IN THE SUPREME COURT OF NEW ZEALAND SC 131/2016

BETWEEN **AFFCO NEW ZEALAND LIMITED**
Appellant

AND **NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED**
First Respondent

ROBERTA KEREWAI RATU AND OTHERS
Second Respondents

Hearing:	20 and 21 June 2017
Coram:	William Young J Glazebrook J O'Regan J Arnold J McGrath J
Appearances:	P R Jagose and G P Malone for the Appellant P Cranney and S R Mitchell for the Respondents J E Hodder QC and J W Upson for the Meat Industry Association of New Zealand Incorporated (Intervener)

CIVIL APPEAL

MR JAGOSE:

May it please Your Honour, Jagose and Malone for Affco.

WILLIAM YOUNG J:

Thank you Mr Jagose.

MR CRANNEY:

If the Court pleases, Cranney and Mitchell for the Union and workers.

WILLIAM YOUNG J:

Thank you Mr Cranney.

MR HODDER QC:

If the Court pleases, Hodder with my learned friend Mr Upson for the Intervener.

WILLIAM YOUNG J:

Thank you Mr Hodder. Yes, Mr Jagose.

MR JAGOSE:

Thank you Your Honour. I'll have the Registrar pass up a green page which I hope Your Honours have which is intended just to be a map of how I want to progress through the various issues given rise on this appeal and on the respondents' other grounds. I propose to start by going to the Act [the Employment Relations Act 2000] itself if I may. Section 82 is the core section that we are discussing today and it appears in part 8 under strikes and lockouts. May I draw Your Honours' attention to please part 8, section 80, which is the object of the Act. The object of the part is (a) to recognise that the requirement that a union –

WILLIAM YOUNG J:

Have we got it in your bundle or not?

MR JAGOSE:

No, Sir, I'm sorry. The Act in its entirety isn't.

WILLIAM YOUNG J:

That's all right.

GLAZEBROOK J:
Where were you sorry?

MR JAGOSE:
I was at section 80 which is the commencement of part 8. So I wanted to walk through various sections in part 8 starting with section 80 and I wanted to draw Your Honours' attention to the first object of this part, which was, "To recognise that the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful (as defined in this part)." I don't propose to interpolate at this point through the legislation, I just want to take Your Honours to it.

If you could then pass to section 82, which defines a lockout as comprising two elements which the Court of Appeal in *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609 described as first the factual and second the mental elements. The first is the act of an employer in carrying out one of four actions. Here, romanette (iv), in refusing or failing to engage employees for any work for which the employer usually employs employees, and then (b) that that Act is done with a view to compelling employees, or to aid another employer in compelling employees to accept terms of employment to comply with demands made by the employer. So that is the conduct and the objective, the intention, which constitutes a lockout. Grammatically part (b), paragraph (b), is the object of the direct object of the employers actions.

The part then goes on at section 83 to define what constitutes a lawful strike or lockout and it says, "Participation in a strike or lockout is lawful if the lockout is not unlawful and relates to bargaining," relevantly for us, "for a collective agreement that will bind each of the employees concerned."

It's worth just stepping back for a moment to section 56 which explains what a collective agreement that is binding is. Section 56(1) says, "a collective agreement that is in force binds and is enforceable by the union and the employer that are parties to the agreement and employees who are employed

by an employer that is party to the agreement and who are members of the unions and whose work comes within the coverage clause."

If I can take you back, then, to part 8, section 85 then identifies what is the effect of a lawful strike or lockout, and it essentially identifies that parties are immune from legal action, but notably specified legal action. There is to be no tortious proceedings, no injunction proceedings, no proceedings for breach of an employment contract for penalty under this legislation or for a compliance order. But in the context of the Employment Relations Act, omitted from that list is personal grievances.

In section 86, then, unlawful is described as being unlawful if – relevantly for us again – it occurs while a collective agreement is binding, which wasn't the case here, as we'll see, occurs during bargaining for a proposed collective agreement unless certain timing is exceeded. But then paragraph (ba) occurs in a situation where (ii) in the case of a lockout the employer has failed to comply with the notice requirements in the relevant sections and you'll see at 86(b) the notice requirement being relatively specific, requiring in writing the period of notice, the nature of the proposed lockout, where it will occur, when it will begin, how it will end, and the names of the employees who will be locked out.

Lastly, if I could have you turn through to section 96, to look at the consequences of a lockout. First that the employer is not liable for wages during the lockout. But I draw Your Honours' attention to subsection (2), "on resumption of work by the employees, their service must be treated as continuous despite the period of the lockout for the purpose of rights and benefits that are conditional on continuous service."

The following section, section 97, allows an employer to engage another person to perform the work of a locked-out employee only if that person is already employed by the employer at the time the strike or lockout commences.

So I suppose we should look briefly at section 6, which is the section of the legislation defining "employee". "Any person of any age employed by any employee to do any work of hire or reward under a contract of service," and relevantly (b)(ii) includes a person intending to work which phrase "person intending to work" is defined in section 5 as meaning a person who has been offered and accepted work as an employee.

I'm going to move to paragraph number 2 in my map which is the factual background, it's not complex here. First there was an agreed statement of facts which, I don't need Your Honours to go to it, but it is in the bundle, volume 2 at page 156. The essence of the relationship between the parties was that AFFCO employed the second respondents, the union's members, at its meat processing plants on terms of a collective agreement, and that collective agreement is in the bundle, volume 2 at 161. That collective agreement made provision for seasonal lay-offs and re-employment, and there are particular sections included in I think part 6 of the, clause 6 of the contract which starts at 178 on the basis of seasonal employment. Of particular note is clause 30(b) at 179 which stipulates that, "re-engagement is dependent upon employees completing the employer's induction process and signed acceptance of terms of employment (being any terms applying in addition to those set out in this agreement and applicable site agreements)."

So this collective agreement you'll see at paragraph 7 of my submissions expired on the 31st of December 2013. Legislation has affect to continue it in force for a further year to 31 December 2014. Prior to its cessation in force the union initiated bargaining with AFFCO for a new collective agreement to bind, among others, the second respondents. Once the collective agreement had ceased to be in force, the legislation provides that employees continuing in employment do so on terms of individual employment agreements based on the expired collective agreement.

By the end of the 2014/15 season the second respondents had been laid off from their employment with AFFCO with effect that their employment had then been terminated, and although that's the finding of the Court of Appeal, that

seasonal ending of employment is a termination of that employment. The union and the appellant continued to bargain for a collective agreement which had not been concluded by commencement of the new season, the 2015/16, to re-open its plants for that new season. AFFCO offered to re-employ its former workforce on terms of intended new individual employment agreements. It informed that intention to everyone who worked at the plant prior, I the prior season and been laid off, and invited them to attend introduction presentations for a new intended employment agreement at the plant. They were provided with copies of information documents and a copy of the proposed individual employment agreement. And all of that sits inside the context of section 63A of the Act which is probably useful just to refer to now. 63A deals with bargaining for individual employment agreements or individual terms and conditions in an employment agreement, which is looking at the variation of an agreement in place, and it requires particular information to be provided, as you will see at subsection (2), that there be a copy of the intended agreement provided, the employee be advised of their entitlement to seek legal advice, or independent advice. That they have a reasonable opportunity to seek that advice, and that the employer will consider any issues the employee raises and responds to them. You will see from the agreed facts that that is in essence what occurred at the time.

ARNOLD J:

Can I just ask a point of clarification. When the collective expired, and the people covered by it were then employed for a year on individual employment contracts, on the same terms as the collective, the collective of course had these provisions that continued in terms of, I'll call it the "write-in", but the opportunity to be re-employed and seniority and preference and all that sort of thing. Now those provisions would have continued to run over, or continued to operate into the individual employment agreements, and when the individual employment agreements came to an end, I assume those conditions would have continued to apply?

MR JAGOSE:

Yes, I understand that's accepted. So that at the end of the season there remained on the appellant an obligation to offer re-employment in the event that further employees were sought for the new seasons to its former employees in seniority order.

GLAZEBROOK J:

How does that quite fit in with a collective employment agreement and continuing conditions if you say the employment's terminated. I mean on any view these are rather hybrid arrangements aren't they?

MR JAGOSE:

Yes, but I don't think it's any –

GLAZEBROOK J:

It hasn't really terminated because there are obligations and once you do come back in, admitting there isn't an obligation to employ if the work's not there, but otherwise there is, you continue with disciplinary issues and seniority and all of those issues as I understand the contract, and that's accepted by AFFCO I gather?

MR JAGOSE:

It's accepted by –

GLAZEBROOK J:

It's not taking the high ground and saying if things come to an end then therefore all obligations come to an end.

MR JAGOSE:

No.

WILLIAM YOUNG J:

Do you have to say that there's a core set of provisions to the agreement that form part of the employment agreement and there's something else beside that?

MR JAGOSE:

There are continuing obligations that are insufficient to constitute the necessary minima for employment.

WILLIAM YOUNG J:

But you see, one of the things in – maybe I've missed something, I must have missed something because it hasn't been raised, but a lockout includes an action of the employer breaking some or all of the employer's employment agreements.

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

So and do you say that the seniority and provisions and the re-engagement are not part of the employment agreement?

MR JAGOSE:

No, I don't say that. The seniority and re-engagement obligations are continuing obligations that survive termination of employment in the same way –

WILLIAM YOUNG J:

Why aren't they part of, why isn't a breach of the employment agreement not to honour them?

MR JAGOSE:

Well it would be.

WILLIAM YOUNG J:

You see, a lockout includes the active employer breaking some or all of the employer's employment agreements.

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

So why isn't that a lockout. Why isn't it a lockout out on that basis? I mean I'm sure there is a reason because otherwise –

MR JAGOSE:

We say there's no lockout at all.

WILLIAM YOUNG J:

Right.

MR JAGOSE:

So it's not exactly our argument to run that.

GLAZEBROOK J:

It might be your argument to answer, though.

MR JAGOSE:

Yes, I'm with that and the proposition is simply that if breaking means "to breach" then that is an act which takes you to asking whether there is a compulsion. The issue isn't around the action. The issue is around employees, whether these subjects of the action were employees for the purposes of section 82.

WILLIAM YOUNG J:

Oh, I see, because under B it's got to be with a view to compelling employees.

MR JAGOSE:

Correct.

McGRATH J:

Mr Jagose, the obligations for re-employment according to seniority in the collective agreement, they're completely within 30 and 31. There's nothing else that we need go to?

MR JAGOSE:

There is one repeat. Let me pick it up. The 31(b) provision is repeated somewhere else. 29(c). I'm grateful for "stereo" assistance.

McGRATH J:

Thank you. But apart from that, nothing else?

MR JAGOSE:

Not in terms of –

GLAZEBROOK J:

29(c), did you say?

MR JAGOSE:

Yes. There is also an appendix, which you'll see referred to at footnote 4 of my submissions which relates to redundancy, but that's a separate matter.

I meant to come back to Your Honour Justice Young's issue around why isn't breach breaking an employment agreement an act and it would be, it would be a constitutive act, including if there was a break of, for example, the obligation to re-engage, to offer re-engagement in order of seniority. I don't understand there is an allegation, nor do the facts establish that there was a break of the contract in those respects.

WILLIAM YOUNG J:

Well, isn't there other litigation which has proceeded on that basis?

MR JAGOSE:

I understand that the other litigation is to recover damages for this lockout. I'm not sure of other satellite litigation.

ARNOLD J:

So just following on from this a bit, the new employment terms that the employer offers could be inconsistent with these continuing obligations so that the preference applies when AFFCO wants to reopen its plant. People present themselves in accordance with the order of seniority. They're given new terms and conditions which remove, let's say, this preference and say, "Well, we will employ you but this is the basis and the preference no longer continues," and your argument is the employer is entirely free to do that?

MR JAGOSE:

Entirely free to do that, and that is, with respect, a critical understanding of what's going on here. Employment is terminated.

GLAZEBROOK J:

So, actually, you're not accepting that it would be a breach of the previous agreement, then, and that there are continuing obligations because you say the employer is perfectly entitled to give conditions that say you're not entitled to be employed on that basis?

MR JAGOSE:

No. The continuing obligations in the employment agreement are exactly the same as conditions that might extend beyond termination of the contract. For example, obligations of confidentiality that extend beyond termination are expressed inside the contract to extend beyond termination. So here we have a continuing obligation to offer re-employment in order of seniority. Once that offer is made, the obligation is spent. If the new contract says –

GLAZEBROOK J:

So it can be, just so I'm clear on this, you accept that it has to be made on the basis of seniority but it can be made on totally different terms that don't, say, accept continuity of service or any of those other terms, say, bereavement leave, long service leave, annual holidays, et cetera? It could just get rid of all of those?

MR JAGOSE:

No, I don't want to argue that because there are other –

GLAZEBROOK J:

Well, you sort of have to, don't you?

MR JAGOSE:

No, I don't. There are other continuing terms which, for example, talk about reference back to earlier disciplinary provisions, disciplinary proceedings, which can be taken into account. I don't want to be heard on this argument, to be taken on this argument, to be saying, "And that's it. That's the extent of the continuing provisions."

GLAZEBROOK J:

But if your argument is right, surely you have to say they could take away any of the terms and offer totally different terms. Of course, that might – there might be a question of whether in fact you have made an offer of the basis of seniority if you do that, because it's an offer that no one would accept.

MR JAGOSE:

I don't quite –

GLAZEBROOK J:

But doesn't your argument logically say you can actually just offer totally new terms? Once you'd offered on the basis of seniority nothing continues in the old contract?

MR JAGOSE:

It depends entirely on what are the continuing terms that apply after termination. There may be other obligations the employer has taken on which it is unable to simply to walk away from, and one of the examples that I have given Your Honour is the idea that previous disciplinary proceedings may continue to have relevance.

GLAZEBROOK J:

Well, that's for the employer. I should imagine the employer would be quite pleased if previous disciplinary conditions went.

MR JAGOSE:

I'm sure that's right.

ARNOLD J:

But surely the logic of what Justice Glazebrook is putting to you is right, isn't it? I mean, what is there to prevent the employer in the new contract from providing terms which don't allow for long service leave or things like that?

MR JAGOSE:

If there isn't an obligation in the terminating contract to allow, for example, long service leave on any return to our employment, if there is no such provision, then yes, the employer is free to offer terms of employment untrammelled by the terms of employment that he might previously have offered.

ARNOLD J:

But the long service leave provisions do, are based on…

MR JAGOSE:

Continuity of service.

ARNOLD J:

Yes, continuity of service or recurring employment or whatever it is. But you say all of those can be effectively removed.

MR JAGOSE:

Absolutely.

ARNOLD J:

Right.

WILLIAM YOUNG J:

So you don't accept that the offers of employment were in effect a breach of contract?

MR JAGOSE:

No, I don't. Far from it.

WILLIAM YOUNG J:

But did the Court of Appeal accept they weren't?

MR JAGOSE:

I'm not sure quite what the Court of Appeal's said, how the Court of Appeal settled on this point. It's to be seen at page 148 of volume 1, bundle, 148, paragraph 62. Probably back up to 59, and, sorry, that probably requires me to back up to 58 where the Court sets the question, "the question is whether the context requires the definition of the employees to extend to seasonal workers who are not parties to a continuous contract of service with AFFCO." They move from that to say notwithstanding that position, at 59, "the collective agreement created ongoing and enforceable contractual rights and duties. Among them were the workers' redundancy rights and AFFCO's obligation to re-employ according to seniority," and this gives rise to a submission from the Union which I will come to later. The Court of Appeal goes on at 60, "It is commonplace for contracts to impose obligations on employees which subsist be the working relationship, such as provisions for confidentiality and restraint

of trade. Likewise, an employer can assume obligations that fetter its future conduct." Notes that at 61 that a breach of these continuing obligations gives rise to a personal grievance, just as a breach of those terms of their contract prior to termination of the same obligations, and I think the Court of Appeal is there picking up on an expansion to the personal grievance provisions, which expressly says that there is an extension to the personal grievances. Sorry, let me pick that up. The personal grievance section is 103.

WILLIAM YOUNG J:

At 64 they seem to be saying, although they don't say it in quite as many words, that there was a breach of contract.

MR JAGOSE:

That's what I wanted to come to, but the reason for working my way through this is to say the Court notes what are the operative clauses to the expired collective agreement at 62. Seniority, suitability for re-employment, rights to submit disputes, other provisions that survive seasonal termination, including records of disciplinary action as I've referred to, but then says, as Your Honour notes at 64, "AFFCO's conduct effectively defeated the existing rights of its seasonal employees to re-employment on the terms set out in the collective agreement and incorporated within the individual agreements." Now it's with respect inconsistent that what the Court of Appeal is saying is all you have to do is simply offer employment on prior terms, that's your obligation. I know that that's the way that reads taken out of context, but it doesn't make any sense when we see the Court of Appeal identifying that there are limited surviving terms. So I take that sentence –

WILLIAM YOUNG J:

What does it mean, I mean I agree it might be a bit of a jump because it means the contract effectively is perpetual.

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

But what, if the seniority rights in the contract, in the collective are to have legal effect, doesn't there have to be some sort of assumption as to what the offer of employment is going to be?

MR JAGOSE:

Well if we look at what the seniority rights are, they are essentially to give rise to rights to be laid off and re-employed in order of seniority. They were laid off at the end of one season and they've been offered re-employment in order of seniority for the next.

WILLIAM YOUNG J:

I know it's a sort of a picky point but there's nothing in clause 29(c) or 31(b) to say that the criteria included willingness to accept different terms.

MR JAGOSE:

No there, it's at 30(b). "Re-engagement is dependent upon employees completing the induction process and signed acceptance of terms of employment (being any terms – "

GLAZEBROOK J:

"In addition to those set out in this agreement and applicable site agreements," it actually sounds like a same terms one.

MR JAGOSE:

Well with respect –

GLAZEBROOK J:

Subject, obviously, to the collective bargaining process.

MR JAGOSE:

Well, with respect, no. If those parenthesised words are saying any more than what the statute says in relation to the continuity of a collective agreement, the terms of the –

GLAZEBROOK J:

Well no I don't think so because you say these people are no longer employees and no longer subject to, so its terminated.

MR JAGOSE:

The terms applying in addition to those set out in this agreement are precisely – sorry. The terms set out in this agreement are precisely zero on the date of the falling out of force of this agreement.

GLAZEBROOK J:

Well it can't possibly mean that because it has to mean that at the very least the continuous service and the long service leave apply, doesn't it?

MR JAGOSE:

No, with respect, I simply don't see that. This is –

GLAZEBROOK J:

Well either they continue to apply because of the contractual obligation, or they don't.

MR JAGOSE:

Well they don't.

GLAZEBROOK J:

All right, so nothing applies, all right. So in fact you could get around this by saying I offer an employ you at $2 an hour, here's an employment contract, I've offered to employ you on a level of seniority, of course it would be stupid of AFFCO to do this, but this is the extension of the argument.

MR JAGOSE:

Your Honour –

GLAZEBROOK J:

There might be a personal grievance but that was it, actually you were going to tell us what the extension was they were relying on.

MR JAGOSE:

I was, but before I move back to that, the point here is that you have a collective agreement which is established by bargaining and it has a lifetime. At the end of that lifetime to enable further bargaining to replace that collective agreement it is extended in force for a year. At the end of that year, assuming there is still no new collective agreement, the employees are employed then on individual terms of employment based on the collective agreement. When their employment terminates, that's the end of their agreement. What's left is the employer's obligation to offer re-employment.

WILLIAM YOUNG J:

I can understand that argument and one question is on what employment terms must the employer offer, are there any restrictions?

MR JAGOSE:

Well there are minimum statutory restrictions –

WILLIAM YOUNG J:

Yes, leaving aside that, I understand. The Employment Court dealt with it at page 64 of the case on appeal, at paragraph 63.

MR JAGOSE:

Yes, that's right, and that's really the argument that I was putting to say effectively that that's wrong.

WILLIAM YOUNG J:

And you're saying it's wrong, what, because it creates effectively a permanent relationship out of something that under the statute is meant to peter out?

MR JAGOSE:

Yes, and keeping in mind that what the, where the Employment Court was, was coming to a conclusion of continuous employment. So that's why it's looking at all of this.

WILLIAM YOUNG J:
Well that's the context.

MR JAGOSE:
Yes.

WILLIAM YOUNG J:
But the approach, it's still material to the, they're still focusing on what the right of re-engagement means. So the right of re-engagement on your approach isn't a very extensive one because the terms of employment are entirely up to the employer to determine and that can be put on a take it or leave it basis?

MR JAGOSE:
I mean that is a possibility, that's one way of looking at it. It's not, with respect, very reflective of –

WILLIAM YOUNG J:
So what's your – I mean I suspect you probably wouldn't put it that way, but what's your interpretation as to what the employer has to offer?

MR JAGOSE:
The employer has to offer terms of employment of a sufficient attractiveness to obtain –

GLAZEBROOK J:
No, no, but that's a business thing. What are they legally obliged to offer?

MR JAGOSE:
Something above the minimum standard.

GLAZEBROOK J:
Where do you get that from?

WILLIAM YOUNG J:

Anything above the minimum wage?

MR JAGOSE:

Well there's minimum wage, there's issues around holidays, there are issues around sick leave, there are, you know, there's a range of statutory criteria.

GLAZEBROOK J:

Why are they not allowed just to offer the minimum, why does it have to be something above it?

MR JAGOSE:

Equal to or.

GLAZEBROOK J:

So they could just offer –

MR JAGOSE:

No less than.

GLAZEBROOK J:

– The minimum statutory – I mean they're not legally able to offer, so they can offer just the minimum statutory requirements?

MR JAGOSE:

Yes.

GLAZEBROOK J:

Right.

MR JAGOSE:

As can any employer in the country. The reality is –

GLAZEBROOK J:

But any employer in the country hasn't actually entered into a re-engagement obligation, or entered into a collective agreement that says that seniority is taken into account.

MR JAGOSE:

On re-engagement.

GLAZEBROOK J:

On re-engagement. So I don't, well there might be other employers in the country who have done that, but you made that as a general statement, that every employer is entitled to, and of course they are. In a business sense it mightn't be wise but…

MR JAGOSE:

Correct.

WILLIAM YOUNG J:

Can I just go perhaps upstream a little. If paragraph 63 of the Court of Appeal judgment is an interpretation of the contract, can we go behind it, under section 214? I mean it seems to me that, I mean I understand the points you make, and I understand the awkwardness of the perpetuality that might be, that's implied on the union's argument, but on the other hand there's some force in this argument that unless you flesh out what's meant, you wind up with a clause that doesn't have much significance.

MR JAGOSE:

Well it certainly does have significance in the sense that seasonal employees know that they will be made an offer which ought at least to be in terms sufficient to find, for the employer to find an attractive –

WILLIAM YOUNG J:

And they know they can't be overlooked so they get someone else.

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

Okay.

MR JAGOSE:

Well they're not required to return. They're entitled to find –

WILLIAM YOUNG J:

What do you say about the section 214 point, because this is rather a particular issue.

MR JAGOSE:

It is a particular issue. So section, in terms of section 214 the highest it seems to have got, which was before Your Honours or some of Your Honours in the *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131, [2016] 2 NZLR 829 was that a misapplication of correct principle gave –

GLAZEBROOK J:

What we're looking at is whether the Court of Appeal misapplied correct principles now, because it's been held the Employment Court applied correct principles and I know Mr Cranney wants to put an argument on that, but assuming that fails as an argument – and I'm not making any comment on whether it fails or not – do we have the right to intervene if the Court of Appeal interpreted it on correct principles i.e. putting itself in the shoes of the Employment Court. I think that's the question.

WILLIAM YOUNG J:

No, my question goes a little bit upstream of that. If that's an interpretation, aren't we stuck with it unless we can somehow or other say it reflects an application of the wrong principle of interpretation?

GLAZEBROOK J:

That was what I was meaning. Sorry.

MR JAGOSE:

I understand your question, Justice Young, to be focused on the Employment Court's right to determine without challenge the construction of employment agreements.

WILLIAM YOUNG J:

Yes.

MR JAGOSE:

What it's doing here is saying, "Here is an interpretation of a clause which supports the life sentence of 63. Our analysis that this is continuous employment." That analysis has been overturned by the Court of Appeal. It's not an –

WILLIAM YOUNG J:

The Employment Court doesn't seem to have overturned this particular analysis of the nature of the re-engagement, though, as the terms upon which re-engagement is to occur.

MR JAGOSE:

Well, it seems to me that the Court has been quite careful, the Employment Court has been quite careful not to interpret in a concrete way what a section or a clause might mean. It is simply asking itself the question, when I read this clause does that analysis favour continuous or discontinuous employment? So it's not interpreting – it's not construing that provision. I mean, there is an analysis also available but disfavoured by the Court upholding discontinuity of employment. The word "favour" is very important to understand that this is not a determination of the wording as it must always apply. It's an analysis available to the Court. It doesn't take it any further than that. This is not a contract instruction.

GLAZEBROOK J:

Can I just ask you a question on this point that we've got at the moment? Would 30B not be interpreted in the context of a collective agreement knowing that they go and then you bargain for new ones is dependent on being employed under this or on terms similar to another collective agreement, although presumably allowing the freedom for individuals to negotiate outside of that if they want to? Because that's the whole structure of the employment relations system. So it wouldn't be a – it would be a continuous employment but on whatever the terms were under the applicable collective employment agreement or which are able to be reached in free bargaining as an individual employment agreement if the employee decides that's what they'd prefer?

MR JAGOSE:

Or including individual employment agreement terms arrived at when there is no applicable collective agreement.

GLAZEBROOK J:

Well, yes, obviously if it's totally come to an end and the other period where you're deemed to be employed on those terms has come to an end.

MR JAGOSE:

As is the case here.

GLAZEBROOK J:

Well, not as I understand it because there's the extension. I know you say there's been a termination of employment.

MR JAGOSE:

I'm troubled that I may not have properly gotten across that the collective agreement terminated. It is extended for a year, or expires, to use the technical term. The collective agreement expired. It is extended for a year, or it expires to use the technical term. The collective agreement expired. It was extended for one year. At the end of that extension it ceases to be in force. Employees continuing in employment after that point continue to be employed

on their subsisting individual agreements, based on the expired collective agreement, and then after that the employee's employment is terminated on seasons end.

McGRATH J:

But the individual employment agreement do you say that terminates, do you equate effectively the termination of the individual employment agreement with the termination of employment?

MR JAGOSE:

Yes.

McGRATH J:

Because that's not the same, not the position with the collective agreement, is it? There is a difference between the termination of employment and the termination of the collective agreement.

MR JAGOSE:

And I misused, the technical phrase for termination of a collective agreement is that it is expired.

McGRATH J:

Yes, but that doesn't answer my question.

MR JAGOSE:

It is different because the collective agreement, in the context of the Employment Relations Act, is an agreement exclusively between the unions and the employer, and it dictates terms on which employees must be engaged if they fall within its coverage. There is also another subsisting employment agreement that must exist between employer and individual employees, and it is open to providing not inconsistent terms with any applicable collective agreement. So, and that just persists after the expiry of the collective agreement.

McGRATH J:

Yes.

MR JAGOSE:

Still with those terms that are not inconsistent, and still with the body of the collective agreement's provisions. But then on termination of employment there is nothing. The collective agreement has ceased to have effect, expired. The individual employment agreement comes to an end save for whatever carryover surviving terms there may be.

McGRATH J:

In other words it doesn't come to an end?

MR JAGOSE:

Well, the employment terminates.

WILLIAM YOUNG J:

The relationship of employment has terminated but there are continuing contractual obligations, that's your argument?

MR JAGOSE:

Yes.

McGRATH J:

Sorry, that was really what I was trying to get clear.

MR JAGOSE:

Sorry.

McGRATH J:

There's no difference between the IEASs, as they call them, and the collective agreement in that respect?

MR JAGOSE:

If employment terminates a collective agreement, if it's continuing in force past that termination, will continue to exist. And individual employment agreement, save for surviving terms, ceases to operate at the point of termination. I'm not sure it's a relevant point but the collective agreement –

McGRATH J:

You say it's different. That the, it's the individual employment agreement being down the end of the scheme of contracts and individual employment agreements, they cease to have force with a qualification, you accept, as I understand it.

MR JAGOSE:

The employment, the –

McGRATH J:

Once the employment relation ceases, or to be more precise, once there is a seasonal lay-off.

MR JAGOSE:

Yes.

McGRATH J:

All right. I will need to think a bit more about that.

GLAZEBROOK J:

Sorry, I interrupted you before you got back to the 103 point.

MR JAGOSE:

103(1)(b) defines as a personal grievance, "That the employee's employment, or one or more conditions of the employee's employment," and it's the parenthesised words that I'm talking about, "(including any condition that survives termination of the employment)," is or was affected to their detriment, disadvantage.

WILLIAM YOUNG J:

This is a point that Mr Cranney makes but are you any better placed with a finding that there was not a lockout, if indeed you face a personal grievance, or a set of personal grievances?

MR JAGOSE:

Well, yes. One, to be held liable for an unlawful lockout has reputational consequences that are significant and serious in terms of one's reputation as an employer. Two, the personal grievance propositions have a contest about whether or not this was reasonable action to be taken, would a fair and reasonable employer, could a fair and reasonable employer have acted similarly. So there is a reasonableness test –

WILLIAM YOUNG J:

That wouldn't assist you if it's a breach of contract, would it? Can you, I know what the test is but could you justify a breach of contract on the basis that it's what a fair and reasonable employer would have done?

MR JAGOSE:

Well if the contest is that the breach was a personal grievance, then yes. The alternative is that somebody brings action to prevent the breach. A compliance order is normally what would be sought in those circumstances.

WILLIAM YOUNG J:

And there are cases pending claiming personal grievances are there?

MR JAGOSE:

Not that I'm aware of.

GLAZEBROOK J:

As you do find that a slightly extraordinary proposition, that you might justify a breach of contract by saying that it was what a fair and reasonable employer would do, but…

MR JAGOSE:

If the challenge is brought on the basis that this particular conduct was disadvantageous and unjustifiably so, the fact that it also happens to be a breach doesn't answer that particular proposition.

WILLIAM YOUNG J:

Can't there be a claim for breach of contract anyway?

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

Which couldn't be justified on the basis of –

MR JAGOSE:

No, of course not.

WILLIAM YOUNG J:

And would such a claim be within the Employment Relations Act institutions?

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

Even though because it relates to a contract that concerns employment?

MR JAGOSE:

Yes, absolutely. I mean it's an application for a compliance order.

GLAZEBROOK J:

I can't see why you have to have a compliance order rather than a personal grievance.

MR PARBHU:

Because a personal grievance is exclusively to determine whether action on the part of the employer is such as could have been conducted by a fair and reasonable employer in the circumstances. It is not tested against a lawfulness of conduct exercise.

WILLIAM YOUNG J:

Yes, although (inaudible) isn't it. It will overlap?

MR JAGOSE:

Yes of course. I think from our discussion I don't need to look at the factual background in any more detail.

WILLIAM YOUNG J:

Is there a reason why notice wasn't given?

MR JAGOSE:

I think in large part because there was no perception this constituted a lockout.

WILLIAM YOUNG J:

Would there have been a practical difficulty with giving notice?

MR JAGOSE:

If it was accepted that this was a lockout, then one of the consequences is that you must give notice of it, and why else, it would be difficult in some respects to comply with the notice provisions that I took Your Honours to, for example because it requires specificity of the names of the employees, the timing and what your conduct yourself to prevent the lockout, stop the lockout, there maybe –

WILLIAM YOUNG J:

Because you have to specify a termination date or event, don't you, in –

MR JAGOSE:

Well, I suppose that with sufficient creativity one could get around that. I'm more perturbed by the idea of needing to identify who are the employees that it applies to in circumstances when none are employees because their employment has been terminated, and it is unclear as to who necessarily would accept an offer to return.

WILLIAM YOUNG J:

To turn this around, what if any disadvantages have the respondents faced by not getting a notice?

MR JAGOSE:

Only the union gets the notice. The employees or former employees do not. What disadvantage have they faced from not getting notice? None whatsoever. They were given indication of the terms that were proposed.

WILLIAM YOUNG J:

What's the timing? What are the timing differences? Are they material?

MR JAGOSE:

I don't believe they are.

WILLIAM YOUNG J:

Well, come back to it in due course. It's really just context.

MR JAGOSE:

Yes. I mean, whether it's going to be precisely – well, in fact for these sorts of lockouts notices, whatever you give it, it simply needs to be a period of notice.

GLAZEBROOK J:

So the requirements – in the course of bargaining it was, I mean, you took us to those provisions but without actually taking us to the facts at the time. But it would have been an awful lockout even though there was bargaining for a

collective agreement and forget for a moment that you're talking about termination of employees. So assuming these were employees, was the bargaining at a stage where a lockout would have been lawful?

MR JAGOSE:
Yes.

GLAZEBROOK J:
Notice or not it was? Thank you.

MR JAGOSE:
And notice would have been required to make it lawful, but other than that …

GLAZEBROOK J:
No, just checking.

MR JAGOSE:
I propose to move on if that was acceptable to the issue of employees and how that was dealt with in the two Courts. Your Honours will have seen in the Employment Court in the bundle volume 1 at page 77 where the Employment Court at paragraph 109 through to 117, having looked at the statutory definition, noted at 110 the limitation to intending to work, moving then through to, with respect, what can only be described as a misreading of *Tucker Wool Processors Ltd v Harrison* [1999] 3 NZLR 576 (CA) at 112 and as the Court of Appeal says at 115, sort of rhetorically asking the question about whether context is sufficient to overcome those definitions they move promptly to the conclusion at 116 that employees and employer may extend to cover persons who are subject to a current employment agreement, about which there's no dispute, or who have not yet been offered and accepted employment. This may accommodate –

WILLIAM YOUNG J:

Just pausing there, this reveals the horrible application of section 214, where you've got a statutory interpretation issue which is not exempt from review that's closely associated with a contractual interpretation.

MR JAGOSE:

Yes. I mean, I accept, you know, that this is a difficult place to make one's way. Nonetheless, the Court concludes at 116 this may accommodate such seasonal employees as the second plaintiffs, even if AFFCO is correct that there is no ongoing employment relationship in the offseason and at 117 notes that the test for context, taking into account context, requires strong indications. The Employment Court thought that was the case because otherwise there would be an injustice.

The Court of Appeal deals with that at –

McGRATH J:

Wasn't there something further in the Employment Court decision on this? I had a feeling they went into – they went to the Court of Appeal. I'm sorry.

MR JAGOSE:

Thank you. The Court of Appeal addresses this at page 147 of the case. You'll see at 146, paragraph 55, they come to at paragraph (b), first of all paragraph (a) noting that the Employment Court mis-read *Tucker*, then moving on to, "Unless the context otherwise requires," and I've read to Your Honours the question that was established by the Court itself at 58. You'll see then at 59 reference to the ongoing enforceable contractual rights and duties including workers' redundancy rights and obligations to re-employ according to seniority. "Context requires former or seasonal workers to be considered as 'employees' within the s 82 meaning of a lockout where the employer owes an existing contractual obligation to make an offer of re-employment; and where it refuses to do so with a view to compelling their acceptance of new terms and for the purpose of defeating ongoing collective bargaining."

Now there are three things inside that sentence and with respect the only one that makes any relevance to what the Court is meant to be looking at here, which is the definition of "employee" is the first asking whether where an employer owes an existing contractual to make an offer of re-employment, whether that is sufficient context to permit employees, to include seasonal employees here.

The next two portions of that sentence –

GLAZEBROOK J:
Sorry, I think I've lost your sentence?

MR JAGOSE:
It's the last sentence of paragraph 59. The Court of Appeal is asking whether the context here is such that requires the definition of "employees" to extend to the seasonal employees.

GLAZEBROOK J:
Well I just read 59 is just saying what Mr Cranney's submission is.

MR JAGOSE:
Yes, the first sentence of paragraph 60 says, "We agree," so let's just back it up to that former sentence.

GLAZEBROOK J:
All right, I see.

MR JAGOSE:
There are three things here. The first is that contextual proposition about owes an existing contractual obligation to make an offer of re-employment. Then there are two more related concepts, where there's a refusal to do so with a view to compelling acceptance of new terms and the third thing is, "For the purpose of defeating ongoing collective bargaining." Now with

respect those latter points don't seem to have anything to do with the context of the word "employee" in section 82.

WILLIAM YOUNG J:

If you look at section 82, if you go to section 82(1)(a)(iii), subclause I took you to earlier, might it not be possible to interpret "employee" as encompassing someone who was a party to an employment agreement for the purposes of subpara (iii)?

MR JAGOSE:

I'm sorry, I don't follow you?

WILLIAM YOUNG J:

Well I know you don't accept that the offers were employment were a breach of the individual employment agreements, so can we park that issue to one side. Let us say for the purposes of this issue that they were a breach of the individual employment agreements. On the face of it they were therefore a breach of section 82(a)(iii), if you accept my assumption.

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

All right. Well then might that not imply that for the purposes of (b) employees encompass parties to the employment agreements which have been breached?

MR JAGOSE:

I don't see that that's a necessary condition because the necessary condition for (b) is that they be employees of whom it is sought to compel to accept terms or comply.

WILLIAM YOUNG J:

If the obligation under the employment agreement which is breached is an obligation to offer particular terms and if the breach of that is offering other terms and refusing to take people on the promised terms, then wouldn't there be something to be said for the view that employees in (b) include people whose contractual rights have been breached in that way?

MR JAGOSE:

With respect, I don't think so. It seems to me there are other remedies available in those circumstances which don't require the finding of a lockout. It really goes to the core of our argument that what we're talking about in a lockout is an obligation in circumstances where there is a continuing contract of employment which has within it constraints on the employer and obligations on the employer, and the employer is seeking to obtain the employee's agreement to vary those continuing obligations.

An example that Your Honour put to me which is, let's assume that there was an obligation to offer re-employment on terms of the prior employment agreements, and so the lockout, the purported lockout action here is that the employer either refuses to engage or breaks those continuing terms. I'm not sure which would be more apposite but it seems to me, with respect, that (iv) is more apposite. Then if it has been done with a view to compelling employees to accept new terms, I don't see why it is necessary for the subject of (iii) or (iv) also to be those same employees. If they have a contractual right to be employed on complete terms that are already known, then that is open to being remedied by ordinary contractual remedies.

WILLIAM YOUNG J:

Say there was a contractual, a lockout following notice. Would that exclude the right – so it's lawful as a lockout – would that exclude the right to personal grievances in the course of the lockout?

MR JAGOSE:

No.

WILLIAM YOUNG J:

Practically it does, doesn't it? Or not?

MR JAGOSE:

No, that's why I go back to that point.

WILLIAM YOUNG J:

I know you took us to the list of exemptions didn't extend to personal grievances.

MR JAGOSE:

No, it doesn't and –

GLAZEBROOK J:

It does extend to Court cases to enforce contracts, didn't it?

MR JAGOSE:

Yes, it does.

WILLIAM YOUNG J:

If someone is locked out, technically, theoretically, anyway, someone who's locked out can apply to the Employment Court or the Employment Relations Authority for a reinstatement order?

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

Do people ever do that?

MR JAGOSE:

I'm not aware of it.

ARNOLD J:

Can I just look at 81(a)? It talks about the discontinuing the employment of any employee in (ii). In (iv) it talks about refusing or failing to engage employees, which seems to assume that people aren't already employees. In other words, it's not talking about – doesn't seem to be talking about failing to offer work to existing employees but it talks about engaging employees.

MR JAGOSE:

I say in my submissions that employees in (iv) is better understood as persons because of the circularity of exactly what Your Honour has just described.

ARNOLD J:

Yes. So in refusing or failing to engage persons for any work for which the employer usually engages or employs people …

GLAZEBROOK J:

It can't be as wide as that, can it?

ARNOLD J:

So when – and it's done with a view to compelling you have to say other employees?

MR JAGOSE:

Yes, actual employees.

ARNOLD J:

But that's really odd.

MR JAGOSE:

With respect, it's not odd at all. For example, I employ a number of people who both make morning and afternoon teas and people who clean the offices and I decide I am no longer going to employ people to make morning and afternoon teas but I am going to try to get the people who clean the offices to perform that task. So I terminate the employment of the afternoon and

morning tea makers and there ceases to be afternoon and morning tea available to the staff unless the cleaning staff are prepared to take up that performance. Now that seems to me to be, with, I mean, apart from the simplicity of it, an entirely ordinary lockout situation.

GLAZEBROOK J:
Who are you locking out? The tea makers?

MR JAGOSE:
No, no. I am –

GLAZEBROOK J:
Then I don't know who you're locking out.

MR JAGOSE:
I am doing it was a view to compelling the cleaning staff to take –

GLAZEBROOK J:
Doing what though? Yes, but doing what?

MR JAGOSE:
I have terminated their –

GLAZEBROOK J:
But you're failing to engage the – who?

MR JAGOSE:
I have –

GLAZEBROOK J:
The tea makers?

MR JAGOSE:
I am not employing any more tea makers. I am allowing them to drift off as they hit retirement age or choose to transfer elsewhere and I say to my

cleaners, “If you want food at morning and afternoon tea then you are going to have to do that work yourself.”

WILLIAM YOUNG J:
But is that a lockout?

MR JAGOSE:
Well, it looks like it is. If I want them –

GLAZEBROOK J:
But who are you locking out?

MR JAGOSE:
I am –

GLAZEBROOK J:
Because you’re not locking out the tea makers, you say, and the cleaners just carry on working. They just do or don’t make the tea.

MR JAGOSE:
Participation in a lockout is the term of art. Locking out a person is not a term of art. A lockout is an act done with a view.

WILLIAM YOUNG J:
So it’s not a sort of, a what do you call it, a verb that has an object? I can’t remember the grammatical term, but you don’t need an object for it to be a lockout.

MR JAGOSE:
Well –

GLAZEBROOK J:
There’d be lots of lockouts around if that were the case because people are told all the time that they’ll have to take on extra work.

MR JAGOSE:

Well, I think, I mean that is almost the point here, Your Honour.

GLAZEBROOK J:

So there should be notices given in all of those circumstances?

MR JAGOSE:

No, they're not – it's not lockout – this is not lockout stuff. This is the ordinary stuff of employment where term –

GLAZEBROOK J:

Sorry, I thought that you said that that was an example of a lockout.

MR JAGOSE:

It's a perfectly good example of a lockout to say, "Where I want somebody else to take on additional duties I stop the employment of the people who have performed those duties to date. I refuse to replace them."

WILLIAM YOUNG J:

The word I was looking for is "transitive". You say it's not necessarily a transitive verb?

MR JAGOSE:

It looks very clearly like a noun to me.

WILLIAM YOUNG J:

A lockout but two lockouts. To engage in a lockout.

MR JAGOSE:

Yes. I mean, that's what the Act says and in this Act lockout means an act, and then it talks about, at 83, participation in a lockout. It does not talk about people being locked out.

WILLIAM YOUNG J:

To lock someone out. Okay.

GLAZEBROOK J:

But there might be a few employers in the country who would be quite dismayed by that analysis of a lockout.

WILLIAM YOUNG J:

Well, I'm not sure that's the case. The point –

GLAZEBROOK J:

So they regularly give notices to people when they ask them to take on extra work and make the, their office people, the photocopiers redundant or the office junior, and redistribute the work.

MR JAGOSE:

That's exactly – that's absolutely the core point for AFFCO.

GLAZEBROOK J:

All right, so they should be making notices, giving notices.

MR JAGOSE:

No. That this is not lockouts.

GLAZEBROOK J:

Okay, well, sorry, I'm really having trouble following you.

WILLIAM YOUNG J:

Well, it's probably – you'd probably say a hare running that may not be worth chasing down on the tea lady issue. Can I just ask, my impression of a lockout is that you are doing something to someone to make them agree to something? That's the core element of it.

MR JAGOSE:

It's the doing something to someone to make them do something is that I take up.

WILLIAM YOUNG J:

Yes, you say not necessarily –

MR JAGOSE:

Not necessarily. They are –

WILLIAM YOUNG J:

It doesn't actually have to be the person –

MR JAGOSE:

They are actions of employers and they are to be done with a view to compelling employees. Whether those actions of employers necessarily touch the same employees on the other side of the fence, is an irrelevancy.

WILLIAM YOUNG J:

So a redundancy, the practical effect of which is the other employees will have to do more, could be treated as a lockout. It doesn't look –

O'REGAN J:

Only if it was done to force other people to agree to take on more duties.

WILLIAM YOUNG J:

There's probably no intention of taking the redundant people back I suppose.

O'REGAN J:

But it's all got to be done with a view to compelling the other employees to accept something. So if you just make someone redundant, and you don't have that purpose, then there's not much you can do with it.

WILLIAM YOUNG J:

I suppose, if they don't want tea breaks, they, in fact, won't be able to make the afternoon tea they don't have to drink it.

MR JAGOSE:

I see where, I mean I understand why Your Honour is raising the point, and in terms of redundancy, and acknowledging Justice O'Regan's point also, in terms of redundancy on a restructuring let's say, you know, where there is a wholesale restructuring, where we're going to move this work that was done by those redundant employees, and we're going to have it done by these people whose terms of employment do not currently require them to perform that, and so I'm just going to have my work not done at all, hoping that these people will pack it up. Distinct from for my operation to function they must pick it up. Otherwise I'm in trouble. My restructuring is going to be an abject failure. So somewhere between those two points is the industrial reality of what a lockout is. And Justice O'Regan, with respect, is right to say that this is not in the hope that someone else will perform. This is with a view to compelling them to accept terms of employment, necessarily a variation of the terms of employment they already have, or otherwise to comply with the employer's demands. It's at that height.

I think I was looking at the collective agreement, sorry the Court of Appeal's looking at the question of context. I was at the end of paragraph 59 of the Court of Appeal's judgment, and I'd raised the point that realistically only the first of those three conditions can be a relevant consideration for determining whether or not a subject person is to be considered an employee.

GLAZEBROOK J:

Is that right, because aren't they just saying in the context of that redundancy and meaning of lockout, you might have to determine employee in a different manner, because if in fact the behaviour is, are undertaking this with a view to forcing them to accept terms of conditions of employment, then it's a, the same sort of argument I think that Justice Young was putting to you, that in that context – you start with employee but if you start with the first part of the lockout then that might suggest you interpret "employee" in a wider fashion. Isn't that all that's being said? And you say, well no, because employee means employee, but the argument is well in the context of that section, it

might mean something wider because it means the people who come within paragraph (a). Or subsection (1).

ARNOLD J:
Well I think we've already accepted that it does mean employees in 82(1)(a)(iv), a reference to employees is really a reference to people.

MR JAGOSE:
My point on the last sentence of 59 is simply to say it's not necessary to determine whether employees includes seasonal employees. To look even for the purpose of section 82, to look at the last two elements in the last sentence of paragraph 59, the first of those last two elements is the compulsion aspect, that's the conduct of the employer, that's its intent, and it can't change the perception or the interpretation of an employee by dint of the employer's intention, and the last point is for the purpose of defeating ongoing collective bargaining, overlooks the object of the lockout part, or the industrial action part of the Act. The very first point which emphasises that lockouts are just another part of accepted industrial bargaining. And indeed where the Court of Appeal goes to is to drop those last two elements out in its conclusion.

It's conclusion is at paragraph 70. "Unlawful lockout provisions must extend to and protect former employees," in this case these workers, "who enjoy existing contractual rights to an offer of re-employment from a party refusing to engage them unless they accept new terms of employment inconsistent with those existing rights." Now they go on to say why in the last sentence. That's, there is a justification for extending but that's not the extension in itself. The extension is only who enjoy existing contractual rights of re-employment. That's what they're focusing on.

GLAZEBROOK J:
What's your complaint? That they mention three factors and only took into account one?

MR JAGOSE:

No, it's not a complaint. I'm taking Your Honour to the Court of Appeal's judgment for the purposes of understanding what it is the Court of Appeal actually found, and what the Court of Appeal actually found was that context permitted expansion of the employee in section 82 to encompass seasonal workers who enjoy existing contractual rights to an offer of re-employment.

McGRATH J:

Just in terms of the context, is the context something that's confined to the statute, rather than wider circumstances.

MR JAGOSE:

Very much our submission Your Honour.

McGRATH J:

And you say the Court of Appeal did not do that?

MR JAGOSE:

No, they most certainly didn't.

McGRATH J:

And is that related to what you've just said in relation to the second and third elements of the adopted reasoning at 59?

MR JAGOSE:

That's the reason for me laying that groundwork.

McGRATH J:

I just wanted to make sure that's what I understood.

MR JAGOSE:

It's a useful point, having surveyed the judgments, to then take up the first of my friend's other grounds, and that's in relation to discontinuous employment. So I'm at 3.3 of my little map. In my written submissions we start at paragraph 24. So just to be clear this is going to the point about continuous

and discontinuous employment. This is nothing to do with the definition of "employee".

We say, I say in my submissions that the Court of Appeal brought completely orthodox principles of contractual interpretation to bear. It noted that context was a necessary element of the interpretive process which is I think Your Honour Justice Glazebrook in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432, that it seems accepted by the Court of Appeal in *Air New Zealand Ltd v New Zealand Air Line Pilots' Assoc Inc* that the process adopted for an employment context is as I've set out at paragraph 27 to assess the natural and ordinary meaning of words used in the context of the collective –

GLAZEBROOK J:
Sorry, I don't think I'm on your right submissions.

WILLIAM YOUNG J:
Paragraph 27 of the supplementary submissions.

GLAZEBROOK J:
It is the supplementary submissions. Sorry. Oh, sorry, you had it written down there. I hadn't noticed.

MR JAGOSE:
I was just saying that adopting the orthodox commercial approach to contract interpretation in an employment context is set out by the Court of Appeal in *Air New Zealand Ltd v New Zealand Air Line Pilots' Assoc Inc* and I've just extracted those headlines, really, and at paragraph 27 the exercise is to assess the natural and ordinary meaning of the word "used" in the context of the collective agreement and in the context of the background circumstances known to the parties and with an eye for business or employment relations common sense.

GLAZEBROOK J:

I'm a bit puzzled why we are going to the contract rather than the statute. I thought we were looking at the statute.

MR JAGOSE:

We're going to the contract because there is an argument raised by my friend on other grounds that the employment – the Court of Appeal heard in finding discontinuous employment.

GLAZEBROOK J:

So we're not looking at the statute? We're looking at the interpretation of the contract now?

MR JAGOSE:

Yes, we are.

GLAZEBROOK J:

Sorry, I haven't quite caught up.

MR JAGOSE:

I'm sorry, Ma'am.

GLAZEBROOK J:

Probably because I was on the wrong set of submissions.

MR JAGOSE:

I think I am at paragraph 29. I get to the point to say that parties are taken to have contracted against a background which includes previous decisions on the construction of similar contracts and you'll see there my citations to *Quay Park Arena Management Ltd v Great Lakes Reinsurance (UK) plc* [2014] NZHC 2204, consistency with which is in principle to be assumed, which is from *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] AC 266 (HL). Divergence is to be established by strong evidence. The parties

intended a different interpretation and that's *Kumar v Nandan* [2016] NZHC 935. That's exactly what the Court of Appeal did here.

GLAZEBROOK J:
What would be the strong evidence if you're actually looking at an objective interpretation of a contract?

MR JAGOSE:
Well, no, you're not. What you're looking at is you're asking yourself what are parties deemed to have understood in using particular words that have been the subject of judicial interpretation, right or wrong.

GLAZEBROOK J:
Well, we are assuming that people actually are very familiar with all of the case law. I mean, I would have thought that most of those are relation to case law on the interpretation of contracts that people have entered into before.

WILLIAM YOUNG J:
The union would know.

GLAZEBROOK J:
No, I understand that but it's just I'm not sure what the strong evidence would be in terms of if you're looking at an objective analysis of the contracts because you're looking at cases that related to awards. You've got a totally different structure now. I'm probably asking two questions there, but I'm a bit puzzled about strong evidence if you don't allow subjective intent to come in or negotiations.

MR JAGOSE:
So the strong evidence would have to be either the use of phrases distinct from those given known interpretations or adoption of known terms with strong evidence that the interpretations were not known. So, for example, the Court of Appeal refers to a case called *Hughes v Riverlands Eltham Ltd* EmpC Wellington WEC58/96, 18 September 1986, in which the Court of Appeal

says, “Look, here is a contract in this industry which identifies precisely that notwithstanding the seasonal employment premise that the industry operates on, this is permanent employment under this contract.”

WILLIAM YOUNG J:
Which is that case?

MR JAGOSE:
It’s *Hughes v Riverlands*. The Court of Appeal refers to it at paragraph 49 of its judgment where the collective agreement there said, “Although the work available to many employees is of a seasonal nature, for the purposes of continuity of employment all employees shall be deemed to be permanently employed by the employer pursuant to the terms of this contract.”

WILLIAM YOUNG J:
We might take the adjournment now.

MR JAGOSE:
Certainly.

COURT ADJOURNS 11.31 AM
COURT RESUMES: 11.48 AM

MR JAGOSE:
I have just established the submissions in relation to the approach to contract interpretation particularly where there are phrases used and judicially defined in meritorious cases, which is why then if I turn to the supplementary submissions at paragraph 31 I say here that the relevant facts are that the parties were party to a collective agreement and that a raft of preceding judgments had determined industry practice to employ meat workers on a discontinuous basis, with the result their employment is terminated at the end of a season. Those judgments I’ve set out, there are five of them, at footnote 75. So we can look at some of those earlier judgments to see that at paragraph 33 the Court of Appeal had held that the relevant award provisions

were truly inconsistent with the co-existence of a contractual provision for permanent employment and thus inferred discontinuous employment, and the Employment Court had then seen that judgment as binding precedent in relation to collective agreements with materially identical provisions. Here, the Court of Appeal explains the relevant employment provisions considered in the leading cases were materially the same or similar to these provisions.

But what the Employment Court did instead, I've set out at 34, was to disregard the history to distinguish the former agreements and to take its task to be to determine continuity from the contract in question and the working relationships in practice. There's – stop there to saying there's nothing in the Employment Court's judgment that articulates what it is about to do that sets out what principles it is following to construe the contract at issue, and it might be said that those principles are now so well understood as to not require repetition. Still, it is unusual that there is nothing in the Employment Court judgment that even indicates the legal parameters of the process that it's entering into, and so when it comes instead to look at this contract from the relatively novel position I've outlined at 34 it's no surprise then that at 35 the Court of Appeal simply said it's an error because it is to construe the contract in a vacuum unrelated to the interpretive inquiry, and that is to say by disregarding the seasonal employment context. Only by disregarding it could the Employment Court recharacterise the employment as continuous. So –

GLAZEBROOK J:
Well, it explained why it didn't take it into account, didn't it, so it didn't disregard it in that sense?

MR JAGOSE:
I'm not sure what the "it" is, with respect.

WILLIAM YOUNG J:
So what's the crunchy paragraph in the Employment Court judgment?

MR JAGOSE:

The crunchy paragraph?

GLAZEBROOK J:

All I'm saying is it explained why I considered those old cases not to be relevant.

MR JAGOSE:

Yes, it did. It most certainly did. What it didn't do was tell us what it's actually meant to be doing which is construing a contract according to principle.

WILLIAM YOUNG J:

175.

GLAZEBROOK J:

Well, its principle assumed that they were, would otherwise be relevant had it not been for the factors it identified.

MR JAGOSE:

Which were that they weren't relevant.

GLAZEBROOK J:

Well, because the context had changed, it said. I mean, they might be wrong in that but is it an error of principle or just a submission that they were wrong and the cases should have been, should have determined the issue?

MR JAGOSE:

It's an error of principle to construe a contract without regard for its context.

GLAZEBROOK J:

Well, they didn't do it without regard to its context. They said they thought that context, particular context, was irrelevant.

WILLIAM YOUNG J:

I think you say they misconstrued the context.

GLAZEBROOK J:

Well, they might have done. I mean, that might have been wrong. Of course, there is an issue as to whether its an error of principle in contractual interpretation or an error in contractual interpretation, whether of principle of otherwise, that actually excludes jurisdiction, or gives jurisdiction, I should say, on appeal.

MR JAGOSE:

Well, I would like to urge you that you have jurisdiction and I will take you to that in a moment, but this is an error in principle. The principle that the Employment Court embarked on is to determine a question of continuity or discontinuity by reference primarily to the contractual terms and conditions in each particular case and the conduct of the working relationships in practice. That's paragraph 177 of the judgment.

GLAZEBROOK J:

Actually, that would seem to me to be actually quite orthodox, to be honest.

MR JAGOSE:

Well, no, it's not and the reason it's not is because it disregards that these are not clauses that spring into presence in this contract but that they have a historical foundation, that they have an industry presence, and that they carry all the weight of the judgments that haven't construed those particular clauses where they are repeated without material change in the contract under consideration. It is a mistake in principle to disregard the context, and that is what one does if one has reference primarily to the contractual terms and conditions in the particular case. Just to sort of step back to what I think was indisputable, that context was a necessary element of the interpretive process, that's the law. "The meaning the contract would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of their contract."

WILLIAM YOUNG J:

Part of, it's 175 is where they deal with the earlier jurisprudence. In a sense their error, as you would have it, is that they just misconstrued it. Seen it as outmoded, locked up in the award system, and therefore not controlling, and it's another section 214 conundrum because it would be insulting to say they didn't take into account the context.

ARNOLD J:

Well it's really a contextual analysis that they've undertaken, and they say in the context of the modern environment, earlier cases no longer apply. Now you say that's wrong, but I mean they did think about it.

GLAZEBROOK J:

So it might be the difference between an error of interpretation and an error of principle in contractual interpretation, because they did take it into account in order to disregard it, but for reasons that they outlined.

MR JAGOSE:

It would be a lot more –

GLAZEBROOK J:

But you may have disagreed with but…

MR JAGOSE:

It would be a lot more compelling if the Employment Court has told us what it was doing according to standard principle.

GLAZEBROOK J:

Well it didn't need to, it was – well I think it did actually just say that it was, oh, maybe that was the Court of Appeal set that out…

McGRATH J:

But in paragraph 175 where it talks about cases going back to the period of industry wide awards, it seemed to me that what the Court had in mind was

the *New Zealand Meat Processers, etc, IUW v Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143 (CA) case, 1991 I think, and that pithy extract that's often quoted from Justice Richardson's judgment. Now we're back into the time of awards then, and then we come forward to *New Zealand Meat Workers IUW v Richmond Ltd* [1992] 3 ERNZ 643 (EmpC), which is an Employment Relations Act case, and you've got the judgments of Justice, Judge Palmer and Judge…

MR JAGOSE:
I think, with respect, *Richmond* was an Employment Contracts case.

McGRATH J:
Employment Contracts Act 1991, but that's the point, they believe they can apply Justice Richardson's principles to an Employment Contracts Act case.

MR JAGOSE:
Yes.

McGRATH J:
Now there I think aren't they really saying that these old cases, really I think particularly seeing the *Richmond* case is just turning off the Justice Richardson's judgment, the *Alliance Freezing Co* case, that they're really saying well that's really going back a long time because if the *Richmond* case is really no more than just following the earlier Court of Appeal case, and it's just – I mean I don't, it seems to me that in those few generally expressed lines there was some underlying meaning they were drawing from those cases.

MR JAGOSE:
Well they say some of these cases go back to industry awards, but of course some do not.

McGRATH J:

But the key case that seems to me that influenced the course here was Justice Richardson's judgment in *Alliance Freezing Co*. It was a very definitive, if somewhat, in the Court of Appeal's view, somewhat narrow in retrospect presumption. That was the, there's not a lot of jurisprudence here but really it seems to me –

MR JAGOSE:

No.

McGRATH J:

– that's the Court of Appeal decision that's been, that set a fairly definitive pattern, and that's the one that goes back to award times.

MR JAGOSE:

Yes, and it's –

McGRATH J:

And they thought it was just not appropriate, not one that stood in modern conditions, particularly under the Employment Relations Act.

MR JAGOSE:

But that's exactly the problem isn't it. It doesn't matter whether those constitutive judgments have contemporary correctness. What matters is that the parties picked up the concepts embedded in them, and have applied them consistently ever since.

WILLIAM YOUNG J:

Well that's your argument, that really they've looked at whether they're good authorities rather than looked at them in terms of whether they inform the meaning that should be attributed to the language in the contract that follows the language that was used. To some extent anyway the language was used in the contracts in issue in those cases.

MR JAGOSE:

Well that's right. Even although the Employment Court itself says that it takes that approach to be a binding precedent. You know these are, this is a high threshold to suddenly get over.

WILLIAM YOUNG J:

Well which is it. What cases does it start binding, the first *Alliance Freezing Co* case?

MR JAGOSE:

Yes, I think so. It's *Alliance Freezing Co* at 106. 103 sorry.

GLAZEBROOK J:

Can I ask what the downside is in having these people as continuous employees in the sense that no one's suggesting, which I think they probably were in the other cases, that there's not an ability to terminate, or not to re-offer employment if in fact you come too far down the seniority pile, and without going through personal grievances, in fact there's possibly even an ability not to offer if you say you were incredibly difficult and not a particularly good employee and therefore I'm going to take the one down below, because no one's really suggesting that these are anything other than sort of perhaps similar to those zero hours contracts where you are an employee, you – well I mean they're slightly different in that you're not obliged to come back because it's accepted the employees had a choice. But nobody's suggesting you have employment rights during the period, they're just saying you are an employee for the purposes of continuity and that's effectively what the contract itself says in terms of long service leave et cetera. So I don't understand the union to be arguing that it gives you any greater rights than are set out actually in the contract.

MR JAGOSE:

One, which is the minimum weekly payments.

GLAZEBROOK J:

Well no I don't think anybody's suggesting you get weekly payments when you're not working. It's not the union's argument, is I understand it, they accept you don't.

MR JAGOSE:

It's not for the union to define which aspects of an employment agreement it may or may not enforce.

GLAZEBROOK J:

Well, no, but the employment agreement itself doesn't give you those rights, just as in the zero, some contracts or whatever, zero hours contract, they have no right to be paid if they weren't working. You're allowed to have contracts like that now, unlike I think under the awards system. So you can have a contract that says if you're not working you don't get paid.

MR JAGOSE:

And if we were starting from a blank slate then possibly that's what this contract would say, but it's not.

GLAZEBROOK J:

But it says you can stop employing them and you don't have to pay them so it does say that, doesn't it.

MR JAGOSE:

The contract is to be construed as providing for discontinuous employment, yes. Your Honour's question was, "What's the downside. Why wouldn't you just accept continuous employment with no work." And one of the answers to that is because the contract provides for a range of minimum requirements, whether working or not. One of which is minimum weekly payments. There are also issues around annual leave. There's a range of issues that come with employment.

I think it was at paragraph 35 of the supplementary submissions. The submissions continue to say that, even though we don't need to make the argument, the foundation judgments can't be represented, as my friend seeks to do, to say that in fact properly construed they provide for continuous employment and I've set that out in paragraph 37. There seems to be some reliance on a proposition in one of the *Alliance Freezing Co* cases that the workers were permanent workers, that is all year round not seasonal workers. There's a point to be drawn from that which is to say although the Labour Court had held that the company's assurance of all round employment was not contractual in nature, the Court of Appeal acknowledged only that there was force in the union's submission that finding erred in law as not founded on any evidence, and it didn't have to decide the issue in any event. But it is not to say that it was necessarily wrong, or that the Court of Appeal found otherwise. And in all of these cases, as we've just said, there is that continuing thread that there not only isn't continuous employment, but that the arrangements during the off-season do not supply the essential elements of a continuing enforceable employment contract.

That's again *Richmond* which brings me sort of back to my prior point which is to say regardless of their correctness or not, paragraph 38, the Court of Appeal was right to say that the notoriety of the judgments will assume factual authority in the minds of the bargaining parties, and forms an effect of private legal dictionary.

I think I've made my way thoroughly through 39 to 44. I note that the collective agreement's own provisions at 45 say, "Seasonal employees are employed for a season," and that they're, on the face of the agreement itself, is very little to support a proposition that this should be considered continuous employment, and again at 46 I say, look this is the, the only way you can get there is to construe the contract without context.

And at 48 I think is really my summary that, "When contracting parties of aware of any use contractual phraseology judicially defined as carrying a particular meaning, strong evidence is required to conclude the parties

intended another meaning. Here, where the parties used ‘similar language, in a similar trade and in similar circumstances’ (or, more accurately, ‘materially the same’ language, trade and circumstances), the first respondent ‘was in fact a party to the three leading decisions which establish the discontinuity principle”, and there is no countervailing evidence of the parties’ contrary intention at all, the Court of Appeal’s conclusion was inevitable.”

Which takes me to the issue around jurisdiction. Although, I’m at paragraph 4 of the supplementary submissions. So I appreciate obviously that the respondents’ were given leave to pursue the points identified in their leave submissions as support for the Court of Appeal judgment on other grounds, the first being that the Court of Appeal lacked jurisdiction to differ from the Employment Court’s construction of the employment agreement. There is no argument in their submissions whatsoever on the point. That’s just the same conclusionary proposition as articulated in the first penultimate paragraphs. And it feels like punching into air to have to respond at this Court at this level to an important argument where there has been nothing raised against – in support of the proposition.

Obviously the case law is well known since *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA) and prior to *Yates*.

O’REGAN J:
It’s probably best if you just leave this for reply isn’t it, given that you are punching at air at the moment.

MR JAGOSE:
Well in that case I’ll just raise one other point then in relation to this, which is that in terms of the Supreme Court Rules 2004 the test is that the respondent does not wish the judgment appealed from to be varied. I do not see how an argument that the Court of Appeal lacks jurisdiction can fall within the ground for support on other grounds. The respondent does wish judgment appealed from to be varied.

WILLIAM YOUNG J:

Well, it depends if the judgment, if the respondent wants the result arrived at by the Court of Appeal to stand but albeit not for those reasons.

MR JAGOSE:

Not quite what the rules say.

WILLIAM YOUNG J:

Sorry?

MR JAGOSE:

Not quite what the rules say. The rules –

GLAZEBROOK J:

Well, should they have cross-appealed? Is that what the suggestion is?

MR JAGOSE:

I think that must be right.

GLAZEBROOK J:

Although the cross-appeal for the same result, I think we'd probably say. We're not sure you can do that.

WILLIAM YOUNG J:

But what does the rule actually say?

MR JAGOSE:

The rule says to support on other grounds requires for the respondent, that the respondent does not wish the judgment appealed from to be varied.

WILLIAM YOUNG J:

Well, the judgment appealed from, let's have a look at it. The appeal is dismissed. There's no order for costs. Isn't that all they want to hold on to? I'm not sure this is a – I mean, I understand that the point that you haven't

been given any particulars of the argument but I don't know that this is a very good point.

MR JAGOSE:
Thank you.

McGRATH J:
It's a reasons for judgment as opposed to the judgment distinction.

WILLIAM YOUNG J:
Yes.

MR JAGOSE:
The last point is the indefinite employment proposition raised by my friends and I think I have dealt with that in the sense of saying at paragraph 20 of the supplementary submissions that once the Court of Appeal corrected the Employment Court's error of continuous employment, the individual agreements, save for their surviving terms, came to an end on seasonal termination, and I do go back to looking at what the Court of appeal in fact was saying, although there was that line I think Your Honour, Justice Young, took me to which suggested that the new employment needed to be on the same terms as the old employment as a condition of the re-employment obligation. I say at paragraph 21 that the Court of Appeal was not endorsing a –

WILLIAM YOUNG J:
It depends on what "on the terms" means.

MR JAGOSE:
Yes, it does. It does very much and it's unfortunate that it's sort of a loose throwaway line. But in the Court of Appeal's judgment to give that "on the terms" as meaning "all of the terms" is inconsistent with the Court of Appeal's segregation of ongoing contractual rights post-termination. It's identification of the operative clauses surviving seasonal termination.

WILLIAM YOUNG J:

Do you say that the seniority rights are like essentially a right of pre-emption, that the employer couldn't offer terms and conditions to someone else ahead of an offer to those who have seniority rights?

MR JAGOSE:

The obligation is to offer re-employment in order of seniority. So it would be, rather than putting it in the negative as Your Honour has put it, it's the first is to offer re-employment in order of seniority. It's a current contractual obligation and it would inevitably be breached by offer of employment to somebody else.

WILLIAM YOUNG J:

On the same terms. Sorry, they can't make an offer of a particular contract to applicant B if applicant A has the seniority entitlement?

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

Right.

MR JAGOSE:

That takes me to what is really the meat of the appeal, to look first at the Employment's Court determination of a lockout. I'm at 4.1 of my map and just referring to the Employment Court's judgment. It's page 103 of the first volume of the case. So the Employment Court says that the decision of lockout is because the seasonal workers were employees when seeking to be engaged at the end of their seasonal lay-off. This is because employment is continuous. Then they go on at 195 to say, "Alternatively, we have concluded that even if the second plaintiffs were not employees they were nevertheless locked out unlawfully when required to agree to IEAs as stipulated for by AFFCO to begin work for the new season."

Then at 196, “The plaintiffs have, therefore, succeeded in establishing that the second employees were employees and the defendant was their employer, as those terms are used in section 82.”

I’m not entirely sure that there hasn’t been a jump in logic there. I take 195 to be picking up on 116, which is at page 79. You’ll recall that we saw this before. The conclusion that employees may extend to cover persons who have not yet been offered or accepted employment. I think that is what 195 is relying on.

Then they go on at 197 to say that AFFCO’s refusal to re-engage them amounted to a lockout. It was the acts of an employer of those employees in refusing or failing to engage those employees for work for which the employer usually employed employees with a view to compelling those employees to accept terms of employment or to comply. I emphasise those because I don’t think that’s a necessary word in all of this. As we’ll see in argument, my proposition is that the critical employees is that appearing in 82(1)(b). That’s what we’re looking at. That’s the object of the actions. And so the question is whether these seasonal workers are to be construed as employees for the purpose of 82(1)(b).

The Court goes on to say that while AFFCO was prepared to accommodate some minor issues and to withdraw what the Court describes as egregious and arguably unlawful provisions, the evidence persuades us that AFFCO was intent on achieving its outcomes and difficult collective bargaining by purporting to re-engage the employees for the coming season effectively on its designed collective terms and conditions of employment, but contained in [individual employment agreements] rather than a collective agreement.

I just interpolate there that I’m instructed that the desired collective terms and conditions of employment, that is to say that whatever was contained in bargaining with the union by the employer, were not in evidence. I take this to be an assumption made by the Court that what individual terms were offered would reflect what the employer required of its collective.

WILLIAM YOUNG J:

Just by way of background, there is now a collective agreement in place, I take it.

MR JAGOSE:

There is. So that's the Employment Court's rationalisation of why this conduct constitutes a lockout, and it goes on, then, to say, well, it's unlawful, one, because it didn't relate to collective bargaining and two, because it was imposed without notice, and although the Employment Court has some doubts about whether or not it related to collective bargaining, those were the agreed facts.

The Court of Appeal then addressed the issue in similar terms at paragraph 63 which you'll see at page 149. So it pulls out the relevant words from the section and says that the application of 82 to such employees, meaning the seasonal workers, was obvious, because the context requires such an interpretation, and goes on to say that the conduct effectively defeated the existing rights of seasonal employees to re-employment on the terms, as Your Honour, Justice Young said, and that the new employment agreement abolished completely the long-standing concept and significance of seniority whereas clause 31 lay-offs and re-employment are presumptively based on departmental or site seniority. The new agreement removes all references to seniority, and we've been through why that's not a breach proposition. That's something that was open to AFFCO to abandon prior concepts so long as it –

GLAZEBROOK J:

I thought you said the agreements weren't in evidence.

MR JAGOSE:

The proposed collective agreement was not in evidence.

GLAZEBROOK J:

Okay.

MR JAGOSE:

That is – sorry, to be absolutely clear, the Employment Court said, at paragraph 198, "Purporting to re-engage the employees for the coming season effectively on its desired collective terms and conditions of employment," and I've said I am instructed that its desired collective terms and conditions of employment was not in evidence, and I said that I thought that must be an assumption made by the Employment Court that what terms and conditions it sought in individual contracts with its employees reflected its collective expectations.

ARNOLD J:

Just on that breach point, there are other provisions in the collective that have long-term effects.

MR JAGOSE:

Yes.

ARNOLD J:

For example, long service leave and such like. So if we take as an example the annual holidays, clause 22, and the person who after six years continuous service is entitled to an extra week's holiday. Now that applies to people employed before the 1st of June 2006. So somebody with that entitlement to an extra week's holiday goes through the exercise and the new contracts offered by the company no longer provide for that, and you say again there's no breach there and that's simply because the employment contract's come to an end.

MR JAGOSE:

Correct.

ARNOLD J:

Well, it seems to me a pretty hard position because the employees have one way and another accrued "rights" or the opportunity to access particular employment benefits, and if the purpose of this structure is really to remove a number of those benefits it's pretty –

MR JAGOSE:

It's not – I think I can go the other way which is that it's not answered by clause 22. The answer is in clause 36 which is a – is on page 183.

GLAZEBROOK J:

Sorry, I've lost that. No, I've found it again.

MR JAGOSE:

183 and clause 36. So there in circumstances of contracting out there's been direct attention to the point about continuity of service on termination. So no entitlement to redundancy compensation but continuity of service deemed not to be broken.

ARNOLD J:

So are you saying then that, that what, in offering the new contracts AFFCO would be obliged to honour 36? In other words there would be, there would have to continue to be continuity of service?

MR JAGOSE:

It only applies in only circumstances of restructuring. My point is that the employer, the employment agreement has looked at the issue of where continuity of service which would otherwise be breached by termination of employment may nonetheless continue, and that's a strong pointer that it doesn't continue simply because there's reference to continuous service in section 22(c). So Your Honour's point is that it is rough. Well, yes, it is, but that's the contract. That's what happens when employment is terminated is that one loses an entitlement to continuity of service because one's service is discontinuous.

ARNOLD J:

Well, with respect, that –

GLAZEBROOK J:

But you're promised to get it back if you're re-employed.

ARNOLD J:

That seems to me to fail to grapple with the fundamental nature of this agreement, that you say, well, it's a whole series of employment, termination, employment, termination, employment, termination, sequences that occur.

MR JAGOSE:

Yes.

ARNOLD J:

And yet the agreement provides a range of benefits that are treated as though it's a long service of employment, a long period, a continuous period of employment, and all my question is whether you assert, and you obviously do, that on this particular termination and re-employment the employer is free to disregard the benefits that have accrued to the employees by the, if you like, deemed continuity of employment that's applied to them.

MR JAGOSE:

Because the collective agreement, which was the source of those benefits, has expired and is no longer in force.

ARNOLD J:

So that even though this structure is, from the employer's perspective, intended to achieve the outcomes of reducing the benefits, it's not appropriate to – and so in that sense fits within the second part of the lockout, it's not appropriate, you're arguing, to take that into account in trying to assess what "employee" in this particular section means, which is the Court of Appeal's sort of approach.

MR JAGOSE:

Sorry, there's a couple of things –

ARNOLD J:

It's not – well, all I'm saying is I don't think it is simply a matter of re-employment. It seems to me this contract offers a broader range of benefits reflecting continuing service and therefore you have to assert a position that you can do away with the whole lot and you can use this particular mechanism of not agreeing a collective, going onto [individual employment agreements], and then offering at the end of that a completely new slate of terms and that's entirely legitimate, not caught by the lockout provisions.

MR JAGOSE:

Yes, and that goes back to my very first point, which is that lockout conduct is entirely legitimate industrial action, but that's not the issue that we have here. the issue that we have here is whether or not by acting in the way that the conduct is described to seasonal workers not employed after the end of that season, that that constitutes a lockout, and what I am to urge on you is that employees in (b) the object of the view to compel, are people in an employment context, in an employment relationship because they are people who necessarily have terms of employment. which are sought now to be varied, I accept, in new terms of employment, or otherwise overborne in response to demands of the employer. What is being said about seasonal who are strangers now to the employment relationship is that they should be treated as if they were employees as a matter of statutory interpretation. The argument is that the statute does not anticipate that. The statute when it talks of employees notwithstanding the prefatory words "unless the context otherwise requires" the statute is talking about people in an employment relationship, and the seasonal employees do not, seasonal workers, do not have the sufficient indicia minima of employment to constitute being in an employment relationship.

GLAZEBROOK J:

So what would be the sufficient indicia of employment, apart from long service leave and those matters that are covered by that.

MR JAGOSE:

An obligation to work and an obligation to remunerate. An obligation to obey, an obligation to direct.

GLAZEBROOK J:

You mean during the period, off-season period?

MR JAGOSE:

Correct. I'm sorry, I've forgotten the name of the case, there is a case which says that there is a minimum indicia of employment.

GLAZEBROOK J:

Perhaps you could come back to us with the name of the case.

MR JAGOSE:

I'm sure I could.

ARNOLD J:

Just one thing, on a lawful lockout the employer's not entitled to employ other people to do the work.

MR JAGOSE:

To do the work of the people on the lock – well, locked out, yes.

ARNOLD J:

Which is rather different than this sort of situation.

MR JAGOSE:

Completely, and that's, you know, that is exactly part of needing to look at this statute in its entirety. It's why I took Your Honours to the various sections, to say it's not as simple as saying, gosh, we can expand the meaning of

employees here to capture seasonal workers. Because that doesn't appear, in our submission, the intention of the legislation.

WILLIAM YOUNG J:
But it would be a reason for not giving a lockout notice because you couldn't take on anyone, if you assume that the seasonal employees are employees, giving a lockout notice would disqualify AFFCO from employing others, which would –

MR JAGOSE:
Mhm. Well, there's a chicken and egg when you start getting into that.

WILLIAM YOUNG J:
We have to start somewhere because otherwise we spin around in a circle.

MR JAGOSE:
Yes, the point, I agree I accept that, but the point is that if you don't give lockout notice, if your conduct is a lockout, it's necessarily unlawful. So that is why I say it's a chicken and egg because the starting point is actually it's no lockout.

WILLIAM YOUNG J:
Yes, no, I understand that. But if you were looking at this from the starting point, AFFCO could have said well we can give a lockout notice and if we do that we'll avoid the potential for being found to have locked out workers unlawfully. On the other hand there is the down side that if we do that we won't be able to employ other people to do the job.

MR JAGOSE:
Unless we already have them in our employ.

WILLIAM YOUNG J:
Yes.

MR JAGOSE:
And they agree to do the work.

WILLIAM YOUNG J:
Yes, okay.

GLAZEBROOK J:
Which realistically is not going to be the case here, presumably, because that's the whole point about seasonal work, isn't it?

MR JAGOSE:
I would say largely yes. So I was just looking at the way the Court of Appeal had addressed the lockout propositions, and at 64 I'd emphasised that – this is off the judgment – I'd emphasise that the Court of Appeal had found meaningful for the purpose of determining that section 82 ought to apply to these employees that its conduct effectively defeated the existing rights of employment, abolishing seniority et cetera.

Coming down to 65, looking at the objects of the legislation overall, although I make the point that it's looking only at two of a number of objects, to say that this was AFFCO's objective to undermine or compromise parallel process of negotiating collectives, its purpose was to fragment the bargaining strength of the workforce by isolating individual workers.

At 67, the relationship had some of the hallmarks of a formal employment relationship, that collective bargaining was designed to redress the inequality inherent in these circumstances, and that the application of the lockout provision to seasonal employees is consistent with that view and the approach the Court took in *Tucker*.

And so that takes us to the Court of Appeal's conclusion at 70. Sorry, just to look at 69 for a minute, the last sentences in 69. "As we have emphasised, the collective agreement created a right to reply for re-employment with the correlative duty on AFFCO to offer re-employment subject to certain

conditions." That is the operative element to the present context. That's why I went back – when I said there were three aspects the Court of Appeal appeared to be pointed at, actually what it's pointing at is only that, and therefore it follows for the Court of Appeal that the contractual and legislative context requires employees in section 82 to include the seasonal workers, being through how the Court of Appeal has articulated that.

It's the enduring nature of these people's entitlements and the employer's obligation which survive outside of a current employment relationship that provide the necessary contextual justification for extending the scope of the unlawful lockout provisions in this case. That's how the Court of Appeal got to its decision.

I'm at 4.3 of my map. There is a suggestion from my friend that there is somehow mootness relating to this appeal and I say at paragraphs 10 and following that the respondents are seeking remedies in reliance on that finding. It's not moot in that respect. The reliance by the respondents on a contended parallel finding of employment agreement breach is rejected. There was none before the Employment Court so that there isn't an alternative foundation for relief available to my friends.

What was before the Employment Court was the first and sixth causes of actions which related to unlawful bargaining and lockout. It's also a finding of breach of section 4. That was the subject of the respondent's second and third causes of action, which were not for determination by the Employment Court, notwithstanding that Employment Court determined that there was a breach of section 4 and the rest of that paragraph articulates what has happened in relation to that particular finding.

So perhaps, some hours in now, we can go to the meat of the appeal. If I can take you to the principal submissions at paragraph 23 please. The submissions begin by going back to *Police v Thompson* [1966] NZLR 813 (CA) which you know well enough in terms of the meaning of the phrase "unless the context otherwise requires" in legislative drafting.

Police v Thompson accepted was at a time of relatively strict legislative interpretation and so we need to read its words with that comprehension at least. It allows that context may perhaps include various statutory consequences, as Justice McGrath mentioned. That there's an assumption that the legislature intended a word or phrase to have its statutory defined meaning. That it's rare for the Court to depart from that, and it's entitled to do so only if the section under construction requires a different meaning, and on the other side of that departure was permitted if it was unmistakably required, if there was some ambiguity leading to inconvenience or absurdity, but –

WILLIAM YOUNG J:
There is a proper, there is at least one use of the word "employee" in section 82 that doesn't fit.

MR JAGOSE:
Yes. And so when we read, with legislative context in mind, we're bound to say that in Roman (iv) where that word "employees" turns up, it's been misused, they didn't mean employees.

WILLIAM YOUNG J:
The drafter's hand is faulty.

MR JAGOSE:
Yes.

ARNOLD J:
Just while we're on that, I'm not sure, you know, going back to 82(1)(b), your argument that compelling employees in that sentence means existing employees, could also include people who are not employees, because if you go back to 82(1)(a)(i) it says, the act of an employer closing the employer's place of business, and that is done with a view to compelling employees. It seems to me that the employees in that situation may be the existing employees or the people who you try to employ in the future. That must be right.

MR JAGOSE:

With respect, it must be not right. If the employees means as defined in the statue as people either under a contract of employment or having been offered and accepted employment, that's how for the legislature took employees. So then you're asking what constitutes a lockout. What is the exercise, to put it in a different way, of industrial muscle that enables us to, an employer, to evade conflict in market forces, namely the contracts that unions may have with us, on which we're bound to employ employees. So we know we can't exert those forces while there is a collective agreement in force. Once it expires there is a period of time within which we still can't exercise those forces. But once the period is open for exercise of industrial action on the part of the employer it will be unlawful unless it relates to collective bargaining so that the context of the actions – sorry, I don't mean to use the word "context" – but the action that we're talking about here is an action which needs to be related to collective bargaining which we've seen is for people who are employed and fall within the coverage clause, and so there may be many Acts which could be affecting people who are not employees that are not caught by the industrial regime that is set out here, and Your Honour's example is exactly one, that I close my business down and say I'm not even going to spend any time or energy or money on it unless you guys accept these terms of employment. Never seen you before. I don't know who you are. Got no prior relationship with you. But here are the terms of employment. It's the only basis on which I am prepared to re-open my business. That's not a lockout because the employees, the object of the action, to compel these people to accept, the compulsion is that I need them to move away from their current entitlement. If they're not employed, they have no current entitlement, we have no relationship at all, and yet I may choose not to operate my business unless I get employees to accept terms that are satisfactory to me. If we say that we don't need to be employees then we capture a whole bunch of conduct that was never meant to be regulated which is employer choice about opening or continuing a business.

Now that's not this case. This case takes those seasonal workers, non-employees, and it says, "We think we should be able to treat you like

employees because we have this overriding obligation to offer you re-employment in seniority order. Without breaching that obligation, we offer re-employment in seniority order of new terms, terms that aren't agreed with the union." How is that then any different from the position with people with whom we've had no prior relationship with? The fact of that continuing contractual obligation doesn't change the relationship that we need to have with an employee for the purposes of having them abandon their terms of employment to accept new terms, varied terms. That's why "employees" in (b) is talking about a current employment relationship. And there are numerous examples through the statute of which section 96 is only one, that what is being looked at as the object of the employer's conduct is current employees. Any other expansion to that gives ride to a need to walk away from other legislative provisions that are to deal with exactly this, and so that in essence an encapsulation of where these submissions are going.

ARNOLD J:
All right, thank you.

MR JAGOSE:
I mentioned *Police v Thompson* as the core judgment relating to, unless the context otherwise requires, it's been applied since in any number of cases. Justice Winkelmann in *Saba Yachts Ltd v Fish Pacific Ltd* (2006) 3 NZCCLR 963 (HC) aligns it with the Interpretation Act's requirements for the meaning of enactment to be ascertained from its text and in light of its purpose, and that that newer piece of legislation does not justify a wholesale casting aside of the approach in *Thompson*.

The Court of Appeal similarly notes that modern Courts may be willing to depart from the definition where context and purpose requires it, and that's clearly a reference to context and purpose in the Interpretation Act. The footnotes, you'll –

McGRATH J:

Isn't that judgment, however reflective of a general gloss of interpretive approach possibly since the Interpretation Act came into effect, but nevertheless emphasising the importance of purpose of interpretation and context generally interpretation, I'm just suggesting that the phrase you quote at page 27 is really a move away from the rigidity of *Thompson* and looking more at context and purpose as being essential aspects of statutory interpretation to clarify the meaning of words in a text which may be almost meaningless, or certainly of uncertain scope unless you put them in context.

MR JAGOSE:

I am in furious agreement with Your Honour and at footnote 41 I just point out that that sort of combined approach, looking both at *Thompson* and the Interpretation Act 1999, is picked up in this quote from *R v L* HC Wellington CRI-2007-485-159, 11 April 2008.

McGRATH J:

Do you accept that now *Thompson* is a starting point? This is, of course, the Court of Appeal judgment, isn't it, in *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Company Ltd* [2011] NZCA 67?

MR JAGOSE:

Yes.

McGRATH J:

And that's very much, I think, reflected in the approach of the Supreme Court, I think in that case, is it on, on appeal in that case?

MR JAGOSE:

Yes and I'm not sure if it was that case or if it was another Font –

McGRATH J:

Another Fonterra case, perhaps.

MR JAGOSE:

Yes.

McGRATH J:

But a starting point seems to me to be a significant indication that *Thompson* is no longer the ultimate polar star in this area.

MR JAGOSE:

I think that's absolutely right, and so the purposive approach is necessary but all that's doing is focusing, like the Interpretation Act does, on the statute. So we're looking at the statute itself. We're not looking intrinsically.

McGRATH J:

Well, that's back to your criticism of paragraph 70, the first line of the Court of Appeal's judgment.

MR JAGOSE:

Yes, yes.

McGRATH J:

And I certainly understand the force of that argument.

GLAZEBROOK J:

Although you presumably, when you're looking at the context of the statute, can look at the particular facts in the case you're looking at to see whether the purpose of the statute was meant to take those people in, which is all I understood the Court of Appeal to be doing, is to say, well, the purpose of the Employment Act, it would be very odd if these people weren't covered by it, or the particular section, because it was only looking at that particular section. I would have thought that must be legitimate because you don't look at the purpose of a statute in a vacuum as against what it's actually meant to be dealing with.

MR JAGOSE:

That's correct. What the Court of Appeal did was to say, “We’re going to reach beyond the statutory terms because of what we see as an undesirable consequence in the factual” –

GLAZEBROOK J:

Well, in terms of the purpose of the statute, though, wasn’t it?

MR JAGOSE:

No, it wasn’t.

GLAZEBROOK J:

All right. So you say it was more general than that?

MR JAGOSE:

It’s done the other way around, which is why, really, I pointed out at 28 this Court –

GLAZEBROOK J:

Well, they did refer to the purposes of the statute, didn't they?

MR JAGOSE:

They were referred to some of them, yes.

GLAZEBROOK J:

But all I’m saying is that I don’t know what else they were doing if they weren’t saying in terms of the purpose of the statute these people should not be excluded from that section.

MR JAGOSE:

That, with respect, is the wrong way round in terms of how one looks at the purpose of the statute. You ask instead whether the purpose of the statute is to encapture these people, not whether these people should be captured in fulfilment of purpose, and it’s an important distinction.

McGRATH J:

Is the question perhaps, Mr Jagose, and I'm going back to paragraph 59 of the Court of Appeal's judgment, whether the purpose, whether the fact that an employer owes an existing contractual obligation to make an offer of re-employment, whether that situation is covered by the concept of employee, the purpose of the statute will be relevant to that. I think you accept that.

MR JAGOSE:

Yes.

McGRATH J:

What you don't accept is the next two elements.

MR JAGOSE:

Yes.

McGRATH J:

But you do have to, if you accept the first point there is an argument there, isn't there, that the agreement to make a fresh offer as to whether that comes within an employee, and purpose of interpretation affects that, that's an argument you are addressing, and have to address?

MR JAGOSE:

Yes and do address.

McGRATH J:

Indeed.

MR JAGOSE:

I suppose the thing that I just wanted to move across was to point out that there is in the submissions fair reliance on footnotes in this section, which extend to looking at this Court's addressing of the phrase "unless the context otherwise requires". This Court is saying, that there should only be displacement where there are strong indications to the contrary in the context,

that's my paragraph 28, picking up on Burrows which says that it is exceptional for there a displacement of the statutory definition, although recognising that it is not unknown, and I also refer to at 30 *Hartono v Ministry for Primary Industries* [2015] NZHC 3307 in which Justice Davidson allows that in circumstances in where a statutory definition only reflects the plain meaning of a word, less weighty contextual factors may displace the otherwise prescribed meaning of the phrase. Now the only reason for raising that is that it was on appeal, going on appeal, and that appeal has now been heard and determined and the Court of Appeal overturned the decision in this respect saying that, "A factual context ought not to influence the meaning to be given to defined terms." I'm referring to paragraph 2 of my supplementary submissions where this appears. And that, "Other considerations, arising out of the facts of this case, cannot alter the interpretation of the relevant terms." And that's in essence what I am pressing on Your Honours here.

I notice that, I note at 31 and 32 of the principal submissions, that emphasis on statutory context that we're looking for, what it was that Parliament intended, not to divert that entitlement, and I point out that indeed in the legislation itself it says, "In this Act unless the context otherwise requires." The legislation itself points to us that this is interpretation of the statutory context, not the contractual or otherwise extrinsic context. Is that a convenient time?

ARNOLD J:

Just before we finish can I just raise one point of context that slightly troubled me and I may have got it completely wrong and you can think about it over lunch. But it's just that in section 81 the meaning of "strike" because that refers to, "The act of a number of employees who are or have been in the employment of the same employer," so it seems to refer to people who were employed in the past, and then it refers to, "In refusing or failing to accept engagement for work in which they are usually employed," so it seems to contemplate being re-employed to do work that they've done, and, "Is due to a combination, agreement, common understanding or concerted action." So the definition of "strike" seems to cover concerted action by previous employers,

employees who refuse to accept engagement for work that they're usually employed in doing. Now if that is right it sorts of suggests the lockout provision might be the other side of the mirror. That's all…

MR JAGOSE:
It might do, or it might suggest the opposite, which is that Parliament –

ARNOLD J:
Well it might too but that would be rather odd.

MR JAGOSE:
Well, we can come back to that after lunch, but I'm going to try and urge upon you that it's not on at all. It makes perfect sense in the context of an industrial dispute.

ARNOLD J:
Thanks.

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.17 PM

MR JAGOSE:
Your Honour, Justice Glazebrook, I said I would find that citation to an irreducible minima of obligation. The case is *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1968] 2 QB 497, the piece in question at 515C. It's been adopted by the Court of Appeal in *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681.

GLAZEBROOK J:
In what, sorry?

MR JAGOSE:
TNT v Cunningham, in New Zealand, [1993] 3 NZLR 681, and by the UK Supreme Court in 2011 *Autoclenz Limited v Belcher* [2011] 4 All ER 745 (SC).

GLAZEBROOK J:
You're going a bit fast. I can't get this down at all.

MR JAGOSE:
Tell me where you are.

GLAZEBROOK J:
Yes, please.

MR JAGOSE:
Tell me where you are?

GLAZEBROOK J:
Adopted by Court of Appeal in *TNT*.

MR JAGOSE:
v *Cunningham*.

GLAZEBROOK J:
I've got that.

MR JAGOSE:
[1993] 3 NZLR 681, and *Autoclenz v Belcher* in the UK Supreme Court [2011] 4 All ER at 745.

And Your Honour, Justice Arnold, we were discussing just before the break the apparent imbalance between strikes, which include reference to a number of employees who have been in the employment of the employer, and lockouts where my argument is that "employees" means only employees. There isn't an even-handedness to sections 81 and 82. Notably, section 81 has no intent requirement at all.

ARNOLD J:
Yes, it's odd.

WILLIAM YOUNG J:

Has no, sorry, what?

MR JAGOSE:

No intent requirement at all. It's simply constituted by actions that are taken collectively. That's all. That's a strike.

ARNOLD J:

So just on this, in this situation, if when AFFCO offered the new agreements all the previous people who had worked for AFFCO in the particular little community had got together and said, "Look, we're not going to sign up to these things. Just not going to do it," that would be a strike, would it?

MR JAGOSE:

I'm not certain because again the combination needs to be – the combination is to be entered into by the employees and that's paragraph (b) of 81(1).

So having said that a number of employees who are or have been in the employment, it's unclear to me whether the next "employees" in (b) is referring to those or whether it's referring to employees as defined. If it is referring to those employees then it would constitute a strike to collectively refuse to accept engagement for work in which they are usually employed. I accept that.

ARNOLD J:

And "employees" in (b) must refer back to the act, the relevant act, mustn't it, which is the act of employees who are or have been? I mean, "employees" –

MR JAGOSE:

Yes, yes. It's due, well, it's due to, it's an Act that is due to a combination. So there needs to be contract arrangement or understanding as between those people or at least some of them.

ARNOLD J:

Yes. No, I certainly understand the point of not requiring an intention but it did seem to me, assuming that that intention were present, which we'll assume for the sake of argument in this case, it would be a rather odd outcome if from the employee's, potential employee's point of view there would be a strike but from the potential employer's perspective there would not be a lockout even though the intention, the reason that the employer refused to employ was – fell into 82(b).

MR JAGOSE:

No more unusual than if in these current circumstances the employer offered precisely the same terms of employment as had existed at the end of the last season and that would still constitute a lockout.

ARNOLD J:

Sorry, I don't follow.

MR JAGOSE:

It is if a lockout is the act of an employer in refusing or failing to engage the employees, done with a view to compelling employees to accept terms of employment and AFFCO comes out and says, "I will employ none of you except of terms of employment that you were previously employed on," it's still a lockout if "employees" has that wide a meaning. And that just, with respect, cannot be the correct interpretation, because what it does –

ARNOLD J:

I'm not sure I follow that.

MR JAGOSE:

Well, if a lockout is an action of an employer in refusing or failing to engage employees, to engage people for work for which the employer usually engages people, and it's done with a view to compelling people, and I am using that deliberately and wrongly, people to accept terms of employment

then there is nothing to distinguish lockout action from the completely ordinary action of employing former employees.

ARNOLD J:
Yes, I'd like to think about that. I'm not sure at all that that follows but I understand what you're saying.

MR JAGOSE:
So that's sort of half my answer to your unusual proposition. The second half of it is to say we need to sort of step back a bit and realise that what we're talking about is something that's been in legislation in more or less unamended form since the early 20th century. That is reflecting the distinctive impact of labour and capital, and as a strike the combination of action is what constitutes the collectivity of labour. As a lockout, it's not necessary to have regard for that collectivity. It's enough that you are aiming at individuals and so that's why in the historical context when you were looking at a strike you are considering not only the actions of current employees but people who have been former employees, either ones who wish to get back in or are simply lending their endeavours out of solidarity with collective labour, and that doesn't get reflected in a lockout. There are cases – or, at least, a case – suggesting that a single individual can be locked out. So we're not necessarily saying what's good for the goose is good for the gander here. It's not a completely balanced proposition.

So I was at the point prior to lunch of moving into looking more intently at section 82 and how it fits in cyber legislation. At my submissions paragraph 36 a summary of what I've just expressed to Your Honour Justice Arnold. The concept is that lockout actions are taken to force current employees to accept necessarily different terms of employment or to comply with demands, and what we say is without that currency there is nothing from which to be locked up. There is no inuring entitlement that exists for former employees to be able to rely on in a lockout context. Everything we see in the Act points us towards that currency. So not only does the Act define what constitutes an employment relationship at section 4 as between an employer

and an employee engaged by the employer, those words, you know, deliberately added, that the definition of employee itself carries a sense of immediacy, as we've seen.

I've already drawn Your Honours' attention to the requirements for notice as having, as being predicated on the lockout being current employees for whom the employer has obligation to both the union and to the administrator. Indeed, when we turn to lockouts – essential in passenger transport industries – we discover that there's an express employees who are employed and that currency, we say, is implicit in the substitute employee provisions where that substitute needs to be already employed.

And you can continue down on all of these things through looking at mandatory reporting requirements, looking at which require reports of hours lost, work affected, salaries lost, they all anticipate current and active employment and that's reinforced by section 96, which I took you to earlier, 96(2), which talks about what happens after the lockout is that on the resumption of the lockout by the employees their service must be treated as continuous. Well, continuous, rhetorically, with what if these are people who have not been employed?

GLAZEBROOK J:
Well, with the continuity provisions in the agreement that they're under.

MR JAGOSE:
But they're not.

GLAZEBROOK J:
Well, I know that's what you say, but …

MR JAGOSE:
So we see, then, that the Act also has regard for circumstances in which employees might be more than current employees or a broader collection. We see the Act refer – and I'm at paragraph 39 of my submissions – to

prospective employees in particular circumstances, to persons who the employer might employ in the future and, of course, as Your Honour Justice Arnold has already taken up, strike talks about have been in the employment, which begs the question of the omission from lockout. We say that these are each contextual indicators that the default definition of employee is otherwise intended to stand.

I've already made my point at 40 that there are other remedies that are available in circumstances in which conditions surviving termination are affected to an employee's disadvantage of remedy and I raise that, really, to respond to the suggestion that context is there in part 2 to defeat manifest injustice or, rather, one can use context to expand the definition to defeat manifest injustice. I think in fairness the Court of Appeal has taken that away in terms of looking for a more contextual look at the statute itself.

But that just comes to the point, is that if there is here a disadvantageous breach of contract, if that actually exists, in the circumstances it isn't necessary to reach out and reconstrue what a lockout might mean to provide for a remedy for that conduct and yet the Court of Appeal thought that it was necessary to provide that remedy through the lockout provisions.

We've already discussed the reference in paragraph 8 to person and people. And so I think the core of the submission is that the issue is not whether the references in paragraph A to employees may bear more extended definition in circumstances they may, but it's whether the object of the employer's action, the employees in B can bear that more extended definition.

We note that neither the Court of Appeal nor the Employment Court considered the subsection from this perspective. I've pointed to the Employment Court's use of those to equate employees in A with the employees in B and the matter may not have come to the Court of Appeal's attention, in part because the Court of Appeal misread statements made by counsel for the appellant's, prior counsel for the appellants, as being a concession that there was, the conduct was taken with a view to compulsion.

So when the recall of the Court of Appeal's judgment happened, the Court of Appeal correctly now recorded that the concession was only that AFFCO was not able to contest the Employment Court's finding of fact. That finding of fact being –

WILLIAM YOUNG J:
It's a finding of law, really, isn't it?

MR JAGOSE:
Well, I thought one stated the law rather than found it.

WILLIAM YOUNG J:
Well, it's an assumption that "employee" means the same throughout the section.

GLAZEBROOK J:
No, no. The concession was that you couldn't contest the finding of fact that there'd been compulsion, that it was with an intent to compulsion. Is that right?

MR JAGOSE:
Yes.

GLAZEBROOK J:
It wasn't a concession in terms of the meaning of "employee".

MR JAGOSE:
No.

GLAZEBROOK J:
That would have been quite obvious from the fact that it was appealed, wasn't it?

MR JAGOSE:

Well, one hopes so and certainly in the Court of Appeal most of the references to section 82 are simply references to section 82. There's no distinction between paragraphs (a) and (b).

GLAZEBROOK J:

Well, it would actually be odd, usually, wouldn't it, to have a different meaning in the same subsection for the same term? I would have thought that it should be the other way around and you do say why it should be different because of the definition et cetera, but normally one would expect that the same term used in contiguous lines would actually mean the same thing.

MR JAGOSE:

Right, but that ends up with the tail wagging the dog because there can't realistically be any dispute that (iv), talking of engaging an employee, means engage a person. And if that wags the dog to say in all references to employee are really to person, that just makes a nonsense of the section.

WILLIAM YOUNG J:

Well, can it not be that in subsection (1) employee can't mean, doesn't mean person but it means someone who has been or is in an employment relationship with the employer? You're giving it a wider meaning than the Court of Appeal would.

MR JAGOSE:

Well, in that case (iv) can only mean in refusing or failing to re-engage employees.

GLAZEBROOK J:

Well, it's difficult to see that it means anything else. But, I mean, sometimes what happens is that at the end of a strike people say "re-engage me" and in fact that happens quite often and the employer says, "No, that's a lockout." So if somebody has gone on strike and said, "I'm not working, I'm terminating

the employment relationship, I'm going out there with my banner," which is what the strike collectively, and then at the end of the period – in fact, I think I've sat on a couple of cases where that was the question, then the employer says, "Well, no," and the question is, wasn't it a lawful strike? In which case it would be an unlawful lockout or was it an unlawful strike in which case it would be a lawful lockout. I've probably got that the wrong way but you know what I mean.

MR JAGOSE:
I know what you mean. The point, though, is that it shouldn't matter whether these were former employees or not because one can't –

GLAZEBROOK J:
I would have thought 4 is actually looking at that very common situation myself where there's a failure to re-employ after a strike.

MR JAGOSE:
Well, with respect, it may well capture that. I don't see that it is for any reason limited to that.

GLAZEBROOK J:
Well, if I go along and say, "I want a job with AFFFO," and AFFCO says no, they've refused to engage me, a person – quite rightly, I might add – for employment.

MR JAGOSE:
Yes.

GLAZEBROOK J:
And that means if that was done to force, for some reason, somebody, some current employee, under your argument, to accept some terms and conditions.

MR JAGOSE:

Yes, that would be a lockout.

GLAZEBROOK J:

That would be a lockout.

MR JAGOSE:

Yes.

GLAZEBROOK J:

It's a very odd – well, especially when "employee" was used to say they must have made a mistake, they were meaning it as wide as if somebody so totally unconnected with the job comes along and asks for it

MR JAGOSE:

And I refuse to employ them with a view to compelling my employees to accept –

GLAZEBROOK J:

Mind you, I can't see how that could follow.

MR JAGOSE:

No, nor do I and that's exactly the point because –

GLAZEBROOK J:

Then why expand what's said there to say that "employee" must mean any old person?

MR JAGOSE:

Because in (iv) it doesn't matter. In (iv) it is circular to talk about a failure to engage employees when an employee can't be engaged until they're an employee. It's just a circularity, it's nonsense.

GLAZEBROOK J:

No, it's for particular work so it's the same sort of thing, isn't it, refusing to take somebody on to do whatever the work that employees usually do.

MR JAGOSE:

Well when you use someone then yes, that's right, it's more expanded than employees.

WILLIAM YOUNG J:

Just stepping back for a minute, you said the section goes back to the early years of the 20th century.

MR JAGOSE:

Yes it does, 1908.

WILLIAM YOUNG J:

So presumably back earlier than that then?

MR JAGOSE:

No, I think 1908 was the first time it was defined.

WILLIAM YOUNG J:

Is it?

MR JAGOSE:

The word "lockout" I think was used in the late 1800s but it was never defined. The 1908 –

WILLIAM YOUNG J:

That's the Industrial Arbitration Conciliation –

MR JAGOSE:

Industrial Conciliation Amendment Act.

WILLIAM YOUNG J:
Oh I see.

MR JAGOSE:
So it's an Amendment Act to the principal 1908 Act, and it provides, actually interestingly it provides for the same intent on both sides of the coin, and that drops out shortly afterwards on the strike side.

WILLIAM YOUNG J:
I mean obviously, there's no, is there any general work or analysis of the lockout cases? I mean we've been taken down a particular lines of cases, which obviously is comprehensive as far as it goes, but has there been any broader sort of review of the jurisprudence?

MR JAGOSE:
Not that I'm aware of. There is some sort of socioeconomic reviews of lockouts in which some of the case law is mentioned but really only for the purpose of identifying the facts. In terms of legal analysis of how this all comes together, I'm not aware of anything that's remotely contemporary.

WILLIAM YOUNG J:
Okay.

MR JAGOSE:
I think I had just been at the point of saying, just dealing with the recall issue in the Court of Appeal, and the extent to which the elements of a lockout were established and determined by the Court of Appeal.

WILLIAM YOUNG J:
Sorry, what paragraph are you at?

MR JAGOSE:
I'm at 44 of my principal submissions. At 45, and this is the argument that I've been making all along, that the employees, once we move into paragraph (b),

take on a very different character because they are now the subject of the employer's intention to have them accept terms of employment or comply with demands. The use of the word "compulsion" is interesting because, and the Court of Appeal here said so, AFFCO can't compel the employees to accept re-employment or anything else, it's former employees to accept re-employment, but there is an indication in *Spotless*, which is footnoted at footnote 80 here.

ARNOLD J:
Sorry, footnoted where?

MR JAGOSE:
At footnote 80 on page 16. There is an indication in *Spotless* that by compulsion all that really is meant is seeking to obtain. It's not about whether there is actual ability to compel.

WILLIAM YOUNG J:
Putting pressure on with a view to getting a result isn't it?

MR JAGOSE:
Yes. My footnote at 80 is, refers to the wrong paragraph of *Spotless*. The correct paragraph should be 43. I just want to hold with that compulsion point for a minute. Both the Employment Court and Court of Appeal appeared to take some weight from the Employment Court's findings that AFFCO sought significant changes in the collective arrangements and that it did so by taking advantage of former seasonal workers' expectations of re-engagement and their lack of alternatives to re-engagement on the appellant's terms. I'm at paragraph 14 of my supplementary submissions, and therefore I'm at 5.2B of my map. Now, without wanting to divert too far here, the first sentence of paragraph 14 is essentially the factual findings from which AFFCO conceded it.

WILLIAM YOUNG J:
Does this really take us anywhere? Because …

MR JAGOSE:

Only to the next sentence on 14.

WILLIAM YOUNG J:

Well, you carry on then.

MR JAGOSE:

Thank you. The only point to raise this is to say there's no moral aspect to the intention element of a lockout, and that we shouldn't be reading into the word "compel" that there is somehow an illicit overbearing of will.

WILLIAM YOUNG J:

But just to make the point I was going to make, assuming the seasonal workers were employees for the purpose of the second part of the section, then they were subject to compulsion.

MR JAGOSE:

If new terms of employment were sought of them, yes. If that was what the view was, we want to get new terms of –

GLAZEBROOK J:

It must have been, wasn't it?

MR JAGOSE:

Well, no. If these are employees, then –

WILLIAM YOUNG J:

Yes, we're assuming they're employees for these purposes.

MR JAGOSE:

Right, so they have terms of employment.

WILLIAM YOUNG J:

Yes. I think you may be off on a bit of a tangent here. Assuming they're employees, and if that assumption is wrong then you win, I think, assuming you're wrong then isn't it clear that they were being subject to pressure, which is compulsion for these purposes?

MR JAGOSE:

New terms of employment were sought of them. They were new terms of employment that did not contain many aspects of their former terms of employment or, on your example, current terms of employment. Beyond that, I don't see where the pressure is.

WILLIAM YOUNG J:

But isn't that – does it need to go any further than that?

MR JAGOSE:

No, and that's my point.

WILLIAM YOUNG J:

Yes, that's why I think we're off on a bit of a tangent. The Court of Appeal may have engaged in a more elaborate explanation as to why there was compulsion but if at the core of the case there was compulsion then we needn't argue about that.

MR JAGOSE:

If the core of the case was that there was a view to obtaining new terms of employment, then absolutely.

GLAZEBROOK J:

Will you accept that would be compulsion?

MR JAGOSE:

Well, the words are done with a view to compelling employees to accept terms of employment and so the only way that I can put that is to say, "I am offering

you something and I am putting you in a position to get you to accept new terms of employment."

GLAZEBROOK J:

But people do that all the time without the compelling aspect, don't they? I mean, they go along to their existing employees and say, "We've got a new employment agreement for you. Have a look at it and see what you think and come back to us," without it being a lockout.

WILLIAM YOUNG J:

But they're not sacking them. They're not shutting them out.

GLAZEBROOK J:

Exactly. I'm just trying to get – do you agree in this situation, assuming they're employees that the definition – which is all I think the Court of Appeal was saying?

MR JAGOSE:

If the question is, do I accept that asking current employees to accept new terms of employment in circumstances where one of the paragraph (a) acts are engaged, constitutes (b)'s done with a view to compulsion, the answer is yes.

GLAZEBROOK J:

All right, thank you.

WILLIAM YOUNG J:

Thank you.

MR JAGOSE:

I have taken you already to section 63A which articulates the steps required of an employer in offering employment to individuals. I'm at paragraph 17 of my principal submissions. Of my supplementary submissions sorry. Which is really just following on from the point that Justices Young and Glazebrook

have been making. The actions, the conduct that is at issue here is indistinguishable from conduct to comply with the Act to employ new employees, and to view that as compulsion has to anticipate the existence of a current employment arrangement, which is sought to be substituted or supplemented by these, or detrimented by these new terms.

WILLIAM YOUNG J:
Yes, so they're a factual and a counterfactual.

MR JAGOSE:
Yes. Because the counterfactual is that an employer is unable to engage employees without it being taken as a lockout, requiring notice to be given, and unable to substitute for those locked out workers. That's exactly the quandary that we've got ourselves into by expanding use of the word "employee" in paragraph (b). I make the point again in 16 of my supplementary submissions, just to emphasise –

GLAZEBROOK J:
We've just explained the concession so what is 17 saying, that that concession is wrong or just the expanded compulsion is wrong?

MR JAGOSE:
17 is saying –

GLAZEBROOK J:
You just said if they are employees, and it was done with a view to doing, the act was done with a view to doing any of the things in (b) then it's compulsion. Is this reneging on that or is it just saying –

MR JAGOSE:
No.

GLAZEBROOK J:
It's not reneging, okay, that's fine.

MR JAGOSE:

No.

GLAZEBROOK J:

You're just saying that there were expanded sort of moral overtones –

MR JAGOSE:

Which are irrelevant.

GLAZEBROOK J:

– that were unjustifiable. Is that all that's being said?

MR JAGOSE:

No. That's one. The second thing that's being said is that because an ordinary offer of employment is indistinguishable from what would constitute a view to compel. It cannot have that meaning. That's why employees in (b) is constrained to current employees necessarily with current terms of employment. Of whom the employer seeks new terms of employment or varied terms –

GLAZEBROOK J:

Right, I understand that point, thank you. I just wanted to make sure that I understood it.

MR JAGOSE:

I am grateful to Your Honour, thank you. I think I am at 5.3.

GLAZEBROOK J:

Can I say, of course, all of this I agree with in the sense that in most cases it would be confined to current employees and not me, for instance, or any person that's around? The issue though, and the narrow issue that both of the Courts below were looking at, was the specific case where people have promises of re-engagement and the more general points don't necessarily answer that because, of course, if I went along to get employment with

AFFCO they would provide me – well, it depends, I suppose, whether I'm part of the union, but let's assume not – they're provide me with an individual contract and tell me to go and get legal advice in exactly the same way and nobody would suggest that that was a lockout. Well, I don't think so.

MR JAGOSE:
One would hope not.

GLAZEBROOK J:
Well, exactly, because one can't see how that could be done with the intent and in any event it doesn't seem to be coming within –

MR JAGOSE:
Well, yes, it is. It's been done with the intention of seeking to compel you to accept those terms.

GLAZEBROOK J:
No, no, I understand that, but it would be factually it's difficult to see how that could be the case is what I meant.

MR JAGOSE:
Yes.

GLAZEBROOK J:
But the issue is – so in fact those more general comments, of course, that's the more general position but the decisions were very much narrower than that and predicated only on this agreement to re-employ, or right to be re-employed, assuming that they wanted to be re-employed and assuming that there was proper room for them, et cetera.

MR JAGOSE:
Which comes to precisely where I was at 5.3, which is to look at paragraph 50 of my principal submissions and following.

GLAZEBROOK J:
Okay. That's good.

MR JAGOSE:
I mean, Your Honour is right to say exactly that, "Well, hang on, we're not, we're actually talking about a limited subsection of people. So now we're saying that – we're trying to find out whether the legislative intention was to say "employees" means employees and includes employees with preferential rights of, sorry, former employees with preferential rights of re-employment.

So it's not that AFFCO's, or indeed meat works', employees are unique in this respect. My friend criticises my submissions on this aspect to say these are flood gates arguments. These are not flood gates arguments. The point here is that the legislative intent cannot be found to, from the context of the legislation, to establish that people with preferential rights of re-employment are also caught within paragraph (b), and there are possibly a myriad circumstances in which people have contractual rights of re-employment. It's not simply seasonal employees. Examples that I've thought were, you know, could be illustrated directly without the need for additional evidence are people on parental leave and people on volunteer leave where the statute establishes not that there is a statutory right to re-employment but that the employer must provide it, must provide that contractual entitlement to reinstatement.

So it's quite carefully worked out in those two statutes. It doesn't confer on employees or on parents a right of re-employment. It obliges the employer to provide that contractually to the employee. So there we have another preferential right of employment, of, sorry, re-employment, which would be captured, offers of re-employment to people who have – sorry, just lost my place. The circumstances in which re-employment is required is where the employer is unable to keep the employee's position open for his or her return from parental leave. So that's the starting point. In those circumstances where they've been unable to make, keep their position open that's essentially a refusal or failure to engage employees for work for which they're usually

employed. They can't keep the position open for their return. The employee obtains preferential rights of re-employment.

GLAZEBROOK J:
But that's the same in this case, and I don't think it's suggested that if there wasn't a position available that it would be a lockout.

MR JAGOSE:
No but an offer of –

GLAZEBROOK J:
Because the very idea is that you're presenting them with another contract with a view to forcing them to accept it. So if there isn't a position then you wouldn't even be there, would you?

MR JAGOSE:
No.

GLAZEBROOK J:
So the same with the parental leave, if in fact you couldn't keep the position open, and that was legitimate in terms of the statute.

MR JAGOSE:
Yes, absolutely, that's the test as well. But the right to preferential re-employment assumes that there is a new position available –

GLAZEBROOK J:
Well I'm not sure on parental leave you actually ever lose your position do you?

MR JAGOSE:
Yes you do, that's exactly what I'm talking about here. It's precisely what I'm talking about.

WILLIAM YOUNG J:

I think you actually get leave, don't you?

GLAZEBROOK J:

Yes, I –

MR JAGOSE:

No, no, no, if you get leave your position is being kept open for your return. That's what you're taking leave from, your position.

WILLIAM YOUNG J:

But if I'm working for a company and I get three months leave because I've been working there for 20 years, that doesn't mean that I'm not an employee.

MR JAGOSE:

No, no, sorry. The way the Parental Leave and Employment protection Act 1987 works is it says, first you are entitled to take leave to look after your children. Second, if we are unable to keep your position open for your return, you have rights of re-employment. Justice Glazebrook is right, the first threshold about your ability to keep the position open for return is extremely high. It's almost impossible not to keep a position open for the employee's return. But in circumstances in which that threshold is crossed, there is then a secondary obligation to offer them re-employment.

WILLIAM YOUNG J:

Well maybe we're chasing another hare –

GLAZEBROOK J:

Yes, I think so.

WILLIAM YOUNG J:

Trying to work out what the Parental Leave and Employment Act means, Employment Protection Act, because I mean the real, I mean obviously, I

mean presumably if we look at the statute carefully enough we should be able to deduce whether the person taking leave retains status as an employee.

MR JAGOSE:
Perhaps –

WILLIAM YOUNG J:
But that's not this problem.

MR JAGOSE:
That's not the point. The point is that in circumstances in which a person with a right to re-employment sought to be re-employed after their period was over, when there is a position open, a position available for them to take, they have a contractual preferential right of employment –

GLAZEBROOK J:
I don't know whether they're –

MR JAGOSE:
The Court of Appeal's definition, sorry to run over you but I just want to finish the sentence, the Court of Appeal's definition would capture this action of offering that person employment as a lockout. That –

GLAZEBROOK J:
To be frank I don't think, all of this is that you, if your position isn't available then as an employee you're offered another position. I don't think it's a re-engagement, you're not fired if they don't have your position available.

MR JAGOSE:
You are, you most certainly are. I'm very sorry. Parental leave is something I understand a great deal about. There is an article written by me that establishes the first cases on parental leave. I can tell you concretely that parental leave involves either first, giving a person leave from their employment, except in circumstances in which their position cannot be kept

open for their return, and then second, in circumstances in which their position cannot be kept open for their return, obliging to offer them preferential re-employment in the event another vacancy becomes available, and that's exactly the context of the parental leave legislation and that's exactly the context of the volunteers leave legislation.

WILLIAM YOUNG J:
But assuming that's so, how does that help us here?

MR JAGOSE:
It helps us here because that conduct, in saying to a new employee, or a former employee now looking to be re-employed to a position for which they have preference, the conduct of saying we'd like you to be employed on these terms, according to the Court of Appeal constitutes a lockout.

ARNOLD J:
I'm not sure that will be right because in a lot of the cases, my only experience of this is as an employer, but the person who is coming back and being offered the new opportunity, the new position is an established position with its terms and conditions and that is simply being offered? I don't see how that's a lockout if those terms and conditions happen to differ in some respect from the terms and conditions when the person left.

MR JAGOSE:
They don't even have to differ. That was my point, also, which was the conduct – what the Court of Appeal is saying is that employee for the purposes of (b) includes former employees with entitlements to re-employment.

WILLIAM YOUNG J:
But what they are also saying, I think, or assuming is that those entitlements to re-employment are more concrete than just an entitlement to, well, I call it a right of pre-emption, that you can't employ someone else ahead of me if I've got seniority rights. So what they're assuming is that the right to employment

is on some terms and that the offer that was made deviated from those terms. So there's a factual and a counterfactual.

MR JAGOSE:

Well, no. I appreciate this is an important –

ARNOLD J:

So let me get this straight. You're saying that offering to re-employ the person on exactly the same terms and conditions as they left on would be a lockout because you're seeking to compel them. The same terms is a lockout?

MR JAGOSE:

Well, this is important. Let's work our way through it. The Court of Appeal says that refusing to engage employees when done with a view to compelling employees to accept terms of employment is a lockout. That's all we're dealing with here. So at the end of a season, an employee leaves. They have their entitlement to be offered re-employment if jobs are available in seniority order and the employer says, "I'm employing nobody unless you accept these terms of employment." Now, it doesn't matter whether they are the same terms as the ones on which applied when they left or they are new and advanced or –

WILLIAM YOUNG J:

But if it's the same terms, the employer doesn't have to say this, does he?

MR JAGOSE:

Doesn't have to.

WILLIAM YOUNG J:

He doesn't have to make this threat. If the employer is just saying, "Okay, welcome back, everyone. It's the same deal as you had at the end of last season."

MR JAGOSE:

And if the employees say, “Well, actually, we’d like a 10 per cent raise.”

WILLIAM YOUNG J:

Well, then, that’s their problem.

MR JAGOSE:

Yes, it is their problem. That’s why this is not a lockout.

WILLIAM YOUNG J:

Am I wrong in thinking that it comes back to whether the rights of the seasonal workers were more concrete or more elaborate than simply a right to be first considered?

MR JAGOSE:

Which goes back to Justice Glazebrook. Was there enough to establish actual employment?

WILLIAM YOUNG J:

Not necessarily. I mean, the Employment Court thought that the right to be re-employed had more substance to it than the right that you are talking about and considering. That is, it was a right to be re-employed on the old terms plus whatever terms might be agreed.

MR JAGOSE:

Yes. That’s what the Employment Court thought.

WILLIAM YOUNG J:

Now, if that’s right offering them different terms would involve an element of compulsion.

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

And the Court of Appeal wasn't absolutely explicit on it but it seems to have been of the same view as the Employment Court on this particular issue, albeit that the Employment Court had this conclusion tucked into a part of its judgment that the Court of Appeal disagreed with.

MR JAGOSE:

Yes, and with respect I disagree with Your Honour. That's not what the Court of Appeal found, and this goes back to on the terms, the issue that you raised with me earlier. We can't explain the Court of Appeal's careful differentiation of surviving terms. It's identification of a limited pool of terms that apply during the – to use a neutral word – the lacuna during that period during the seasonal lay-off. The Employment Court said, "You're employed continuously and therefore the same terms apply throughout." The Court of Appeal said, "You're not employed continuously," and what is left are surviving terms and those surviving terms it identifies are not sufficient to constitute employment either at the time of lay-off or in the future, assuming agreement.

GLAZEBROOK J:

But they might be sufficient, depending upon how they're interpreted, to give a right to employment on exactly the same basis that the Employment Court held, that is, on the terms that were in the collective agreement or in fact in what had become the individual agreements. So the surviving terms might be, depending upon how they're interpreted, be sufficient. So you can't – that's not dependent on there being continuous employment. It's dependent on the interpretation of the right of re-employment and what that means.

MR JAGOSE:

Correct, and that requires one to identify what, and this goes back to Your Honour's question or Your Honour's observation around perpetuity in employment arrangements, what is the consequence of a collective agreement that has not only expired but gone out of force. According to the statute, all it means is that the people continuing in employment have their terms based on the expired collective, which means that when their

employment terminates so too their employment agreements and there is nothing in their individual employment agreements establishing that were you ever to be employed in the future it will be on the terms that you were employed on in the past.

GLAZEBROOK J:
Well, but in fact you are saying if that's right then they have actually no right to be re-employed at all.

MR JAGOSE:
No, they have a right.

GLAZEBROOK J:
Well, but if the contract is gone then the contract must have gone and even that right of re-employment must have gone. If you're right, then gone is gone.

MR JAGOSE:
No, the –

GLAZEBROOK J:
Well, how does the right to be re-employed survive but not the right to be re-employed on certain terms if that is the interpretation of the – the correct interpretation?

WILLIAM YOUNG J:
It's just a wide interpretation, that is the company may not offer a job on terms to someone other than the people in order of seniority.

GLAZEBROOK J:
But that depends on the interpretation of the contract. What I thought you were saying was because the contract's gone then everything's gone.

MR JAGOSE:
No.

GLAZEBROOK J:

Well, how does part of it go and not the other party? If the true interpretation, the proper interpretation, of that contract is that you have the right to be employed on the same terms, or on something similar to that, how does that go keeping the right to re-employment?

MR JAGOSE:

Well, I mean, let's just take that example. There is a contract we say which has precisely an entitlement to be re-employed at the employer's volition on exactly the terms it applied when employment was terminated. No one is suggesting that in that intermediate period there is a current contract of employment, a current employment relationship. At the employer's volition then down the other end, the employer says, as Justice Young has noted, "I need new employees. I have an obligation to offer them first to you, and I," as in this theoretical case that we've got, "I have an obligation to offer them to you on the whole of the terms that formerly applied."

So when I offer that to my former employees, I wish them to accept it. Those are the terms on which I want to engage them, and it's quite wrong to look at that as constituting a lockout, or the second element, the mental element of the lockout, because it –

GLAZEBROOK J:

Well, I can't see that that's – I mean, that's suggesting that actually complying with a contract – I mean, it's taking an interpretation of the Court of Appeal's decision I think to ridiculous lengths to say that if you actually comply with your contract, that's with a view to forcing them to accept the terms of the contract and it's a lockout. I mean what you're saying is here under my terms of my contract I'm offering you this.

MR JAGOSE:

Your Honour has exactly what I am saying.

GLAZEBROOK J:

Well I don't think that's an argument that goes either way for you frankly.

MR JAGOSE:

Your Honour has exactly what I am saying. The Court of Appeal's construction of employee as including former employees with rights to reinstatement cannot stand with the obligations on an employer in employing people. The problem is that because "employee" in paragraph (b) has been taken by the Court of Appeal to extend to "former employees" there is now no ability to distinguish an offer constituting a lockout, or making up the mental element of the lockout, and an offer of employment.

WILLIAM YOUNG J:

I think I could probably distinguish it if I had to you know. Where there's a will there's a way and my approach probably would be along the lines I've indicated, that if the offer, if you can put some meat in the sandwich of are-engagement obligation, and offer, which is inconsistent with those obligations, is likely to be by way of compulsion. If there is no obligation other than an inability to offer the job to someone else, but no obligation as to terms, then I'm probably with you.

GLAZEBROOK J:

And the third one would be if you offer it on exactly the same terms that is the meat, then there would also be no compulsion because that's just beating the contractual terms.

WILLIAM YOUNG J:

And the idea of compulsion must be with a view to changing something.

MR JAGOSE:

Yes, exactly, and the thing that has been changed is that underlying employment relationship on terms.

WILLIAM YOUNG J:
Okay, well where do we go to from here?

MR JAGOSE:
I imagine, with respect, that me banging away at section 82 and context is not going to take us particularly further. I do want to focus on paragraph 53 if I may of my principal submissions. This only goes to the point about the Court of Appeal's finding that section 3(ii) and (iii) were factors that impressed on the Court to grab this larger definition of "employees" and I point out that there are countervailing considerations at 53 including integrity of individual choice, which is said to be one of the statutory objectives. At section 4 the identification of what constitutes an employment relationship. At section 6, seeing that the legislature has exactly looked at when a person intending to work might be caught by the definition, and I've already spoken of section 80's objective. So none of those adds any weight to the Court of Appeal's interpretation exercise. Indeed, having gone about it the way they did, the Court of Appeal has elevated certain objectives, without identifying their conflicts with others, and that's a policy judgment. That's not really something, with respect, for a Court to be doing. The legislation itself doesn't support, in its entirety, the expansion of the employee to former employees, even with rights of re-employment.

Again, to go back to Your Honour's proposition at 55, we were asking well what is the obligation, the contractual obligation to re-employ? The Court of Appeal says that in the lacuna, in the offseason, there are some of the hallmarks of a formal employment relationship, and that's just not enough. It's the reason that I made reference to, that irreducible minima, before.

I don't think I need to point at my conclusion because I suspect it's obvious. Unless there's anything else?

WILLIAM YOUNG J:
Mr Hodder, is there anything you want to add to the written submissions?

MR HODDER QC:

There are some matters I would like to add, Sir. So when we originally sought leave, we sought leave to file written submissions and to make submissions for up to 30 minutes. The minute from the Court through Justice O'Regan said you can make written submissions and appear and we'll decide later whether we want to hear you orally or not, so we're at that point, I think.

WILLIAM YOUNG J:

I think we'll hear you orally. But we have got the gist of your submissions, which are pretty similar to those we've just heard. But you may wish to add to them.

MR HODDER QC:

There are one or two, perhaps, differences on that. There's also a question of order. I've spoken briefly with my friend Mr Cranney, who says he prefers me to go first. In a sense, I'm replying to him but I'm in the Court's hands about when I might say something.

WILLIAM YOUNG J:

I think we'd probably prefer you to do it now.

MR HODDER QC:

While it's not part of the case on appeal, I'm assuming the Court has access to and may have read the affidavit of Mr Ritchie in support of the association's leave application. It sets out why the association is concerned about –

GLAZEBROOK J:

The non-leave Judges have not read it. It was made clear it wouldn't be looked at for the – except in the context of the leave application.

MR HODDER QC:

Yes.

GLAZEBROOK J:
So you can't assume anything of the sort.

MR HODDER QC:
All right. Well, in that case –

GLAZEBROOK J:
And, in fact, probably can't refer to it because we said we wouldn't, although if it's just why you're interested I shouldn't think there'd be an objection.

MR HODDER QC:
Well, what I was going to do was refer to the matters that are in that affidavit, and it's not really part of the exercise. It's not contentious insofar as I understand is contentious. It simply says what the industry members' concerns were. It doesn't say that they're definitive. It just says what concerns they have. But they do include relevantly to the discussion the Court's concerns about the uncertainty that may arise. So the proposition is that members of the industry association who employ somewhere north of 10,000 people in the industry have concerns that if the approach taken by the Employment Court is sustained, then that's the issue that is challenged by my learned friend Mr Cranney by way of his supporting points or other grounds. Then that creates a series of uncertainties about entitlements of other kinds, and that is the basis on which the industry association has sought leave and for which leave is to be granted.

I don't want to go further than that, but I hope that explains some of the context as to why the industry association would be here.

In terms of what concerns the association has about the Employment Court judgment, there are two sections of the judgment that cause particular concern for the association. The first set of sections is starting at paragraph 166. This is volume 1, and the relevant passages are starting at about page 96. There's a section that runs from about paragraph 166 to 171, which purports to be a textual analysis of aspects of the expired collective

agreement, which then lead to the proposition that those matters are significant for interpreting how the employment relationship is, it was not continuous, so that's the first section 166 to 171.

Then it carries on shortly after that to 175 to 177, which I suspect the Court is well familiar with, but it's in those particular provisions that the Court comes to its conclusion that says, on the basis of what it described as employment, nature of employment changing, significant in the last 30 years or so, that the old cases are to be disregarded or have no particular impact, and now in 176 is a combination of collective agreements and employment agreements, and then 177, "In the circumstances we consider it's appropriate to determine the matter by reference primarily to the contractual terms and conditions of each particular case, and the conduct of the working relationships in practice." And it's 177 that we get to the point that the submissions that the Court has from its focus which is that from the association's point of view the essential question is whether or not the seasonal discontinuous employment is a basic premise or long-standing assumption in this industry, and the starting point is necessarily a matter of history. There's also a biological function behind this. With the reason it's seasonal is because of grass growth and breeding of stock for slaughter. But that seasonality has been around for as long as there's been an organised meat industry. The question that's been arising in this particular litigation is whether or not there is a discontinuous form of employment or not, and it's in that context that we say that the Court of Appeal's approach is to be preferred and the Employment Court's approach is troublesome, to put it mildly. And there are two lines of authority which the Court will appreciate from our submissions. The first line of authority, and this partly goes to the short volume of authorities we've handed in, is really what is surrounding circumstances. Probably the first and possibly the last word on that is the *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (HL) case, which is included in our bundle at tab 2, back from 1975 or '76, and in particular pages 1383 to 1384. This is – sorry it's tab 3, not tab 2. Tab 2 is *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) –

GLAZEBROOK J:
Sorry, we're just finding things.

MR HODDER QC:
So tab 3 of our bundle, which is *Reardon Smith*.

McGRATH J:
Did you give some paragraphs of that to look at?

MR HODDER QC:
Pages 995 to 997 is where I'm taking the Court to. So the first passage, and I'm sorry for taking the Court to passages that I'm sure you've all been taken to many times before, but the first passage starts at 995H, "No contracts are made in a vacuum." Now that wasn't revolutionary then and it's not revolutionary now, but it's the point that we get to, and then His Lordship Lord Wilberforce says, "The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined." In a sense that's where about here. What are the surrounding circumstances that are relevant to the case that's before the Court now. So on the next page, on 996, His Lordship cites, as he did in *Prenn v Simmonds*, Justice Cardozo's judgment from *Utica City National Bank v Gunn* (1918) 118 NE 607, which again talks about the surrounding circumstances which may have an impact on the meaning that the words have in a contract, and towards the end of that passage refers to the genesis and aim of the transaction.

At page 996E there's a second element of that judgment which I refer the Court to, which is where His Lordship addresses himself to the objective aspect of contract, again, nothing new about that, making the point that when one speaks of the intention of the parties of the contract, one is speaking objectively. The intention that reasonable people would have if placed in the situation of the parties, and carries on in that basis. Again, that's been adopted by this Court in terms of the objective approach to contract. the last aspect of the judgment for our purposes is at the bottom of page 996 where

the Court, or the House of Lords, this is when *Charrington & Co Ltd v Wooder* [1914] AC 71 (HL) was cited, and Viscount Haldane has referred to in his passage, “Circumstances which the parties must be taken to have had in view,” and then over the page at 997B Lord Dunedin in the same case, “In order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to a contract were placed, in fact when they made it – or, as it is sometimes phrased, to be informed as to the surrounding circumstances,” and then that leads to the relatively famous sentence, “All their lordships are saying, in different words, the same thing – what the Court must do must be to place itself in thought in the same factual matrix as that in which the parties were.”

So that was picked up in the *Vector Gas Ltd v Bay of Plenty Energy* [2010] NZSC 5, [2010] 2 NZLR 444 decision of this Court. It’s referenced –

WILLIAM YOUNG J:
This is all pretty familiar country.

GLAZEBROOK J:
Yes.

MR HODDER QC:
I appreciate that.

GLAZEBROOK J:
And it’s not really adding anything, is it, to the submissions?

WILLIAM YOUNG J:
What I’m more interested in is the Australian case which is perhaps a bit more on point.

MR HODDER QC:

Well, what I was going to do is if I can have one sentence on *Vector* which is just to confirm that the Court already knows that it picks up *Reardon Smith* and cites it in some of the judgments. There's nothing different when we get to the most recent decision from the UK Supreme Court which is the *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095 decision from earlier this year which we've included in our bundle at tab 4 which I wasn't proposing to take the Court to. That reconfirms the general approach to surrounding circumstances.

Then we come to what is relevant here, which is that the surrounding circumstances include the general legal background, which is not a topic which has had much attention in the case law. Then in our submissions the Court – well, no, we pick that up by passing reference to Burrows and you'll find the reference to the Burrows text, John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016), in the second volume of the appellant's bundle at tab 45. I wasn't proposing to take the Court to it. And then we have cited Professor Carter's text, JW Carter *The Construction of Commercial Contracts* (Hart Publishing, Oxford, 2013), which I would like the Court to go to, which is in our volume at tab 5, and Professor Carter's text at paragraph 6-28 comes directly to the area where we are placing our emphasis. It says that he is correct in his construction or his creation of his article 6.5, context includes legal context. "The context of a contract includes" –

GLAZEBROOK J:

Sorry, what page are you on now?

MR HODDER QC:

I'm at tab 5 of our volume.

GLAZEBROOK J:

You said 6.5. I can't – is that –

MR HODDER QC:
It's 6-28.

GLAZEBROOK J:
6.28, sorry.

MR HODDER QC:
"The context of a contract includes general legal background, as determined on a factual basis," and that's the proposition that we are particularly focused on, and going onto the next page, page 202 of the extract, the first full paragraph, "The relevance of legal background has sometimes been expressed by reference to a contrast between the 'factual matrix' and the 'legal matrix'." The latter phrase was first coined by Lord Goff in a lecture. "The description is useful for emphasising that the background of a contract may include its legal setting or 'legal context'." Then it goes on to refer to *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10, (205) 222 CLR 241 which I'll come to after we've finished with this particular extract.

Then the next paragraph, 6-29, the significant distinction is made between legal context and precedent. So in the second paragraph where it says "second", it follows that the legal material is usually of a general nature as part of the general commercial background but whether or not that is the case, in order to count as context the relevant raw material must, in a construction sense, be circumstantial and not determinative in a dispositive sense of requiring the contract to be given a particular construction. That point is then elaborated further in paragraph 6-30.

So what the submission for the Association is it's not that the line of cases which the Court is familiar with, which I'll touch on shortly, is binding as a matter of precedent and that the Employment Court misunderstood the precedent. It's that the Court erred by treating the issue as whether they were precedents rather than whether they were part of the legal background, and that's the proposition that our submissions are directed to.

That general approach finds support in the High Court of Australia decision in *Amcor*, paragraphs 213 and 214. There is a not quite so clear reference in paragraphs 41 and 42 of the joint judgment of Justices Gummow, Hayne and Heydon, and in a concurring judgment Justice Kirby goes into the matter in a little more detail than the others. In his judgment where he approaches this matter beginning around paragraph 64 on page 261 of the judgment, he's looking at the Act and it constitutes a legislative background against which the agreement was made and certified, a background that would have been in the minds of both parties: Amcor on the one hand, the union on the other, this being a redundancy case.

The legislative background is therefore part of the common knowledge attributable to the parties of the agreement. So far as it's relevant, it would ordinarily be assumed that, agreeing as they did, the parties intended the agreement to take its place within the industrial setting created by the Act."

Paragraph 65, "to some extent that industrial setting also incorporates not only the provisions of the Act dealing with the special problem of redundancy … but also the consideration by courts and industrial tribunals during the past three decades of the issue of redundancy and employment."

It's a submission for the association that that passage is applicable to the case that the Court has before it. So whereas in the Employment Court there's a reference at about paragraph 175 to the fact there's been significant change over 30 years, the Association's response is to say, actually, for 30 years the employment institutions have said this kind of employment is seasonal. That's why it's referred to in Justice Richardson's judgment as being a basic premise of the industry.

GLAZEBROOK J:
I'll put what I put to the appellant. Nobody's really suggesting – I don't understand the union to be suggesting the work is anything other than

seasonal. They're just saying that in terms of the contract it's a continuous employment relationship but that you don't work and you're not paid over the off-period. That's my understanding of the argument.

MR HODDER QC:
I may have misstated what I meant to say. What is a basic premise is that this is seasonal and discontinuous.

GLAZEBROOK J:
Well, maybe but discontinuous in the context of the old award meant that you weren't paid in the off-season because continuous would have meant you were paid in the off-season, wouldn't it, in terms of awards?

MR HODDER QC:
I would offer a simpler approach which says discontinuous means there wasn't employment.

GLAZEBROOK J:
Well, I realise that but they had to in that context because they weren't allowed not to pay people if they were employed.

MR HODDER QC:
Well, in a sense, that's a level of going beyond the basic proposition that creates the background, in our submission. The basic background of this is that the employment has been recognised as being seasonal and discontinuous. If there's to be a change from that, there needs to be something that's significant that changes because that process has been in place for at least the last 30 years and recognised in various contested matters, including contested by the respondent in this particular circumstance.

So no, we don't – in our submission, it's not sufficient to say that it was seasonal and we don't know whether or not it was discontinuous or not. The proposition is to the contrary, that there's a line of cases which both recognise and reinforce the point that this seasonal employment is

discontinuous and unless and until there's something that changes that, that's the background against which the parties have taken to have been negotiating.

Now, Justice Glazebrook, I think, put to my learned friend Mr Jagose that there must have been – or there was some regard to context and it's true there's a reference to context of a socioeconomic nature in paragraphs 85 to 89 of the Employment Court judgment. It actually has a heading of "context" but that's all that it talks about.

What we submit is that the failure of the Employment Court to appreciate that the context included the legal background in the way that is described in the Carter text, the *Amcor* case, et cetera, was an error in principle, an error of approach. It simply didn't appreciate that its task was not to find whether or not there was a basis for distinguishing that series of cases. Its task was to appreciate that the background or the surrounding circumstances in which these parties were reaching their contractual arrangements included this line of cases and the premise of it that there was discontinuous employment. So although there is this reference from paragraphs 85 to 89 under the heading "Context", talking about the absence of other employment in small towns, the size of the off-season, the semi-skilled nature of the work and the non-transferable nature of the skilled, nowhere is there a reference to the kind of legal background we're talking about and the end result is, and we can see the amount of space devoted to the topic, we finish up with the Employment Court having taken a text-centric approach to this issue contrary to the well known line of cases which Your Honours are familiar with.

So beyond that we say that having established that there is a basic premise, those line of cases then require some strong basis for departure from that, and Your Honour, Justice Glazebrook, I think asked, "Well, what is the strong evidence one might look for," and for that we say the Court of Appeal has offered a useful answer in paragraph 49 of its judgment, which takes one back to the case that my learned friend, Mr Jagose, mentioned, but paragraph 49, in our submission, correctly cites or says, "AFFCO, the union and the workers

are deeply embedded in an industry with a long history of collective bargaining and legal disputes, many of which have been resolved in the courts. In the light of this background, a reasonable and properly informed third party would look for clear evidence of the parties' intention to depart from the industry standard of inter-seasonal termination of employment," and then it gives an example of the *Hughes v Riverlands* case where there is a specific statement, "All employees shall be deemed to be permanently employed." That will be the kind of strong evidence that says that overrides the presumption or the premise, whatever phrase one likes to use, and amounts to the strong evidence that something else was intended. But absent that, the Association's submission is that there is no reason to depart from the basic premise and the Employment Court erred in its approach by not considering whether it should depart from the basic premise given that was the background and the Court of Appeal was able to get, we say, to the correct answer.

So in terms of the summary for the Association, in our written submissions which the Court has we say the analysis supports what we've set out in paragraph 45 of the written submissions. So 45.1, regard to the factual background is necessary. 45.2, that background includes all surrounding circumstances of facts reasonably available. 45.3, it includes a legal background, including previous judicial decisions as a matter of principle, not as a matter of precedent. In this case there was a line of authorities reflecting and affirming that basic premise of discontinuous seasonal employment, and the Employment Court failed to take the basic premise into account when it interpreted the collective agreement, and that, we say, was an error of principle, or putting it another way, the Court asked itself the wrong question. That's the Employment Court. What it asked itself was were these cases distinguishable or were they binding precedents? It was able to find that they weren't binding precedents. What we say is the correct question was: "were those cases reflecting or establishing and reinforcing a basic industry premise of discontinuous employment?"

Now, Your Honours, that's as far as I think I need to take the matter but I do stress that we are looking at these cases, this line of cases, from *Alliance* 1987 through to *Alliance* 2006, not as matters of precedent but as matters that establish the premise, reinforce the premise, against which the parties have taken to be negotiated.

Now that's the short version which Your Honours I think would be appreciating more than the longer version.

O'REGAN J:
The short version's a good version.

WILLIAM YOUNG J:
Thank you.

MR HODDER QC:
But subject to any questions I think that probably covers the ground that I would like to cover. As Your Honours please.

WILLIAM YOUNG J:
Mr Cranney, you may as well make a start, I think.

MR CRANNEY:
Now Your Honours, I have a road map to hand up. Now Your Honours, I'll come back to the submission that's just been made later on in my comments. I wonder if I could – I do think that the statutory provisions in the statutory scheme are important and I do want, if Your Honours please, to spend a few minutes going through some of these sections because it's impossible to understand section 82 or anything about the meaning of a lockout without fully appreciating the statutory scheme for collective bargaining generally, and I'll come back to section 3 but just if I may note that at the beginning. The fundamental object section of the Act which highlights two very important human rights considerations in section 3(b), and that is the observance in New Zealand of the principles underlying ILO Convention 87, which is

freedom of association, and Convention 98, being the rights to bargain, to organise and bargain collectively, and these, or at least one of those, the second one is mentioned in the Employment Court judgment, I'll come back to it, and those are fundamental, I say, to understanding this dispute. And also in the 3(a) provision, section 3(a), there is first of all an acknowledgement at 3(a)(i) about good faith behaviour and at 3(a)(ii) a reference to the inherent inequality of power in employment relationships, and then in (iii) the promotion of collective bargaining, not just the protection of it but the promotion of it, and those I'll come back to later.

But just to draw Your Honours' attention to some of the other sections I will be referring to and I think the starting point is to emphasise the broad nature of the good faith obligation under the statute, and the opening words of section 4(1)(b), "Without limiting paragraph (a)," so there's this theme all the way through section 4 which make clear that this is an all-pervasive obligation, and then at (1A)(b), the obligation to be actively constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative, and section 3(1A)(c), 4(1A)(c), emphasising that if an employer is proposing to make decision that could affect, have an adverse effect on the continuation of employment on an employee, the employee must be given access to information and an opportunity to comment. And then at section 4(2), over the page, the employment relationships are defined as being between, including, at paragraph (b), a union and an employer, and at section 4(4), the duty of good faith applies to the following matters, bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of bargaining, and then (ba), bargaining for an individual employment agreement or for a variation to an individual employment agreement, which existed here, and any matters arising under or in relation to an individual employment agreement while it is in force. Over to (d), a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business, and then subsection (5) emphasises that the matters specified in subsection (4) are examples and do not limit subsection (1).

Now in section 5, I could just draw your attention to some definitional provisions. First of all, “bargaining” is defined in section 5, the third definition down, fourth definition down, but it’s only defined in that provision in relation to collective bargaining for a collective agreement. So there’s no definition of “bargaining” beyond that. “Employee” is defined over the page by reference to section 6. “Employer” means a person employing any employee or employees, any employee or employees, and includes a person engaging or employing a homeworker. An “employment agreement” means a contract of service, and an “employment relationship” means one of the relationships specified in subsection 4(2), which we’ve referred to.

Now just coming to section 6, which is the definition of employee, we’ll come back to that, and then leaping over for collective bargaining purposes, which is what the purpose of these sections is that I’m referring to, to section 31 of the Act which are the objects provision for collective bargaining in New Zealand, and the first object is, to emphasise, under 31(a), “To provide the core requirements of the duty of good faith in relation to collective bargaining.” So again emphasising that these are not the minimum requirements. And then 31(d) is very important, “To promote orderly collective bargaining.” Orderly collective bargaining.

And then moving on to section 32, which my friend hasn’t even mentioned but I am going to mention given the illegality around section 32 in this case, “The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement,” and it’s common ground that that was occurring here, “to do at least,” again at least, “the following things,” so the opening words of section 32(1) emphasise that section 32 is part of section 4. It’s the duty of good faith in section 4 that requires this and to do at least the following things. And then to section 32(1)(d), “Must recognise the role and authority of any person chosen by each to be its representative or advocate,” that is the union or the employer, and then the second one, “Must not directly or indirectly bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for,

unless the union and the employer agree otherwise," and, "Must not undermine or do anything that is likely to undermine bargaining or the authority of the other in the bargaining." So an absolute prohibition affecting both employees and non-employees on an employer bargaining without the consent of the union or without the agreement of the union with union members who are being bargained for. Absolute prohibition. And the reason for that I'm going to come back to, and it's related to ILO Conventions 87 and 98, the promotion of orderly collective bargaining, and collectivism generally. And then subsection (5) –

GLAZEBROOK J:

Can I just – I was just slightly puzzled by this in the sense that at 199 of the Employment Court judgment it was said it was conceded that it was actually bargaining in respect of individual agreements, not a collective agreement.

MR CRANNEY:

Yes, but the prohibition is a prohibition on any bargaining of any type without the agreement of the union during collective bargaining. It can't be done without the agreement of the union.

GLAZEBROOK J:

Well, what's the concession?

O'REGAN J:

But didn't you say bargaining is only collective in relation to collective agreements?

MR CRANNEY:

The definition of bargaining in section 2 is the definition that only relates to collective bargaining. But this provision here is one of the duties that's imposed on an employer bargaining for a collective agreement, in the opening words of section 32(1), and an employer in that position may not bargain about, I think it says, may not bargain about matters relating to terms and conditions of any kind. They have to go through the union.

O'REGAN J:

Yes, but if the word "bargain" means only collective then it doesn't include individuals.

MR CRANNEY:

No, no, if you look back at the section, Your Honour, it's a definition of bargaining in relation to collective bargaining.

GLAZEBROOK J:

It says here both parties –

O'REGAN J:

So is this another, other, the context otherwise requires argument?

MR CRANNEY:

No, I don't think so.

ARNOLD J:

It just repeated the definition of bargaining for a collective agreement.

GLAZEBROOK J:

No, no, it just says that, in 199 it says, "The parties are agreed that the lockout was related, unrelated to the collective bargaining." Well, if it was unrelated to the collective bargaining what's – why would the prohibition come in?

MR CRANNEY:

The lockout was – it's a bit – I'll come on to it, but the argument is simply this. A lockout is unlawful unless it relates to collective bargaining for an agreement that will bind each of the employees concerned, and that was conceded by the other side that this one did not relate –

GLAZEBROOK J:

Sorry, it's okay. You'd perhaps better walk through it a bit slower. I'm probably being too slow. So the argument was the lockout was unlawful, because?

MR CRANNEY:

Any lockout that is unlawful, and this is section 83, to be a lawful lockout it must relate to bargaining for a collective agreement that will bind each of the employees concerned. This is section 83(b)(i). That's the – there are two –

O'REGAN J:

This is sort of cart before horse, isn't it, because the whole question we've got to decide is is it a lockout at all. I mean, if it is a lockout there's obviously a problem but –

MR CRANNEY:

If it's a – it's a lockout if it fits within the definition of lockout and then it becomes either lawful or unlawful, depending on whether or not –

O'REGAN J:

Well, yes, but they didn't give notice so it was unlawful anyway.

MR CRANNEY:

It was unlawful for that reason.

O'REGAN J:

But it – well, it doesn't matter how many reasons. It's either lawful or unlawful so we don't really need to exercise ourselves with this, do we?

MR CRANNEY:

Well, it's still important – well, I think the illegality, Your Honour, the thing which I think the previous submission missed is that lockouts in certain circumstances are lawful. You are entitled to breach an agreement with impunity if you're an employer as long as you meet the criteria of legality. You are entitled to say to somebody, "Even though I've got a signed agreement with you which requires me to give you work I am breaching it with impunity because I'm caught by the protection of section 85 and you will stay out the door and go hungry until you accept my terms," but in order for that to succeed –

O'REGAN J:

There seems to be a little bit of embellishment to the statutory language here, with all due respect.

MR CRANNEY:

Well, that's what – but this is what happens and this is what happened here and 160 people were out for six months in Wairoa and were looked after by the State, but if you look at it – in terms of benefits. But if you look at the – in order for that to be a lawful lockout it must relate to bargaining for a collective agreement for each of the employees locked. If it doesn't, you're not allowed to lock people out for good reason to compel them to accept an individual agreement. You can see the concept there. This is a collective right. You can't walk up to a worker, whether they are a tea lady or a cleaner who's on an individual agreement, and say, "Go from this place until you accept my terms." You can if collective bargaining has been initiated, bargaining has taken place for the requisite period. The lockout is for the purpose of compelling acceptance of the demand and it relates to collective bargaining, sorry, to a collective agreement that will bind each of the employees concerned. You can do that and you can do it lawfully. So in a funny way what the employer is arguing for here is arguably to restrict their own rights to lockout. They're really saying, "Well, we can't do it till we engage them all first and then after we've engaged them presuming it's lawful, presuming that section 84 is met and all the other requirements are met, we can then lock them out to compel acceptance of the demand." But what happened here was, was not that, and coming back to section 32 where I started, the prohibition on bargaining about any matters directly with employees is part of that, so I'll come onto the facts later. I say that that's an absolute prohibition as the Employment Court found.

GLAZEBROOK J:

I understand now.

MR CRANNEY:

Yes. It doesn't mean it can never happen because it says with the union's agreement, so what would have happened here, they would have gone back, we need to restart the season, we need to bargain with people and get them back in or whatever.

The next section I want to refer Your Honours to is subsection (6) of section 32 which allows an employer to communicate with the employees during collective bargaining, but only as long as the communication is consistent with subsection (1)(d), which is the prohibition on bargaining. So there's a limitation on communicating with collectivised employees during bargaining.

Then coming to section 40, which is the next section I want to refer Your Honours to, this is simply a provision by which a union initiates bargaining. So you're required to give notice to the employer. The method of notice is described at section 42. It must be in writing. It must identify each of the intended parties, that is, the employer and the union, and it must identify the intended coverage. The words "intended coverage" are actually defined in section 5 to be the work that the agreement is intended to cover. So after section 42 notice is given, bargaining then occurs and –

GLAZEBROOK J:

And you say there was still current bargaining going on? Because I thought we were told that there wasn't.

MR CRANNEY:

There's no question that bargaining was current. In fact, it was conceded by the other side in the opening moments of the Employment Court case. The transcript is in the bundle, bundle 5.

GLAZEBROOK J:

I was just – I might have misunderstood.

WILLIAM YOUNG J:

I think there was an application by AFFCO at some stage for a declaration that bargaining was over.

MR CRANNEY:

Yes, and that's what I'm about to come to. So leaping over to section 50, sorry to section 50A –

WILLIAM YOUNG J:

Just pause there. it's now 4 o'clock. Shall we go on for 10 minutes or so? We'll go on until 4.15.

MR CRANNEY:

I'll just finish the sections and then perhaps –

WILLIAM YOUNG J:

Well, because we don't want to be tight for time tomorrow.

MR CRANNEY:

Thank you Your Honour. So 50A to 50J, I don't, they're not that relevant. Just to draw Your Honours' attention to them, which is a process by which bargaining, that goes off the rails can be facilitated by the Authority. 50J is a separate, or a distinct provision which essentially allows the Authority to fix terms in certain circumstances of extreme bad faith. Then 50K to 50KA, which are the provisions that came in on the 6th of March, I think, 2015, and which resulted in an application by AFFCO against the union for an order that bargaining was concluded because they said that the union had misconducted itself in bargaining, and that never went anywhere in the end, it's now been discontinued. But those are provisions whereby bargaining can be brought to an end but the Court has to consider, in fact if one party is found to have breached good faith, as AFFCO was here, because of the section 32 breach, this type of application must be dismissed, it's in the sections.

Then the next section my friend has referred to, 63A, this is the requirement of individual bargaining, and we say very strongly that section 32(1)(b) overrules section 32, sorry, section 63A. You can't bargain at all without the agreement of the union, with unionised employees during collective bargaining and I'll come on to what actually happened in a few moments.

GLAZEBROOK J:
Can you just give me a few moments.

MR CRANNEY:
Section 63 capital A.

GLAZEBROOK J:
Yes. I understand.

MR CRANNEY:
And we say that those are the rules for individual bargaining, but if you can't bargain the rules are irrelevant, unless you get the agreement of the union to hold it all together.

Then section 66, which is a provision about fixed term agreements, and although this is not for the determination of the Court, in general terms fixed agreements are unlawful in New Zealand, unless there is a genuine reason based on reasonable grounds for the employment being fixed term, and that's subsection 66(2) and there are provisions in the section, for example, section 66(6) where you see that if an employer does not comply with subsection (4), which requires the fixed term provision to be in the agreement, the employee can elect to treat the employment as continuous. So generally speaking fixed term agreements are not lawful in New Zealand unless there is a genuine reason why they should be fixed term and we say obviously here there's no genuine reason.

WILLIAM YOUNG J:
You say, sorry, what?

MR CRANNEY:

There's no genuine reason.

GLAZEBROOK J:

Well there's a genuine reason for not having workers and paying them over the off-season which you accept.

MR CRANNEY:

Absolutely, no problem.

GLAZEBROOK J:

And that there could well be a genuine reason for not having continuous employment because there are ups and downs over seasons and you don't know the workforce you need, so I wouldn't have thought that a discontinuous necessarily falls outside of that.

MR CRANNEY:

No it doesn't I think, yes, Your Honour will have picked up from our submission that we, the argument about how the clauses work, about what people actually do and what they're obliged to do over the years, there's no real argument apart from ones that have been raised today, but we get laid off, we come back, we sometimes get laid off intra-season, in the middle of a week, or for a few days, no problem. We get laid off at the end of a season, we get re-engaged, and it goes on –

WILLIAM YOUNG J:

But isn't there a different, aren't there specific provisions about intra-season lay-offs?

MR CRANNEY:

Same provision. The provisions for lay-off at the end of the season also apply intra-season. But the words in the contract is mistakenly written as "inter-season". It's a term of art in the industry, people call intra-seasons, inter-season. Then, so we'll come back to section 66, but the last few

sections, Your Honour, interrupt me if you wish, but section 80. My friend referred to this section setting out the object is, "To recognise the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful." So you can do it and it is a very powerful economic weapon for collective bargaining for both employers and for unions, and that's the whole purpose of it.

Then section 82, which we'll come back to. Section 83, now this is the shield, a very important shield which prevents strikers and lockers from being sued, and it's not just being sued by the other party, it's being sued by anybody. So you're protected from any contractual or tort action – sorry for any employment agreement or tort action, and there were even cases where people have relied on this section to get out of defamation cases, where the breach of employment agreement was a defamation. There's no need to get into that, but it's a powerful shield against damages for taking strikes or lockouts. Now my friend suggests, and I have never heard it suggested before, since 1908, that you can take a personal grievance if you're locked out. So this is an unjustified lockout. No one has ever thought of that before. And I think if you took a personal grievance for something which the employer is legally entitled to do if they do it properly, you would not get very far as the way the Courts currently work, because the employer is entitled to lockout if they meet the criteria and they are entitled to damage you economically as the workers are entitled to damage the employer economically by strike action, and so 83 is the scheme, and then 85 – sorry, 85 is the scheme.

Section 86 sets out the illegality of lockouts, the grounds on which they can be illegal, and one of them is a failure to give notice and my friend referred to the general requirement to give notice of a lockout, but there is also a specific essential industry requirement which applies here, which is section 91. So this is an essential industry like airports or petrol, anything to do with livestock. There's a specific provision requiring notice. Then the provision to which I've already referred Your Honours which is that to be lawful a lockout must relate to bargaining for a collective agreement that will bind each of the

employees concerned. Then section 91 I've referred to which is the notice provision.

Section 92, and this is important as well because this is the provision that requires mediation if lockout notice was given. So there's a provision which requires the Chief Executive to take steps to stop a lockout once notice is given under, in essential industries, section 92.

Then section 97, to which reference has been made, which is the strike breakers provisions, and sections 99 and 100 which essentially provide that if somebody does issue tort proceedings in relation to a strike or a lockout, if the lockout is lawful the action must be dismissed. That's section 99 and 100. So and also granting the Court, Employment Court, exclusive jurisdiction in relation to torts, strikes and lockouts. Now, Your Honours, may I continue, Sir?

WILLIAM YOUNG J:
Yes, yes.

MR CRANNEY:
So coming back now to section 3, which is this ILO Convention, these provisions about inherent inequality, promoting collective bargaining, freedom of association. These provisions of the statute have to be read as protecting those rights. So for an employer, and I'll come onto this when I talk about the facts, to be entitled to go to a meat worker in a remote town and send them a letter on a Friday and say, "Come in on Monday. I want to talk to you, to bargain with you, and settle your agreement for the next season," is an infringement of her rights to collectively bargain and to associate for the purpose of advancing her interests, which is what happened in this case. They got letters. They were told to come in, and each of them was obliged to participate in this unlawful bargaining as a precondition of maintaining the means of their subsistence for the season, and that's what the case is about. And the documents that they were obliged to sign, and the agreements, is at volume 2, page 300. Now this individual agreement, which was, that the

employers were required to consider during this unlawful bargaining removes all references to trade union rights that used to exist in the collective agreement.

O'REGAN J:
Sorry, all references to?

MR CRANNEY:
Trade union rights, stop-work meetings, right of access, union fee deductions, and the standard trade union right provisions that were in the existing collective agreement which Your Honours have got earlier in the bundle. Worse than that the agreement also, at least until after the interim injunction provision, contained provision at clause 28 on page 311 prohibiting the employer from attending any meetings organised by anybody else on-site either before, during or after work hours, or off-site during work hours, without the prior express permission of the employer. So that particular clause and one other clause was the demand placed on the workers at Rangiuru which was removed from the subsequent individual agreements because the Employment Court said these clauses were offensive and should be removed. But all of the other trade union rights that were in the existing collective agreement, or the existing individual agreement, were not retrieved and were not retrieved until the Employment Court issued its judgment in November, or whenever it was, in 2015, during which time the employees operated under this agreement. The judgment also debates, or describes the differences between the existing individual agreement, which the union says should have applied in the new season, and this new document which they were required to sign individually to get back in, and it's not just the loss of union rights or these sorts of degrading clauses that were in it that was the problem. There were significant other changes, including changes to breaks, to instead of having a half hour break in the middle of the day and a proper rest break in the morning and the afternoon, the provisions were changed so that breaks, there were two half hour breaks during the day in a way which the workers thought was too exhausting, and there were numerous other serious issues with these agreements and hundreds of workers had to sign these to get back

in and the employer laid off Rangiuru, as the papers make clear, laid them off, brought them back on the new terms, laid the next one off, brought them back on the new terms, right up until the last one, which was the Wairoa plant, and they didn't go back. They said we're not signing back, and the employer wouldn't let them back, and there was a few individuals in the other plants as well that didn't go back.

So that's what we say the case is about. The other issues have arisen in the context of the case. Whether they're an employee or not. Whether subsection (2) in section 80 – sorry section (1)(b) in section 82 matters. But the fundamental nature of this dispute is about meat workers' collective bargaining rights and we say, and we come back to *Richmond*, that case, we want to try to bury it here today so it never comes up again because what that case says is what my friend advocated for. That meat workers can be laid off under the award and they've got no right at all to re-engagement other than to enter discussions with the employer. No right to be re-engaged on new terms and so –

WILLIAM YOUNG J:
I think what he would say is that they're entitled to be re-engaged, if anyone's being re-engaged. In other words they can complain if people are offered better terms than them or ahead of them. They've got no entitlement – but there's no continuing substance to their re-employment obligations beyond that.

MR CRANNEY:
Yes, the *Richmond* decision I think said that you can come, you've got a right to be re-engaged but you have to reach an agreement first.

WILLIAM YOUNG J:
Okay well I think we might call it a day now and we're in good time to finish tomorrow?

MR CRANNEY:

Definitely Sir.

COURT ADJOURNS: 4.20 PM

COURT RESUMES ON WEDNESDAY 21 JUNE 2017 AT 10.02 AM

WILLIAM YOUNG J:
Mr Cranney.

MR CRANNEY:
Thank you, Your Honours. Your Honours, just to explain a couple of documents in front of you, the single sheet is the 1917 case *Ross v Moston* [1917] GLR 87 (Court of Arbitration) which is referred to in the Court of Appeal judgment. That paragraph at the bottom of the first column and the top of the second column is the entire case, and you can see the headnote above it. This is a case about workers who were –

WILLIAM YOUNG J:
Grandfather or great-uncle?

O'REGAN J:
Great-uncle.

MR CRANNEY:
I see, yes. I think the – apart from anything else, it's short enough to be readable which is one of the great benefits of the case, but what it's also saying is that these – I am tempted to say something about emulation but I won't – the workers resigned from their employment and said that this is not a strike, "We've just resigned." Well, it was a strike, in *Ross v Moston*, and for quite good reason it's caught by the section. And the second case, this slightly longer judgment, *New Zealand Fire Service Commission v McCulloch* [2011] NZCA 177, (2011) 8 NZELR 488, this is a judgment which refers to and relies on *Ross v Moston*, and I just gave that to you for your information.

Now this *Ross v Moston* wasn't referred to the Court in the first 1987 case that started this chain of cases. The 1987 case is in the bundle, tab 34 of volume 2, and essentially comes to the opposite conclusion to *Ross v Moston* but this case wasn't referred to, referred to the Court in that case.

Your Honours, when we left I had just finished going through a number of sections and had begun to talk about the facts and I just want to return to one particular section and to refer Your Honours to some case law about it, and that is section 83 which says the, "Participation in a strike or lockout is lawful if the strike or lockout … relates to bargaining for a collective agreement that will bind each of the employees concerned," and there is a case in the bundle dealing with that section of the Court of Appeal, the *Spotless* case which has been referred to briefly yesterday which is in tab 18 of the appellant's authorities, and the relevant passages which I say are both good law, 39 and 40, of that judgment. "For there to be a lawful lockout, the employer's demand under section 82(1)(b) must be linked to the particular lawfulness ground it asserts under section 82 or section 84," the latter being health and safety strikes, and then it goes on to say, "In addition, the justification under section 83 or 84 must be the dominant motive of the lockout." It refers to an authority. Last, it goes on to say, "Where the lockout is said to be lawful under section 83, the dominant motive must be to further collective bargaining." Not to destroy it but to further it. You can't lockout to further individual bargaining.

And then, at paragraph 40, the sentence second, "If the employer's demand is unlawful, then both parties accept (and we agree) that the lockout will be unlawful. This is not, however, because the lockout does not meet the definition … as the Chief Judge held. It will be a lockout but an unlawful one because section 83 and 84 could not be interpreted to allow any person, whether a union, employer or employee, to act in a manner contrary to the ERA or is otherwise unlawful."

And that position is also followed by the Employment Court in a case referred to in my submission at footnote 10, *McCulloch v New Zealand Fire Service* [1998] 3 ERNZ 378 (EmpC), different than the one you've got there, which is the 1998 case where the Fire Service Commission dismissed the entire work force and gave them notice and gave them all new individual employment agreements in that case and that judgment of Chief Judge Goddard at the

time was consistent with what the Court of Appeal later said in *Spotless*, you can't do it.

WILLIAM YOUNG J:
So the answer to the question I asked Mr Jagose yesterday is that it was not open to AFFCO to pursue the strategy it was pursuing by way of a lockout?

MR CRANNEY:
Yes.

WILLIAM YOUNG J:
It wasn't just a matter of notice?

MR CRANNEY:
No.

WILLIAM YOUNG J:
They were pursuing individual agreements and that's a disqualifying factor?

MR CRANNEY:
Yes, and unfortunately that wasn't found by the Employment Court but only because they conceded that –

GLAZEBROOK J:
Yes, I now understand the point yesterday, thank you.

MR CRANNEY:
And the Employment Court also regrettably expressed its doubt about that proposition but it doesn't matter, it was never argued, about the concession.

GLAZEBROOK J:
Well, I wonder whether it was doubt. When I read it again, I wondered whether they were expressing doubt that if they had said it was in pursuit of collective bargaining that they would have doubted that.

MR CRANNEY:

Yes, yes, could be.

GLAZEBROOK J:

And I suspect that's the reading of it rather than that they doubted.

MR CRANNEY:

Yes, but I –

GLAZEBROOK J:

But it's hard to – it was a bit confusing which was…

MR CRANNEY:

Yes. But I do think that that proposition in *Spotless* is undoubtedly correct, that you cannot push people out of work with a view to compelling them to accept individual terms of – individual agreements, otherwise you could do it to anybody, and having said that I now come back to the facts and I was discussing with Your Honours in volume 2 the individual employment agreement at page 300 and referred Your Honours to what I said was a repressive clause, or a humiliating clause, and there's another couple I want to refer to. The one I referred to was clause 28 which prohibits the employees from attending any meetings either on or off-site, before or after work. The other two are clause 33, I beg your pardon, clause 32.8.

WILLIAM YOUNG J:

I missed that I'm sorry?

MR CRANNEY:

Sorry, 32.8 Your Honour, page 315. The clause which is expressed to create a justification for non-re-engagement if the worker fails to follow an aspect of the disputes procedure.

GLAZEBROOK J:

Sorry, I think I've still lost it.

MR CRANNEY:

It's on page 315, Your Honour, at the top of the page. "The employee acknowledges that the agreed process for resolving employment relationship problems is considered to be fundamental."

GLAZEBROOK J:

Okay.

MR CRANNEY:

And if the employee breaches it the employer loses any obligation to offer re-engagement following lay-off. It's an interesting clause because it seems to assume there's an obligation to offer re-engagement. That came out after the Rangiuru lockout, for the subsequent lockouts, and the third one is –

GLAZEBROOK J:

What's the agreed process you're talking about?

MR CRANNEY:

It's just the standard procedure for employment relationship problems 32, clause 32.

GLAZEBROOK J:

So how could you breach the process? I'm sorry, I'm being slow here.

MR CRANNEY:

I'm not really sure. I think they were, the complaint was that people were raising disputes without going through mediation first or something. Something like that.

GLAZEBROOK J:

Okay.

MR CRANNEY:

And the other one was clause 24.4 of the same contract, which provides that if the employer elects to terminate for irreconcilable differences, that there will

be no redundancy. That came out. And just while I'm on the topic of the clause of redundancy, Your Honours will see in clause 24 generally that this clause significantly removes and destroys the redundancy rights of the expired collective agreement. There's no provision in there about making, if the employer fails to make seasonal employment available, or fails to make it available, you'll get redundancy. Millions of dollars at stake in that sort of clause and that's not in this individual agreement. So removed from it. Then if Your Honours turn to page 336 you'll see there, because by this time, the time of the interim injunction proceedings, quite a lot of people who had signed the agreement had gone back and the employer was running around with a variation to remove these three clauses, which the Court had expressed its strongest objection to. Then argument. So the Court really, I think, had really clear evidence, as I say in the paragraph 3 of my road map, of blatant and obvious unlawful individual bargaining, and the sections I referred to yesterday refer to that prohibition, section 32(1)(d), and what section 32(1)(d) does, it effectively undoes *Ivamy v New Zealand Fire Service* [1996] 2 NZLR 587 (CA) which is a 1993 case of the Court of Appeal which split three/two, the three allowing these direct communications in bargaining and the two disallowing it. So 32(1)(d) is a legislative reaction to that which the employer here had breached, and as the Employment Court –

WILLIAM YOUNG J:
I just want to go back to that.

MR CRANNEY:
32.

WILLIAM YOUNG J:
2(1).

MR CRANNEY:
32(1)(d).

WILLIAM YOUNG J:

Okay, yes. Okay, so that effectively overruled one of the *Fire Service* cases?

MR CRANNEY:

The *Ivamy* one. So that, the *Ivamy* one was first which was about what happened here in fact where lots of material was sent out to the firefighters to sign while collective bargaining was current. The second one which I referred to you earlier, the 1998 one, was the mass dismissal of the firefighters for – to sign terms.

So at 32(1)(d), and I say that 32, it is a fundamental aspect of New Zealand collective bargaining law. It greatly strengthens the positions of unions in bargaining because it means that employers have to go through the union. They are not allowed to undermine the union. They are not allowed to try and peel people off by offering them greater wages to get them out of the union, to offer them a greater rate, to deal with them all individually because of that section. So quite apart from the other illegalities here, there is the overall illegality of what they did, and the – we –

ARNOLD J:

Can I just, before you leave that, completely leave the comparison between the individual employment agreement and the collective, I couldn't quite understand under clause 21 of the individual employment agreement, it had the long service leave requirements which are, seemed to be similar to those in clause 23 of the collective except that they introduce this date which you have to be employed prior to 30 September 2006, and that qualification wasn't in the collective as far as I can see. What's the reason for that? Does that date have any significance?

MR CRANNEY:

The date – I think I can tell you, Sir, but I'm going into evidence.

ARNOLD J:

All right, but am I right that that, introducing that date into the long service leave, was a new limitation? In other words, it doesn't seem to be in clause 23. There is another date in clause 22, annual holidays, in the collective but not in the long service leave ones.

MR CRANNEY:

If Your Honour looks in the same volume at page 176, clause (e), you will see there that the old collective contained a similar date.

ARNOLD J:

Yes.

MR CRANNEY:

A slightly different date, 1st of October 2005. No, I can't really help Your Honour with it.

ARNOLD J:

Yes, okay.

MR CRANNEY:

But the overall picture of the agreement, it's not a minimum wage agreement, which my friend said could have been introduced. It does preserve some things but it is significantly inferior to what the collective agreement provided, including, as I say, the removal of clauses 39 to 45 of the collective agreement, the old collective agreement, which were at page 184 onwards of the agreement, imposing significant consultation obligations, union representatives obligations, union fee deductions, union meetings, union offices, so the plants had union offices, employment relations leave and seminars and so on. That all went.

Now the – and I've said at my paragraph 3 of my road map, the last point, the Court really have I think very clear evidence of bad motive because of those sorts of clauses and because of the two particular agreements that they had in

front of them. And there is a detailed comparison in the judgment of the Employment Court, paragraphs 91 to 109, comparing the old agreement and the new agreement, which draws conclusions, and I accept that the Court seems to have concluded, or to inferred, that the demands that they put into the individual agreement were the same ones they were seeking in bargaining, and I wouldn't say that that was something that was outside of their scope at all, it was pretty obvious, even though the bargaining stuff wasn't done, they put in what they wanted into the agreement.

The agreement has one other peculiar feature at that is at clause 23 of it, which is on page 307, which is it does introduce a termination clause and termination clauses in a collective agreement usually mean that they're indefinite, as was noted by the Court in *Richmond*. The meat award didn't have one and most other agreements did have one, they put one in. I don't know whether they then accidentally made them all permanent, but it's an unusual choice to put in a termination clause in the agreement. So we say there was very clear evidence of bad motive, of undermining that went on, and if you look, Your Honours look at the actual documents that the workers got, which are at page 296, again in the same volume, Ms Ratu, who's the first respondent, so she gets a letter on a Friday, the 2nd of June, which you can take from the Bar that it was a Friday, saying that if you want to come back this is the process you must follow, you see then, at the end of the second paragraph, "you must follow". "We welcome your unpaid attendance to an introduction presentation … for a new individual agreement." So the agreement wasn't sent to them. They had to go into the plant to get it. And it says that the IEA has been changed from the previous season, and these need to be brought to your attention. Then it says, 'A copy… will be provided during your attendance, and explained … You will be given time to seek advice on the IEA and the company will also attend individual meetings with employees who wish to discuss the agreement. Should you desire you can register for a time." Then the time suggests that the earliest is the 8th of June, and then over the page you see what happened on the 8th and the 9th of June.

GLAZEBROOK J:

Can I just check with you, the first paragraph says, “As a previous seasonal employee desiring to return,” had they already given notice they wished to return or was this just sent out as a matter of course?

MR CRANNEY:

It was sent out as a matter of course. What they do is they –

GLAZEBROOK J:

They just assume that people would –

MR CRANNEY:

They leave their phone number or their address and people like who have been there for decades, 10-15 years, so –

GLAZEBROOK J:

So the assumption is that they will desire to return unless they –

MR CRANNEY:

Yes, there was no –

GLAZEBROOK J:

– have said at some stage that they wouldn’t.

MR CRANNEY:

And then over the page Your Honours you’ll see there the presentation notes. It goes on to say, “This presentation will take an hour,” in paragraph 2 there, and, “Further time will be available should you require an individual meeting to raise any issues … A time for that meeting will need to be booked.” And, “This is not an induction,” it says. This is to try and separate it from clause, from the security of employment clause in the old agreement, “Is not an induction meeting,” and the third sentence of that paragraph, “You are welcome to bring a support person/representative to your individual meeting.” And then in the second to last paragraph, sorry, the third to last paragraph

sets a deadline. "You should sign the IEA and return it to reception … but no later than 16th June," which was I think the day before the injunction judgment, so they set a three or four day deadline, and then in the next paragraph, which we say is quite misleading, second sentence, "None of the previous expired IEAs … based on the collective agreement) continued automatically past the lay-off season end. All employers are required to offer an intended employment agreement in writing." Now the first thing that the employer conceded in the Employment Court was that at least some of it did continue past season end but they told the employees that none of it continued past their season end, at least on our interpretation of that clause, and then this correspondence from the union objecting to what was occurring and eventually leading to an interim injunction hearing. But even at that hearing the deadline for accepting the offers was only extended by the company by one day and they had to be accepted by the 20th of June. So a high pressure tactic and scenario was adopted here.

And then one of the issues, going onto my submission at paragraph 4 of my road map, leaving aside the written submissions, just sticking with the road map for the moment, there is complaint and it's been repeatedly made by the respondent – by the appellant, that it was treated unjustly by the Employment Court, that findings were made by the Employment Court that –

WILLIAM YOUNG J:
Does this matter now?

MR CRANNEY:
Pardon?

WILLIAM YOUNG J:
Does this matter?

MR CRANNEY:
No, and I was hoping Your Honour would say that.

WILLIAM YOUNG J:

I mean, so we are getting quite a lot of sizzle here and not a lot of steak in terms of what's at issue in the case.

MR CRANNEY:

No, no, I agree, I agree. I agree it doesn't matter. I don't want to take Your Honour to all the evidence. All I can say is that it's in there that the Court of Appeal had before it both the affidavits to check this accusation that they took evidence from the affidavits instead of the evidence. The Court of Appeal examined all of this, examined all the papers from the application for leave to appeal hearing in the Court of Appeal. The Court of Appeal asked for those all back for the judicial review.

WILLIAM YOUNG J:

But actually, I mean, having tried to sort of hurry you along, I'm going to slow you up slightly. I rather got the impression from the Court of Appeal judgment, which I've only really skim read, that they just took the view that AFFCO was out of luck, that the jurisdictional limit was a fundamental problem as was the abuse of process that it was effectively a duplicate of the dismissed component of their application for leave.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

So it's not really a finding on the merits.

MR CRANNEY:

No, although they did ask and they do say in the very last paragraph, or the last two or three paragraphs of the judgment, that any complaint about breach of natural justice by the Employment Court was cured in the leave to appeal application.

WILLIAM YOUNG J:

I see.

MR CRANNEY:

They asked for all that paperwork.

WILLIAM YOUNG J:

Well, maybe. But anyway, look, I don't think it matters.

MR CRANNEY:

I agree, maybe, but it's not that we're – the appellant is stuck with the findings of the Court, of the Employment Court, didn't apply for re-call, has thrashed this issue and it's stuck now with all of those findings, so I don't intend to take Your Honours to the evidence and I agree unless Your Honours are going to make adverse findings on that I'm –

WILLIAM YOUNG J:

Sort of add to the problems.

MR CRANNEY:

I'm quite happy to skip over it. So I think that then takes me to –

WILLIAM YOUNG J:

Whether the appeal's moot.

MR CRANNEY:

I don't have to do the natural justice complaint. So primary appeal moot.

WILLIAM YOUNG J:

That also might be rather a moot issue, isn't it, because we have granted leave and we've just got to get on with it?

MR CRANNEY:

Yes, it's only moot in the sense that it overlaps entirely with another issue which Your Honours don't have to determine and which will resolve the case, that is the breach of contract.

WILLIAM YOUNG J:

But it may be that the lockout claim gives you arguments that might not be available on the breach of contract.

MR CRANNEY:

Yes, and that's why one runs them because –

WILLIAM YOUNG J:

But what – that also means it's not moot.

MR CRANNEY:

Yes, yes, it's – well, I'm not going to bang on about it. I'd be very surprised if this Court doesn't determine this having taken it, and the reason why one does run the contractual argument and the lockout because if our interpretation of that clause about re-hiring rights hadn't been successful, we would have had to rely on the last part of the lockout section, that is failure to engage people you would normally engage as opposed to breach of contract. So that's why people run –

WILLIAM YOUNG J:

Yes, and that's why, because it's not a complete overlap, that's why I don't think it's moot.

MR CRANNEY:

Yes, so that moves us past moot.

WILLIAM YOUNG J:

So we've made a lot of progress.

MR CRANNEY:

No, that's good. I'm quite happy, yes, and then onto – and I'm not a prolonged submitter in any event so it's a shortening of a shortening – and then if you look at 6.1 of the – coming to the employee issue, and rather than again going to the written submissions just to explain our position on it, this repeated statement being made that there was 30 years of sound jurisprudence on the issue is not correct. Or even that there was 30 years of jurisprudence on the issue. The *Richmond* case, starting with the 1987 case, I've referred Your Honour to *Ross v Moston* which is sort of the opposite conclusion, and in my submissions I refer to the 1990 Court of Appeal case, which I say has been misread by subsequent Courts et cetera, but coming to the *Richmond* case, there are only really two other cases, there are *Richmond* plus this 2006 case. Now the Court of Appeal case in, the *Alliance* case in 1990, first I say it's been misread, but secondly we're not necessarily always stuck with the particular judicial thinking of 27 years ago, and that is an odd case in the sense that it said that the employees who have been told they could work all year could not enforce that obligation because it wasn't consistent with the award, and this is after 100 years of awards where before that point everybody had said it's only inconsistent if it's worse than the award, and that's referred to in the judgment. It's not inconsistent if it's better. Now the Court of Appeal in that case said, well I don't see why that rule applies, this is almost on the last day of the award system, and on the same day that *G N Hale & Son Ltd v Wellington, etc Caretakers, etc, IUW* [1991] 1 NZLR 151 (CA) was delivered, which is referred to in the last sentence of the judgment. So it was kind of a high point –

WILLIAM YOUNG J:

G N Hale was an unjustifiable dismissal case.

MR CRANNEY:

Yes and it was a high point in managerial prerogative in the Court's thinking, and sometimes things change as time goes on and with that of the subsequent case of *Grace Team Accounting v Brake* [2014] NZCA 541, [2015] 2 NZLR 494, which essentially overturns *G N Hale*. So I don't really

put much weight on either of those first two cases. We come to *Richmond*. *Richmond* of course is it doesn't, it certainly doesn't reflect this part employment agreement because what *Richmond* said was that all meat workers covered by the award, as soon as they're laid off, lose all of their entitlements forever, except their right to reapply for a job and to bargain for an individual agreement with the employer. That's what *Richmond* said. It was nothing like this case and it's nothing like what we say is the industry practice. It did, of course, say as part of its reasoning that part of our reasoning is they're not employers in the off-season but the gist of the case was to say, look, once the season ends, that's the end of employment, and you've got no rights under the agreement. A strange decision, I say. Split the Court, very controversial at the time. And then followed again in 2006 by the Employment Court in the *Alliance* case. Now the reasoning in that case isn't right and in any event this employment agreement is different. And while there is a submission made by Meat Industry Association and by AFFCO here that there's an industry practice that everyone accepts that employers are always terminated at the end of a season, the unions don't accept it. We don't accept that's true as a matter of evidence.

WILLIAM YOUNG J:

Can I just pause there for a moment. I take it that just as a matter of industrial practice in bargaining procedures that quite a lot of the provisions in the last collective agreement can be traced back to the last award?

MR CRANNEY:

Yes, but they weren't in this particular case, and the reason was that –

WILLIAM YOUNG J:

The rights of re-engagement, if I can use a neutral term, that they can be traced back to the awards?

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

And the associated seniority rights?

MR CRANNEY:

Yes, you can see the similar provisions but they're not identical and some of them are quite different as indeed in this case where there's a heading of a clause saying, "Security of employment," and –

WILLIAM YOUNG J:

Sorry, the heading?

MR CRANNEY:

There's a clause saying, "Security of employment."

WILLIAM YOUNG J:

In this case?

MR CRANNEY:

Yes, which wasn't in the award, and the clause –

WILLIAM YOUNG J:

Well, are you going to take us to that?

MR CRANNEY:

Yes. That's the – the agreement is at volume 2.

ARNOLD J:

And where would we get a copy of the award? Is that anywhere in the record?

MR CRANNEY:

What's that, Sir?

ARNOLD J:

A copy of the award?

MR CRANNEY:

Yes, it is in there, Sir. It is in the record.

WILLIAM YOUNG J:

So the last award is in our material, is it?

MR CRANNEY:

The last two or three awards are in there, yes. I do, while I'm on that topic, Sir, comment that the same part of the bundle also includes the Alliance agreement which was considered by the Court in 2006 which was not part of the evidence and shouldn't be in there and we've objected to it, and –

WILLIAM YOUNG J:

Yes, but it's sort of not necessarily evidence. It may be just something that's material to the consideration of the judgment in the second *Alliance* case.

MR CRANNEY:

Well, it depends on what use it's put. I've got all the other 24 Meat Industry Association –

WILLIAM YOUNG J:

Spare us that, I think.

MR CRANNEY:

I've got them all here ready to hand up.

GLAZEBROOK J:

Well, it might be relevant if they're making comments about industry practice based just on one.

WILLIAM YOUNG J:

Yes, well, we can't – but we can't make a comment on industry practice that's based on agreements we don't have.

MR CRANNEY:

No, no.

WILLIAM YOUNG J:

And that's not the case that they're advancing, as I understand it.

MR CRANNEY:

No, no.

WILLIAM YOUNG J:

Sorry, what's the security of agreement clause?

ARNOLD J:

Clause 30.

MR CRANNEY:

So if you look at clause 30.

WILLIAM YOUNG J:

30.

MR CRANNEY:

On page 179 of volume 2. Now this is giving, we say, a re-engagement right for the employees who don't have to sign anything other than any additional terms, any additional terms.

WILLIAM YOUNG J:

Which you say are terms they agree to.

MR CRANNEY:

Yes, and they don't have to agree to them.

GLAZEBROOK J:

Well, it may be terms that are – side agreements. It may be issues in respect of – because it's effectively saying that you sign up to the collective contract terms, doesn't it?

MR CRANNEY:

Yes.

GLAZEBROOK J:

But I assume it's done in the expectation that you will just have rolling collective contracts.

MR CRANNEY:

Yes.

GLAZEBROOK J:

Rather than a perpetual contract, it's a rolling collective agreement, so you will sign up to whatever the current one is.

MR CRANNEY:

Yes. Well –

GLAZEBROOK J:

Well, sign up, I mean you're covered by it, not sign up to a –

MR CRANNEY:

Yes, what we're saying this means is something completely different to what happened in *Richmond*. This agreement you come back on your terms and it doesn't say "and additional terms". It says "any additional terms". So that means it's leaving open the possibility there might be none agreed. So this agreement preserves the seasonal employees' rights in perpetuity. It goes on forever until it's terminated. You're always entitled to come back and if you don't come back, your work's not made available to you, then there are various very substantial redundancy obligations on the employer which go

well beyond payment of money and which include all sorts of other redeployment options, re-engagement options, everything else which you get as an employee.

WILLIAM YOUNG J:

I suppose the argument you face is, at a sort of a slightly, a reasonably general level, it is that rightly or wrongly the courts have, at least since *Richmond*, the appellant and the Meat Industry Association would say at least since the first *Alliance* case, seen employment as seasonal and not continuous, as discontinuous not continuous – and that when people bargain using contractual language similar, not necessarily identical but similar to that in issue in those cases, it's a reasonable inference to draw that their purpose was to provide for discontinuous or not continuous employment, and that may be not what they want, which probably presumably isn't what they want on the part of the union, but that just as a matter of objective context it supports the discontinuity theory.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

I mean that's a reasonable argument.

MR CRANNEY:

Yes, that's one side of the context argument. The Employment Court took a different view of the context.

WILLIAM YOUNG J:

They sort of did it for reasons that are a bit conclusory, not really articulated in any detail.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

Which is probably why the Court of Appeal was a bit critical.

MR CRANNEY:

And so what we say about the context arguments we put up is that this contract is different.

WILLIAM YOUNG J:

Yes, I appreciate it's different now and the question then is how significant is the difference.

MR CRANNEY:

Exactly and that's the issue. See there's a case in the bundle I think, I can't remember, there's a case saying that with industrial agreements you can go back into the history of the agreements, but in this particular case there was no document about the history of this agreement from 1990 until 2017, sorry, until the Court case, there was only this one. The Court was well aware, because it's referred to in the transcript at volume 5, that there was an earlier lockout which resulted in disagreement, because that Court sat on it, and it was also aware that there were very significant differences between this agreement and the awards, including the clause which, the completeness clause, which is clause 3(g) on page 165.

GLAZEBROOK J:

I think you were going to give us a reference to where the award was so we can have a look at it.

MR CRANNEY:

The awards, volume 4, page 532. There's three or four awards in there. Now some of those weren't before the Employment Court either, but I'm not objecting to the awards going in, because they're like public records.

WILLIAM YOUNG J:

Where were they published?

MR CRANNEY:

Yes, they were published, it's called the *New Zealand Book of Awards*. It's an NZBA, or BA it's called, it's sort of like a legal series, *Book of Awards*.

GLAZEBROOK J:

Where's the re-employment in here?

ARNOLD J:

Seniority, clause 30 at 542 deals with re-employment.

MR CRANNEY:

I'm trying to find the re-engagement provision.

ARNOLD J:

Well 30(c) says, "Consistent with the departmental needs," et cetera, "re-employment will be based on departmental and/or group seniority."

MR CRANNEY:

30(c) Sir?

ARNOLD J:

Yes, clause 30(c).

MR CRANNEY:

Are we looking at the same –

ARNOLD J:

At 542 it says, "Re-employment will be based on seniority."

MR CRANNEY:

What page are you on, Sir?

ARNOLD J:

That's 542.

MR CRANNEY:

30(c) in my 542 says, “Consistent with departmental needs and individual’s competency, lay-offs and re-employment will be based on seniority.”

ARNOLD J:

Yes.

WILLIAM YOUNG J:

So is that the only re-employment or re-engagement provision? I can’t see another one from just looking at the headings.

GLAZEBROOK J:

No wonder, they said it was just to be a right to –

MR CRANNEY:

Can I just consult with Mr Mitchell?

GLAZEBROOK J:

There must be something about seasonal lay-offs in here though.

MR CRANNEY:

29(g). I knew it was there somewhere. You can see it’s a completely different scheme. It requires applications.

GLAZEBROOK J:

But whereabouts –

MR CRANNEY:

It’s 29(g). It’s on –

GLAZEBROOK J:

29(g), thank you. Where’s the seasonal work lay-off in here?

MR CRANNEY:

I wonder, Ma'am, before we just move onto that, if I could just comment about 29(g)?

GLAZEBROOK J:

Sure.

MR CRANNEY:

I've referred to this also in my submission. It uses much stronger language than is used in this later agreement. It talks of a worker having to apply for their position, applications, and I think that's the same also in the *Alliance* 2006 provision. This one you don't have to apply.

WILLIAM YOUNG J:

Except there's a similar – the long service leave at page 537 does talk about continuous service.

MR CRANNEY:

Yes, but I think that if you take out the word "application" then you can – you are entitled to ask why was it removed.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

And you'd have to say that for continuous service and long service leave anyway. It makes sense in the context.

WILLIAM YOUNG J:

Well, it may just –

GLAZEBROOK J:

It's deemed to be continuous.

WILLIAM YOUNG J:

It's – yes.

GLAZEBROOK J:

I mean, in the sense that because that's why you get long service leave because you're deemed to have continuous service.

WILLIAM YOUNG J:

It does actually define continuous service in (d), 5037.

GLAZEBROOK J:

Sorry, what page?

WILLIAM YOUNG J:

At 537.

GLAZEBROOK J:

I see, yes.

WILLIAM YOUNG J:

All right, well, you say, well, it's got similarities but you say it's different.

MR CRANNEY:

Yes, and we say that the effect of *Richmond*, and it's quite easy to accept it, I think, that if you say to a whole industry that anyone that's laid off from now on has no right to come back on the existing terms, then first of all that will greatly tip the balance in favour of the employers in the industry and, over time –

WILLIAM YOUNG J:

But this is an industry argument that in a way you're resisting, industry-wide argument in a way you're resisting.

MR CRANNEY:

Yes, but I say that over time people move away from that harsh position and my learned friend from the Meat Industry Association said it's an

unilluminating word to say this was a harsh result, but it's not unilluminating. It's obvious that if you – up until the end of the award system, you always got back on your existing conditions if you got back because the award, the law required it. If you were under the covers of the award you got it. This peculiar *Richmond* decision which completely abolished that practice, it didn't confirm industry practice, absolutely abolished it, and left the industry in a position of having to then deal with the issue –

O'REGAN J:
But this is a different issue from continuity or discontinuity.

MR CRANNEY:
Yes.

O'REGAN J:
You're saying the effective discontinuity under *Richmond* was very harsh.

MR CRANNEY:
Yes.

WILLIAM YOUNG J:
But what we're interested in is: was there continuity or not and has that been basically carried forward? Is there something in the new agreements that say, "We used to have discontinuity; now we've changed," and from what I can see there isn't anything that says that.

MR CRANNEY:
Well, the – well, both the award and the agreement have aspects which are continuous and aspects which are discontinuous, and leaving aside for a moment the issue about whether they are an employee in the off-season, which is almost like a strange nomenclature matter although it may have some legal consequences, everybody agrees that this agreement has resulted in a position where employees are continuous in that they come back every season on the same terms, at least to that extent.

O'REGAN J:

Yes, but the whole idea of coming back assumes you left and then came back.

MR CRANNEY:

Well, you did.

O'REGAN J:

So I mean you may well be right that in practical terms it doesn't matter much but nonetheless it's an issue we're being asked to decide.

MR CRANNEY:

Yes, you are, Sir, but I don't really see the difference between someone who goes off for the weekend or someone who goes off for a week and someone that goes off for a month at the end of the season. Now these workers are working many of them 10 months, certainly they are at Wairoa, going off on annual leave, being laid off for a month without pay and coming back to start a new season, or even if you have six months off, as I've said in my submission, like some seafarers working six months on, six months off. I say where is the discontinuity?

McGRATH J:

Mr Cranney, there is however a specific provision in relation to seasonal employment, isn't there?

MR CRANNEY:

Yes.

McGRATH J:

And we look at paragraph 29, page 178, where you have in (a), "Seasoned employees are employed for a season," and you then go to (e), "Upon termination at the end of the season." Now that does seem, if one should be viewing this in the context or, if you like, the – yes, the context of decisions such as *Alliance* and *Richmond* as preserving that concept for

seasonal employment, never mind for interrupted employment in – which is what you have now referred to. Those passages it does seem to me do offer some support for the argument of the appellant.

MR CRANNEY:

To which I answer why does it then say in 31(a), which is the core provision, "Employees shall have seniority in accordance with the date of their commencement," and it actually says in that case, "commencement of employment," as opposed –

WILLIAM YOUNG J:

The truth is that, as you've said before, there are provisions going both ways on this issue.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

And in the end it's a matter probably for the Court to reflect on them.

MR CRANNEY:

Yes, I agree.

WILLIAM YOUNG J:

I mean, I expect analysis of them one at a time isn't going to –

MR CRANNEY:

No, no, no, and to which I come back to my point about jurisdiction, that if you've got a phrase saying here "commencement of employment" and then you've got another clause which says "termination" without saying what it is, and you've got the Employment Court going back and analysing these cases and saying, "Look, some of these cases have plainly focused too much on that telephone clause," the telephone number clause which they call it, leave your telephone number on termination, and things are different now. We don't

accept the argument about context that's been put up. In fact, it wasn't even put up in the Employment Court. There was no argument in the – there was no statement by the Meat Industry Association in the Employment Court about the industry. There wasn't one skerrick of evidence about it, and there isn't a skerrick of evidence here.

WILLIAM YOUNG J:

But how did they – but what did they rely on the cases as establishing? Were they relying on them as authorities in themselves or as contextual material the Court should have regard to in interpreting this agreement?

MR CRANNEY:

They were relying on it for the second purpose, but there was no evidence.

WILLIAM YOUNG J:

No.

O'REGAN J:

Well, you don't need it. You just need the –

GLAZEBROOK J:

No, but one difficulty might be that you might need evidence of wider context really because if they say – if the argument is, well, everybody knows about these cases and they contract on that basis, you may need the 24 contracts to see whether that's the case and you may also need something about practice because there's no doubt that, well, as I understand it, that the unions and the employees accept that they don't have work or pay during the off-season.

MR CRANNEY:

Yes.

GLAZEBROOK J:

And so a lot of the context might be, well, of course we accept that but it might be that the practice has been that the awards carry on and in fact they are

employed on the same terms. This is now an argument that you provide individual contracts might accord with *Alliance* and *Richmond* but we're now in the Employment Relations Act context of collective bargaining with a lot more strengthening rather than under the Employment Contracts Act where one can understand an argument that says a contract is a contract and you can provide the contract but in this context we're not, we're no longer in that, under that type of legislation.

MR CRANNEY:
Yes.

GLAZEBROOK J:
And I mean it might have been odd, as you say, that *Richmond* was decided the way it was but that might be explained by the fact that there wasn't actually a substantive re-employment obligation.

MR CRANNEY:
Yes, and there is also a provision in the statute, although it doesn't apply for this Court, of deference to the Employment Court. This is section 216. "In determining an appeal under section 214 or 218, the Court of Appeal must have regard to the special jurisdiction and powers of the Court, the object of this Act and the object of the relevant Parts of this Act," which includes section 3 and the whole collective bargaining structure of the Act and, in particular, it goes on to name certain sections. Now I don't know whether that applies here.

WILLIAM YOUNG J:
You've made the point in your submissions but you haven't really developed it that the Court of Appeal didn't have jurisdiction to engage with the interpretation issues.

MR CRANNEY:
Yes.

WILLIAM YOUNG J:

Is there anything in particular you want to say in support of it? I mean, it may be that it's simply a proposition that is at its irreducible simplicity in the way you've put it but it may be you want to add to it.

MR CRANNEY:

Well, it's – first of all I'm not trying to change the law in this hearing about section 214, which is what my friend thought I was trying to do. I'm just saying that because the Employment Court made no error of –

WILLIAM YOUNG J:

All right, the error of principle that the Court of Appeal has identified is the failure to have regard to context.

MR CRANNEY:

Yes, and I say that because there was no error of principle, in other words it did have regard to context, the Court of Appeal has got no jurisdiction, and that's the – it is, if you like, irreducible. This interpretation they came up with was within the scope of correct interpretations.

WILLIAM YOUNG J:

So they had regard to albeit they discounted the significance of the context?

MR CRANNEY:

Yes, they went in great detail through the cases and they identify significant differences between some of the clauses in the agreement that we're looking at and the award, including clause 30 which is headed "Security of Employment" which does suggest to me that you are secure in your employment and that –

WILLIAM YOUNG J:

Well, we're just dealing with the jurisdiction point for a moment.

MR CRANNEY:

Yes, yes, so –

WILLIAM YOUNG J:

So did you have a – your proposition is probably as simple as the summary I've put, isn't it?

MR CRANNEY:

Yes. You see, what's being asked here is that this Court is being asked to form a factual conclusion that the Court of Appeal was right. See, the Court didn't just find an error that we didn't take into the cases. The Court of Appeal also said, "We find that this outfit is embedded in a seasonal industry where everybody gets laid off and re-engaged." It didn't say there are some this way and some that way, there are some awards, some agreements this way and some that way. They identified one which they found and said it's only if you reach that high threshold of explicitly excluding employment, they said, that you can interpret these agreements. Now that's a factual matter which we say is not correct. The agreements are not – the industry is not the way that the Court of Appeal assumed it is.

WILLIAM YOUNG J:

Is there any movement to have section 214 changed, because it adds a sort of a layer of complexity and, I suppose –

MR CRANNEY:

I shall leave it. It is, it's –

GLAZEBROOK J:

Well, especially, I mean, here as well because you do have that link between the statute and the contract and whether the contract in terms of the statute could be interpreted in that way, which you haven't developed necessarily, apart from saying well there was clearly a lockout because of the fact it was related to individual contracts.

MR CRANNEY:

Well my opinion about section 214 is that there are two different ways of approaching it. The old Lord Cooke method was basically deference. It was deference to the Employment Court. In the early 90s, partly as a result of one could even say conflict of views between the then Employment Court and the Court of Appeal that the Court of Appeal expanded its approach to allow contractual intervention by it in those cases and it has opened a Pandora's Box, and at the moment I think nobody in this room will probably disagree with us, that there is really no principle basis at the moment that one can predict about whether or not one can get leave, or not leave, and which Court one ends up in. So I think the real policy issue here is whether there's deference, and I say in this case there should be deference otherwise you're being asked to make a ruling to affect a whole industry, and see this is the other objection the union has to it, it doesn't just affect, I'm quite happy to say that *Richmond* affects the whole industry because it's the award and everybody was affected by it. But when they've got business interests here coming in and saying, well, we would like you to say that this industry is seasonal and everybody gets laid off and they've not got employment rights in the off-season, and we say, no. We say the best way that, if that argument is going to be run, let them bring the contracts up and let's have a look at the contracts, and as I've said, this one here was, and it's not in the evidence but it's referred to in the transcript, the result of a lockout in 2012, and it contains also a completeness clause, which was referred to by, in argument in both Courts but not referred to in the judgment, and I just wonder what exactly is this Court going to do if we say, well, we go as far as the Court of Appeal, which is to say that it's actually a seasonal industry and everybody's in it, unless they've expressly said they're not, everyone's laid off, it's not, it's a different environment now. They would have been okay in the days of the award system, but they're all sorts of, the Meat Industry Association, without referring to the actual affidavit, referred to four employers covering 40% of the industry, there's another 60%, and the four employers are not all, in the whole operation, laying people off in the, non-employees in the off-season. So that's my concern. It's a factual issue that I'm worried about. And, you know, it would be different if these cases were high quality cases, but they're, at least

two of them aren't, the 2006 one and the *Richmond* case, and one shouldn't worry too much about abandoning these cases. If you look at the –

O'REGAN J:
Yes, but I think that the quality of them is neither here nor there if they're relying on as context rather than as authorities. The fact is they stated the law and that was the law that applied and everybody contracted against that background, that's the argument.

MR CRANNEY:
Yes.

O'REGAN J:
So it's irrefutable that that's the background, so the only – whether it's a good background or a bad background, it's still the background, isn't it?

MR CRANNEY:
Yes, but the issue Sir, so I agree it is the background, and I agree that it's relevant, but I say that people have contracted away from those decisions.

O'REGAN J:
That's fine, that's your argument, but that doesn't require us to decide whether *Richmond* is right or wrong. That requires us to decide whether this contact has moved on from it.

MR CRANNEY:
Yes, but it does require you to make, I think, at least some factual conclusion about whether the, what I say is right or not. If, it's really a factual matter. Did these contracting parties, or did the whole industry, however you want to look at it, did they attempt to move away with these words from that, or did they move away from –

WILLIAM YOUNG J:
I don't think it's a factual issue. It's a construction issue.

O'REGAN J:

It's a construction of contract issue.

MR CRANNEY:

Yes, but you can use the background for two different purposes. One is to say that this agreement must have moved away from such a harsh background, and the other one is they must have complied with a harsh background.

WILLIAM YOUNG J:

We're probably not necessarily going to start from the premise that it was a harsh background. We're just going to start – we would probably just start from the premise that that was a view expressed in 1991 or 1992 against the context of the then-legislation and the wording of the then award.

GLAZEBROOK J:

I suppose the other thing one could do even if one accepts that that's the background up to now, whatever we say in this judgment about those cases will change the background.

MR CRANNEY:

Yes.

GLAZEBROOK J:

And one does wonder how long a background like that against changes of legislation can sort of put out it's ghostly hand.

WILLIAM YOUNG J:

You can always, I mean, presumably it would be always open to the parties to say employment is continuous. That could be on the log of claims that the union puts in.

GLAZEBROOK J:

Well, you say they did with clause 30.

MR CRANNEY:

Yes, and what – I ask you, Your Honour, what difference does it make if it's continuous? This issue has only ever arisen, leaving aside that Holidays Act case in 2006 –

WILLIAM YOUNG J:

In this sort of context.

MR CRANNEY:

– in lockout context, because it's part of the lockout thing. Now this case of *Beaufort Developments v Gilbert-Ash* [1999] 1 AC 266 (HL), which is tab 25 of the respondent's volume 2, where the House of Lords walked away from a contractual interpretation which five Courts of Appeal, sorry, three Courts of Appeal, have endorsed and said, "Well, that wasn't right." If you look at page 269 of the judgment at the last sentence –

GLAZEBROOK J:

Sorry, I've missed the –

McGRATH J:

Sorry, could you just give us the reference here? Is this the appellant's authority? You said volume 2.

GLAZEBROOK J:

No, respondent's.

MR CRANNEY:

I beg your pardon, Your Honour. It's appellant's authorities volume 2, tab 25, page 269 of the judgment. It says, "In the meantime, *Dawnays'* case had been followed in five other cases."

GLAZEBROOK J:

Sorry, no, I've now lost it, still lost it.

McGRATH J:

269?

MR CRANNEY:

269 of the judgment, the last sentence.

GLAZEBROOK J:

Right.

MR CRANNEY:

And they corrected it in this judgment, which is really what the Employment Court tried to do in this case. So they almost –

McGRATH J:

So what's – can you just repeat the points for me, Mr Cranney, that you're making from this passage, referring to *Dawnays Limited v FG Minter Ltd and Trollope and Colls Ltd* [1971] 1 WLR 1205 (CA) case at page 269, what's the –

MR CRANNEY:

That in some circumstances it is appropriate to move away from an accepted position that the Courts have –

McGRATH J:

In cases considering precedent, the precedent effect?

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

No, no, this is –

GLAZEBROOK J:

No, this is context actually.

MR CRANNEY:
Contractual.

McGRATH J:
It's a context case.

MR CRANNEY:
Context.

WILLIAM YOUNG J:
These are building contracts that are in standard forms that have been construed in one way by the Court of Appeal and later the House of Lords has said, "Well, that construction was wrong," even though you could say that the contracts in issue in the later case had been informed by the earlier decision.

MR CRANNEY:
Yes.

WILLIAM YOUNG J:
So when a decision – when a contract provides for what happens on an arbitration, well, then it would be – the argument for the Meat Industry Association and the appellant have put up would have been available because you'd say, well, obviously they contracted against the background of the *Dawnays* case or whatever.

MR CRANNEY:
Yes.

WILLIAM YOUNG J:
So do they deal with this point, however, the House of Lords or do they just say the cases were wrong?

MR CRANNEY:
No, they don't really. They just do it. They just –

GLAZEBROOK J:

They just say that sort of it's a –

WILLIAM YOUNG J:

Cases are wrong.

GLAZEBROOK J:

Yes, just sort of compounds itself into the fact you've got five cases doesn't make them right.

MR CRANNEY:

No, no.

GLAZEBROOK J:

Or it doesn't constrain us in moving away from the interpretation.

MR CRANNEY:

And you see in this agreement, if you look at Appendix A, which is on page 195, which was scarcely dealt with by the Court of Appeal. Indeed, the Court of Appeal simply limits itself to sections, clauses 27 – 29, 30 and 31 and a few bits of Appendix A. But Appendix A is part of the agreement and was not part of the award. But the problem that I've got in this case is the 2006 case because this – there was a redundancy agreement here which wasn't properly dealt with by the Court in the 2006 case. It's just mentioned. But this case, this is quite clear, on any clear language that it refers to the phrase, "The employee's seasonal employment," being made unavailable. So it's actually referring to the employee as being an employee at the time that the employers –

O'REGAN J:

But it's an extension, isn't it. It's against a background that you needed to have something special in relation to redundancy because of the stand-down period, so it's giving rights as if there was continuous employment to someone

who doesn't have continuous employment. I mean it seems to me it's, at least be able to be construed in that way so it can help both sides, really.

MR CRANNEY:

It can help both sides but some of the entitlements in it can only apply if you're an employee. It talks about redeployment.

O'REGAN J:

But you wouldn't have needed the special provisions if you were, in fact, an employee.

GLAZEBROOK J:

Well you would, wouldn't you, because you'd still need the redundancy provisions.

O'REGAN J:

Well no because it's providing for the stand-down period, isn't it.

MR CRANNEY:

Well the way in interpret it is this Sir, is that when you get laid off at the end of the season, you're not redundant, because you're not terminated in any complete sense. You're actual surplus to the employer's needs but you're not redundant, so this excludes the definition from, this makes clear that it's only if you're season of employment is made unavailable, and then it goes on to 2(b) coverage, that shall apply to all employees it uses who are currently seasonally laid off.

GLAZEBROOK J:

Because there will be employees who aren't laid off, won't there?

MR CRANNEY:

Yes, because –

GLAZEBROOK J:

Minimal but –

MR CRANNEY:

Well they all get laid off at different times because of the weather.

GLAZEBROOK J:

Oh I see.

MR CRANNEY:

People get laid off one month and then the next month in different plants, but this is referring in clause 2(b) to employees who are seasonally laid off. It does seem to me to be quite clear that the party are talking about them as employees. In fact even the Court of Appeal does it at one point in its judgment, refers to them as seasonally laid off employees, and then it goes through and gives all these, these very substantial employment rights to them as employees, and this is an employment agreement, this redundancy agreement is part an employment agreement which continues.

I suppose that brings me to the second argument, which is the 6(1)(b)(ii) argument which is are they persons intending to work, and I say yes. Even if they're not employees under 6(1), they've got an employment agreement under which they agree that the commencement of their employment, to use the words of the agreement itself at clause, the date of their commencement of employment was 31(a), they're bound by this agreement and it seems to me that that fits exactly in with the extended definition of "employee" in section 6, which is people who have been offered and accepted work, a person intending to work, and that's defined in the definitions, a person who's been offered and accepted work as an employee. Now these people have been told, come in here, we'll give you a seniority number at the date of your first commencement and you'll be laid off and re-engaged in accordance with that system. So I say that even if they're not employees under 6(1), they are employees under 6(1). If they're not employees under 6(1)(a), they are employees under 6(1)(b)(ii).

GLAZEBROOK J:

And effectively by leaving their address they indicate they're available for work, is that –

MR CRANNEY:

Yes and –

GLAZEBROOK J:

They're told they have to if they want to be, and they have to keep it up to date.

MR CRANNEY:

Yes, in effect these days, that's an old award provision, but in effect these days companies keep a register of all of their people they lay-off. It's a protection for the employer if they're not rung they can say well you didn't leave, you didn't update your address.

GLAZEBROOK J:

Yes.

MR CRANNEY:

But these people are giving a, and this is the reality too –

O'REGAN J:

Are you saying that leaving your phone number it constitutes acceptance of an offer to work? It seems a bit far-fetched.

MR CRANNEY:

No, the acceptance –

O'REGAN J:

The whole reason to have a phone number is so an offer can be made, isn't it?

MR CRANNEY:

The acceptance of work is at the beginning is at the beginning, using the words of section 31(a) on page 179, “Employees have seniority in accordance with the date of their commencement.” So they commence employment, that is the work and they go on for decades being laid off and re-engaged in accordance with an unchanged employment agreement, whether or not their employees in the off-season, they simply get called back in.

O’REGAN J:

But if they're not employees in the off-season they have to become employees again and you're saying by leaving their telephone number they’ve accepted an offer. What I’m saying is by leaving their telephone number they’ve said I’m available to receive an offer and then I’ll decide whether I accept it or not.

MR CRANNEY:

Well the trouble is under this particular agreement it’s not an offer, it’s an entitlement. You don’t get offered it, you just get told to come back in accordance with the seniority.

O’REGAN J:

Well you can refuse if you want to.

MR CRANNEY:

Yes anyone can walk away at any time from employment.

O’REGAN J:

So you don’t have to accept.

MR CRANNEY:

No I don’t have to accept work tomorrow in my office either.

O’REGAN J:

So it is an offer isn't it?

GLAZEBROOK J:

Well I suppose the thing is if you do go along and say I want it you have accepted then. So as soon as they go to the meeting they've accepted.

ARNOLD J:

Exactly that's what I was going to say. If you look at it from the point of view of the people here who indicated to the company that they wanted to work in the new season, at that point the only issue remaining in terms of their contract, because the terms of the collective agreement became part of their individual employment agreements, that included section, a clause 30(b) where they were entitled to be re-engaged assuming the employer was continuing its operation on the terms set out in the agreement and the site agreements which were identifiable, so the only other issue was whether there were going to be any additional terms which seems to me at least at the moment would have to be consistent with or in addition to what's in the agreements that are identified and not inconsistent with them. Now at that point when the employee says, "I want to be employed", it seems to me you can argue well at that point they are employees because the terms are all there. The only thing is, is there any little additional point.

MR CRANNEY:

Well if this clause 30 said what the old award said, 29(g), that you have to apply I'd be out of here because that clearly says that you're making an offer but this doesn't say that. The heading of the clause is "Security of employment". It gives you security of employment and you don't have to do anything, you don't have sign anything at any time from the date you start until you leave at the end of your career.

ARNOLD J:

You have to indicate a willingness to accept re-employment which I think is the point and you do that by indicating to the company yes and then there's a deal.

MR CRANNEY:

Well they send you a letter, start date is next Wednesday, five days' notice, you turn up. If you don't turn up you're deemed to be dismissed after four or five days. That's another factor in this. There's a provision for abandonment if you don't come back. So if you're told to come back and you don't come back you're deemed to have abandoned your employment, which is consistent with employment having –

GLAZEBROOK J:

But effectively these people turned up to the meeting, they got their letter, turned up to the meeting, must have been an indication they were willing to work.

MR CRANNEY:

It's not necessarily, it's acceptance perhaps.

GLAZEBROOK J:

Well not an acceptance of the particular terms but if they are – if it is as indicated under clause 30, then actually the terms are already agreed.

ARNOLD J:

Exactly and all you're talking about then is any little peripheral matters but I mean all the essential terms are agreed.

MR CRANNEY:

Yes the way it works you don't get an offer of acceptance, you get told to come back under this agreement.

GLAZEBROOK J:

And the additional terms you say in any event, Mr Cranney, must be agreed in any event, so it would be like anybody in an employment context they're told well same terms but we now give you an extra week's holiday or whatever it might be because we're generally giving that to employees.

MR CRANNEY:

And I would rely on section 63A for that. You have to agree to additional terms by agreement, you can't just have them imposed. It may be useful to look at the abandonment of employment provision, which you will see it assumes employment otherwise there would be no need for an abandonment provision, so there's a, you see there, 31(e), sorry on page 180, so this is dealing with seniority, "shall be broken in the following circumstances, (i) where an employee voluntarily leaves the company."

GLAZEBROOK J:

Sorry I've lost –

WILLIAM YOUNG J:

Page 180.

MR CRANNEY:

Page 180 of volume 2.

O'REGAN J:

This is seniority –

MR CRANNEY:

Yes, I agree, it's more narrow than I thought Sir, I'll have to check that in the break.

WILLIAM YOUNG J:

I think in the end you can come up with a list of clauses that favour you and Mr Jagose can come up with a list of clauses that favour him. I'm not sure that, you know, debating or arguing the toss over each provision is going to assist us much.

MR CRANNEY:

Yes, the only real, yes, because Your Honour is quite capable of reading it yourself, including the Appendix A. The only real issue here is whether or not

the background was such as to create the presumption that these things must mean what AFFCO says they mean, or whether the background was different, and if so, what is the evidence of that in each case. So what's the effect of the completeness clause for example.

WILLIAM YOUNG J:
Well we've dealt with really, I guess, your argument on the, in terms of contract employment is continuous or discontinuous, is that right?

MR CRANNEY:
Yes indeed.

WILLIAM YOUNG J:
And we've dealt with the intending to work argument, which is a pretty simple, and it's closely related to the other arguments.

MR CRANNEY:
Yes.

WILLIAM YOUNG J:
But then we've perhaps, and we've got your jurisdiction contention.

MR CRANNEY:
Yes.

WILLIAM YOUNG J:
And that then really leaves the issue as to what, the section 82 argument, is that right?

MR CRANNEY:
That's so.

O'REGAN J:
And context otherwise requires argument.

MR CRANNEY:

Yes, and my argument on that is very short. First of all I didn't really, I thought that this issue had been dealt with by the recall judgment, but Your Honours are aware of that argument. But my learned friend conceded, Mr Wicks as it was at the time, conceded in the Court of Appeal that this issue is not before the Court, the meaning of section 82. The compliance or otherwise with section 82(2).

GLAZEBROOK J:

The compliance one was it, yes.

WILLIAM YOUNG J:

But what he's saying is that an employee must mean in section 82(1) what it means in section 82(2).

MR CRANNEY:

Yes, look I have to accept that that's open to him to argue that. It's a meeting point. So my submission on it, and it was really the same submission that was made in both the Courts below, and I'll just refer you to my written submissions at paragraph 101. Paragraph 101 on page 26, that reference to section 82, the second reference, should be to section 82(1)(b), not to 82(2).

McGRATH J:

Sorry what are you referring to now Mr Cranney?

MR CRANNEY:

Sorry, my written submissions Your Honour. I don't intend to read them but go straight to paragraph 101.

WILLIAM YOUNG J:

Well I've just made exactly the same mistake as you did I think. Okay so section 82(1)(b), yes.

MR CRANNEY:

Yes, 82(1)(b), and the word used to be “workers” Your Honour. The word in the Act used to be “workers” and not employees. In other words to describe people as a kind of a class of person without talking about the relationship between the employer and the employee, which the word “employee” –

ARNOLD J:

So there’s no definition of “worker” as a person who is employed somewhere?

MR CRANNEY:

Actually I’ll have to check what the old definition of “worker” was.

WILLIAM YOUNG J:

So are you talking about before the Employment Contracts Act?

MR CRANNEY:

Yes, yes.

WILLIAM YOUNG J:

Were there lockout and strike provisions in the Employment Contracts Act that were similar to this?

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

And then were they picked up from, what was it, the Industrial Relations –

MR CRANNEY:

Yes, the Labour Relations Act 1987.

WILLIAM YOUNG J:

Labour Relations Act.

MR CRANNEY:

And then the IC…

WILLIAM YOUNG J:

IRC.

MR CRANNEY:

Industrial Relations Act ’75 and then the ICNA Acts going back. Pretty much the same provisions, but the meaning was a bit different because the word “worker” was used and I think that’s really what’s happened here and clearly I think that word in subsection (b) means the workers that are referred to who have been refused or failed to engage under (v) or whose employment agreements have been broken under (iv). That’s my – I don’t get into any great justice that requires an argument. I simply say the section means that if you don’t engage people that you would otherwise engage and the purpose is to –

WILLIAM YOUNG J:

Well, that is a context otherwise requires argument, I think.

MR CRANNEY:

Yes, yes.

WILLIAM YOUNG J:

But it’s a simple one.

MR CRANNEY:

Yes, it is a – well, yes, well, it is, it is – yes, I suppose that’s right. It’s – but I don’t really see there’s any mystery to this. If I say to union members who I’ve got an agreement to re-engage, “I’m not going to re-engage you until the collective agreement’s signed on my terms,” that’s a lockout.

ARNOLD J:

Right, so you are limiting it to that sort of situation. You're not arguing for an open-ended, because one of Mr Jagose's points was that if you end up with an open-ended interpretation you really do cut across the ability of the employer to negotiate with new potential employees. So from your point of view it's the existence of the right to re-employment or an entitlement to re-employment that makes the difference.

MR CRANNEY:

Yes, and I would have to add to it though, Sir, it depends on the facts. The provision is about failing to – if you look at subsection – which is in the submissions – it's subsection (iv), "In refusing or failing to engage employers for any work for which the employer usually employs employees in order to compel them to accept terms of employment," it could be a lockout in some circumstances. I don't think we should try to worry about tea ladies and cleaners and parental –

ARNOLD J:

Well, we don't want to be ending up with an interpretation, the impact of which we don't fully understand and one way of exploring whether the language bears particular meanings is looking at the consequences and it can't be right that if an employer says to somebody who's asking for twice the normal salary, "Well, I'm not going to employ you," and a whole lot of his friends come along with the same demands, "I'm not employing any of you on that basis."

MR CRANNEY:

Yes. My argument was limited in the Court of Appeal to the proposition that if there is an employment agreement which gives you re-engagement rights and then you refuse to re-engage, it's a lockout.

ARNOLD J:

Yes.

MR CRANNEY:

And I think the best way to deal with the hypotheticals is don't worry about them too much because they may or may not ever come up, and my submission made to the Court of Appeal –

WILLIAM YOUNG J:

Like the future.

MR CRANNEY:

Yes, it doesn't –

WILLIAM YOUNG J:

May not happen.

MR CRANNEY:

No, it may not happen and it doesn't extend into any – I'm an incrementalist. Let's just start off dealing with what we've got and it's lucky that what I'm asking for is not of the type of thing that could cause problems.

GLAZEBROOK J:

Well, what you could say is compelling employees in (iv) means at the least but probably not more than, because it is used deliberately, employees who have right of engagement.

MR CRANNEY:

That's all I'm asking for.

GLAZEBROOK J:

And it possibly might include if you always employ a whole lot of casual workers, possibly, not doing that with a view to forcing current employees, I think that was Mr Jagose's example, current employees to accept other terms may not be within the contemplation of the – or may give rise to a lawful lockout, in fact, in some circumstances if it's related to bargaining and notice is given.

MR CRANNEY:

It used to be fashionable to plead every breach is also a lockout. We used to try and do these silly things in the ’90s, and there was even a case where there was a case – it’s called the *Beard’s* case – that a command by Air New Zealand that people shave their, pilots shave their beards, was pleaded to be a lockout. But I’m – it doesn’t really matter. Let’s just worry about these workers that have re-engagement rights. They were told not to come back until they signed agreements.

WILLIAM YOUNG J:

Okay. Well, we might take the adjournment now. You’ve just about run out of steam.

MR CRANNEY:

I have indeed, Your Honours. I have.

WILLIAM YOUNG J:

All right. Well, anyway, have a think about it over the adjournment and we’ll come back in 15 minutes.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.45 AM

MR CRANNEY:

Thank you Your Honours, the only final brief submission is to say that the text of the – the transcript of the Employment Court argument is actually in volume 5 and when one reads it, it says that the main argument about these cases from the company was that they were binding precedent not that they were contextual background. So all I do is draw Your Honour’s attention to the fact that it’s there.

McGRATH J:

That’s what's said by the Court at the hearing is that?

MR CRANNEY:

No the argument, an argument by the parties. And the Court of Appeal thing has changed quite significantly.

WILLIAM YOUNG J:

Sorry where is the transcript of the argument?

MR CRANNEY:

The argument is in volume 5. The whole of volume 5 is the – there's a whole transcript of the argument.

McGRATH J:

So what's your concern about that? Who is that –

MR CRANNEY:

My only point Your Honour is that when one reads that transcript you'll see that the argument in that Court was about the idea that these cases were binding. The argument in the Court of Appeal shifted significantly.

McGRATH J:

To be in context?

MR CRANNEY:

To this context argument. It's quite clear from the two judgments. So the judgments essentially reflect the arguments.

McGRATH J:

So we can't blame the Employment Court totally.

MR CRANNEY:

No, no, Court of Appeal only. And I think that's it, I mean the materials contain reference to various contract handbooks which refer to the case law relating to the relevance of deciding cases and contract interpretation issues about particular clauses and there are two conflicting principles. One of them is they are interesting but usually distinguishable is what one normally – the

way one normally treats them. So that's what we say happens here. So if there's indications that you move away from the words, as we have done here, the principle is easily distinguishable and the competing principle of course is this one that's been argued by AFFCO. So those are my only – unless I can help Your Honours further, thank Your Honour.

WILLIAM YOUNG J:
Just before you get under way with what you want to say, have you any comment on the point that Mr Cranney has just made that the argument on the prior jurisprudence in the Employment Court was as to binding effect rather as to context?

MR JAGOSE:
I wasn't counsel in the Employment Court.

WILLIAM YOUNG J:
I appreciate that.

MR JAGOSE:
All I can say is that if that was the argument that was made, it doesn't prevent a different argument being made on appeal in the Court of Appeal to say that the Employment Court got it wrong by disregarding context.

WILLIAM YOUNG J:
That's a pretty tough argument though in relation to section 214.

MR JAGOSE:
With respect I'm not sure I see that.

WILLIAM YOUNG J:
Well I mean if it were the case that there was no contextual argument advanced by AFFCO then I would struggle to conclude that it was an application of a wrong principle by the Employment Court, not to refer to the context that wasn't relied on.

MR JAGOSE:

I can only take Your Honour back to the initial cases that I referred about what was orthodox contract interpretation and in particular the statement in *Firm P1* is that context is a necessary part of construction.

WILLIAM YOUNG J:

I understand that but I mean if there isn't a context, if no one relies on context then you can't really expect the Judge to Google it.

MR JAGOSE:

To Google it, I'm sorry I didn't quite hear the word.

GLAZEBROOK J:

And there may be dangers in doing that as well because Google might give you just an incomplete view of context.

MR JAGOSE:

I'm not suggesting that the Court takes up an investigative role. Nonetheless –

WILLIAM YOUNG J:

I mean, what you could say is that it was put up, these cases were put, one way or another, were put up and they could have been relevant to context even if it wasn't articulated that way in the argument.

MR JAGOSE:

Even if it wasn't articulated. I'm just – I'm simply not in a position to be able to gainsay what has been said by my friend.

WILLIAM YOUNG J:

No, okay. Well, it's now – the floor is now completely yours.

MR JAGOSE:

Thank you. Just before we get into reply, I did bring up the definition of worker from the Industrial Relations Act and –

WILLIAM YOUNG J:

That was very clever of you. How did you do that? I was sort of trying to do that but not able to do it.

MR JAGOSE:

If I said Google, would that be too much?

GLAZEBROOK J:

I must say I find that quite a useful research tool quite often.

MR JAGOSE:

It's in the NZLII's.

WILLIAM YOUNG J:

Right, okay, yes.

MR JAGOSE:

So anyway the definition of worker is, "Means any person of any age of either sex employed by an employer to do work." So we're just back to that same core issue that is running through all of this. Is it that seasonal workers are to be considered employees for the various sections in the legislation after seasonal termination? That really is, not wanting to be *Woolmington v DPP* [1935] AC 462 (HL) about it, but that really is the golden thread that's running through this because it informs every aspect of the statute, it informs every aspect of the claims that are faced and the decisions that are made.

And my friend is right, there are slips. It's easy to talk about "seasonal employees" when one clearly in context, as the Court of Appeal was dealing with, was talking about employees whose employment had terminated at season's end and were now in that lacuna prior to whatever happened for the new season.

If I can just go back to then a proper reply. So I'd just like to address first a proposition raised by my friend that section 32 overrode section 63A and his

submission was essentially that once the union had commenced collective bargaining, or once collective bargaining was under way, an employer ceased to be entitled to negotiate with members of the union directly, and that was taken from 32(1)(d)(ii).

And what the prohibition is about – first, I note that in other cases the Court of Appeal has said here where the word "bargain" is used in (d)(ii), it simply means negotiate.

Next, the point I want to make is that there is reference not to "employees" here at all but to "persons". That is, the persons whom the representative or advocate are acting for.

And then we need to go back to section 18.

GLAZEBROOK J:
Can you just give your proposition? Can I just check what it is?

MR JAGOSE:
Yes, I'll give my proposition now, which is that under section 63A an employer is entitled, indeed required, to present proposed terms of employment to new employees irrespective –

GLAZEBROOK J:
I'm just thinking, you were saying it's new employees. You do accept that if these were existing employees, let's assume in a totally separate industry where you have a continuous employment, absolutely clearly current employees, covered by a collective agreement, that the employer can't present new terms and conditions individually in the course of bargaining. Do you accept that or not?

MR JAGOSE:
Yes I do accept that.

GLAZEBROOK J:

All right so this is dependent on these being new employees?

MR JAGOSE:

Absolutely right.

GLAZEBROOK J:

All right that's fine.

MR JAGOSE:

Everything about the appellant's case is about discontinuity of employment.

GLAZEBROOK J:

No, no I understand that, I'm just – so you don't argue with Mr Cranney's position that if these are employees however that might be – well let's assume they are employees, leave that aside, you would agree with Mr Cranney that the employer can't come along and say I want you to accept this individual employment contract, if it's in the course of bargaining for a new collective contract?

GLAZEBROOK J:

Okay that's fine.

MR JAGOSE:

And the employees are members represented.

GLAZEBROOK J:

Yes obviously, obviously yes.

MR JAGOSE:

Well the reason I say that because now I take you back to section 18.

GLAZEBROOK J:

No, no I understand the –

MR JAGOSE:

Section 18 identifies how the union is entitled to represent members' interests. So one, "A union is entitled to represent its member in relation to any matter involving their collective interests as employees", not as prospective employees, as employees. That's why in terms of section 63A, when we are talking about its obligations that it imposes on employers to present a desired employment agreement to give time for discussion about it, that those things for new employees are not affected by the fact that there is parallel collective bargaining which would –

WILLIAM YOUNG J:

Aren't you in trouble on this, because there's a finding of the Employment Court the other way here that it's now past the point of challenge.

MR JAGOSE:

Yes there is a finding of the Employment Court the other way.

WILLIAM YOUNG J:

And it is past the point of challenge.

MR JAGOSE:

It is past the point of challenge.

WILLIAM YOUNG J:

So what is the point of the argument?

MR JAGOSE:

The point of the argument is that as a matter of statute the interpretation put forward by my friend it is wrong.

GLAZEBROOK J:

But that's only if you're wrong in terms of what employee means in the context.

WILLIAM YOUNG J:

But even if – does the Court of Appeal decision rest on the status of the workers?

MR JAGOSE:

Yes.

GLAZEBROOK J:

But under 82 –

WILLIAM YOUNG J:

I'm not so sure.

MR JAGOSE:

Well with respect, then we go back to section 82(1)(b). That's the core of the argument.

WILLIAM YOUNG J:

No but we're sort of in a way probably off on a bit of a tangent. We're talking about the good faith bargaining course of action which was the subject of findings by the Employment Court.

MR JAGOSE:

Yes. I'm only doing this to reply.

WILLIAM YOUNG J:

Okay.

GLAZEBROOK J:

Well Mr Cranney was really doing it in a contextual sense in order to say that section 82 must mean what he says it meant and you're effectively saying exactly the same thing from the other point of view.

MR JAGOSE:

I understood Mr Cranney to be saying in support of a proposition that this appeal was moot, was that there was a standalone finding –

WILLIAM YOUNG J:

Well I don't think we're very interested in the argument that the appeal is moot and I think Mr Cranney walked away from that in the end anyway.

MR JAGOSE:

Then that's fine by me. Mr Cranney made a point late last night or late yesterday afternoon and first thing this morning about how the offered individual employment agreement excluded all union rights and that's scarcely, with respect, a surprise given that this a contract offered to individual employees at a time at which there is collective bargaining going on with the union. It would be odd, with respect, for the employer to put into the individual contract the very collective things that it was at that point in time transcending to negotiate with the union. Just as a common sense, practical proposition, if you know that you are bound to negotiate at a later point, you not be rolling out your bottom line in other contracts, you want to hold that in your pocket to see where you get to in those negotiations. I think what my friend wants to say is that this individual employment agreement was extraordinarily hostile to collectivity in general and illustrates that by the absence of the union rights that used to be existing in the collective agreement but it's as equally supported by the proposition that these are just individual agreements in which –

WILLIAM YOUNG J:

Well the purpose of the exercise was to move from a collective agreement to individual agreements.

MR JAGOSE:

They were already on individual agreements.

WILLIAM YOUNG J:

Yes, okay yes.

MR JAGOSE:

At the end of the last, and this comes onto a point that I also want to raise in response to a question raised by Justice Arnold, at the point in time of the seasonal termination, these seasonal workers were employed on individual employment agreements that were based on an expired collective agreement. When the new season commenced they required new employment agreements. Your Honour Justice Arnold's proposition was and I think Justice Glazebrook similarly, was that actually in the individual employment agreements there was sufficient there to allow for perpetuity of their terms and conditions so that all that was necessary was a come to work, here it is and the work was completed, the contract was complete, all the terms were known in advance, all the necessary terms. So that's as I understood the perpetuity proposition.

ARNOLD J:

It was based on does clause 30B, is that a term of the individual employment agreement and I guess the answer is yes and then I suppose the question is well what meaning do you give to this agreement, bearing in mind that this expired.

MR JAGOSE:

And so what I wanted to take Your Honours to then is a passage in my submissions which in my supplementary submissions at paragraph 22, just so that you know it's there, what we're seeing at paragraph 30B is really just a rephrasing of the –

GLAZEBROOK J:

I haven't – whereabouts are you referring in your submissions?

MR JAGOSE:

So paragraph 22 of the supplementary submissions.

GLAZEBROOK J:
"Instead is also said"?

MR JAGOSE:
Yes.

GLAZEBROOK J:
Oh okay thank you.

MR JAGOSE:
And I'm asking and we've been discussing, Justice Arnold and I, clause 30(b) of the individual employment agreement and I want to draw your attention to section 61(1) of the Employment Relations Act which states, "The terms and conditions of employment of an employee who is bound by a collective agreement may include additional terms" et cetera. And then (2), "If the applicable collective agreement expires the employee is employed under an individual employment agreement based on the collective and any additional terms and conditions agreed under subsection (1). Now my submission is that 30(b) is really saying no more than 61(1) and what it's not saying that these are terms and conditions that are to be handed over together with the obligation to re-employ and the key to it is coming down to, in 30(b), the word "applying" because on termination, on seasonal termination, there are no terms applying whether in addition to this agreement or not. It is necessary to have a brand new agreement.

ARNOLD J:
Sorry because it says, "Re-engagement is dependent being terms applying in addition to those." So the assumption is that the terms in the agreement, in the applicable site agreements continue to apply and so we are looking at any additional ones that apply, isn't that –

MR JAGOSE:
I'm offering to Your Honour the suggestion that that's to read this backwards. The proposition is that you as a returning seasonal worker are required to sign

acceptance of terms of employment. That's the obligation for re-engagement. And then those –

GLAZEBROOK J:
Can you just wait until I get up 30(b) again, please?

MR JAGOSE:
Sorry, yes.

GLAZEBROOK J:
Thank you.

ARNOLD J:
Your short point is that terms applying covers all terms.

MR JAGOSE:
Well, no, no, I mean –

ARNOLD J:
In other words, the employer is unrestricted.

MR JAGOSE:
I haven't made the point yet. The returning seasonal worker is required to sign acceptance of terms of employment. And then the question is: what are those? Those are any terms applying in addition to those set out in this agreement. None of the terms in this agreement apply because the agreement has expired.

WILLIAM YOUNG J:
But that's just funny, it's funny drafting then, isn't it?

MR JAGOSE:
Well, the reason it's funny drafting is section 61(2) because in my submission 30(b) says nothing more than 61(2).

WILLIAM YOUNG J:

It's – well, if you just look at it in its own language, it does suggest that the terms of the agreement, the collective agreement, will be rolled over but may be supplemented.

MR JAGOSE:

In the – the usual expectation would be that until expiry and then that continuing period after expiry while it continues in force the collective agreement would be applying. That's the statutory construction, and what I'm suggesting is that 30(b), or the parenthesised words in 30(b), mean nothing more than what the statute says at 61(2), and what the statute doesn't say at 61(2) is that there is perpetuity in the underlying collective agreement.

GLAZEBROOK J:

Well, of course it doesn't.

MR JAGOSE:

Exactly.

GLAZEBROOK J:

Well, but I'm not sure – I need to get it up, I think, but I mean it applies to just about everything, so of course it doesn't because you just get – well, I mean there is perpetuity in the sense that you're employed on those terms.

WILLIAM YOUNG J:

Most employment contracts are perpetual in that sense.

GLAZEBROOK J:

Yes.

MR JAGOSE:

To the point that they terminate.

WILLIAM YOUNG J:

Until – yes, yes, but until they – yes, leave aside the language that is contentious in this case. Most employment contracts are indeterminate in duration. They can be brought to an end by dismissal or redundancy or resignation.

MR JAGOSE:

Yes, but the point here is as seasonal workers are not employed or as their employment terminates at season's end, the question then is what are the terms on which they are bound to be employed in the new season, and I was responding to the propositions raised by Justice Arnold and Justice Glazebrook of my friend that in fact there is sufficient terms here under the obligation to re-employ to fully constitute new seasonal employment. In effect, nothing is required. And what I am arguing –

GLAZEBROOK J:

I just don't see where you get that from 61(2).

MR JAGOSE:

I don't get that from 61(2). I get it from –

GLAZEBROOK J:

Well, you say that the bracketed words just – I'm sorry, I really don't understand the point.

MR JAGOSE:

Okay. The point was raised with my friend, Mr Cranney.

GLAZEBROOK J:

No, no, I understand what you're – I understand the point you're answering. What I don't understand is your answer as it relates to the statute.

ARNOLD J:

Well, is what you're saying the effect of section 61(2) is at the end of the extended period, that is the end of the period of the IEA based on the collective agreement? Once you get to the end of that, effectively the slate is wiped clean. There's nothing left.

MR JAGOSE:

Almost. Once you get to –

GLAZEBROOK J:

But are we – were we at the end of that period?

MR JAGOSE:

We're way beyond it. Once we get to – you have the point of expiry of the collective agreement. You have the period in which the collective agreement continues in force. You then have a period of the individual employment agreement, based on the collective agreement, and at seasonal termination it's gone.

GLAZEBROOK J:

No, no, no, but assuming –

ARNOLD J:

But doesn't that mean then the obligation to – the seniority and everything else goes, the re-employment, everything goes?

MR JAGOSE:

No, because we're back to the proposition that although the contract has terminated it can have terms that survive its termination as is a matter of construction comparably with the pre-emption, for example, that Justice Young –

ARNOLD J:

Okay, so you're accepting that some terms flow on beyond the end of the –

MR JAGOSE:

I'm accepting there is an obligation to re-engage, to offer re-engagement.

ARNOLD J:

But other terms you say continue, discipline, seniority, all that stuff? Oh they don't?

MR JAGOSE:

No.

ARNOLD J:

Just the obligation to re-employ. So why is that?

MR JAGOSE:

Because properly construed the individual employment, based on the collective agreement, only provides for a single surviving provision, and that single surviving provision is the obligation to offer re-employment in the new season.

ARNOLD J:

I see.

MR JAGOSE:

In order of seniority, end of story.

ARNOLD J:

Yes, okay.

WILLIAM YOUNG J:

I suppose, what I really struggle to get past the actual language of course, 30(b), because it does seem to presuppose the terms of re-engagement will be those set out in this agreement albeit subject to supplementation.

MR JAGOSE:

Except that this is a collective agreement –

WILLIAM YOUNG J:

I understand that, I understand.

MR JAGOSE:

Which expires –

WILLIAM YOUNG J:

Yes, but it could form the template for the re-engagement agreement.

MR JAGOSE:

Yes it could. If it continued to be –

GLAZEBROOK J:

But it becomes an individual agreement.

MR JAGOSE:

– in existence.

WILLIAM YOUNG J:

Sorry?

MR JAGOSE:

If it continued to be in force.

WILLIAM YOUNG J:

Yes but even if it's not in force you can still say, I will agree to re-employ you on the basis of the previous agreement, albeit that it has been terminated.

MR JAGOSE:

Yes, exactly, and what I'm suggesting to Your Honour is that the parenthesised words in 30(b) are not meaning anything in addition to 61(2), which wouldn't have that additional requirement that Your Honour has just articulated.

WILLIAM YOUNG J:

All right, okay.

GLAZEBROOK J:

But I still don't understand the 61(2).

MR JAGOSE:

Well –

GLAZEBROOK J:

Because 61(2) says if you've been subject to a collective agreement and you resign or the agreement terminates, you have an individual employment agreement on those same terms, which means that their individual employment agreement is actually this one, it was at the time it was terminated, in that was an obligation under clause 30 to employ on the same terms. I don't see what section 61(2) has to do with it.

MR JAGOSE:

I can't put it any higher than saying to Your Honour what I've said at clause, paragraph 22 –

GLAZEBROOK J:

So we interpret 30(b) as, but I mean it doesn't, I don't see how 61(2) does anything. Is the proposition simply put, say for instance we're looking at – well is the proposition simply put that because this agreement was terminated, the individual agreement was terminated, then there is no obligation apart from re-employment in terms of, despite what's said in clause 30.

MR JAGOSE:

Yes. That clause 30 –

GLAZEBROOK J:

Well how do you read clause 30 to say that?

MR JAGOSE:

In terms of the parenthesised words where it says, “Any terms applying in addition to those set out in this agreement,” there are no terms applying as set out in this agreement. All terms are additional.

GLAZEBROOK J:

Oh, okay. Okay, thank you.

WILLIAM YOUNG J:

Wouldn’t it be simply better to sign acceptance of terms of employment as agreed between the parties at the time.

MR JAGOSE:

And the reason for the bracketed words, that’s why I’m saying is drawn from 61(2). It’s to illustrate that there is a statutory entitlement to enforce terms. You don’t have to sign a document that says, I agree that the collective agreement, which is in force, applies to my employment here.

GLAZEBROOK J:

But you’d say that, no, no but that’s not a statutory entitlement because once you’ve ceased employment you don’t have any statutory entitlement under 61(2).

MR JAGOSE:

You do if there is a current collective agreement which covers the work that you are doing and you are a member of the union that has negotiated it.

WILLIAM YOUNG J:

You don’t have a right of re-engagement do you? Say they had actually finished up, say someone said, “I resign”, then two years later they come back at the start of the season and say, “I want to work”, they're simply not – they don’t have any rights do they?

MR JAGOSE:

Assuming that there was a collective agreement in force, their entitlement to work would be on terms not inconsistent with that collective agreement.

O'REGAN J:

Not if they completely ceased –

WILLIAM YOUNG J:

It's not an entitlement.

MR JAGOSE:

Yes, yes absolutely if they completely ceased, they had terminated, they said, "I'm not working here anymore, I'm gone" and then thought actually I'd like to be a meat worker again.

WILLIAM YOUNG J:

But it's not an entitlement to work, it's an ability to work otherwise than on the terms of the collective.

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

Okay I understand it.

O'REGAN J:

Oh I see what you mean.

MR JAGOSE:

I'm not suggesting for a moment that AFFCO is obliged to re-employ every person who leaves.

O'REGAN J:

I see, you're just saying they can't ask for different terms from the collective.

MR JAGOSE:

While the collective is in force and that's all that those bracketed words, those parenthesised words is in my submission saying.

WILLIAM YOUNG J:

I understand that now. I mean I understand that but it is quite an elusive meaning. It's not one that occurred to me when I first read it.

GLAZEBROOK J:

Well especially since it says "additional terms".

MR JAGOSE:

That's exactly the point isn't it?

GLAZEBROOK J:

Well in addition to terms, to those set out in this agreement and applicable site agreements.

MR JAGOSE:

This needs to be understood in the climate of collective negotiations and bargaining and agreements and so this is a document that is drawn from its statutory foundation and it includes in it various references that are only really explicable when you understand the statutory context.

WILLIAM YOUNG J:

And also the assumption probably that there will be one collective agreement after another.

MR JAGOSE:

Yes. And when you see the scheme for negotiating, the obligation to continue negotiating, the expectation that industrially there will end up being collective agreements for all time, those words make perfect sense. What they don't make sense – the sense they don't make is the sense drawn from them by Your Honour Justice Arnold that they provide for perpetuity of the individual

employment agreements terminating at season's end, it's just not the right way of construing that clause. Your Honour Justice Glazebrook discussed the telephone clause and I just wanted to make sure that Your Honour had read it. It's at 29(e) on page 179 of the case. The point I make is that while practice, as Mr Cranney put it, may have been on a level of informality and expectation, the contractual provision is relatively strong. It talks of termination at the end of a season, an employee being responsible for keeping the employer advised of address and phone number if they wished to be contacted for employment at the commencement of the next season. I mean that's not something that should lightly be taken into account when one is talking about long service or long record of employment from season to season to season. It seems an important aspect in the process by which an offer is to be made.

GLAZEBROOK J:
But it could be taken, which was all I was saying, as an indication that these people were ready for work if it was offered to them?

MR JAGOSE:
Yes, and clear recognition –

GLAZEBROOK J:
Which was the only point.

MR JAGOSE:
Sorry?

GLAZEBROOK J:
Which was the only point I was making.

MR JAGOSE:
Then we're perfectly square. The only other point I wanted to just raise was the reference to *Gilbert-Ash.* I relied on *Gilbert-Ash* in support of a proposition from Lord Hoffman that the context from preceding judgments was important –

WILLIAM YOUNG J:
So what's 25?

MR MR JAGOSE:
Yes, it's 25 of volume 2 of my authorities. My friend drew your attention to 267 which is, sorry, 269 which was an observation from Lord Lloyd about *Dawnays Limited v FG Minter Ltd and Trollope and Colls Ltd*. The reason that the case was relied on was Lord Hoffmann at page 274 at section D. "It is also important to have regard to the course of earlier judicial authority and practice on the construction of similar contracts. The evolution of standard forms is often the result of interaction between drafts-people and the Courts and the efforts of the draftsperson cannot be properly understood without reference to the meaning which the Judges have given to the language used by their predecessors."

GLAZEBROOK J:
Sorry, what was the letter?

MR MR JAGOSE:
D.

GLAZEBROOK J:
Thank you.

WILLIAM YOUNG J:
So did Lord Hoffman conclude that the earlier case should be departed from?

MR JAGOSE:
What he was discussing here at this point was how the contracts come together and that where there is historical cases they are drawn on by the drafts--people. That's the only point that was relied on. In his opinion he thought the earlier judgments were wrongly decided and that the appeal should be allowed but the point that he was making was in response to an argument about redundancy, as you can see from the top of that paragraph,

that irrespective of the incorrectness of the underlying case law the evolution of contracts may be based on those things.

McGRATH J:
Is this discussed in your original submissions?

MR JARGOSE:
Yes it is.

McGRATH J:
Can you just point me to where?

MR JAGOSE:
Certainly, it's in the supplementary submissions and it is at paragraph 29, footnote 69 picks up *Gilbert-Ash* in support of my proposition that parties, that consistency with previous decisions on the construction of similar contracts is in principle to be assumed.

WILLIAM YOUNG J:
At 281 he says he obviously doesn't like *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644 (CA) – the earlier case.

MR JARGOSE:
Yes.

WILLIAM YOUNG J:
He notes since then, "However, 14 years have passed and the building industry has lived with the *Crouch* construction of the standard building contracts," and then reflected legal legislative changes.

GLAZEBROOK J:
At 282 he says that, "I don't think anyone in the industry can be said to have acted in reliance on it," at the top of 282, so he overrules it.

WILLIAM YOUNG J:

I wonder what he means by, "I don't think anyone in the industry can be said to have acted in reliance on *Crouch*." Presumably predomination of *Crouch* and *Balfour Beatty* would have affected the way in which arbitrations were conducted.

MR JAGOSE:

Yes.

WILLIAM YOUNG J:

So it doesn't make much sense to me actually.

GLAZEBROOK J:

Unless Duncan Wallace QC has said it's a ridiculous decision and –

MR JAGOSE:

Well, it's unlikely that Lord Hoffmann said something that doesn't make sense so I'm assuming there's something in there.

WILLIAM YOUNG J:

Well I don't understand what he means.

MR JAGOSE:

I think what he must mean in context is to say that there is no prejudicial impact on people relying on *Crouch* as if it were correct.

WILLIAM YOUNG J:

Well what he might say is that on an ex-ante basis when people enter into contracts continuing arbitration clauses, they're probably not anticipating the *Crouch* problem.

MR JAGOSE:

Yes, yes.

WILLIAM YOUNG J:

But on the other hand it might be that when people say okay we're going to contract on the, whatever the standard construction contract provisions are gee before we do so let's have a look and see how they've been construed. I mean that may be too theoretical.

MR JAGOSE:

I think at the foot of the previous page really illustrates probably Your Honour's point. Just pointing out that the, having decided the contract, that's what's been given effect to, and there's no suggestion that the approach in *Crouch* is one that has been given sort of a contractual stamp.

WILLIAM YOUNG J:

Well it's all, probably the most frightful boilerplate stuff that no one is going to read until –

MR JAGOSE:

Until they're in dispute.

WILLIAM YOUNG J:

They're in dispute.

MR JAGOSE:

Exactly.

WILLIAM YOUNG J:

Okay. Well I think I do now understand what he meant.

MR JAGOSE:

As Your Honours please. I'm very sorry. My learned friend has just pointed out to me that in the transcript of the Employment Court, page 754, volume 5, from sort of line 15, running along for the next page or so, is the reference to context where Judge Colgan says at line 10, "And if, as context is always

important," asking whether there is an argument that the context is important and interpretation, and running on through.

WILLIAM YOUNG J:

Thank you counsel for your submissions which have been of considerable interest and assistance. We'll take time to consider our judgment.

COURT ADJOURNS: 12.29 PM