[26]

e) Alternatively, the actions of AFFCO undermined, or were at least likely to undermine, the collective bargaining and/or the authority of the Union in that bargaining. AFFCO's strategy had 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.[27]

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22 At [202].
23 At [202].
24 At [203].
25 At [204].
26 At [205].
27 At [209].

[24] The Court concluded that AFFCO had breached the statutory provisions referred to in the plaintiffs' first and sixth causes of actions. It noted that the plaintiffs' claimed compliance orders against AFFCO to restore the second plaintiffs to the situation in which they would have been, absent the breaches. Whilst the Court in principle agreed that this may be an appropriate remedy particularly if AFFCO was unprepared to put right its wrongdoing, the precise form of compliance orders and the identities of the persons to whom they would relate was not entirely clear.[28]

[25] The Court went on to discuss problems which were currently inherent in the coercive remedies sought, these problems relating to the precise identities of those entitled to relief, and representation at the hearing of some of the unionised employees.[29] A further complicating factor arose because there were separate proceedings relating to an issue of whether collective bargaining has ended.[30] Consequently the Court concluded that the question of other remedies of compliance orders should be reserved for later determination if required.

AFFCO's application for leave to appeal

[26] On 8 December 2015, AFFCO filed an application seeking leave of the Court of Appeal to appeal the full Court judgment on 13 grounds. The company also requested an urgent hearing, seeking a direction that the application for leave and the substantive appeal be heard at the same time. The Court of Appeal declined the application for such a direction; the application for leave to appeal is now listed for hearing on 18 March 2016. If leave to appeal is granted, then the questions for which leave is granted will be the subject of a subsequent hearing.

[27] Mr Cranney, counsel for the plaintiffs, submitted that even if the Court of Appeal were to grant urgency for such an appeal, it is unlikely that a substantive judgment resolving the appeal would be available until late July 2016. Mr Wicks QC, counsel for the defendant, submitted that it was possible that such a judgment could be available in June 2016. However, the possibility of subsequent

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28 At [211].
29 At [212]-[214].
30 At [216].

consideration of the issues by the Supreme Court cannot be ruled out. It is apparent that if leave to appeal is granted, there will be a significant lapse of time before appeal processes conclude.

[28] In the meantime, no application for stay of the decision of the full Court has been brought by AFFCO. Against that background, this Court must resolve the pressing issues which affect many longstanding employees and their families on the one hand, and the company on the other, recognising that AFFCO has appeal rights which it is entitled to exercise.

Overview of the parties' cases

[29] At the heart of the plaintiffs' application is the assertion that they are yet to be re-engaged following the unlawful lockout, and that illegal conduct continues because employees working on IEAs on the morning shift are performing the work of affected plaintiffs who under their terms and conditions should be engaged on that work so that there is an ongoing breach of s 97(5) of the Act by AFFCO. The company's proposal that all second plaintiffs should return to work on a night shift on grounds of efficiency, takes no account of the important seniority provisions of the expired collective agreement.

[30] It is pleaded that but for the company's unlawful lockout and unlawful conduct, the affected members of the Union would have been re-engaged sequentially in accordance with their seniority and that many would have been placed on the day shift. They say that re-engagement only on an afternoon shift would impose unfair and unlawful disadvantage on many of the second plaintiffs.

[31] The remedies sought include a compliance order requiring AFFCO to re-engage the second plaintiffs to the positions in which they would have been engaged were it not for the unlawful actions in accordance with the terms and conditions of their based-on ieas; this includes engaging on the day shift those second plaintiffs who would have been so engaged were it not for the unlawful conduct.

[32] In response, AFFCO pleads that those second plaintiffs who had been engaged in the previous season but who did not restart at the commencement of the 2015/2016 season were able to take up employment at the commencement of the season without prejudice to the outcome of the appeal relating to the lockout, but declined to do so. AFFCO acknowledges the findings of the judgment of the full Court without prejudice to its intended appeal, but otherwise denies the second plaintiffs were locked out from the start of the 2015/2016 season. It also denies that during the alleged lockout other employees performed the work of the affected plaintiffs within the meaning of s 97(5) of the Act. Their work, it is pleaded, remains unperformed as those persons had refused or declined to accept re-engagement and undertake such work.

[33] It is asserted for AFFCO that it did not know the names of the second plaintiffs; but in any event AFFCO denies that it would not re-engage them except on the basis that all affected workers would be employed (only) on an afternoon shift, because some would be transferred thereafter to the morning shift. Further, the offer which was made was in accordance with the applicable provisions of the based-on ieas.

[34] The company goes on to deny that but for the alleged unlawful lockout and other conduct referred to by the full Court, the affected members would not have been re-engaged sequentially in accordance with seniority and that many would have been placed on a day shift. It further pleads that the time at which an employee was engaged and laid off involves a selection process of which only one factor, the last, is seniority; and that seniority only applies to layoff and re-engagement and not to appointment to shifts. The allegation of unfair and unlawful discrimination and disadvantage is also denied.

[35] Finally, AFFCO denies that any compliance order is required because:

a) It had already offered to re-engage the affected workers on the provisions of their based-on ieas, as contemplated by the full Court.

b) The present issues constitute a dispute as to the extent of application of seniority rights. If the Court holds that AFFCO is wrong in its position,

it will immediately act in accordance with the terms of this Court's judgment.

c) The orders sought do not provide sufficient certainty so as to allow AFFCO to be able to ensure compliance.

d) As for the relief sought in respect of compensation for lost wages, AFFCO would not be able realistically to recover any wages paid in the event that its appeal is successful.

[36] The Court received evidence from 15 witnesses for the plaintiffs and 11 for AFFCO. Documentation that was before the full Court was also available to this Court. Additional documents were introduced in evidence, focusing on the position at the Wairoa plant at all relevant times particularly those relating to the parties' attempts to negotiate a return to work for the locked-out workers.

[37] The key themes of the plaintiffs' evidence were:

a) Seniority lists are maintained, ranking workers in order of their initial start date at the site or department. Re-employment is to be undertaken according to the position the worker holds on the list; that is, on a "last on first off basis". Seniority should be the paramount consideration when an employee is re-employed under the terms of a based-on iea, although that entitlement could be subject to a need for specific skills on a chain.

b) Normally, a season would commence with the engagement of workers on a day shift only; a second shift, the night shift, would commence at the peak of a season. Seniority would apply when the day shift was established, although some such employees would be transferred to a night shift upon its commencement to ensure there were sufficient skills available on both shifts.

c) Some workers started their initial employment with AFFCO on a night shift, and some on a day shift. Those starting on a night shift would in time move to a day shift, having regard to their seniority ranking.

d) When considering the selection of employees for particular shifts, there should be appropriate consultation. Long experience at the Wairoa plant showed that affected workers were not forced to work on a particular shift. Rather, there was a process by which preferences based on personal obligations and circumstances could be explained and if possible accommodated by the employer; and skill requests could also be discussed and if possible accommodated by the employee.

e) The Union had attempted to act constructively and cooperatively on return-to-work issues after the issuing of the full Court decision; this included provision of lists of locked-out persons who sought re-engagement.

f) Despite the efforts which had been made, the Union and affected Union members believed that the latter were being forced to accept re-engagement on an afternoon shift without consideration of seniority of individuals, and that this was contrary to the provisions of the based-on ieas.

[38] The key themes of the company's evidence were:

a) It was wrong to assert that seniority, either contractually or by custom and practice, was a factor that could determine whether a person worked a day shift or a night shift.

b) Factors such as skill requirements, the need to train staff across shifts, differing cut specifications, classes of stock and attendance and disciplinary records could be relevant. Seniority is the final factor for consideration. It is a factor which comes into play only when all other things are equal.

c) If a plant starts a season with a single shift that would normally be a day shift. In such circumstances, night shift would follow later in the season as required by livestock supply.

d) Had the judgment of the full Court been known in advance of start-up at the Wairoa plant on 9 September 2015, the plant would have commenced with two shifts. In those circumstances, the provisions of the based-on iea as to seniority would have had no relevance. Using management prerogative, the most efficient option for AFFCO would have been to create two shifts. All the employees engaged on IEAs would be employed on one shift, and employees engaged on based-on ieas would be employed on another shift. This was because the new IEAs included different operational provisions from the expired collective agreement.

e) As an interim measure, AFFCO had offered re-engagement to all of the Union members at the Wairoa plant on the terms and conditions of the based-on ieas. On six occasions it was expected those persons would commence work, as from late November 2015. On no occasion did they advise that they would not commence; and they did not attend the plant for re-employment. This caused significant expense and inconvenience.

f) Despite repeated requests for accurate lists of persons who had allegedly been locked out and who wished to return to work, the Union had not provided such information. The plaintiffs' failures had put the company to considerable disruption, cost and harm to its relationships with farmers.

g) The Union and its members were not seeking a return to work on the terms of based-on ieas, but were attempting to insist on additional advantageous terms and conditions.

h) It would be impracticable and unworkable to set shifts in positions based on seniority, or to re-engage employees only in positions they had worked in previous seasons, or to guarantee Union members preferential appointment to a day shift.

i) AFFCO had always ensured that each shift would operate as efficiently as possible; accordingly placement was primarily based on the skill set of each worker.

The circumstances of the present application

[39] The present dispute arises in unusual circumstances which should be clearly acknowledged. The findings of the full Court, as summarised earlier show that there has been a significant strategy of wrongful conduct.[31] Those circumstances form the context for the application for compliance orders.

[40] Another contextual factor of the current application concerns the relations between the company and the Union. Unsurprisingly, the circumstances giving rise to the issues in this litigation have created tensions and at times ill-feeling. This was demonstrated by the placing on a notice-board at the Wairoa plant of a document dated 29 July 2015 signed by the Plant Manager, Mr Tucker, in which seriously derogatory statements were made about the Union.

[41] Against these background circumstances, there have been significant ongoing difficulties in arranging a return to work of the locked-out plaintiffs at Wairoa.

[42] When cross-examining company witnesses, and in his submissions, Mr Cranney emphasised that the Union on behalf of its affected members had been proactive in attempting to reach agreement on issues as to return to work. It was contended that various mechanisms had been adopted in an attempt to reach an agreement, including on-the-record mediation on 3 and 4 December 2015, off-the-record mediation on 10 and 11 December 2015, and discussions between the parties on 12 and 13 December 2015. As well, the parties attended Court-directed mediation in early January 2016.

[43] Mr Wicks emphasised for AFFCO that there had been a request for members to attend induction on 30 November 2015, and to work on a night shift on 1, 2, 3, 14 and 15 December 2015, as well as 6 January 2016. Company witnesses stated that

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[31] At [201]-[202].

AFFCO had made extensive arrangements for livestock, for day shift workers to transfer and for relevant officials such as vets, inspectors and halal slaughtermen to be available for the commencement of an afternoon shift. These arrangements were thwarted by the unwillingness of the affected workers to present themselves for re-employment. It had attended mediation in an attempt to resolve issues constructively. Management was also frustrated by the fact that it understood the Union insisted on communications about return-to-work issues being addressed only via the Union.

[44] There has been a fundamental issue as to the identity of locked-out members who wished to return to work. A list of persons who the Union alleged were locked out was provided by counsel for the Union on 26 November 2015. AFFCO did not accept that the list was accurate. It contended that there were certain persons who:

- were covered by independent employment agreements at the conclusion of the previous season, and not the collective agreement;
- became members of the Union after the collective agreement expired on 31 December 2014; and
- had resigned or were no longer employed by AFFCO.

[45] At the interlocutory hearing on 21 December 2015, the Union accepted that such persons would not be eligible for re-employment under based-on ieas.[32] A further issue related to the fact that some 32 workers would need to give notice to their existing employers before they could return to work for AFFCO. The first advice which the Union provided to AFFCO of those persons was in a letter dated 16 December 2015, though not as to the period of notice which each would need to give.

[46] The Court provided guidance to the parties on these issues. In his interlocutory judgment of 9 December 2015, Chief Judge Colgan outlined a practical methodology for establishing identity of the relevant Union members who sought

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[32] Interlocutory injunction judgment, above n 5 at [32].

return to work at the Wairoa plant.[33] In doing so, he emphasised that questions about individual eligibility should not hold up the process of dealing with non-controversial identities listed by the Union.

[47] At the hearing of the application for an interim injunction on 21 December 2015, there was still uncertainty as to the identity of some persons who wished to return to work. I found that they had been resolved to some extent, although it was unclear as to how much actual communication there had been between the Union and individual members to confirm their desire to restart.[34] In my judgment I directed that a schedule of the plaintiffs' names on whose behalf relief would be sought was to be filed and served by 20 January 2016. On receipt of this schedule, AFFCO analysed and accepted that 150 persons fell within the category of persons who were correctly described, as having been illegally locked out on the basis of the full Court judgment; but that some 43 further persons were not correctly included in this class.

[48] Following the hearing, the parties agreed that there are 159 persons eligible for return to work under the terms and conditions of their based-on ieas.

[49] At the hearing, Mr Cranney confirmed (as he had at the interlocutory hearing) that some of the company's objections were correct, and the number of persons in respect of whom there is dispute was reduced. There are now five persons where there is an issue as to whether they have in fact resigned. I have insufficient evidence to determine their status and reserve leave to them to apply for further directions if need be.

[50] There is a final issue relating to the provision of information. In the course of the hearing, Mr Tucker agreed to provide a seniority list; he said this had not been released previously, because it had not been requested. He considered that it was not the sort of document which should be freely available because it would very quickly become inaccurate. The document was described as a "live document"; that is, one which is constantly updated as either persons resign or new employees are engaged.

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33 *New Zealand Meat Workers and Related Trades Union Inc*, above n 9 at [5]-[6].

34 Interim injunction judgment, above n 5 at [64].

Mr Tucker arranged for the document to be submitted to the Court, and it was produced as an exhibit. It is evident from the seniority list that there are many second plaintiffs who have high seniority at the Wairoa plant.

[51] It is convenient at this point to mention a further aspect of return-to-work arrangements which was discussed with counsel at the hearing. It relates to the question of how much notice individuals may have to give employers where they have obtained alternative employment in the meantime. Counsel were able to agree that:

a) The Union would obtain information as to shift preferences from each of the eligible members (now 159) and provide those to AFFCO within seven days of the agreement; that is, by 3 February 2016.

b) Following the issuing of the Court's judgment, AFFCO would provide five day's notice of re-engagement.

c) Clause 9 of the Wairoa site agreement provides that where an employee is absent from work for three consecutive days without the consent of, or an acceptable notification to, the employer, that employee will be deemed to have terminated his employment. It was confirmed that this provision would continue to apply.

[52] Returning to the question as to who wishes to return to work, it is the case that several schedules of persons desiring to be re-engaged were submitted through counsel for the Union, but I accept, as was stated in a letter from the Union's representative to AFFCO on 7 December 2015, that it was difficult to compile an accurate list given a very uncertain and fluctuating situation. Further, the company held information both as to resignations and the dates on which Union members decided to sign IEAs, so that it was difficult for the Union to be completely accurate. In addition, AFFCO held an accurate list as to seniority, presumably based on the personnel records of its employees; it was obviously a relevant document which under the expired collective agreement it was supposed to provide to the delegate at the commencement of the season, but it was never volunteered.

[53] Both the Union and AFFCO could have made more effort to resolve the various uncertainties. However, in my view the difficulties over lists is a side issue, because the key problem relates to the correct application of the seniority provisions, a subject to which I now turn.

The competing contentions as to the applicable terms and conditions

[54] As I have indicated, the dispute which has arisen is whether it is permissible for AFFCO to stipulate that any return-to-work is to take place on the basis that all the affected Union members who were locked out should return to work initially on a night shift; and that within a defined period thereafter it would apply the relevant terms and conditions of the based-on iea to transition some workers from the night shift to the day shift. Its policy was for two reasons. First, it would re-employ the second plaintiffs who wished to return to work as a group. Secondly, the quickest, most efficient and least destructive way of returning members to work was to have the morning shift work 480 minutes as required under the IEAs, and a second shift working 450 minutes under the based-on ieas. This would mitigate potential compatibility conflicts in both shifts, albeit a consideration of preferences and skills might result in some affected members being transferred to the morning shift.

[55] It was also the company's case that, depending on numbers of eligible Union members, it might still be necessary to have some non-members on the shorter 450-minute shift, but that would be greatly preferable from AFFCO's point of view, because inefficiencies would be restricted to the afternoon shift, and not suffered by the morning 480-minute shift.

[56] In his closing submissions Mr Wicks submitted that such an approach was justified on efficiency grounds and was well provided for under the terms of the based-on ieas. He argued that such an approach was also contemplated by the full Court judgment when it said:[35]

> 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

[35] Full Court judgment, above n 1 at [217].

> 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.

[57] Mr Wicks also said:

a) Clause 10 d) of the expired collective agreement, as well as other clauses confirming management prerogatives such as cls 10 c) and 10 e), expressly recognise AFFCO's right to allocate workers as it deems fit; and

b) The seniority provisions as contained in cls 29 c) and 31 b) of the expired collective agreement were only applicable with regard to the date at which an employee would be laid off or re-engaged; those provisions did not extend to shift allocation.

c) Because the object was to restore the affected members to the situation they would have been in had breaches not occurred, and because AFFCO would have established two shifts at the commencement of the season had it been aware of the views of the full Court at that time, it was appropriate to analyse the circumstances which would have applied at the commencement of the season when two shifts might have been established.

[58] For his part, Mr Cranney submitted in response:

a) It could not be assumed that had the company complied with its good faith obligations at the commencement of the season that all the unionised members could and would have been placed on the night shift. The "but for" scenario advanced by AFFCO should accordingly be rejected.

b) A proper application of the seniority/skill provisions would have resulted in a fair distribution of day and night shift work between persons on based-on ieas, and others on IEAs, having regard to seniority and skill, such as had occurred at many other AFFCO plants.

c) Such an outcome is required having regard to a proper application of the relevant terms and conditions of the based-on ieas.

d) The plaintiffs' submission was based on a proper interpretation of the seniority provisions of the expired collective agreement; it was not being argued that there was a term implied by custom.[36]

Relevant terms of the based-on IEA

[59] The main provisions of the expired collective to which the parties referred are:

> **9. INTENT**
>
> a) The parties to this Agreement acknowledge the importance of the meat industry to the New Zealand economy as a whole and as a major provider of employment and income in rural and provincial regions.
>
> b) That AFFCO as a major meat processor and exporter must remain profitable and competitive. This in turn requires effective procurement, processing and marketing policies, good management, a committed workforce, and a flexible and innovative approach to problem solving and industrial relations by all concerned.
>
> c) Accordingly, this agreement is drafted to reflect a balance of rights and responsibilities between the Company and its managers on the one hand, and the employees and their Union on the other, without detracting from the Company's right to manage and control its business nor the employees' right to protect their interests.
>
> d) Therefore, 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.
>
> f) The parties to this agreement are committed to safeguarding the safety health and welfare of the employees and providing conditions of employment and payments which are fair and equitable to employees and the Company, and which safeguard

[36] As in *Whitcombe & Tombs Ltd v Taylor* (1907) 27 NZLR 237; and see *Forivermor Ltd v ANZ Bank New Zealand Ltd (formerly ANZ National Bank Ltd)* [2014] NZCA 129 at [42].

their various interests while providing maximum possible continuity and security of employment.

10. PURPOSE OF AGREEMENT

…

d) All employees may be transferred within and/or across departments and to any tasks within their ability at the discretion of the company and dependant on the company's operational requirements. Employees may be transferred from department to department to ensure the smooth and efficient operation of the work and shall be paid the rate applicable to the job, except where transferring temporarily at the request of the company when the employee shall be paid no less than the normal daily earnings applicable to their department of origin.

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.

…

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.

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.

30. SECURITY OF EMPLOYMENT

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).

31. SENIORITY

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.

f) Seniority shall operate across both the dayshift and the nightshift.

g) Any dispute will be dealt with under the dispute provisions in clause 54 of this Agreement.

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 31 b).

Relevant principles

[60] As I observed in the interim injunction judgment,[37] *Vector Gas Limited v Bay of Plenty Energy Limited* is the leading authority on contract interpretation.[38] The starting point is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text.[39] It is nevertheless a valid part of the interpretation exercise for the Court to "'crosscheck" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve.[40] Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear.[41] Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean.[42]

[61] Developing the final point of the foregoing summary, I observe that a great deal of evidence was placed before the Court which did no more than tend to prove what individual parties understood the words used in the applicable provisions to mean. That evidence is not particularly helpful or relevant for the purposes of the interpretation exercise which the Court is required to undertake. That said, for the purposes of any crosscheck which should be undertaken, the context within which the provisions operate is illuminated by the evidence of the parties.

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37 Above n 5 at [53].
38 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, 2010 2 NZLR 444.
39 At [80] per McGrath J.
40 At [26] per Tipping J.
41 At [31] per Tipping J.
42 At [19] per Tipping J.

The context in which the expired collective was agreed and operated

[62] The full Court made findings about the context in which the expired collective agreement was agreed and operated, which included reference to the position at Wairoa:[43]

> [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.
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> [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.

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[43] Full Court judgment, above n 1 (footnotes omitted).

> [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'. That is no less relevant where, as in this case, the Court must determine whether, at particular times (during the off-seasons), the 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.

[63] Those findings, which I respectfully adopt, are just as relevant to issues relating to the nature and application of seniority provisions as they were for issues as to whether employment on based-on ieas is continuous or discontinuous.

The nature and importance of the seniority provisions

[64] Re-employment under the based-on ieas is to be based on seniority, in accordance with the seniority list which the company maintains on an ongoing basis, for a site or department as is appropriate. The practical effect of the seniority list is that employees should be re-engaged sequentially in accordance with seniority; and many will in the first instance be placed on the day shift. Other factors such as skill and preferences may, as I shall elaborate shortly, also fall for consideration.

[65] The full Court acknowledged the importance of the seniority system. It held that seniority provides "a very significant element of protection for employees".

[66] This statement is reflected in many other previous judgments on this topic. Although it reached a different conclusion on the issue of continuity, the full Court in *New Zealand Meat Workers Union Inc v Alliance Group Limited* made a similar – and uncontroversial – observation when it found that the "seniority system" was "one of the most important aspects of employment of [the Union's] members".[44]

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[44] *New Zealand Meat Workers Union Inc v Alliance Group Ltd* [2006] ERNZ 664 at [12].

[67] Again uncontroversially, Judge Ford in *New Zealand Meat Workers Union Inc v AFFCO New Zealand Ltd* (the first 2011 judgment) said after analysing a significant body of evidence which had been placed before him:[45]

> Against that background, it can be seen that historically the seniority system has always been regarded as a significant feature of employment in the meat industry.

[68] As explained earlier, the current seniority list was produced. It shows that as at 27 January 2016, 678 persons were ranked in the order of initial employment at the Wairoa plant. Mr King, Production Manager at the Wairoa plant, informed the Court that in the current season between approximately 315 and 330 employees have been engaged – that is on IEAs. The rankings of the second plaintiffs according to the seniority list suggest that many of them would fall within that range, prior to consideration of any other factors that could fall for legitimate consideration.

New Zealand Meat Workers' Union of Aotearoa v AFFCO New Zealand Ltd

[69] Mr Cranney relied on the conclusions of Judge Ford in the first 2011 judgment. At issue in that case was whether the seniority provisions in the then collective agreement would apply to employees engaged under individual employment agreements. The context was that employees covered by the relevant collective agreement, having seniority according to the seniority list, were laid off in preference to new employees engaged under individual employment agreements. The Court held that the seniority provisions of the collective agreement required AFFCO to layoff and re-engage Union members in accordance with seniority lists issued under cl 30 d) of the then collective agreement. The lists were to be based on the commencement date of all workers at the relevant site or in the relevant department irrespective of whether they were covered by the collective agreement or independent employment agreements.

[70] Mr Wicks submitted that the decision related solely to the determination of whether seniority should be measured against all process workers including those on

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[45] *New Zealand Meat Workers' Union of Aotearoa Inc v AFFCO New Zealand Ltd* [2011] NZEmpC 32, [2011] ERNZ 126 at [10].

IEAs, or only those who were Union members. It was distinguishable for present purposes because there was no dispute as to the relevance of seniority to layoffs and re-engagement, that being the only time at which the seniority provisions would apply.

[71] I note that Mr Wicks did not argue that Judge Ford's conclusions were incorrect; only that the case was distinguishable. I have carefully considered the history of the seniority provisions as described by Judge Ford, and his conclusion that the natural and ordinary meaning of the language used in the relevant clause under the then collective ties seniority into the site or the department which he expressed in these terms:[46]

> The natural and ordinary meaning of those provisions, which is consistent with the way in which they have historically been applied, is that the list recording the names and commencement dates is to include *every process worker* on the site or in a department as the case may be.
>
> (Emphasis added)

[72] For the reasons he gave, I respectfully agree and adopt those conclusions. I also find that they are relevant to the present case. In this case, seniority must have regard to all process workers, not just those employed under based-on ieas. Indeed, this is not controversial. The current seniority list as submitted to the Court records the names and commencement dates of every process worker employed on site.

[73] In his submissions, Mr Wicks relied on a further judgment of Judge Ford, *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Limited* (the second 2011 judgment).[47] As he submitted, in that case the Court held that seniority did not extend to the right to be trained. Mr Wicks argued that from this conclusion it was evident that the seniority provisions were not intended to have wide application.

[74] The conclusion reached in that instance resulted from the Court's analysis of and focus on the correct meaning of the clause in question. Judge Ford held that it related to seasonal engagement of workers in the meat industry, and that it had no

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[46] At [32].

[47] *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2011] NZEmpC 144.

application to other issues such as training.[48] The relevant provisions applied only to layoffs and re-employment and did not have wider application.[49]

[75] I do not consider that the issues presently under consideration go further than the process of re-employment. The approach adopted in the second judgment is not relevant for the purposes of the present case.

AFFCO's "but-for" scenario

[76] In this case, I am required to consider re-engagement issues at two relevant dates; first, I must consider the provisions of the based-on ieas as at the date when any compliance order might take effect, since that is the relief sought for the plaintiffs. Second, I must also consider those provisions for the purposes of AFFCO's hypothetical scenario as to the circumstances which would have applied at the commencement of the season: the "but-for" scenario. For the purposes of that submission, AFFCO's position is that the seniority clause would have had no relevance, because all workers would be re-engaged at the same date, non-Union members on the day shift working on IEAs, and Union members working on based-on ieas on the night shift. It is argued that this must be correct because seniority provisions make no reference to placement on shifts.

[77] Since the "but-for" scenario underpins AFFCO's case, I consider it first.

[78] I have concluded that where the company decides to commence two shifts on the same day at the commencement of a season, the seniority provisions are just as relevant then as at any other stage of a season. This is for several reasons.

[79] First, the relevant provisions must be construed in the context of the shift structure which is prescribed both in the expired collective agreement and the relevant site agreement.[50] Further context relating to shift arrangements was given in evidence. It is clear from that evidence, which I accept, that a key consequence of the seniority system was to provide for sequencing first on the day shift. It was

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48 At [28].
49 At [27].
50 Clause 11 b) of the expired collective, and cl 3 of the Wairoa site agreement; and see [4] above.

regarded as the primary shift since it enabled those with higher seniority to work for the duration of the season. When a night shift was established, the seniority provisions would also apply; but that shift was regarded as a secondary shift since it operated only during the peak of the season. It was these circumstances which pertained when the parties reached their agreement in 2012.

[80] Next, the dicta of Judge Ford in the 2011 judgment is applicable as I have already indicated.[51] On a plain and ordinary construction of the clause, seniority applies to every process worker on the site or in a department as the case may be. Prima facie, workers must be engaged sequentially in accordance with their particular seniority position in relation to the rest of the work force;[52] the sequencing must commence with the day shift since it is the primary shift; then follows the night shift.

[81] Such a conclusion is emphasised by the words used in cl 31(b), to the effect that re-employment will be (that is, must be) "*based on* departmental and/or site (as appropriate) seniority and will operate on a last on first off basis".[53]

[82] Clause 31(f) confirms that seniority shall operate across both the day shift and the night shift. The language used is broad. The plain and ordinary meaning of the words used confirms that seniority applies not only within each of those shifts, but across them as well.

[83] Neither clause excludes the application of well-established principles of seniority even where two shifts are commenced on the same day at the start of a season. Given the importance of the principle of seniority and given the detailed provisions relating to seniority, it is reasonable to conclude that if no exception was recorded then none was intended by parties when they concluded their agreement.

[84] When the collective agreement was entered into on 29 May 2012, the seniority provisions were amended. Despite taking the opportunity to amend these by clarifying how the system was to operate, the parties did not decide to exclude the

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51 *New Zealand Meat Workers' Union of Aotearoa Inc*, above n 47.
52 See [32] and [34].
53 Emphasis added.

operation of those provisions where two shifts were established on the same day. Where the parties intended to address matters relating to simultaneous shifts, they did so expressly: cl 29 b).

[85] If the words used seem clear in their natural meaning, the Court may nonetheless search for an alternative interpretation if the natural meaning flouts business commonsense.[54] Although a specific submission to this effect was not made, AFFCO witnesses such as Mr Gerrard, a member of its Board, referred to the desirability of keeping compatibility conflicts (between those engaged on based-on ieas and those engaged on IEAs) to a minimum. Mr Gerrard explained that such arrangements created unnecessary expense for AFFCO; however no particulars were provided.

[86] The Court is required to construe an agreement which was intended to apply not only at the Wairoa plant but also at other AFFCO processing plants. Factors relating to business commonsense have not precluded the establishing of shifts consisting of both classes of employees at other plaints, if that is necessary so as to comply with the seniority provisions. Accordingly, I do not consider that the natural and ordinary meaning of the language flouts business commonsense to the point that it is necessary to conclude that something has gone wrong with the language and that some alternative interpretation should be adopted.

[87] Such a conclusion does not in my view imply an additional term that persons having seniority have a right to allocation of position or shift, as was argued by Mr Wicks. Rather, the application of seniority in a sequential manner is simply to apply to the method of re-employment to which the parties agreed.

[88] Finally, cl 31 h) is significant. It emphasises that seniority "shall" be taken into account in "determining re-employment". The obligation to do so is mandatory; again no exceptions were provided for when this clause was introduced in 2012.

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[54] As confirmed by Lord Hoffman in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913; and in *Vector Gas*, above n 38 at [4], [22] and [61].

[89] Having reached those conclusions, which include an assessment that there is no error in the language used, it is still necessary to cross-check any objective extrinsic evidence with regard to the background circumstances, to ensure the meaning was not modified by context. I have already referred to the findings made by the full Court in that regard; and I find that there is no evidence that issues relating to dual shifts at the commencement of the season were considered or contemplated by the parties in 2012 when the collective agreement was entered into. The cross-check analysis does not reveal any contextual evidence which should modify the plain and ordinary language used in the agreement. Nor does the conflicting evidence now given by the parties as to their understanding amount to post-contract evidence which demonstrates objectively what the words were intended to mean.[55]

[90] Given the importance of the seniority system, I am well satisfied that it must be concluded from an objective standpoint that the intention was that prima facie seniority was to apply in all circumstances of re-engagement.

[91] I conclude, therefore, that the submission made for AFFCO that seniority has no relevance where dual shifts are established is incorrect.

Management prerogative

[92] Another aspect of AFFCO's case is its submission that it is entitled to place all the second plaintiffs on an afternoon shift as a matter of management prerogative. That assertion requires consideration of several relevant provisions of the expired collective agreement.

[93] It is appropriate to begin the analysis by considering the provisions of cl 31, which is the specific provision as to the re-employment of employees containing reference to factors which management may consider at the time of re-employment.[56]

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[55] *Vector Gas*, above n 38 at [31] per Tipping J.

[56] The discussion which follows applies equally to cl 29 c) which is in the same terms as cl 31 b).

[94] Although re-employment is to be based on departmental and/or site seniority on a "last on first off" basis, cl 31 b) refers to other relevant criteria.

[95] First, the application of the principle of seniority is subject to "all things being equal".

[96] That phrase is commonly used in redundancy situations. It is a "very widely encompassing" phrase,[57] and is often relevant to considerations of efficiency and productivity in a redundancy context.[58]

[97] However in this instance factors of that nature (experience, employment record, competency, skills of individuals and the need to maintain an efficient, balanced workforce) are specifically referred to later in the clause.

[98] Assessed objectively, I consider that the opening words, "all things being equal" have been included from an abundance of caution. There may be factors other than those which are specifically referred to, but the phrase must nonetheless be construed in the context of the agreement as a whole, and the Act. For instance, the parties cannot have intended that the employer could consider factors which would clash with overriding objectives such as obligations of good faith as found in cls 9 and 10, or in s 4A of the Act. The phrase is not one which permits consideration of any 'thing' whatsoever.

[99] Secondly, the sub-clause stipulates that the "last on first off" principle is subject to the four specific factors I have mentioned. The parties are at odds as to their understanding of the weight to be attributed to these factors. AFFCO witnesses stated that the seniority principle is applied only if there is no other relevant applicable factor – that is, seniority is to be considered last. Witnesses called for the plaintiffs said that seniority is a paramount consideration, although the specific factors could be raised for consideration.

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57 *Tune v Babcock New Zealand Ltd* [1998] 3 ERNZ 594 at 602.

58 For other examples see *Dunn v Methanex New Zealand Ltd* [1996] 2 ERNZ 222 and *McKechnie Metals Ltd v Schreib*er [2002] 2 ERNZ 758.

[100] In my view the starting point in the present case must be an acknowledgment that seniority is a very significant protective right under the expired collective agreement. That right can be subject to a consideration of specific factors, but I consider that as a matter of objective interpretation, those factors are intended to allow for flexibility which is to be applied in a fair and reasonable way.

[101] Clause 38 underscores the obligations of "effective consultation" on "issues which involve individuals or a group of people". This is reflected in many other clauses.[59] The last on, first off principle is the starting point, but AFFCO is entitled to raise specific factors for consultation and consideration. The evidence clearly establishes that, in practice, 'skill requirements' are the main criteria requiring consideration. Individual preferences can also be discussed. Employees under based-on ieas will often agree to an assignment to a particular role or shift when asked.

[102] In my view, from an objective standpoint it is self-evident that seniority must be the starting point but factors allowing for flexibility as to the basis of re-employment can be raised and must be considered. However, the parties reinforced that conclusion when in cl 31 h) it was stated that seniority had to be taken into account when determining layoff and re-engagement, albeit final suitability would be determined by the employer under cl 31 b). In my judgment, that clause acknowledges the starting point that seniority must be considered in the first instance.

[103] I turn next to the two provisions which were also relied on by AFFCO for the purposes of its case. Clause 10 describes the "purposes" of the agreement. Clause 10 d) states as one of those purposes that the company may transfer employees within and/or across departments and to any tasks within their ability at the discretion of the company. I consider that the clause cannot be construed as meaning that the company has a right to transfer employees which overrides the

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[59] Clause 9 b): "flexible and innovative approach to problem solving"; cl 9 c): "the employees right to protect their interests"; cl 9 d): "industrial relations [are to be] based on mutual respect and trust between all levels of management, the employees and their Union organisation and which recognises their interdependence"; cl 9 e): "consultation and worker involvement are vital to the success of the operation"; cl 9 f): "the parties to this agreement are committed to … providing conditions of employment … which are fair and equitable to employees and the company".

specific provisions relating to seniority. Seniority is dealt with precisely and in some detail. Clause 10 d) does not state that it prevails over the re-engagement clauses. It is a clause of general application intended to apply after an employee has been re-employed.

[104] I reach a similar conclusion with regard to cl 10 e), another of the "purpose" clauses. It states, as a general principle, that AFFCO has the right to manage and control its own business, a concept which is referred to also in several instances in cl 9.[60] Clause 10 e) is the primary clause relating to management prerogative, but it is clearly expressed as being "subject to the provisions of this agreement". I find that the parties intended that cl 29 and cl 31 were to describe the particular provisions which would apply to re-employment, and would achieve the correct balance between employee protections on the one hand and the company's right to manage and control its business on the other. Clause 10 e) does not override the provisions of cl 29 or cl 31.

[105] There was some reference to the significance of the amendments which were made when the expired collective was agreed, compared with the similar provisions of the previous collective agreement. Some witnesses considered the amendments had the effect of relegating seniority to a position where it was a final factor for consideration only if other factors did not prevail. Whilst it is the case that the seniority provisions of the expired collective agreement are more elaborate and detailed than those in the preceding collective agreement, I consider that the amendments are in reality a clarification of the earlier provisions. The previous collective confirmed that whilst layoff and re-employment would be based on departmental and/or site seniority, this was to be "consistent with departmental needs and the individuals' competency."[61] The evidence establishes that it is generally those criteria which the company may need to discuss with individuals when re-engaging them. Although a more accurate description of relevant factors was

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[60] Clause 9 c): "this agreement is drafted to reflect the balance of rights … without detracting from the company's right to manage and control its business"; cl 9 e): "the company and the employees and their Union agree it is in the mutual interest to operate efficient, competitive and profitable sites".

[61] AFFCO New Zealand Core Employment Agreement, 1 January 2010-31 December 2011, cl 30 (c).

introduced, I do not consider that this amounts, in effect, to a modification of the principle of seniority.

[106] A number of second plaintiffs gave evidence as to requests made of them to accept employment on a night shift, notwithstanding their seniority. In many instances they agreed to do so; they said this was to assist the company. The company points out that all but seven of the second plaintiffs have at some stage worked on night shift. AFFCO witnesses also said that the company had the right to direct a worker to placement on a different shift. For instance, Mr Tucker said that there were "endless occasions" where this was required.

[107] The overwhelming weight of the evidence is that constructive discussions are normally held, with regard to both skill requirements and preferences; the employer and employees make constructive efforts to accommodate genuine requests. I do not find that the evidence establishes that custom and practice permits management prerogative to override the specific obligations of the collective agreement, as I have construed it.

[108] Standing back and considering the plain and ordinary and for the same reasons as I outlined earlier, there is no relevant extrinsic evidence which leads to a different conclusion by way of cross-check.

Application of the principles to the second plaintiffs

[109] I turn now to an application of the foregoing principles to the circumstances of the second plaintiffs.

[110] I find that re-employment of all affected second plaintiffs as a group on a night shift, without their consent, would not be in accordance with the provisions of the expired collective agreement. Whilst the company may consider such an option to be the most efficient and least disruptive way of re-employing those persons who were locked out and who wish to return to work, and that it would allow for an efficient shift configuration, it is contrary to the seniority system. By proceeding in this way, seniority would be irrelevant to the re-engagement of those persons.

[111] Mr Wicks in closing relied on the phrase "all things being equal" to support a submission that in order to achieve an efficient reintegration of the affected employees, placing them all on the night shift was a legitimate option for the company. I do not accept this submission. I have indicated earlier that these words must be understood in the context of the agreement and the Act, both of which incorporate good faith obligations. The present difficulties arise as a result of those obligations being breached; and I do not consider that the phrase could mandate a decision not to apply seniority provisions due to potential incompatibility or commercial issues which are a consequence of illegal conduct.

[112] An associated issue is the submission made for the Union that illegality continues because AFFCO is employing other persons to perform the work of the affected plaintiffs who were locked out, being contrary to s 97(3) of the Act. That provision states:

> …
>
> (3) An employer may employ another person to perform the work of a striking or locked out employee if the person–
>
> (a) is already employed by the employer at the time the strike or lockout commences; and
>
> (b) is not employed principally for the purpose of performing the work of a striking or locked out employee; and
>
> (c) agrees to perform the work.

[113] The Supreme Court considered this section in *Air Nelson Ltd v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc*.[62] It emphasised that a judgment as to whether a breach of s 97 has occurred is "a matter of practical substance not potential duties under the employment contract".[63] I approach the issue on that basis.

[114] Where the application of seniority would have resulted in second plaintiffs being engaged on the morning shift, and where those duties are now being performed by persons on IEAs, I find that there is an infringement of s 97. It follows that the denial of employment to second plaintiffs who have a legitimate right to

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62 *Air Nelson Ltd v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc* [2010] NZSC 53, [2010] ERNZ 279.

63 At [24].

work on the morning shift because of seniority constitutes an ongoing breach of statutory duties.

[115] Nor would it be appropriate to conclude that the reference to the "need to maintain an efficient, balanced workforce" in cl 31 b) could permit AFFCO to override the seniority system. This is for similar reasons. The company created the situation in which it finds itself; the parties cannot have intended that the seniority system would not operate when the company was in breach of its obligations, given its significance.

[116] It is next necessary to consider the company's "but-for" scenario, which it will be recalled, requires a consideration as to what the situation would have been at the commencement of the season but for the unlawful lockout and other conduct identified by the full Court. In essence AFFCO's position was that the seniority clause would have had no relevance because all workers would be re-engaged at the same date – persons on IEAs on the day shift, and persons on based-on ieas on the night shift.

[117] I have already rejected the legal submission that the seniority provisions would have no application if two shifts were commenced at the start of the season, and persons in the latter category were to be engaged on the night shift.

[118] However, could the company have achieved this outcome by the application of the phrase "all things being equal", or by considering "the need to maintain an efficient, balanced workforce"?

[119] I accept Mr Cranney's submission that any analysis as to the circumstances which would have applied at the commencement of the season must proceed on the basis that the conclusions of the full Court were respected. The Court has to assume that AFFCO would not have acted in bad faith, (that is in breach of its duty of good faith under ss 32(1) and (4) of the Act), or in the various respects described earlier. The Court must analyse the "but-for" scenario on the basis that the parties would have been active and constructive in establishing and maintaining productive

employment relationships which would have entailed them, amongst other things, being responsive and communicative.

[120] It was Mr Cranney's submission that if all the relevant obligations had been complied with, "the whole project would either have collapsed or gone in a completely different direction". I accept this submission. Given the importance of the seniority system to the Union and its members, I find that the parties would have discussed these issues constructively; had that occurred it is probable the present dispute would not have developed. The parties would have either reached a mutually acceptable settlement, or the dispute would have come to this Court for resolution. It has not been established that the company could legitimately have placed all persons on a based-on iea on a night shift without regard to seniority. The company has not established its but-for scenario.

Compliance orders?

[121] At the commencement of the hearing, Mr Cranney advised the Court that the plaintiffs were seeking two orders.

[122] The first was a compliance order that AFFCO prepare a seniority list and provide it to the delegate for each department. Because the current seniority list was produced during the hearing, there is no need to consider that issue further.

[123] The primary order which was sought is that AFFCO:

> Re-engage the second plaintiffs in accordance with their terms and conditions of employment, including their individual employment agreements based on the expired collective agreement, to the positions they would have been engaged in were it not for the unlawful actions of the defendant at the commencement of the 2015/16 season, including engaging on the dayshift those second plaintiffs who would have been so engaged were it not for the unlawful conduct.

[124] Mr Wicks strongly opposed the application. I have already dealt with the two main grounds of opposition which related to uncertainties of the schedule of persons wishing to return to work, and the submission that all members would have been appointed to a night shift in any event.

[125] Two important arguments, however, remain outstanding. The first is Mr Wicks' submission that it is not appropriate to order compliance where the central issue involves a dispute as to the terms of employment, reference being made to *Auckland Provincial District Local Authorities Offices IUOW v Waikato Hospital Board*[64]and *New Zealand Airline Pilots Association IUOW v Billmans Management Limited (t/a Ansett New Zealand Limited).*[65] He submitted that the dispute should be resolved in the normal way. Secondly, it was submitted that any compliance order also requires sufficient certainty as to its terms that it could be strictly complied with, without hesitation or confusion.

[126] Relevant to the first of those issues is the statement contained in AFFCO's statement of defence to the effect that if the Court were to hold that the company was wrong in its position, it would immediately remedy the issue in terms of the Court's judgment. Mr Wicks confirmed in his closing address that this is the company's position with regard to the present dispute.

[127] However, in my view there are exceptional circumstances which require the Court's continued oversight. The second plaintiffs have been unable to return to work since early September 2015. There are no doubt very significant financial consequences for these employees and their families. The issues must be resolved urgently. It is well established that in some circumstances a compliance order is appropriate even although an interpretation dispute is involved.[66]

[128] I am satisfied that in the first instance the company should be given a time-limited opportunity to meet its obligations as to re-engagement of the second plaintiffs, now that the position as to seniority has been clarified by the Court.

[129] The Production Manager at the Wairoa plant, Mr King, was asked how long it would take to determine shift placements once it was known who the persons for re-employment were. He said that such a process could be completed in one day.

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64 *Auckland Provincial District Local Authorities Officers IUOW v Waikato Hospital Board* (1988) 2 NZELC 96, 505.

65 *New Zealand Airline Pilots' Association IUOW v Billmans Management Ltd (t/a Ansett New Zealand Ltd)* [1991] 1 ERNZ 670.

66 For example, *Prendergast v Associated Stevedores Ltd* [1992] 1 ERNZ 737 at 754-755.

Also relevant is the agreement reached between the parties at the substantive hearing as to the timeframes which would apply to any re-employment of second plaintiffs.

[130] I expect the Union will by now have informed the company as to shift preferences in respect of the persons whom it is agreed are eligible for re-employment. The agreement then requires five days' notice of re-engagement.

[131] I propose therefore to adjourn the issue of whether a compliance order relating to a return to work should be made. This is to provide an opportunity for re-employment of eligible second plaintiffs in accordance with the terms and conditions of their based-on ieas, and in light of this judgment. I expect those persons to be engaged in the positions in which they would have been engaged were it not for the wrongful conduct which has been discussed. In particular, I expect those second plaintiffs who would have been engaged on the day shift but for that unlawful conduct, to be so engaged. Consideration may need to be given by the parties to an acknowledgment that such re-employment is without prejudice to AFFCO's appeal rights in respect of the full Court's judgment.

[132] At the expiration of that period, I shall consider whether that process has been completed and if not whether a compliance order should be made. If need be I shall receive submissions as to the form of any necessary order. I shall deal with this issue at a submissions-only hearing, the details of which are given below.

Compensation?

[133] The plaintiffs also sought a compliance order requiring that reasonable wages be paid for the duration of the lockout on the basis of the sum that each second plaintiff would have been paid but for the unlawful conduct and lockout; and a compliance order requiring AFFCO to identify for each of those persons those sums within a time to be identified by the Court.

[134] Chief Judge Colgan referred to this issue in the interlocutory judgment of 9 December 2015, when it was recorded that the company would be cooperating with the Union in the calculation of loss of remuneration. It was also recorded that it was open to the Union now to seek access to the company's time and wage records

for the purpose of calculating those losses if they become more difficult to ascertain with the passing of time.[67]

[135] At the hearing regarding the application for a compliance order, Mr Wicks elaborated on the company's position by submitting that the plaintiffs would need to provide information as to earnings where alternative employment had been obtained. He went on to say that while the company has no objection to undertaking a process for the calculation of compensation, it would object to actual payment being made. He said that were the company to be granted leave to appeal and if it was successful, then there would be difficulties in obtaining repayment from individuals. The possibility of seeking an order of stay in respect of payment was alluded to.

[136] In light of the fact that more work needs to be done on the issue of compensation on both sides, it is premature to consider making a compliance order. I direct that counsel for the parties are to confer with a view to agreeing to directions which the Court might make as to the process for determining compensation. Counsel are to file a joint memorandum in this regard as below. If agreement cannot be reached on a direction, then individual memoranda should be filed and served.

Conclusion

[137] With regard to return-to-work issues, I adjourn the plaintiffs' application for compliance orders. The issue will be considered at a submissions-only hearing to be held at the Auckland Employment Court at 8.30 am on 23 February 2016, and in light of any affidavits and memoranda as filed and served by noon on 22 February 2016.

[138] With regard to the five persons over whom there is controversy as to eligibility, I reserve leave to them to apply for further directions on three days' notice.

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[67] At [10].

[139] With regard to directions for calculating loss of remuneration, counsel are to confer and file a joint memorandum or individual memoranda by noon on 22 February 2016. I will consider this issue further on 23 February 2016.

[140] Because this proceeding is not yet finalised, it is premature to consider any as to costs issues.

B A Corkill
Judge

Judgment signed at 3.30 pm on 11 February 2016

SCHEDULE A

	Last Name	First Name
1.	Agnew	Clarry
2.	Albert	William
3.	Amato	Peter
4.	Anderson	Dave
5.	Ataria	George
6.	Barbarich	Shane
7.	Bates	Vincent
8.	Bean	Max
9.	Beattie	David
10.	Blake	Joe
11.	Brown	Dardie
12.	Brown	Horo
13.	Brown	Kelvin
14.	Brown	Willie
15.	Burton	Des
16.	Burton	Tama
17.	Campbell	Robert
18.	Capper	Aaron
19.	Carroll	Joe
20.	Christie	Trevor
21.	Clair	Daphne
22.	Clair	Frances
23.	Clair	James
24.	Cooper	George
25.	Cotter	Daleena
26.	Cotter	Denise
27.	Dean	Jasmine
28.	Eaglesome	Boston
29.	Eaglesome	Phil
30.	Edwards	Baldy (Alfred)
31.	Edwards	Jordan
32.	Edwards	Nancy
33.	Edwards	Peter
34.	Edwards	Samson
35.	Edwards	Teena
36.	Edwards	Wipere
37.	Ereatara	Tony
38.	Flutey	Kevin
39.	Gilbert	Hurae
40.	Gilbert	Kevin
41.	Goodley	Jason
42.	Governor	Bulk (Ray)
43.	Grant	Eddy

44.	Gray	Geraldine
45.	Grigsby	PaddyAnn
46.	Hagen	Doug
47.	Hati	Jim
48.	Hema	Lily
49.	Hema	Shayden
50.	Henare	Hoki
51.	Henare	Ike
52.	Heta	Jasmine
53.	Heta	Maude
54.	Heta (jnr)	Tommy
55.	Heta (snr)	Tom
56.	Hikawai	Cindy
57.	Hook	Denis
58.	Hook	Sue
59.	Hooper	Stacey
60.	Horua-Edwards	Kathy Jean
61.	Hubbard	John
62.	Hunuhunu	Aroha
63.	Jane	Malcolm
64.	Jury	Joe
65.	Jury	PC
66.	Kahukura	Pango
67.	Kaimoana	Adelaide
68.	Kaimoana	Justin
69.	Katene	Bobby
70.	Lambert	Silky
71.	MacGregor	Charlie
72.	MacGregor	Liz
73.	MacIntyre	Les
74.	Manukau	Shannon
75.	Marshal	Liz
76.	Marshall (snr)	Terry
77.	Mason	Joe
78.	McCormack	Reuben
79.	McIlroy	Hirini
80.	McKenzie	Fred
81.	McKenzie	Wayne
82.	McQueen	Val
83.	McRoberts	Moana
84.	Mihaere	Peter
85.	Mitchell	Chevron
86.	Morrell	Jim
87.	Morrell (jnr)	James
88.	Murray	Henry
89.	Nepe	Iria

90.	Ngamotu	Quarry
91.	Ngarangione	Andre
92.	Ngarangione	Andre
93.	Nia Nia	Rob
94.	Nicholson	Berta
95.	O'Brien	Anton
96.	Ormond	George
97.	Paku	Rangi
98.	Paku	Raymond
99.	Phillips	Rueben
100.	Pohe	Joe
101.	Pomana	Denal
102.	Raihania	Te Pari
103.	Rarere	Josh
104.	Raroa	Lou
105.	Ratima	Kasual
106.	Repia	Derek
107.	Rewi	Airini
108.	Robertson	Delma
109.	Robertson	Isobel
110.	Rohe	Hilton
111.	Rohe	Nihera
112.	Ropitini (Calvert)	Shontay
113.	Ruru	Jack
114.	Ruru	Vaughn
115.	Salu	John
116.	Shelford	Steve
117.	Solomon	Erroll
118.	Solomon	Hira
119.	Sowter	Dave
120.	Stevenson	George
121.	Storey	Tonia
122.	Tahuri	Mark
123.	Tahuri	Mitch
124.	Tahuri	Pauline
125.	Tahuri (Mitchell)	Hera (Sarah)
126.	Tamehana	Rangi
127.	Tangiora	Codford
128.	Tapine	Shamus
129.	Taurima	Dave
130.	Taurima	Justeen
131.	Taurima	Stacey
132.	Tawhai	Namana
133.	Taylor	Roydon
134.	Te Amo	Jordan
135.	Te Amo	Monty
136.	Te Kahu	Tracey

137.	Te Nahu	Steve
138.	Terry	Reuben
139.	Thompson	Dean
140.	Thompson	Joey
141.	Thompson	Nelson
142.	Tuahine	Eliza
143.	Tuapawa	Joe
144.	Tuapawa	Lisa
145.	Tuapawa	Senga
146.	Turipa	Therese
147.	Waihape	Francis
148.	Waihape	Gene
149.	Waihape	Renata
150.	Wairoa	Jesse
151.	Waiwai	Johnson
152.	Watson	Susan
153.	Whaanga	Bobette
154.	Wharehinga	Daphne
155.	Wharehinga	Matt
156.	Whatuira	Gordon
157.	William	Gaine
158.	Winiana	Ivan
159.	Winiana	Joe
160.	Daniel (disputed)	Terry
161.	Edwards (disputed)	Joanzy
162.	Robertson (disputed)	Jaci
163.	Rossitor (disputed)	Johnny
164.	Wilson (disputed)	Garry