IN THE SUPREME COURT OF NEW ZEALAND

SC 131/2016
[2017] NZSC 135

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
Court:	William Young, Glazebrook, O'Regan, McGrath and Arnold JJ
Counsel:	P R Jagose and G P Malone for Appellant P Cranney and S R Mitchell for Respondents J E Hodder QC and J W Upson for Meat Industry Association of New Zealand Incorporated as Intervener
Judgment:	7 September 2017

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The appellant must pay the first respondent costs of $35,000 plus reasonable disbursements. We certify for two counsel.**

REASONS
(Given by Arnold J)

Table of Contents

Introduction

[1] The appellant, AFFCO New Zealand Ltd (AFFCO), operates a number of meat slaughtering and processing plants in the North Island, including at Rangiuru in the Bay of Plenty, at Imlay in Whanganui and at Feilding in Manawatu. Slaughtering at the plants is seasonal, so that most of those who work at them are not required to work all year round. When one season ends, the workers are laid off until the new season starts, when most return to work. In the interim, they are free to work for other employers (assuming other employment is available).

[2] The first respondent, the New Zealand Meat Workers and Related Trades Union Inc (the Union), had a collective employment agreement with AFFCO covering its plants, including the three just mentioned. However, the collective no longer applied from the end of December 2014, with the consequence that the second respondents and other employees at the plants were employed for the remainder of the 2014/2015 season on the basis of individual employment agreements containing the same terms as the collective.[1]

[3] The second respondents claimed that, when they presented themselves for work at the beginning of the 2015/2016 season, AFFCO locked them out unlawfully because it required them to agree to new individual employment agreements containing terms that were substantially less favourable than those contained in the

[1] See the Employment Relations Act 2000, s 61(2).

expired collective and carried over into their individual employment agreements. The Union and the second respondents issued proceedings. Initially they sought an interim injunction restraining AFFCO from offering new terms of employment in individual employment agreements, but their application was unsuccessful.[2] The matter then went to trial, where a Full Court of the Employment Court upheld the unlawful lockout claim.[3] The Court of Appeal also upheld the claim, although for different reasons than those adopted by the Employment Court.[4] This Court granted leave to appeal on the question whether the Court of Appeal was correct to find that AFFCO locked the workers out in terms of s 82 of the Employment Relations Act 2000 (the ERA) when it required them to enter new individual employment agreements before beginning work for the 2015/2016 season.[5]

[4] The essential question in the appeal is whether those who presented themselves for work at the beginning of the 2015/2016 season were at that time "employees" for the purposes of s 82(1)(b) of the ERA. If they were, it is accepted that there was an unlawful lockout.[6] Mr Cranney also sought to support the outcome that the workers were "employees" by raising the issues of jurisdiction under s 214 of the ERA (which, if accepted, would have left the Employment Court's reasoning intact) and mootness. As he did not develop these points in submissions, however, we will not address mootness at all, and will deal with jurisdiction only briefly at the end of the judgment.[7]

---

2 *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd (No 2)* [2015] NZEmpC 94, (2015) 10 NZELC 79-056 (Chief Judge Colgan) [*AFFCO* (Interim injunction)].

3 *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2015) 10 NZELC 79-057 (Chief Judge Colgan, Judge Perkins and Judge Ford) [*AFFCO* (EC)]. The Court also found that AFFCO had breached its obligation of good faith bargaining in relation to a collective agreement: at [201].

4 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 482, (2016) 10 NZELC 79-067 (Ellen France P, Harrison and Toogood JJ) [*AFFCO* (CA)].

5 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 30.

6 See below at [35].

7 See below at [81]–[84].

[5] To resolve the question whether the workers were "employees" in terms of s 82(1)(b), it is necessary to consider two issues:

(a) The first is whether the workers were "employees" as defined in s 6 of the ERA. This requires consideration of the nature of their employment arrangements with AFFCO. Specifically, it requires consideration of whether the workers had an on-going employment relationship with AFFCO across seasons even though they were not required to work (or entitled to be paid) during the off-season, or whether their employment was discontinuous in the sense that they were employed only for a particular season, were not employed by AFFCO during the off-season and were then re-employed for the next season. In addition, there is an alternative analysis, namely whether the workers came within the definition of "person intending to work".[8]

(b) The second issue arises if the workers do not fall within the s 6 definition. The question then becomes whether the word "employees" in s 82(1)(b) bears the defined meaning or whether the context requires that some broader meaning be given to it and, if so, whether this broader meaning covers these workers.

[6] As will be explained in more detail below, the Employment Court held that the workers were "employees" within the meaning of s 6, so that they were unlawfully locked out by AFFCO,[9] although the Court did also outline an alternative analysis leading to the same conclusion.[10] The Court of Appeal disagreed with the Employment Court's primary reasoning that the workers were employees within the meaning of s 6,[11] but nevertheless upheld the result it reached.[12] The Court did so on the basis that the word "employees" was used in s 82(1)(b) in a broader sense than the definition in s 6, which is expressly subject to the qualification "unless the

---

8 Section 6(1)(b)(ii) of the Employment Relations Act provides that "employee" includes a "person intending to work", which is further defined in s 5: see below at [19].

9 *AFFCO* (EC), above n 3, at [174]–[180] and [194].

10 See the discussion below at [54]–[56].

11 *AFFCO* (CA), above n 4, at [49]–[54].

12 At [72]–[73].

context otherwise requires" (for ease of reference, we will refer to these words as the "context qualification").[13]

[7] We have concluded that the Court of Appeal's analysis is correct. We do not agree with the Employment Court that the workers were "employees" in terms of s 6 at the relevant time. However, we consider that the term "employees" in s 82(1)(b) has a broader meaning than the definition in s 6 and covers the workers at issue. The result is that we agree with both Courts below that AFFCO locked the workers out unlawfully. Given the view which we have reached, we will deal with the s 6 arguments more briefly than otherwise we might have and will focus on the s 82(1)(b) arguments.

Factual background

[8] There was no dispute about the factual background, which can be stated briefly.

[9] The collective agreement between AFFCO and the Union had an expiry date of 31 December 2013. While it was in force, the collective, together with any relevant site agreement, set out the terms of employment of AFFCO's workers at its plants.[14] Because AFFCO and the Union had begun negotiations for a new collective before the 31 December 2013 expiry date, the collective continued in force for the period of the negotiations, but subject to a time limit of 12 months.[15] As no replacement collective had been agreed by the end of December 2014, AFFCO's workers were employed for the balance of the 2014/2015 season under individual employment agreements containing the same terms as the collective.[16]

[10] Taking the Rangiuru plant (which was the first of AFFCO's plants to re-open for the 2015/2016 season) as an example, the 2014/2015 processing season ended in mid-April 2015 and most workers at the plant were laid off. In early June 2015, AFFCO wrote to workers who had been employed at the plant in the previous season notifying them of its intention to open the plant for the 2015/2016 season on 22 June

---

13 At [58]–[62].
14 It may be that some workers had additional, individual conditions.
15 Employment Relations Act, s 53.
16 Section 61(2).

2015 and inviting them to attend an "introduction presentation" at the plant for a new individual employment agreement for the season. As AFFCO's letter noted, the proposed individual employment agreement contained changes from the agreement which had applied in the previous season.

[11] At the introduction presentation, workers were supplied with copies of an explanatory handout and the proposed individual employment agreement. The handout advised that the introduction presentation was not an induction meeting for employment purposes. Rather, it was to introduce the proposed individual employment agreement. Among other things, the handout said:

> The company requires a signed employment agreement to be entered into with each employee before they commence work. None of the previous expired [individual employment agreements] (including [those] based on the expired Collective Agreement) continued automatically past the layoff season end. All employers are required to offer an intended Employment Agreement in writing and to have an employment agreement signed by both the employer and employee.

[12] While no explanation of the terms of the proposed individual employment agreement was given, the handout did reiterate that some of the terms of the proposed individual employment agreement had changed from those previously offered. The handout advised workers of their right to take independent advice and offered individual meetings with a company representative, with the opportunity to bring a support person or representative. Among the changes proposed by AFFCO was the following clause:

> **28. GENERAL CONDITIONS**
>
> Subject to any enactment to the contrary, the employee shall not attend any meetings organised by anyone else on site, either before, during or after work hours or offsite during work hours, without the prior express permission of the employer.

There seems to have been a suspicion that this was aimed at the Union, which at the time was still engaged in collective bargaining with AFFCO although those negotiations had stalled. In any event, AFFCO eventually removed the clause.

[13] On 9 June 2015, the Union issued proceedings in the Employment Court, in which it sought an interim injunction restraining AFFCO from offering the workers

new terms of employment in individual employment agreements. The Union claimed that AFFCO's actions constituted an unlawful lockout. Chief Judge Colgan held that the Union had an arguable case but declined to issue an interim injunction on balance of convenience grounds.[17] Almost all members of the Union then signed AFFCO's individual employment agreement without seeking any changes, but without prejudice to their rights, whereupon AFFCO engaged them for the 2015/2016 season, which began on 22 June 2015.

[14] A similar process was followed at the Imlay and Feilding plants. They re-opened for the 2015/2016 season on 5 August 2015. Prior to that, those who had worked at the plants in the previous season were contacted and invited to attend introduction presentations in relation to new individual employment agreements, which were in substantially the same terms as the Rangiuru agreement.

[15] Before we go on to discuss the issues, we should set out the terms of the key statutory provisions and then some of the more important terms of the collective agreement.

The statutory provisions

[16] The purpose of the ERA is set out in s 3. That section provides in part:

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

[17] *AFFCO* (Interim injunction), above n 2.

(iv) by protecting the integrity of individual choice; and

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

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

[17] Two features of this stand out for present purposes: first, the recognition of an inherent inequality of power in employment relationships and second, the promotion of collective bargaining.

[18] Section 82 gives the meaning of lockout. Relevantly, it provides:

82 Meaning of lockout

(1) In this Act, **lockout** means an act that—

(a) is the act of an employer—

(i) in closing the employer's place of business, or suspending or discontinuing the employer's business or any branch of that business; or

(ii) in discontinuing the employment of any employees; or

(iii) in breaking some or all of the employer's employment agreements; or

(iv) in refusing or failing to engage employees for any work for which the employer usually employs employees; and

(b) is done with a view to compelling employees, or to aid another employer in compelling employees, to—

(i) accept terms of employment; or

(ii) comply with demands made by the employer.

This definition has two elements – the employer must: (a) commit one of the specified acts; (b) for one of the specified purposes. Of central significance in this case is the second requirement that the employer act with a view to compelling *employees* to accept terms of employment or comply with the employer's demands.

[19] Relevantly, the word "employee" is defined in s 6(1), as follows:

> **6 Meaning of employee**
>
> (1) In this Act, unless the context otherwise requires, **employee**—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> (b) includes—
>
> …
>
> (ii) a person intending to work; …

The phrase "person intending to work" is defined in s 5 to mean "a person who has been offered, and accepted, work as an employee".

[20] Finally, we should note that lockouts (and strikes) are not per se unlawful. Section 83 provides that participation in a lockout or a strike is lawful if certain conditions are met and s 85 provides protections for those who participate in lawful lockouts or strikes. Section 86 sets out the circumstances in which participation in a lockout or strike is unlawful and ss 86A and 86B set out the notice requirements for strikes and lockouts respectively.

The collective agreement

[21] The collective agreement contains numerous provisions which have their origins in earlier awards governing the meat industry.[18] Some of its provisions favour the view that employment is discontinuous, as argued by AFFCO; others indicate a longer term employment relationship, as urged by the Union.

---

[18] Awards were an instrument of delegated legislation providing minimum legally enforceable terms and conditions of employment and minimum wages: Gordon Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011) at 31–33.

[22] We do not propose to set out all those provisions which might be relevant to one or other view. Rather, we propose to identify the main provisions by way of example.[19]

[23] An important series of provisions is cls 29–31 of the collective. Clause 29 provides:

> **29. SEASONAL EMPLOYMENT**
>
> a) Seasonal employees are employed for a season and shall be given five (5) calendar days' notice of seasonal lay off such notice to be given on or before 10.00 am of the first day of such period.
>
> b) Seasonal employment will not necessarily finish on the same day for all employees*;* for example a night shift may start later and finish earlier; or where two day shifts are running, they will revert to one day shift when demand drops off, or some areas of work may finish before others and or numbers employed in any department may decrease as the season starts or draws to a close.
>
> c) All things being equal, layoffs and re-employment will be based on departmental and/or site (as appropriate) seniority and will operate on a last on first off basis, subject to the experience, employment record, competency and skills of the individuals, also the need to maintain an efficient, balanced workforce. (The Department Supervisor shall consult with the Union Delegate prior to lay-offs of employees before making a recommendation to the Plant Manager).
>
> d) The employee acknowledges that the nature of the industry is such that available stock numbers change rapidly and as a result a decision to cease or lower production and give notice of a layoff is made within a tight timeframe. As a result the employee agrees that:
>
> i) A notice of lay-off may be rolled over or extended by the employer;
>
> ii) Depending on stock availability, factory and processing requirements there may be inter-season lay-offs for periods affecting all or some staff. Selection of staff will be on the basis advised for end of season lay-offs.

---

[19] A comprehensive description of the terms of the collective agreement can be found in the Employment Court's judgment: see *AFFCO* (EC), above n 3, at [34]–[83].

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

There are several features of this provision which support the view that employment under the collective is discontinuous rather than continuous, in particular the reference in cl 29(a) to seasonal employees being employed for a season; the reference to layoffs and re-employment in cl 29(c); and the terms of cl 29(e), for example, "[u]pon termination at the end of the season".

[24] Mr Cranney for the Union placed particular emphasis on clauses 30(a) and 31(b), neither of which, he said, were in the award on which the collective agreement was based. He also emphasised the heading to cl 30, which provided:

30. SECURITY OF EMPLOYMENT

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

b) Re-engagement is dependent upon employees completing the employer's induction process and signed acceptance of terms of employment (being any terms applying in addition to those set out in this Agreement and applicable Site agreements).

Mr Cranney said that the reference to security of employment showed that the collective contemplated a long-term employment relationship, as was acknowledged explicitly in cl 30(a).

[25] Clause 31 provided for employees to acquire seniority based on length of service with AFFCO. Seniority would, in general, determine the order of layoffs and re-engagement. The clause provided:

31. SENIORITY

a) Employees shall have seniority in accordance with the date of their commencement of employment with [AFFCO] and in accordance with the provisions of this agreement.

b) All things being equal, layoffs and re-employment will be based on departmental and/or site (as appropriate) seniority and will operate on a last on first off basis, subject to the

> experience, employment record, competency and skills of the individuals, also the need to maintain an efficient, balanced workforce. (The Department Supervisor shall consult with the Union Delegate prior to lay-offs of employees before making a recommendation to the Plant Manager.)
>
> c) A seniority list shall be prepared for each department and/or site and be made available to the delegate each season prior to the commencement of end of season lay-off and again at re-engagement at the commencement of the season.
>
> d) Approved absences due to sickness or injury shall not break seniority providing the employee has not been employed elsewhere during the period of absence (unless so directed by the Accident Compensation Corporation).
>
> e) Seniority shall be broken in the following circumstances:
>
> i) Where an employee voluntarily leaves the company or is dismissed;
> ii) Where an employee fails to return from a seasonal layoff.
>
> …
>
> h) While seniority shall be taken into account in determining layoff and re-engagement final suitability shall be as determined by the employer subject to clause 31b).

As can be seen, this clause provides support for both sides. On the one hand, it recognises and rewards length of service in the concept of seniority, suggesting continuity of employment. On the other hand, it talks of "layoffs and re-employment", which is consistent with AFFCO's argument that employment is discontinuous.

[26] Another feature relied on by the Union was the fact that the collective agreement conferred certain benefits on workers on the basis of their length of service with AFFCO. So, for example:

(a) Clause 22(c) provided that after six years' continuous service, workers employed before 1 June 2006 were entitled to an extra week's annual holiday.

(b) Clause 23 provided for special holidays to recognise long service. By way of illustration, a worker who had completed more than 20, but

less that 25, years of service was entitled to a special holiday of three weeks.

(c) Clause 24 provided that an employee's sick leave entitlement (normally 40 hours per year) could accumulate to a maximum of 340 hours "provided the employee's periods of service with [AFFCO] are in consecutive seasons".

(d) Appendix A provided for redundancy.[20] Redundancy payments were calculated on the basis of a worker's period of "continuous service"[21] with AFFCO and increased with the years worked.[22]

[27] The collective agreement also gave AFFCO rights which carried over beyond a particular season. For example, cl 34 created a warnings process for disciplinary matters. Clause 34(c) provided in part:

> Warnings shall be issued in three stages and shall lapse after one year from the date of recording, with the exception that final warnings shall lapse after two years from the date of recording.

[28] We will return to the collective agreement in the discussion which follows. We begin with the first question in the appeal, namely, whether the workers were employees within the definition of s 6.

Were the workers "employees" within the meaning of s 6?

[29] As we have foreshadowed, there are two alternative bases on which it might be argued that the workers were employees within the meaning of s 6:

(a) The first is that they were employees because they were employed on employment agreements of indefinite duration.

---

[20] Mr Cranney noted that redundancy was not provided for in the award.

[21] "Continuous service" as it applied to seasonal employees was defined in cl 23 (long service leave) to mean "service by any seasonal employee employed by [AFFCO] for a period of at least two calendar months in each consecutive season. Where [AFFCO] can only offer employment for less than two calendar months, this lesser period shall suffice, provided that the employee has not refused an employment offer earlier in the season": cl 23(d).

[22] The entitlement was four weeks pay for service of between one and 12 months, with an extra two weeks pay for each additional year: Appendix A, cl 5.

(b) The second is that they were employees because they were people who were "intending to work" within the meaning of s 6(1)(b)(ii), as further defined in s 5.

We begin with the first line of argument.

(i) Did AFFCO employ the workers under employment contracts of indefinite duration?

[30] The Employment Court held that the workers had a continuous employment relationship with AFFCO and were employed on employment agreements of indefinite duration, so that they were "employees" within the meaning of s 6.[23] In reaching this decision the Court considered a number of matters, four of which require mention.

[31] The first is the terms of the collective agreement.[24] The Court concluded that, while there were indications both ways, taken as a whole the collective's provisions favoured the Union's position of continuity of employment between seasons rather than AFFCO's position that employment was discontinuous.[25]

[32] The second is the context in which the collective was agreed and operated.[26] The context to which the Court referred was the geographic setting of the relevant plants, many of which were in small towns where the plant was the major employer and often employed several members of the same family. Many workers served with the company for years on end in what were semi-skilled jobs, in circumstances where their skills were not transferrable.

[33] The third matter is a series of earlier decisions which indicated that seasonal work in the meat industry was generally discontinuous.[27] These cases were *NZ Meat*

---

23 *AFFCO* (EC), above n 3, at [174]–[180] and [194].
24 At [33]–[84].
25 At [83].
26 At [85]–[90].
27 At [118]–[161].

Processors, Packers, etc IOUW v Alliance Freezing Co (Southland) Ltd (*Alliance* (1987)),[28] *New Zealand Meat Processors, etc, IUW v Alliance Freezing Co (Southland) Ltd* (*Alliance* (1991)),[29] *New Zealand Meat Workers etc Union Inc v Richmond Ltd* (*Richmond*),[30] *Cruickshank v Alliance Group Ltd*[31] and *New Zealand Meatworkers' Union Inc v Alliance Group Ltd* (*Alliance* (2006)).[32] The Court considered that these cases were distinguishable, first because there were differences in the terms of the awards at issue in the earlier cases and the collective agreement in the present case and second, because the cases had been determined in circumstances which were very different and so had been overtaken by events. The Court explained:

> [175] The nature of employment generally and its regulation have changed significantly over the last 30 or so years in New Zealand, including at times when a number of the cases which concluded that seasonal meat industry work was discontinuous, were decided. Some of those cases go back to the period when industry-wide awards were made by the Court's predecessor. These governed a large number, perhaps all, of the meat industry companies in New Zealand. Awards were quasi-statutory or regulatory instruments and did not take much, if any, account of the particular employment relationships between individual companies and their employees or, especially, particular plants owned by those separate companies and their employment practices.
>
> [176] By contrast now, not only is there a combination of collective agreements and [individual employment agreements] entered into by meat companies but, as this case illustrates, there are differences between plants owned by individual companies which are illustrated by separate site agreements.
>
> [177] In these circumstances, we consider that it is appropriate to determine this question of continuity or discontinuity of employment by reference primarily to the contractual terms and conditions in each particular case and the conduct of the working relationships in practice.
>
> [178] In the case of AFFCO's North Island plants and on the evidence of the three directly concerned in this proceeding but which we understand to be typical of all of AFFCO's plants, we have concluded that employees … are engaged by AFFCO on employment agreements of indefinite duration. Their employment is not terminated at the end of each season and new employment entirely is not entered into between the parties for the following

---

28 *NZ Meat Processors, Packers etc IOUW v Alliance Freezing Co (Southland) Ltd* [1987] NZILR 537 (ArbC) [*Alliance* (1987)].

29 *New Zealand Meat Processors, etc, IUW v Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143 (CA) [*Alliance* (1991)].

30 *New Zealand Meat Workers etc Union Inc v Richmond Ltd* [1992] 3 ERNZ 643 (EmpC) [*Richmond*].

31 *Cruickshank v Alliance Group Ltd* [1992] 3 ERNZ 936 (EmpC).

32 *New Zealand Meatworkers' Union Inc v Alliance Group Ltd* [2006] ERNZ 664 (EmpC) [*Alliance* (2006)].

> season. To maintain, as AFFCO does, that its recent current arrangements for the employment of meatworkers reflect those traditional patterns reinforced by court decision in the past, is now an artificial, unrealistic and strained account of the reality of the situation at its plants and under current employment law.

[34] Finally there is the scheme of the current employment legislation. The Court emphasised that the legislation promoted and protected orderly collective bargaining conducted in good faith.[33]

[35] The Court concluded that there was a lockout and that it was unlawful.[34] AFFCO had accepted that the lockout did not relate to bargaining for a collective agreement that would bind each of the workers[35] and, in any event, AFFCO had not given the workers the required notice.[36]

[36] The Court of Appeal disagreed with the Employment Court's view that the workers were employed on employment contracts of indefinite duration.[37] Having outlined the principles of contractual interpretation, the Court of Appeal said that "the central feature of the context and genesis of the collective agreement is the body of case law which has determined disputes about the continuity of employment in the meat industry".[38] These decisions were part of the background against which the parties negotiated. The Court considered that the authorities affirmed "the industry standard of termination of the employment relationship between meat processor and seasonal worker at the end of each killing season"[39] and said that the Employment Court had ignored this "decisive background factor" in interpreting the collective.[40] Having considered the collective's provisions, the Court concluded that some were explicable only on the basis that the parties intended that the workers' employment would be terminated at the end of each season.[41] The Court said that the Employment Court was wrong to distinguish the earlier authorities on the basis

---

33 *AFFCO* (EC), above n 3, at [188].
34 At [197]–[199].
35 At [199]. See also Employment Relations Act, s 83(b)(i).
36 At [199]. See also Employment Relations Act, 86B.
37 *AFFCO* (CA), above n 4, at [54].
38 At [32].
39 At [38] (footnote omitted).
40 At [39]. We note that Chief Judge Colgan did raise this issue with counsel for AFFCO in the course of the hearing but it was not addressed in the Employment Court's judgment.
41 At [50].

that they were decided in a different era.[42] Although it disagreed with the Employment Court on this point, however, the Court of Appeal agreed that AFFCO had unlawfully locked the workers out. As we will develop later in these reasons, the Court held that the workers were "employees" within the meaning of s 82(1)(b).[43]

[37] In this Court, Mr Cranney sought to support the Employment Court's judgment on the ground that it was right to conclude that the workers were employed by AFFCO on employment contracts of indefinite duration. He argued that the Court of Appeal was wrong to identify an "industry standard" of discontinuous employment and was critical of the what the Court had taken from the earlier authorities. He identified a number of differences that he said were material between the collective agreement and the award that was the subject of most of the earlier decisions and argued that, to the extent that the decisions supported the view that employment in the meat industry was discontinuous, they should be discarded as the products of an earlier and very different labour relations era. For AFFCO, Mr Jagose argued that the Court of Appeal's analysis of s 6 was correct, as did Mr Hodder QC for the Intervener.

[38] We begin with the approach to the interpretation of employment contracts. This Court addressed that topic in *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* (*NZALPA*).[44] As with other contracts, the essential approach is that described in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*:[45]

> [60] … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

---

42 At [52].

43 At [70]–[71].

44 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, (2017) 14 NZELR 402 [*NZALPA*] at [71]–[77].

45 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

However, the special features that characterise employment bargaining may also be relevant to interpretation in some circumstances.[46]

[39] Turning now to the authorities discussed by the Employment Court and Court of Appeal, we accept that at least some held that employment in the meat industry was discontinuous, on the basis of awards which contained many of the same terms as the collective agreement. We refer to four of the authorities in particular. First is the decision of the Arbitration Court in *Alliance* (1987).[47] The Arbitration Court was required to determine whether there had been a strike by certain slaughtermen who refused to take up employment at the commencement of a new killing season. The Court held that there was no binding contract of employment between the employer and any individual slaughterman during the off-season, even assuming that the employer's obligations to re-hire on the basis of seniority were enforceable.[48] As a result, there was no "strike" when the workers refused to take up employment at the beginning of the new season.

[40] Next is the decision of the Court of Appeal in *Alliance* (1991).[49] The issue was whether six particular workers were employed on a permanent basis or on seasonal contracts of employment. The workers worked in the general services department, which had traditionally not been affected by seasonal layoffs. The workers claimed that they had been assured by a company representative that they would be employed in the department on an all year round basis. When they were laid off at the end of the season, they alleged that this was a breach of their employment terms and gave rise to a personal grievance.

[41] Having noted that the Labour Relations Act 1987 provided that an award prevailed over a contract of service to the extent that there was any inconsistency between the two, the Court of Appeal analysed the terms of the relevant award. It expressed its conclusion on this aspect of the case succinctly:[50]

---

46 See *NZALPA*, above n 44, at [75]–[77].
47 *Alliance* (1987), above n 28.
48 At 543.
49 *Alliance* (1991), above n 29.
50 At 150.

> The award is designed for a seasonal industry. The seasonal engagement of workers is a basic premise underlying the award. That is clear from cl 29(g), cl 30 and the leave provisions earlier referred to. Thus cl 30(c) providing for layoffs and re-employment to be based on departmental and/or group seniority, and cl 30(d) requiring a seniority list to be prepared for each department or group prior to the commencement of seasonal layoffs, necessarily govern the position of general services department workers. In order to uphold the claim of unjustifiable termination as advanced for the six workers, it would be necessary to disregard those award provisions. They are truly inconsistent with the co-existence of a contractual provision for permanent employment.

As will be obvious from the references in this passage, the provisions of the award were, materially, identical in some respects to provisions in the collective agreement.

[42] The Employment Court followed these decisions in *Richmond*.[51] Certain workers alleged that a meat company had locked them out unlawfully at the commencement of a new slaughter season. This raised the question whether the workers were employed under continuous contracts of employment, by virtue of which they were "employees" in the off-season, or whether their employment was discontinuous. By a majority, the Employment Court held that the workers were not employed under continuous employment contracts; rather, their employment was discontinuous.[52] Chief Judge Goddard dissented.

[43] Finally, we mention *Alliance* (2006), a decision of the Full Court of the Employment Court.[53] Section 63 of the Holidays Act 2003 gave certain leave entitlements to employees who had completed specified periods of "current continuous employment" with their employer. The Employment Court was required to assess how this provision applied to meat workers; specifically, the Court had to determine whether meat workers who worked on a seasonal basis resumed work at the beginning of a new season as new or as continuing employees. The Court concluded the meat workers' employment was terminated when they were laid off for the season and they were re-employed at the beginning of the new season. This was on the basis of the earlier authorities and the contractual arrangements between the parties.

---

51 *Richmond*, above n 30.
52 At 684–685 per Finnigan J and at 704 per Palmer J.
53 *Alliance* (2006), above n 32.

[44] Both Mr Jagose and Mr Hodder argued that the question whether these decisions were right or wrong was not one the Court had to consider. They submitted that the significant point was that the decisions were undoubtedly part of the shared background against which both parties (whom the Court of Appeal described as "embedded in [the] industry")[54] negotiated the collective agreement; the collective agreement carried over many of the award's provisions and should be interpreted consistently with that shared background.

[45] We agree with this submission. The authorities are firmly based on the view that seasonal employment in the meat industry is discontinuous. On an objective view, this was an important part of the background against which both AFFCO and the Union negotiated the collective agreement (and therefore the workers' individual employment agreements).[55] This is not to say that parties cannot negotiate different arrangements. The Court of Appeal gave the following provision from a collective employment contract as an example of an alternative arrangement:[56]

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

But absent some such explicit provision, we consider that the parties must be treated as having negotiated against the background that seasonal employment in the meat industry was discontinuous, which raises the question whether there is some such explicit indication to the contrary in the collective agreement.

---

54 *AFFCO* (CA), above n 4, at [49].

55 Other courts have recognised that judicial interpretations may be part of the relevant background: see, for example, in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 (HL), where Lord Hoffman accepted that the evolution of some forms of contract was often the result of interaction between drafters and court, so that some provisions could not be understood properly without reference to the meaning which judges had given to their predecessors over time: at 274. In *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10, (2005) 222 CLR 241 the legislative background was part of the context in which a redundancy agreement had to be construed: see at [13] per Gleeson CJ and McHugh J, at [50] per Gummow, Hayne and Heydon JJ and at [64]–[65] per Kirby J (who referred also to judicial interpretations of awards and other employment agreements).

56 *AFFCO* (CA), above n 4, at [49] citing the expired collective employment contract at a meat processing works in *Hughes v Riverlands Eltham Ltd* EmpC Wellington WEC58/96, 18 September 1996 at 3.

[46] One feature of the collective agreement (and the individual employment agreements based on it) is that it contains a number of provisions which were intended to confer continuing benefits or rights, or to impose continuing obligations. The presence of such provisions supports the continuous employment analysis as adopted by the Employment Court. However, we do not see this feature as a decisive indication as parties may have arrangements (as to re-employment, for example) which remain binding and enforceable even though employment terminates at the end of each season. Equally, we do not see it as decisive the other way that workers have a period where no work is offered and they have no right to any pay; that feature is seen in its most extreme form in "zero hours" employment contracts.

[47] While we acknowledge the point made by the Employment Court that conditions have changed since the awards were in force and some of the earlier cases were decided, we consider that the meaning of the collective agreement (and therefore the individual employment agreements) is clear. We agree with the Court of Appeal that it contemplates discontinuous employment. We consider that the language of key provisions such as cls 29, 30 and 31,[57] viewed in the context of the whole agreement, points strongly to discontinuous employment. While we accept Mr Cranney's submission that some provisions in the collective impose continuing obligations, that does not, as we have just said, necessarily mean that there was a continuing employment relationship – pre-acquired rights can survive termination of a contract. The background provided by the earlier decisions of the Arbitration Court, Court of Appeal and Employment Court confirms this view of the collective's meaning. There is nothing in the collective sufficient to negative the view that it reflects the approach established in the earlier authorities – quite the reverse, in fact.[58]

---

57 See above at [23]–[25].

58 We acknowledge that there may be rare situations where contracts have been negotiated against a background of judicial decisions as to the interpretation of particular clauses but where it is nevertheless arguable that those interpretations have become inappropriate for some reason: see *Beaufort Developments*, above n 55, for an example of this in the context of a construction contract.

(ii) Were the workers persons intending to work?

[48] We turn now to the question whether the workers were persons intending to work in terms of s 6(1)(b)(ii) (as defined in s 5). The Court of Appeal held that the second respondents did not fall within this definition, because the formal elements of an employment contract were required, rather than simply an intention by the workers to take up employment.[59]

[49] Mr Cranney argued that the second respondents were, during the off-season, persons intending to work within the s 5 definition, because they had been offered and had accepted work. Both the employer and the workers were parties to an ongoing agreement, although the workers had not yet begun work. The workers did not need to agree a new contract with AFFCO before they re-commenced work at the beginning of the new season because the collective (and individual employment agreements based on it) continued to apply.

[50] Two provisions of the collective agreement are particularly relevant to this argument, cls 29(e) and 30(b). Although we have quoted them earlier,[60] we reiterate their effect:

(a) Clause 29(e) provides that on termination at the end of the season employees are responsible for keeping AFFCO advised of their current addresses and of the phone numbers on which they wish to be contacted for employment at the beginning of the following season.

(b) Clause 30(b) provides that re-engagement for the new season is dependent upon employees completing AFFCO's induction process and signing an acceptance of terms of employment "(being any terms applying *in addition to those set out in this Agreement and applicable Site agreements*)" (emphasis added).

[51] The result was, Mr Cranney argued, that if workers had supplied their contact details, all they had to do was wait. Re-engagement was "mandatory and automatic"

---

59 *AFFCO* (CA), above n 4, at [56]–[57].
60 See above at [23]–[24].

unless the particular person was surplus to requirements for skill or other reasons. The terms of re-engagement were essentially settled.

[52] While this argument has some attraction, it does seem to us something of a stretch to describe a person who has left his or her name with AFFCO at the end of the season "a person who has been offered, and accepted, work as an employee".[61] Clearly, a person who has left his or her name has no obligation to present him or herself for work with AFFCO at the beginning of the next season. It might be argued that by responding to AFFCO's invitation to attend the initial presentation about the new season, a worker accepts an offer of employment made by AFFCO through the mechanism of the continuing provisions in the collective agreement (or the individual employment agreements based on it), but that argument was not developed in submissions and is not something that we need to decide in the present case.

[53] Accordingly, we prefer to deal with the case on the basis of the next argument, to which we now move.

(iii) What is the meaning of "employees" in s 82(1)(b)?

[54] The Employment Court accepted an alternative analysis to its principal analysis that the second respondents were "employees" in terms of s 6. The Court considered that even if the workers were not employees after the end of the 2014/2015 season, they had been locked out unlawfully by AFFCO when it required them to agree new individual employment agreements in order to work for the 2015/2016 season. The Court said:

> [197] Combined with its actions in current collective bargaining for a collective agreement with which the Union did not agree, AFFCO's refusal to re-engage the [workers] amounted to a lockout under s 82 of the Act. They were the acts of the employer of those employees in refusing or failing to engage those employees for work for which the employer usually employed employees, with a view to compelling those employees to accept terms of employment or, alternatively, to comply with the employer's demands (s 82(1)(a)(iv) and (b)).
>
> [198] AFFCO was prepared to accommodate the [workers] on some minor issues, and to withdraw particularly egregious and arguably unlawful

[61] Employment Relations Act, s 5.

> provisions. However, the evidence persuades us that AFFCO was intent upon achieving its outcomes in difficult collective bargaining, by purporting to re-engage the employees for the coming season effectively on its desired collective terms and conditions of employment, but contained in [individual employment agreements] rather than a collective agreement.
>
> [199] The lockout was unlawful. The company accepts that the lockout did not relate to bargaining for a collective agreement that would bind each of the employees concerned (s 83(b)(i)). It related to individual bargaining for [individual employment agreements] with the [workers]. Although [AFFCO] has conceded this exclusory factor, we may otherwise have had some doubts that the lockout was unrelated to the collective bargaining but both parties agree that this is so. It was, without doubt, unlawful in that it was imposed without the required notice to the employees. The defendant's actions purported to be a lockout, but we find that this was an unlawful lockout.

[55] This extract appears to refer back to a passage earlier in the Employment Court's judgment, when the Court noted that the s 6 definition began with the words "In this Act, unless the context otherwise requires". The Court said:

> [115] Can it be said that the "context" of the use of the words "employee" and "employer" in s 82 of the Act defining a lockout requires a different meaning to that provided in ss 5 and 6? Does the context of bargaining (especially collectively) mean that the words "employer" and "employee" and the plurals of those referred to in s 82(1), mean not only persons who have currently an employment relationship under s 4(2)(a) of the Act but also persons who have had previous relationships of seasonal employment and who are both wishing to engage in a further seasonal employment relationship after a seasonal lay-off? In that analysis, the reality of both the applicable history between the parties, and the relevant contents of the collective and/or [individual employment agreements] which governed their previous relationship as defined by ss 5 and 6 of the Act, will be relevant. This question applies particularly to s 82(1)(a)(iv):
>
> > … the act of an employer —
> >
> > …
> >
> > (iv) in refusing or failing to engage employees for any work for which the employer usually employs employees; and
> >
> > (b) … with a view to compelling employees … to
> >
> > (i) accept terms of employment; or
> >
> > (ii) comply with demands made by the employer.
>
> [116] We conclude that, at least in s 82(1)(a)(iv), the words "employees" and "employer" may extend to cover persons who are subject to a current employment agreement or who have not yet been offered and accepted employment. This meaning accommodates such seasonal employees as the

> second [respondents], even if [AFFCO] is correct that there is no ongoing employment relationship in the off-season.

[56] Although not entirely clear, we interpret these extracts as adopting a similar analysis to that which found favour with the Court of Appeal, namely that "employees" in s 82(1)(b) has a broader meaning than the definition of "employee" in s 6.[62] Mr Jagose challenged this interpretation of s 82 strongly.

[57] Mr Jagose drew attention to the Court of Appeal's statement of its conclusion:[63]

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

He submitted that the Court of Appeal had misconstrued s 82 and argued that the Court had usurped the function of the legislature by relying on circumstances extrinsic to the Act itself in its consideration of context, specifically, the contractual arrangements between the parties to the effect that the workers had a right to apply for re-employment and AFFCO had a "correlative duty" to offer re-employment subject to certain conditions.[64] Mr Jagose argued that the word "employees" in s 82 could only refer to persons who were employees at the time of the alleged lockout. In this case, the Court of Appeal had accepted that the second respondents were not employed by AFFCO at the time of the alleged lockout.

---

62 We interpret the Employment Court's judgment differently to the Court of Appeal on this point. The Court of Appeal appears to have considered that the alternative analysis referred to by the Employment Court at [195] of its judgment (*AFFCO* (EC), above n 3) was that AFFCO's actions amounted to a refusal to engage prospective employees within the meaning of s 6(1)(b)(ii): *AFFCO* (CA), above n 4, at [4] and [57]. While the Court of Appeal noted that the Employment Court had "touched on" the possibility of another alternative analysis under s 82, it stated that the Employment Court did not develop the analysis, going no further than simply "asking rhetorically within its continuity inquiry whether the 'context' of the use of the words 'employee' and 'employer' in s 82 requires a different meaning to that provided in ss 5 and 6": *AFFCO* (CA), above n 4, at [58].

63 *AFFCO* (CA), above n 4.

64 At [69].

[58] We begin our consideration of this aspect of the case by outlining the approach to be taken to context qualifications. The Court of Appeal discussed this topic in *Police v Thompson*.[65] The issue in that case was whether the word "bar" in s 259(7) of the Sale of Liquor Act 1962 included a bottle store. At the request of an adult friend, the defendant, who was 19, accompanied another friend in a car to a bottle store to pick up two kegs of beer which the adult friend had previously paid for. After the two had put the beer kegs into the boot of the car, they went back into the bottle store to collect the taps for the kegs. At that point, they were seen by a police constable. Upon being questioned, the defendant acknowledged that he was 19. He was subsequently charged with being in a "bar" under-age (at that time, under 21), contrary to s 259(7). Although "bar" was defined in the legislation in a way that included a bottle store, both the Magistrate at first instance and Hardie Boys J on appeal[66] held that the context of the relevant provision meant that the ordinary meaning of "bar" applied rather than the extended meaning in the statutory definition and that, on its ordinary meaning, the word "bar" did not include a bottle store. Accordingly, the charge against the defendant was dismissed. The Court of Appeal were unanimous in allowing the Crown's appeal, on the basis that the statutory definition applied.

[59] Three judgments were delivered. North P summarised the approach to be taken to context qualifications as follows:[67]

> The view I take is this: where a statute contains a definition section giving a word or phrase an extended meaning beyond its ordinary meaning, a Court of construction should commence its inquiry by assuming that the Legislature intended the word or phrase to have its statutory meaning. I would think that only rarely indeed will the Court be justified in departing from that meaning. It is entitled to do so only if the language of the section under construction requires a different meaning.

According to this extract, the focus of the contextual analysis is the language of the particular provision.

---

65 *Police v Thompson* [1966] NZLR 813 (CA).
66 *Police v Thompson* [1965] NZLR 935 (SC).
67 *Thompson*, above n 65, at 818.

[60] In his judgment, Turner J seems to have been prepared to take a wider view of the relevant context. The Judge said:[68]

> If "context" is used in its broadest sense, it may perhaps include the policy of the Act and the history of the legislation, and the consequences of a given interpretation, as well as the text surrounding the provision under examination. Hardie Boys J took all these into account. Before noticing his observations on these matters I will for myself say that all of them lead me to the conclusion that the definition in s 2 is applicable to the word "bar" in s 259(7).

His Honour then went on to discuss the policy and legislative history of the provision.

[61] Finally, having noted that, if the statutory definition applied, a bottle store was a "bar" for the purpose of the particular provision, McCarthy J made the following observation:[69]

> The definition is to be used "unless the context otherwise requires". This merely expresses the general law controlling the construction of statutes. It is indubitably the law that in order to arrive at the true meaning of any particular phrase in a statute that phrase is not to be viewed detached from its context in the statute, but is to be read with the whole context. Nevertheless, it would take a conflict of unmistakeable character, in my view, to justify a Court departing from a specific meaning which a statute expressly requires to be applied, if it reasonably can: … .

[62] To summarise, all members of the Court agreed that, where a word or phrase is defined in a statute, there is a high threshold to be crossed before a court will conclude that the definition was not intended to apply to the word or phrase in a particular provision in the statute. However, it is not clear whether the members of the Court agreed on what constituted relevant context. North P seemed to focus on the language of the particular provision under consideration, as did McCarthy J, whereas Turner J was prepared to give "context" a broader meaning, so as to include legislative history and policy considerations (including the consequences of particular interpretations).

[63] It may be that the different articulations of the test do not reflect significant differences in approach as a practical matter, however. Although North P referred to

---

[68] At 820–821.
[69] At 823.

the language of s 259(7) as being the key contextual consideration, he also gave prominence to policy considerations, as follows:[70]

> Approaching the appeal in this way, in my opinion it is manifest that there is no difficulty in fitting the defined meaning of the word "bar" into s. 259(7) *and indeed, in my opinion, there are cogent reasons why the Legislature should be concerned to keep minors away from that part of premises where liquor is sold*.

Moreover, the approach to interpretation mandated by the Interpretation Act 1999 (s 5(1) in particular)[71] needs to be borne in mind in this context, as in others.

[64] In *Barr v Police*, Wilson J, delivering the judgment of this Court, cited with approval the following statement from the then current version of *Burrows and Carter Statute Law in New Zealand* (citing *Thompson*):[72]

> A statutory definition is only displaced where there are strong indications to the contrary in the context. That is particularly so where the definition is the stipulative kind that extends the meaning of the word.

Wilson J went on to say:[73]

> Such indications as there are in the present context, however widely the context is understood, cannot be said to point strongly to giving the plain words other than their ordinary meaning. The definition is, in a sense, "stipulative" in nature because it restricts the meaning of the word "test" to a meaning that is not its usual meaning of subjecting blood to examination.

[65] Summarising what we consider to be the correct approach, where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court's consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing interpretations against the statute's purpose, against any other policy considerations reflected in the legislation and against the legislative

---

70 At 818 (emphasis added).

71 Section 5(1) of the Interpretation Act 1999 provides: "[t]he meaning of an enactment must be ascertained from its text and in light of its purpose".

72 *Barr v Police* [2009] NZSC 109, [2010] 2 NZLR 1 at [11]. The quoted extract appears in the current version of Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 439. See also the discussion at 438–441.

73 At [11].

history, where they are capable of providing assistance. While we accept Mr Jagose's point that the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained.

[66] Against this background, we turn to consider s 82.

[67] We have set s 82(1) above.[74] It will be recalled that it requires two elements:

(a) a specified act by an employer (s 82(1)(a)); and

(b) which is done for a specified purpose (s 82(1)(b)).

Two of the acts specified in s 82(1)(a) are "discontinuing the employment of any employees" (s 82(1)(a)(ii)) and "refusing or failing to engage employees for any work for which the employer usually employs employees" (s 82(1)(a)(iv)). In the first of these, the word "employees" obviously refers to existing employees. That is not true of the second, however. In the phrase "refusing or failing to engage employees", the word "employees" must cover persons who are not employees in fact but rather are seeking employment, as Mr Jagose acknowledged in his submissions.

[68] Turning to the purpose element in s 82(1)(b), the purposes identified are: to compel employees, or aid another employer in compelling employees, to "accept terms of employment" or "comply with demands made by the employer". Mr Jagose submitted that in the purpose provisions, "employees" was limited to those employed by the employer at the time of the relevant act. He argued that this reflected the fundamental characteristic of a lockout – there had to be an underlying employment relationship from which the employee could be locked out. The employer's action had to be directed at compelling an employee, who already had terms of employment under his or her existing employment agreement, to accept new terms of employment. While there were provisions in the collective and individual employment agreements which carried over beyond termination (at least as to priority for re-engagement), those provisions were insufficient to constitute the

---

[74] At [18].

minima necessary for an employment relationship. Mr Jagose pointed to other sections in the ERA which made explicit provision for people who were not at the relevant time employees: for example, the references in s 56A(6) to persons whom the employer might employ in the future and in s 63A(7) to certain employers' obligations extending to "prospective employees".

[69] In this context, Mr Jagose also drew attention to the strike provision, s 81. Relevantly, s 81(1) provides:

> **81 Meaning of strike**
>
> (1) In this Act, **strike** means an act that—
>
> (a) is the act of a number of employees who are or have been in the employment of the same employer or of different employers—
>
> (i) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or
>
> (ii) in refusing or failing after any such discontinuance to resume or return to their employment; or
>
> (iii) in breaking their employment agreements; or
>
> (iv) in refusing or failing to accept engagement for work in which they are usually employed; or
>
> (v) in reducing their normal output or their normal rate of work; and
>
> (b) is due to a combination, agreement, common understanding, or concerted action, whether express or, as the case requires, implied, made or entered into by the employees.

Mr Jagose emphasised the opening words of s 81(1)(a): a "strike … is the act of a number of employees who are *or have been* in the employment of the same employer" (emphasis added). This showed that the legislature was well aware of the distinction between current and former employees and included the latter where necessary. There was no similar language in s 82. Mr Jagose submitted that this was a further contextual indication that the definition of "employee" in s 6 applied in relation to s 82(1)(b).

[70] We are not persuaded by these submissions. Before we explain why, however, we need to address the "carry over" provisions in the collective agreement and in the individual employment agreements based on it. Mr Jagose accepted that even though the individual employment agreements terminated at the end of the 2014/2015 season, AFFCO was contractually obliged to offer re-employment for the 2015/2016 season in accordance with the seniority provisions in the agreements. However, Mr Jagose suggested in argument that other apparently continuing provisions in the agreements did not continue to apply after termination. Perhaps the most significant example is cl 30(b), which provided:

> 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*).
>
> (emphasis added)

The reason that this provision is important is that it seems to identify the terms that would apply on re-engagement, that is, the previously applicable terms (subject, of course, to any others that might be mutually agreed). If it is interpreted in this way, the clause limits AFFCO's ability on re-engagement to require workers to accept individual employment agreements that contain less advantageous terms.

[71] The term of the collective agreement was 1 May 2012 until 31 December 2013. Accordingly, it was intended to run across at least two seasons (more if the statutory extensions are taken into account). Given its multi-season coverage, it is to be expected that the agreement would address the terms to apply at the beginning of the new season while it was in effect. The critical question is, what happens when the collective and its statutory extensions come to an end? If, as Mr Jagose accepted, the re-engagement requirements based on seniority continue to apply, why do the other continuing provisions not also continue to apply, especially as there are continuing provisions for the benefit of both workers and AFFCO?

[72] One objection raised by Mr Jagose to the continued application of cl 30(b) was that it would mean that employment, although seasonal, was effectively perpetual, that is, as each new season commenced, AFFCO would have an obligation not only to offer re-employment based on seniority but to do so on the same terms as

in the relevant expired agreement (subject to any agreed variations). It is difficult to see, however, why that raises any difficulty of principle. Putting fixed term contracts to one side, employment contracts are generally perpetual, in the sense that they apply until the employee resigns or retires, or until he or she is terminated for cause or as a result of redundancy. In any event, the parties no doubt contemplated that the collective agreement would be replaced by another collective, given that they starting negotiating for a new one before the old one expired. More importantly, however, it is difficult to see any principled basis on which one continuing obligation (to offer re-employment) survives termination, but others do not. It is not possible, in our view, to differentiate between the various continuing obligations in the agreements in this way.

[73] In the result, then, we consider that there are continuing obligations in the collective agreement, and in the individual employment agreements based on it, which survive termination. One of these is AFFCO's obligation to offer re-engagement in accordance with seniority at the start of the new season. Once it is accepted that the obligation to offer re-employment survives, we consider that the other continuing clauses also remain in effect, including cl 30(b).

[74] We turn now to the reasons for rejecting Mr Jagose's submissions on the meaning of "employees" in s 82(1)(b).

[75] First, we consider that the word "employee" is used in s 82(1)(a) in different senses, one of which does not fall within the s 6 definition, that is, "employees" in s 82(1)(a)(iv). As we have said, there is no dispute that "employees" in that context means persons seeking employment. We also consider that the context indicates that "employees" in s 82(1)(b) carries a broader meaning than simply existing employees (including persons who have been offered and have accepted work as employees). One of the specified purposes is compelling employees to accept terms of employment. Given that existing employees will already have terms of employment, it might have been expected that the provision would have used language such as "new", "different" or "more onerous" terms of employment had the intention been to limit the specified purpose to compelling existing employees. As written, the

language is apt to include persons seeking employment (subject to the qualification expressed below).[75]

[76] Second, s 82(1)(a)(iii) refers to the act of an employer "in breaking some or all of the employer's employment agreements". In a seasonal employment situation where employment is terminated at the end of the season and re-engagement occurs at the beginning of the new season, there may be terms of employment that carry over beyond termination, as in the present case. The Act recognises in other contexts that an employer may breach such a term, even after employment has ended.[76] If such a continuing obligation was breached by an employer and the employer's act was intended to compel the particular worker and/or similarly placed workers to accept new and less advantageous terms of employment, there is no linguistic reason that "employees" in s 82(1)(b) should not be read as applying to those workers. Moreover, we consider that this interpretation conforms with the legislative purpose. We see no substantive difference in this context between seasonal workers who have a permanent employment clause and seasonal workers such as the second respondents who do not.

[77] Third, although a direct comparison cannot be made between the strike and lockout provisions given their different requirements,[77] we think it significant that a strike may involve acts by persons who are no longer employees. In principle, there seems to be no reason why the lockout provisions should not apply to acts committed by an employer for the purpose of making a person accept particular terms of employment, in circumstances where the person is owed employment obligations by the employer, although he or she is not actually employed at the time.

[78] We must make explicit a limitation that is implicit in what we have said in the preceding paragraphs. It is not the case that an employer who refuses to hire a new employee because the two are unable to agree terms of employment will, for that reason alone, have locked out the potential hire. As we have emphasised, the second respondents in this case were not, in contractual terms, strangers to the

---

75 See below at [78].

76 Employment Relations Act, s 103(1)(b).

77 Whereas s 82 requires an act committed for a purpose, s 81 requires an act that results from a combination or concerted action by employees.

employer. Rather, they were people who had previously worked for AFFCO and to whom AFFCO owed contractual obligations, including as to re-hiring, even though their employment had terminated at the end of the previous season and they were seeking to be re-engaged for the new season. That feature of termination plus re-engagement under the umbrella of a number of continuing obligations distinguishes this case. Like the Court of Appeal, we consider that the relationship between AFFCO and the second respondents was sufficiently close to bring the latter within the scope of the word "employees" in s 82(1)(b).

[79] Mr Jagose argued that even this limited approach was over-broad. It created the risk of "collateral damage" as there were others who might be caught within it, such as people on parental[78] or volunteer[79] leave. As we understood it, Mr Jagose's point was that although there will be no difficulty where an employee's position is held open, in the relatively rare situations where the employee's position cannot be held open, so that the employee is left with a preference for re-employment, there is a real risk of the employer being found to have "locked out" the employee if the Court of Appeal's approach is accepted. As he put it, if the Court of Appeal is right, there is now no ability to distinguish between a straightforward offer of employment and an offer that constitutes a lockout.

[80] We do not agree. The examples given relate to matters which are the subject of particular legislation, and it is that legislation that will determine the rights and obligations of employees and employers in the particular settings. Nor do we agree with Mr Jagose's argument that the Court of Appeal's decision means that an offer by AFFCO to a returning worker of identical terms of employment to those which he or she enjoyed during the previous season would amount to a lockout. On the basis of cl 30(b), those terms and conditions would continue to apply unless and until the parties agreed alternative terms and conditions, so the issue of lockout does not arise.

Jurisdiction

[81] Finally, we come to the question of jurisdiction under s 214 of the ERA. As we have said, Mr Cranney raised the question whether the Court of Appeal had

---

[78] Parental Leave and Employment Protection Act 1987.
[79] Volunteers Employment Protection Act 1973.

jurisdiction, an argument that, if accepted, would have left the decision and reasoning of the Employment Court intact. As Mr Cranney did not develop the point in submissions, we will deal with it briefly.

[82] This Court discussed the relevant principles in *NZALPA*.[80] We have no doubt that there is jurisdiction in this case, for two reasons. As the Court of Appeal noted in *Sears v Attorney-General*, the authorities established that the Court was:[81]

> … not precluded from examining questions of principle going beyond a particular term of a contract and that where the Employment Court errs in principle in how it goes about interpreting the contract, that is an error of law for appropriate consideration by this Court …

The Court then went on to say that the same applies where crucial questions concern the interpretation and application of legislation.[82] The present case illustrates both elements of this.

[83] First, the Employment Court erred in principle in its treatment of context. As we have said, the Employment Court treated the geographic setting of AFFCO's plants (in small communities) as part of the context against which the collective agreement had to be interpreted and distinguished the earlier authorities discussed above on the basis that they were decided in circumstances which were very different from those currently applying. It did not address at all the argument that the earlier authorities were part of the background against which the parties to the collective agreement negotiated, although the Chief Judge did raise the point with counsel in the course of argument. This approach constitutes an error of principle in the interpretation of the collective agreement sufficient to found jurisdiction.

[84] Second, as is obvious, this case depends crucially on the interpretation of certain legislative provisions, in particular s 82(1)(b) of the ERA, so that the Court has jurisdiction for that reason also.

---

80 *NZALPA*, above n 44, at [21]–[66].
81 *Sears v Attorney-General* [1995] 2 ERNZ 121 (CA) at 125.
82 At 125.

Decision

[85] The appeal is dismissed. The appellant must pay the first respondent costs of $35,000 plus reasonable disbursements. We certify for two counsel.

Solicitors:
M A C Williams, Hamilton for Appellant
Oakley Moran, Wellington for Respondents
Chapman Tripp, Wellington for Intervener