IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 94
EMPC 152/2015

IN THE MATTER OF	an application for interim injunction
BETWEEN	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INC First Plaintiff
AND	ROBERTA KEREWAI RATU AND OTHERS Second Plaintiffs
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing:	16 June 2015 (Heard at Rotorua)
Appearances:	SR Mitchell, counsel for plaintiffs G Malone and R Webster, counsel for defendant
Judgment:	17 June 2015

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN

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[1] This interlocutory judgment determines the plaintiffs' claim for an interlocutory and interim injunction restraining AFFCO New Zealand Limited (AFFCO) from offering the second plaintiff employees new terms and conditions of employment in individual employment agreements. That is because the plaintiffs say that doing so constitutes an unlawful lockout. The plaintiffs claim that AFFCO insists that the second plaintiffs must agree to these before starting work at its Rangiuru plant at Te Puke as from 22 June 2015, the start of the new meat slaughtering and processing season.

[2] The second plaintiffs are meatworkers who, until they were laid off at the end of the last processing season in mid-April 2015, were employed by AFFCO at Rangiuru. Although the defendant's evidence is equivocal in that either 70 per cent

of its workforce across New Zealand were not members of the Union, or that 70 per cent of its workforce at the Rangiuru plant were likewise not unionised, it seems clear in any event that there is a not insignificant element of the workforce at Rangiuru which is not unionised.

[3] It also appears that AFFCO's Rangiuru plant is among the first, if not the first, of AFFCO's to be about to restart after the off-season and to re-engage employees for this purpose.

[4] Because the plaintiffs claim that AFFCO has indicated that its offers of employment to union members on its new form of individual employment agreement had to be accepted by the end of yesterday to enable employees to commence work on 22 June 2015, the interlocutory injunction application has been heard urgently and this judgment is being delivered as soon as possible following that hearing. The hearing yesterday occupied almost a full day and expanded significantly upon the issues originally raised in the pleadings. That is usually inherent in cases such as this and has necessarily made the proceedings more complex and difficult. It only emerged during the hearing that the ramifications of the Court's decision are significant, affecting not only AFFCO's Rangiuru plant but other AFFCO plants and perhaps even other meat company plants throughout New Zealand. In these circumstances, the Court indicated that it would deliver its decision in writing by the close of business today. Mr Mitchell, on behalf of the plaintiffs, undertook to obtain urgent instructions from his clients and, in turn, AFFCO agreed to delay the deadline for accepting applications for employment until Thursday 18 June 2015. This delay of about two days should still enable the Rangiuru plant to begin processing bobby calves, as it plans to do on 22 June 2015.

[5] An interlocutory injunction requires parties to adhere to an interim solution of their dispute until it can be heard and judged on its merits including by evidence and legal submissions on what is, as I have already said, a difficult and controversial issue of employment law. At the end of this judgment I will deal with timetabling matters to a substantive hearing.

[6] For these reasons, the tests that the Court must apply to the plaintiffs' application are three:

[7] First, the plaintiff must establish that there is a serious or arguable case for trial.

[8] If so, the Court must determine where the balance of convenience may lie between the parties during that period. One element of assessing that balance is whether a subsequent substantive remedy in the plaintiffs' favour (a permanent injunction or an award of damages) may be adequate if interlocutory injunctive relief is not granted. Essentially, the balance of convenience test is to determine whether it will be more just to grant the injunction the plaintiffs seek in the event that the defendant is successful at trial or, vice versa, it will be more just to refuse the interlocutory remedy in the event that the plaintiffs do succeed.

[9] The interlocutory relief sought being discretionary, the Court is required to stand back from the detail of the first two tests and determine whether the overall justice of the case warrants the grant of an injunction as sought.

[10] The following is the essential context in which the application has come before the Court.

[11] AFFCO owns and operates a meat slaughtering and processing plant at Rangiuru in Te Puke. This is one of a number of meat works in New Zealand owned and operated by AFFCO or by associated companies. The first plaintiff Union has members at the Rangiuru plant and at other AFFCO plants throughout New Zealand. The second plaintiffs number approximately 190 members of the Union who were engaged as employees at AFFCO's Rangiuru plant when it closed, as usual, temporarily about two months ago at the conclusion of the 2014-2015 season. Union members constituted a significant proportion of the plant's workforce at the end of the last season in April 2015.

[12] The Union and AFFCO were parties to a collective agreement which, together with a "shed" agreement affecting the Rangiuru plant (the contents of which

are not in issue in this case), determined many of the terms and conditions of the second plaintiffs' employment with AFFCO. That collective agreement expired in December 2013 and although the parties have been in negotiation for a replacement collective agreement since that time, those negotiations have run into difficulties and have stalled. There are proceedings which are being brought by the Union in the Employment Relations Authority alleging bad faith bargaining in those collective negotiations by AFFCO, but those matters are not before the Court today.

[13] Pursuant to s 53 of the Employment Relations Act 2000 (the Act), the expired collective agreement remained in force for the period of 12 months to 31 December 2014. It therefore covered the terms and conditions of employment of the second plaintiffs for at least the first part of the 2014-2015 season. The plaintiffs say that for the balance of that season they were employees of AFFCO on individual employment agreements which were based on the expired collective agreement.

[14] AFFCO says that as from the close of the last season on or about 15 April last and the laying off of the second plaintiffs, they are no longer its employees. Rather, AFFCO says, they are applicants for employment for the forthcoming season. In the absence of an applicable collective agreement, AFFCO says it is entitled to offer them employment on its terms and conditions specified in its form of individual employment agreement which the second plaintiffs are free to accept or reject, but in the absence of agreement to which they will not be employed. AFFCO says that both the process by which it is now offering employment and the contents of its form of individual employment agreement, are lawful.

[15] As has long been the case in the meat industry, employees laid off at the end of a season have a number of options open to them. Some take holidays; some live on savings; others obtain such alternative temporary employment as they are able to (in the case of the Rangiuru works, in the kiwifruit industry in the Bay of Plenty in particular) and there may be other options that those employees are free to exercise. Most, but potentially not all, employees from a previous season will traditionally be re-engaged by meat companies such as AFFCO for the commencement of the new season. Certain practices such as seniority, the possession of required skills, and the like will dictate if and when such employees are re-engaged.

[16] The standard terms and conditions of AFFCO's new individual employment agreements offered to the second plaintiffs largely (but not completely) mirror, in effect, its proposed form of collective agreement for which it is currently in bargaining with the Union. The Union says that these new proposed terms and conditions of employment are detrimental to its members in the sense that, among other things, they will be required to work longer and more arduously for less income. The second and third of these assertions, at least, are disputed by the defendant.

[17] I simply mention at this point that it is surprising that the prolonged bargaining just described, and the stalemate which the parties have reached, has not been the subject of bargaining facilitation by the Authority or even of assistance by a skilled and experienced mediator, as is one of the services offered by the Mediation Service of the Ministry of Business, Innovation and Employment (MBIE). The parties had, however, been put on notice by the Court that they may be directed to mediation as required by the legislation. At the end of yesterday's hearing that was done by oral interlocutory judgment.[1]

[18] AFFCO is insistent that new terms and conditions of employment be agreed to before any of the second plaintiffs are re-engaged. The second plaintiffs and the Union are opposed to beginning work on those terms and conditions on which they say the company is insisting. Many of the second plaintiffs are longstanding meat industry employees who have always wanted, and continue to want, the Union to negotiate their terms and conditions of employment collectively. To a greater or lesser extent, however, money is running out for many of the second plaintiffs. They are under pressure to either agree to AFFCO's new individual terms and conditions (or with minor variations of them) if they are to be re-engaged at the plant where many have worked for long periods or, effectively, to give up work, at least for AFFCO. In those circumstances, they must attempt to find alternative jobs for which they are not skilled or qualified and which may not exist currently in or around Te Puke.

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

[19] The method by which individual employees are being engaged by AFFCO is unusual. They have been contacted initially by telephone and letter on the basis that at the close of the season in mid-April 2015 they expressed their interest in re-engagement for the new season. Those persons were then invited to one of several meetings consisting of a number of such employees and representatives of the company. At those meetings a prepared statement was read out by one of the company representatives and the company's draft form of individual employment agreement was handed out.

[20] The company representatives declined, deliberately, to answer any questions about the process or about the contents of the proposed individual employment agreements. Prospective employees were invited to take these away, consider them and, if they wished, to arrange a one-on-one meeting with a company representative although at which the second plaintiffs were permitted to bring a representative. Either at such a meeting or otherwise, the prospective employees were invited to return the company's form of individual employment agreement (a complex 36-page legalistic contract resembling more one for a senior manager than for a meatworker) to the company signed by the prospective employee. The company would then determine whether to accept this "offer" of employment by the employee and, if it did so, would then sign the agreement.

[21] This is an apparently unique means of engaging (and especially re-engaging) employees. It is counter-intuitive to describe an employee's execution of a form of individual employment agreement, prepared by the employer and with which the employee disagrees, as an offer by the employee to be employed by AFFCO on its terms and conditions and which offer might or might not be accepted by AFFCO.

[22] AFFCO has asserted in submissions by counsel that it is not requiring absolute acceptance of its form of individual employment agreement before any employee will be re-engaged. It also says that in a few cases it has been prepared to agree to minor amendments to that formula. However, the "Presentation Handout" to the second plaintiffs "for intended IEA covering the new season" establishes more reliably at this stage the defendant's position. That was:

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

[23] That document made no mention of negotiation at the individual meetings that it offered between prospective employees and the company. It is arguable for the plaintiffs that the clear impression intended by AFFCO and conveyed to the second plaintiffs, was that the agreements were largely, if not completely, non-negotiable. So, too it is arguable, was the impression created by the form of agreement handed out. It was in a final executable format. It was, as already noted, very lengthy and legalistic. It contained schedules that set terms and conditions not simply for each particular individual employee, but for the whole workforce.

[24] AFFCO's case is that a significant number of persons have already signed these agreements but that it cannot operate the Rangiuru plant with a workforce that is on different terms and conditions. In effect, AFFCO's workforce at Rangiuru must be on materially identical individual employment agreements for the plant to operate.

[25] That, too, reinforces the impression that the terms and conditions on which the second plaintiffs will be re-engaged will be essentially those already presented to them by AFFCO. It is notable that although offered, during the course of the hearing, an opportunity to negotiate such agreements with employees, either collectively or individually, AFFCO declined this opportunity. To be fair, however, so too did the Union on behalf of the plaintiffs. The parties apparently saw no alternative to litigation to resolve this dispute. In the circumstances, it is difficult to argue against the plaintiffs' contention that AFFCO desires to have, in effect, a collective agreement (although in the form of materially identical individual employment agreements) on its own terms and conditions absent any collective bargaining or even any effective individual bargaining.

[26] The parties' contest about whether the plaintiffs have an arguable case for trial turns on a combination of statutory provisions, employment agreement clauses,

and decided case law. The statutory provisions, some of which are new, include ss 80, 82, 83, 85, 86, 86B and 91 of the Act. The contractual provisions are contained in the parts of the expired collective agreement carried through to the employees' individual employment agreements based on that collective agreement. The case law turns on a number of judgments of this Court, its predecessor, and the Court of Appeal, although the last one of which was decided almost 10 years ago.

Discussion of arguable case issues

[27] What is the nature of the current relationship between the second plaintiffs and AFFCO? The company says that there is none unless and until the second plaintiffs are engaged (or re-engaged) on new individual employment agreements so that it is entitled, in law, to stipulate the terms and conditions of employment on which the second plaintiffs will be engaged.

[28] The plaintiffs assert, however, that there is an arguable case of an ongoing employment relationship between the second plaintiffs and AFFCO, even although they have been laid off and have not, at least yet, been re-engaged.

[29] To determine whether there is an arguable question for trial on the existence and nature of such a relationship, it is necessary to go back to the employment relationship that the second plaintiffs and the defendant had during the 2014/2015 season. There is no doubt that for the first part of that season, until 31 December 2014, the essential terms and conditions of the second plaintiffs' employment were those set by the last, but then expired, collective agreement between the parties. That was the effect, in law, of s 53 of the Act which provides as follows:

> **53 Continuation of collective agreement after specified expiry date**
> (1) A collective agreement that would otherwise expire as provided in section 52(3) continues in force—
> (a) if subsection (2) is complied with; and
> (b) for the period specified in subsection (3).
> (2) This subsection is complied with if the union or the employer initiated collective bargaining before the collective agreement expired and for the purpose of replacing the collective agreement.
> (2A) However, a collective agreement that binds 2 or more employers continues in force in relation to an employer that has opted out of bargaining under section 44A, but only—

> (a) if (after the employer's opt-out notice takes effect and before the collective agreement expires) the employer or the union initiated collective bargaining for the purpose of replacing the collective agreement; and
> (b) for the period (not exceeding 12 months) during which bargaining continues for a collective agreement to replace the collective agreement that has expired.
>
> (3) The period is the period (not exceeding 12 months) during which bargaining continues for a collective agreement to replace the collective agreement that has expired.
>
> (4) However, for the purposes of calculating the period referred to in subsection (2A)(b) or (3), the period referred to in section 50K(3)(b) is to be disregarded if—
> (a) the Authority or the court determines that the collective bargaining has concluded; and
> (b) the determination has been successfully challenged or appealed against.

[30] What was the position between December 2014 and the end of the last season when the employees were laid off? There is again no disagreement that the terms and conditions of their employment remained the same as they had been before December 2014. That factual commonality is consistent with the established law about the consequence of the expiry of a s 53-deemed applicability of a collective agreement.

[31] After December 2014, the legal position was that the second plaintiffs were engaged on individual employment agreements based on the provisions of the former collective agreement. This meant, in law, that if AFFCO had sought to alter any of those former terms and conditions of employment set by the collective agreement, it would have had to bargain individually with the second plaintiffs and would have had to obtain their agreement to any amendments. It appears that it chose not to do so but, rather, to wait until the employees were laid off at the end of the season. In that event, it considered that it would be entitled, in law, to impose its own preferred individual terms and conditions of employment in new individual employment agreements without the risk of any arguments of inconsistency with the expired collective agreement.

[32] At least to the close of the 2014-2015 season in mid-April last, the second plaintiffs' individual terms and conditions of employment based on the expired collective agreement contained a number of provisions which both contemplated, and arguably imposed on AFFCO and the employees, employment obligations and

rights. That was even although the actual working parts of the relationship between the second plaintiffs and AFFCO may have ceased for the off-season.

[33] The following parts of the individual agreements and the expired collective agreement relating to 'continuity of employment' set out those provisions which survive both the expiry of the extended duration of the collective agreement, and the seasonal layoff:

> **SECTION 6: TERMS OF EMPLOYMENT**
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> **29. SEASONAL EMPLOYMENT**
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> …
>
> 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).
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> …
>
> e) Upon termination at the end of the season the employee is responsible for keeping the employer advised of their current address and phone number if they wish to be contacted for employment at the commencement of the next season.
>
> **30. SECURITY OF EMPLOYMENT**
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> a) The employer acknowledges the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required.
>
> b) Re-engagement is dependent upon employees completing the employer's induction process and signed acceptance of terms of employment (being any terms applying in addition to those set out in this Agreement and applicable Site agreements).
>
> **31. SENIORITY**
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> a) Employees shall have seniority in accordance with the date of their commencement of employment with the Company and in accordance with the provisions of this Agreement.
>
> b) All things being equal, layoffs and re-employment will be based on departmental and/or site (as appropriate) seniority and will operate on a last on first off basis, subject to the experience, employment record, competency and skills of the individuals, also the need to maintain an efficient, balanced workforce. (The Department Supervisor shall consult with the Union Delegate

> prior to lay-offs of employees before making a recommendation to the Plant Manager).

[34] These are important elements because the plaintiffs rely, to establish a lockout of the second plaintiffs, upon the provisions of s 82(1)(a)(iii) and (iv) and subs (b) of the Act. The definitions of "lockout" involves two constituents. The first, which may be described as the factual constituents, include the act of an employer "in breaking some or all of the employer's employment agreements …" and "in refusing or failing to engage employees for any work for which the employer usually employs employees …". Although the plaintiffs relied initially on (iv), Mr Mitchell expanded this to include subs (a)(iii) in the course of argument. The defendant had an opportunity to address that expanded submission and was able to do so because its arguments really cover both subsections. The 'motivational' or 'mental' second and essential element of a lockout is required by s 82(1)(b). The relevant factual element or elements must be "done with a view to compelling employees …" to either "accept terms of employment" or to "comply with demands made by the employer". As will be seen, there are several references to "employer", "employment agreements", "employees" and "terms of employment" within those definitions of a lockout.

[35] Are the second plaintiffs arguably still the "employees" of AFFCO?

[36] The defendant's case is, simply, that because there is now no employment relationship between it and the second plaintiffs, it cannot meet the definition of "employer"; the second plaintiffs cannot be "employees"; and there is no "employment agreement".

[37] The plaintiffs' case, however, relies on a rarely, if ever, examined or used definition of the words "employer" under s 5 of the Act and "employee" under s 6 of the Act. Although "employer" under s 5 "means a person employing any employee or employees", that in turn depends on the definition of "employee" which is contained in s 6. This appears to mean "any person of any age employed by an employer to do any work for hire or reward under a contract of service" and "includes … a person intending to work …". That category of "employee" is likewise further defined as someone who has been offered and accepted employment

even although the job may not have begun. Under s 5, the definition of a "person intending to work" "means a person who has been offered, and accepted, work as an employee; and **intended work** has a corresponding meaning."

[38] Each of the foregoing definitions under ss 5 and 6 is, however, qualified by the introductory words "unless the context otherwise requires. So, while Mr Mitchell accepts that the second plaintiffs may not meet the express s 6 definition of "employee", he argues that they are nevertheless employees because the context of s 82 requires a different and expanded definition of that word.

[39] That does not appear to be a point that has ever been examined specifically despite previous cases determining that a 'prospective employee' or person who proposes or wishes to work (as the second plaintiffs do), is not an employee for the purpose of the definition of a lockout.

[40] On the question whether "unless the context otherwise requires" in a definition of a word or phrase, the definitions of "employee" (and "employer") were examined by the Court of Appeal in *Tucker Wool Processors Ltd* v *Harrison.*[2] The Court referred to the qualifier to the definitions (in s 2 of the Employment Contracts Act)". The Court held that the context of the bargaining provisions of pt 2 of the Employment Contracts Act and of s 57 in particular to apply to a 'prospective', as well as an existing, employee or employer. Those parts of the legislation dealing with prospective employers and employees, and their freedoms of association, were distinguishable by their subject matter from the latter substantive parts of the Act concerned with issues arising after the employment relationship had been established.

[41] It is arguable, I conclude, for the plaintiffs that the definition of "employee" under ss 5 and 6 of the Employment Relations Act may, in circumstances such as these where there is a seasonal layoff and re-engagement of employees, extend to cover the situation of prospective employees, persons such as the second plaintiffs. It would be inappropriate to determine any more certainly that this is or will be so.

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[2] *Tucker Wood Processors Ltd v Harrison* [1999] ERNZ 894.

All that is required is a serious or arguable question and I conclude that the plaintiffs have established that in the circumstances of this case.

[42] Mr Mitchell's argument is that although many persons who may be locked out by an employer may be employees in the usual and express statutory sense under ss 5 and 6, the word "employee" in s 82 should be interpreted more broadly. That is because, for example, persons seeking new employment in a greenfields enterprise, or with an existing enterprise that is expanding its operations to take on further and new employees, may not be either employees actually in work or persons intending to work as defined expressly and statutorily. However, they may nevertheless be the subject of compulsion by an employer to accept terms of employment or to comply with demands made by the employer and the employer's refusal or failure to engage those persons for any work for which the employer usually employs employees. Mr Mitchell contends that such prospective employees may be able to be locked out under s 82.

[43] Section 61 of the Act also arguably governs the current legal position between the parties. Subsection (1) is inapplicable because it deals with the terms and conditions of an employee who is bound by an applicable collective agreement although at least one part of the subsection will become relevant to s 61(2) which addresses the position on the plaintiffs' contention

[44] Subsection (2) provides:

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

[45] In this case the applicable collective agreement has expired. Subsection (2)(a) provides that in these circumstances, the second plaintiffs were and arguably are employed under individual employment agreements based on the expired

collective agreement and on any additional terms and conditions agreed under subs (1). Subsection (2)(b) also allows the employer and the employees to agree mutually to vary the individual employment agreement based on the expired collective agreement.

[46] On the plaintiffs' argument, subs (2)(a) is engaged. If that is so, another controversial question is whether the individual terms and conditions being offered by the defendant to the second plaintiffs, amount to "any additional terms and conditions agreed under subsection (1) …".

[47] Referring back to subs (1) (which deals with individual terms and conditions of employment that are additional to those in a collective agreement), subs (1)(b) provides that these must be "not inconsistent with the terms and conditions in the collective agreement". In the context of subs (2) and this case, the reference to "the collective agreement" would be to the expired collective agreement if the plaintiffs are right.

[48] So, the question must be posed, if cl 30 of the expired collective agreement remains as an existing (collective) term of the second plaintiffs' individual employment agreements based on the expired collective agreement, is the employer entitled to insist on "terms of employment (being any terms applying in addition to those set out in this Agreement and applicable site agreements)"?

[49] These are all difficult, complex, and largely un-navigated waters.

[50] I turn next to the case law on which AFFCO relies about the nature of the relationship between a meat company and its laid off staff who wish to be re-engaged for the forthcoming season. A number of cases are relied on by the defendant to support its argument that there is no employment status by agreement at this time. The plaintiff, for reasons which will be examined, submits that each of these judgments is distinguishable or no longer applicable under the current legislative regime or, alternatively, that they were wrongly decided and should now be the subject of fresh judicial examination in this case.

[51] The first in time is *NZ Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd*.[3] That case was decided under the provisions of the Industrial Relations Act 1973 (although by the Labour Court then constituted under the Labour Relations Act 1987) and under a 1986 national Award covering all meat company employers in New Zealand. As slaughtering was about to commence at the start of a new season, employees did not attend the works because a document setting out their terms and conditions of employment had not been executed by the employer. It suspended other employees who were preparing machinery for a new killing season. The lawfulness of the suspensions required the existence of a strike by the slaughtermen. The Union contended that there could not have been a strike because there was no contract of employment with the yet-to-be engaged slaughtermen. That position was upheld, the Court finding that the existence of a contract of employment was fundamental to a strike, and that there was no such relationship in the off-season between the employer and the slaughtermen.

[52] The definition of "strike" was then set out in s 123 of the Industrial Relations Act. It contained materially similar definitions to those of the factual elements of a lockout in the current s 82 of the Employment Relations Act. These referred to the acts of workers or former workers of the employer doing things in relation to their "employment", their "contracts of service" and the like. There was a similar qualification to the definition of "worker" in the 1973 Act as there is now attaching to the definition of "employee", that is "unless the context otherwise requires". This point appears not to have been taken before, or considered by, the Court.

[53] The Labour Court accepted that for there to be a strike, there had to be a contract or contracts of employment between the relevant parties. It relied on the definition of "worker" under s 2 of the Industrial Relations Act as "any person of any age of either sex employed by an employer to do any work for hire or reward …". The Labour Court concluded that both under the relevant statute and pursuant to the relevant Award, the existence of an employment contract between the parties was essential if there was to be a strike because such a relationship was necessary under the statutory definition of that action.

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[3] *NZ Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd* [1987] NZILR 537; (1988) 2 NZELC 95,850.

[54] Next in time is the judgment in *NZ Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd.*[4] That was an appeal against a decision of the Labour Court affecting seasonal freezing workers who claimed to have been transferred to positions offering "all year round employment" but who were later laid off. The case arose by way of personal grievances alleging unjustified disadvantage in employment. The Labour Court had dismissed these claims because it considered the relevant Award had classified the workers as seasonal/hourly workers who could be and were laid off legitimately under the Award's prescribed criteria.

[55] Dismissing an appeal against that decision of the Labour Court, the Court of Appeal concluded that the Award applied to the employees in question and provided for their seasonal engagement. The case turned on the primacy of an Award provision over a contrary assurance given by the employer of continuity of employment. The Court of Appeal held that the Award was designed for a seasonal industry having, as a basic premise underlying it, the seasonal engagement of workers. Its provisions were not to be disregarded and prevailed in the case of inconsistency with such elements as expectations of, and promises made to, relevant employees.

[56] The next judgment is *NZ Meat Workers IUW v Richmond Ltd.*[5] That was a judgment (by a majority) of a full Court of the Employment Court. Despite a strong dissent of Chief Judge Goddard, the majority (Judges Finnigan and Palmer) concluded, in relation to a claim of lockout of workers at three plants during the off-season, that the constituents of a lockout were not established. The facts bear some strong resemblances to the facts in this case.

[57] The employees had been on individual contracts of employment based on an expired collective contract made under the Employment Contracts Act 1991. Negotiations between the Union and the employer for a new collective contract had broken down and were at a stalemate. The employer called seasonally laid-off staff back to work for the start of the new season pursuant to seniority and other provisions which had formed part of their individual employment contracts during

[4] *NZ Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143.
[5] *NZ Meat Workers IUW v Richmond Ltd* [1992] 3 ERNZ 643.

the previous season. Those persons were presented with a re-hire agreement on the employer's terms agreement to which was a condition precedent to their commencing work. At two plants the defendant refused to re-hire or re-engage the workers unless they accepted the terms and conditions of a new plant-specific collective employment contract and rescinded the Union's authority to represent them in negotiations. The Union argued that this amounted to an unlawful lockout because of the failure to give notice in an essential service. The majority of the Court concluded that the employer had not assured workers contractually that it would re-employ them on the same terms as the previous season and had, therefore, not offered them employment on those terms before the commencement of the new season. The majority also concluded:[6]

> … the contract of employment of a meatworker who has been seasonally laid off does not thereafter legally continue to subsist through off-seasonal suspension … [A] meatworker's contract of employment is terminated when he or she – as the case may be - is laid off and a new contract of employment entered into when a particular worker is re-employed at the commencement of the succeeding killing season.

[58] Further, the majority concluded that a seniority list represented a continuing future obligation arising out of a term of the individual employment contracts which were terminated at the seasonal layoff but that the senior, superannuation, share purchase arrangements, gear storage, and holiday pay obligations which continued during the off-season did not constitute a continuing and enforceable employment contract.

[59] The reasoning of the majority of the Court appears in the judgment of Judge Palmer. Relevantly he said:[7]

> This provision [s 19(4) of the Employment Contracts Act dealing with the expiry of a collective contract], according to its very explicit tenor, applied to meatworkers who, subsequently to the expiry of the award, continued in the employment of their respective employers. At the conclusion of the 1991 killing season when meatworkers were progressively laid off and their seasonal contracts of employment terminated, s 19(4) ceased, I conclude, to have continuing application to such workers. They were no longer employed by their respective employers following their off-season layoffs.

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[6] At 692 per Palmer J.
[7] At 701.

[60] Section 19(4) of the Employment Contracts Act provided:

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

[61] Significant to that deemed continuation were the qualifying words "each employee who continues in the employ of the employer". That is a different provision from the current s 61(2) of the Employment Relations Act dealing with the expiry of a collective agreement which does not contain such a qualification.

[62] Finally, and most recently, a full Court of this Court addressed this matter in *New Zealand Meat Workers' Union Inc v Alliance Group Ltd.*[8] The dispute decided by that case was whether seasonal layoffs in meat works amounted to a termination of employment so that employees returned or were re-engaged as new employees or, on the other hand, whether a layoff was simply a temporary suspension of a continuing employment relationship. The case was decided in the context of the Holidays Act 2003 and entitlements to sick leave and bereavement leave which arose after six months' "current continuous employment".

[63] Although the context is different, the case provided an opportunity for a reconsideration of the nature of the relationship during an off-season. The full Court decided not to adopt the dissenting judgment of Chief Judge Goddard and reject the majority judgments in the *Richmond* case and the judgments of the Court of Appeal in both *Alliance* cases as well as in others referred to in that judgment. At [103] the Court held:

> We also consider there is an issue of binding precedent. Although the subject-matter of the Court of Appeal's decision in the 1990 *Alliance* case was clearly different, we are satisfied that it turned on the question of whether the contended implied term of continuous employment was consistent with the relevant provisions of the award. Those provisions of the award are effectively repeated in the collective agreement of the present case. In light of those judgments, the parties to the subsequent collective instruments have continued or adopted materially identical provisions. The issue is therefore effectively the same.

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

[64] The Court referred to another judgment, *Gray v Crown Superannuation Fund* but distinguished this.[9] *Gray* dealt with the superannuation consequences of seasonal employment and, therefore, the potential significance of its conclusion that seasonal workers could be regarded as having been in continuous employment notwithstanding seasonal layoffs. The full Court nevertheless distinguished the reasoning in *Gray* because the latter had relied on the particular terms of a superannuation trust deed which differed markedly from the provisions of the collective agreement before the Employment Court.

[65] Further, at [106], the Employment Court concluded that references to "re-employment" (as in this case) meant the entering into of an employment contract with someone who was previously employed, but whose employment contract had terminated. That was said to have accorded with the dictionary definition of "re-employ" as "employing again".

[66] The Court concluded that, as in the earlier cases, there would be no need for such a provision as that protecting seniority rights, if employment remained continuous through the off-season. It was also significant that laid off employees were free to engage in any other employment during the off-season including with competitors of the employer or to apply for unemployment benefits. So, too, were the employer's processes of re-engagement consistent in that case with a new employment contract being entered into each season. At [109] the Court concluded:

> For all these reasons we accept the defendant's contentions that the meat workers who are laid off seasonally are not in "current continuous employment" for the period of the seasonal lay-off.

[67] I am unable to conclude, as the defendant contends, that these cases are so binding, relevant, and represent the law now, that they must defeat any prospect of success for the plaintiffs.

[68] It is significant, also, that Parliament has not changed that position by legislation and that the Union has continued to agree to collective instruments containing the same or very similar wording. Mr Mitchell has not been able to point

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[9] *Gray v Crown Superannuation Fund* [1991] 1 NZLR 129.

to any relevant statutory change which will indicate a parliamentary intention to depart legislatively from that line of cases.

[69] Although I would not suggest that the law on this question is set immutably and acknowledging the significant and reasoned dissents of Chief Judge Goddard in two of the full Court decisions of the Employment Court, that background must cause the plaintiffs' arguable case of a lockout to be, at this stage, not a strong one.

[70] If the plaintiffs establish that they were prospective employees covered by s 82, that may cause the defendant's action to be a lockout of them. AFFCO's insistence on re-engaging the second plaintiffs substantially, if not wholly, on its own new terms and conditions of employment on individual employment agreements, which contradict the obligation on the company to offer re-engagement on terms that are in conformity with the expired collective agreement, may arguably amount to the breaking of some or all of AFFCO's employment agreements. There is also an arguable case that this is done with a view to compelling the second plaintiffs to accept its terms of employment or otherwise to comply with the company's demands. So it is arguable that AFFCO's impugned actions constitute, in law, a lockout under s 82(1)(a)(iii) and (b) of the Act. The strength of that arguable case is, however, a matter going to the balance of convenience test.

[71] As already noted, it is common ground that AFFCO has not given notice of its intention to effect a lockout, such notice now being a statutory pre-requisite to any lockout. There is also the matter of whether the defendant's business is an essential service such as that in which it is probably engaged pursuant to Part B of sch 1 to the Act.

[72] Section 86B, effective from 6 March 2015, provides materially as follows:

> **86B Notice of lockout**
>
> (1) No employer may lock out any employees—
> (a) unless participation in the lockout is lawful under section 83 or 84; and
> (b) without having given to the employees' union or unions and to the chief executive notice of the employer's intention to lock out; and

(c) before the date and time specified in the notice as the date and time on which the lockout will begin.

(2) The notice required under subsection (1) must—
  (a) be in writing; and
  (b) specify the following information:
    (i) the period of notice given; and
    (ii) the nature of the proposed lockout, including whether or not it will be continuous; and
    (iii) the place or places where the proposed lockout will occur; and
    (iv) the date and time on which the lockout will begin; and
    (v) the date and time on which, or an event on the occurrence of which, the lockout will end; and
    (vi) the names of the employees who will be locked out.

(3) The lockout notice must be signed by the employer or on the employer's behalf.

(4) To avoid doubt, this section does not apply if notice is required under any of the following provisions:
  (a) section 91 (lockouts in essential services):
  (b) section 94 (procedure to provide public with notice before lockout in certain passenger transport services).

[73] Subsection (4) makes the predominant requirement of notice that which is mandated under s 91 of the Act where AFFCO's operation is an essential service. Section 91 provides materially:

91 Lockouts in essential services

(1) No employer engaged in an essential service may lock out any employees who are employed in the essential service—
  (a) unless participation in the lockout is lawful under section 83 or section 84; and
  (b) if subsection (2) applies,—
    (i) without having given to the employees' union or unions and to the chief executive, within 28 days before the date of commencement of the lockout, notice in writing of the employer's intention to lock out; and
    (ii) before the date and time specified in the notice as the date and time on which the lockout will begin.

[74] I now address the next statutory test of whether a lockout is unlawful. Whether a lockout (or a strike) relates to bargaining for a collective agreement has been considered authoritatively in two cases. The first was *McCulloch v New Zealand Fire Service Commission.*[10] The employee was employed on an individual employment contract based on an expired collective employment contract. After the expiry of the collective contract attempts to negotiate a further collective contract

[10] *McCulloch v New Zealand Fire Service Commission* [1998] 3 ERNZ 378.

broke down and there was a concern that the employer proposed to restructure its operations resulting in the loss of positions held by existing employees. One of the several questions for decision by the Employment Court was whether the employer had threatened to lock out unlawfully any of its employees. The court concluded that there was a threatened lockout by the prospective discontinuance of some employees' employment after disestablishing their positions. By this, the Court concluded that the employer had threatened to break, by terminating, some or all of its contracts including current collective contracts. The contract was presented to employees on the basis that they would either accede to it or leave their employment. The Court's remarks about the relationship between the acts, the employer's motivation, and the collective bargaining, assist the plaintiffs' case on this issue.

[75] The definition of "lockout" in s 62 of the Employment Contracts Act 1991 was materially the same as it is now. At page 398 the Court dealt with the question whether what it had found to be a lockout "relates to the negotiation of a collective employment contract, even to the limited extent that collective employment contracts are being contemplated by the [employer]." The Court concluded:[11]

> There is a strong implication from the defendant's conduct that it has no intention to negotiate the collective employment contracts as such but takes the view that it can offer employment on terms determined solely by itself. It has no intention to negotiate those terms, although it does not exclude the possibility that, if asked, it may do so in individual cases. My concern, however, is with the defendant's state of mind at the time that it embarked upon its course of conduct and so threatened a lockout. It is quite clear that it intended to present a contract that it had already drawn up on the basis that employees would either accede to it or go away without employment. There was no intention to allow them to make any contribution to the form or content of any collective employment contract. I have recently held that such an approach falls short of what is intended by the legislature to be conveyed by the expression "negotiation" as used throughout the Employment Contracts Act 1991: *Harrison v Tuckers Wool Processors Ltd* [1998] 3 ERNZ 418. Accordingly, even if the plaintiffs had not been entitled to succeed on other causes of action, they would be entitled to an injunction to restrain the threatened unlawful lockout subject to any discretionary considerations to the contrary. …
>
> The defendant may have thought that, because it was offering new positions, it could offer employment on such terms as it saw fit. I have come to the view that the positions are not new but in any event it is highly doubtful whether the defendant's approach was right in law, even if the positions were new. This is because it was proposing collective employment

[11] At 398.

> contracts. The minute collective employment contracts are mentioned, collective bargaining is involved. This means negotiating with the employees collectively as a collective. It means giving them the opportunity to agree on a ratification procedure before the negotiations begin, which also involves telling them that they have a right and an obligation to do so and giving them an opportunity to meet together for the purpose of agreeing such a procedure. This is so in a situation where the employees have expressed a wish, as they have in this case, to be represented in negotiations; but even if they had not, while a ratification procedure agreement would not be necessary, the defendant - as employer - would be bound to negotiate with the employees themselves which I take to mean with them collectively, not singly.

[76] I am satisfied that, by conveying to the plaintiffs that, albeit with some potential minor exceptions in some cases, AFFCO will not re-engage the second plaintiffs other than strictly on its own individual terms and conditions, the defendant is refusing or failing to engage employees or any work for which the employer usually employs employees. There is little doubt that AFFCO usually employs employees at its Rangiuru plant for slaughter and processing. AFFCO committed under cl 30 of the expired collective agreement that it would re-engage the second plaintiffs upon their signed acceptance of terms of employment (those terms being any terms applying in addition to those set out in the expired collective and applicable site agreements). However, it is arguable for the plaintiffs that the significantly different terms and conditions of AFFCO's proposed individual employment agreement do not amount to terms and conditions that are additional to those set out in the expired collective employment agreement but are substantially in substitution for them. It is arguable that cl 30(b) is to be read in light of cl 30(a), the employer's acknowledgement of the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required at Rangiuru.

[77] I am also satisfied that there is an arguable case for the plaintiffs that AFFCO's refusal or failure to engage the second plaintiffs in arguable breach of its cl 30 obligations, is being done with a view a statutory motivation under s 82. That is, with a view to compelling them to accept its terms of employment or to comply with its demands of them that they sign its form of individual employment agreement if they are to have any prospect of working at Rangiuru during the

forthcoming season, or even of being assessed for engagement which will not occur until after they commit to those terms and conditions.

[78] Is this arguable lockout unlawful other than having been implemented without the required notice? Although, as I expressed at the hearing, I retain some scepticism about the assertion that the company's actions are unrelated to the collective bargaining between the parties, both agree that this is so. On an application for interim injunction heard urgently, which necessarily precludes detailed examination of a number of questions, I would be loath to arrive at a conclusion contrary to the agreement of the parties about that issue. In these circumstances, I am prepared to accept that there is an arguable case that the lockout does not relate to the parties' bargaining for a collective agreement so that it is unlawful.

[79] For the foregoing reasons I conclude that the plaintiffs have established an arguable case for trial. It is now appropriate to consider the balance of conveniences between the parties. "Convenience" means, in this context, the relative harms that each may suffer by the grant or refusal of interim relief and how this may be compensated for.

Balance of convenience

[80] The thrust of the defendant's evidence in opposition to the injunction claim deals with the balance of convenience question. That is appropriate because its defence to the serious question issue turns predominantly on legal argument about largely undisputed, or unresolvable disputed, facts.

[81] The defendant's case is that about 70 per cent of the putative workforce at Rangiuru have agreed, or are agreeable, to employment on its individual employment agreement terms. If, however, the balance of the workforce represented by the Union refuses to agree to them, the plant cannot operate effectively with two sets of employees engaged to perform the same work but on different terms and conditions as to time worked and other important practices. For example, the company says that it will have to continue to operate uneconomically during those

weeks when there is a shortage of stock. That is because, under the terms of the expired collective agreement, it does not operate at all for the duration of such weeks whereas, under its new form of agreement, it could operate (and, therefore, employees would be engaged and paid for) some days on those weeks but not on others. It says that would more accurately reflecting the actual shortage of stock to kill and process. The company says that to have to delay reopening the plant after a temporary closure until a full week's production capacity is assured, will result both in employees losing wages and AFFCO suffering economically because of lost opportunities for processing and procurement.

[82] The company's case is that if an injunction is granted but the Union is not ultimately successful at trial, it will be "almost impossible" to quantify AFFCO's losses of income because production lost will be difficult to attribute to its inability to operate for short weeks and its inability to operate for 480 rather than the 450 minute working days. The defendant's Dane Gerrard, a director of AFFCO, goes so far as to depose that if the Union's injunction is granted, resulting in employees working shorter days and only complete weeks (unlike the company's competitors), Rangiuru "is unlikely to survive the season and certainly any season it does not have will be significantly shorter, to the long term loss of both the company and those who would otherwise be employed there, including Union members".

[83] It was accepted at the hearing, however, that Mr Gerrard's gloomy prognosis for the plant was based on his misapprehension that an interim injunction would apply to the whole of the forthcoming season. It will not. That reduces, significantly, the company's predictions of doom should an injunction be granted.

[84] AFFCO also says that if the injunction sought by the plaintiffs is not granted, the second plaintiffs will not suffer irreparable harm and will in fact have a real opportunity to be financially better off under the new form of individual agreement by being able to work more consistently and earn more money than they have in previous seasons.

[85] As I have said, the plaintiffs' claim is brought on a narrow basis in the sense that the sole cause of action is that the defendant's actions amount to a lockout which

is unlawful. That is said to be so because of AFFCO's failure to give the required statutory notice of it. It is, I think, undisputed that if the company's actions did, and do, constitute a lockout as defined in the statute, no notice has been given of that lockout as the Act now requires, so that it would be an unlawful lockout.

[86] If that were to be the case, however, it would be a curable defect affecting the future even if it cannot change the past. That could be achieved by the defendant now giving the required statutory notice which, on the plaintiffs' case, would cause the lockout to be lawful. No minimum period of notice is required. There is no other ground on which the plaintiffs say that the defendant's actions are unlawful. Even if the argument in favour of these actions being a lockout is not strong, the defendant could nevertheless give notice of a lockout out of an abundance of caution and thus minimise or eliminate the risk of any further injunction proceedings against its continuing to re-engage labour for the opening of the new season.

[87] Given its consistent position to date that the defendant's actions amount to a lockout, the Union could not hereafter logically contend that the opposite is true. This weakens the balance of convenience argument for the plaintiffs. The plaintiffs, in these circumstances, might be entitled to declarations of unlawfulness of past and current conduct by the defendant, and even to damages. However, it would be unlikely that they would succeed in their substantive application for a permanent injunction because the giving of statutory notice by the defendant, following an interlocutory injunction in the plaintiffs' favour, would cure that defect for the future. Modest damages may be the only remedy in these circumstances.

[88] Unlike s 91 notices in essential services, there is no specified minimum period which must elapse between the giving of the notice and the commencement of the lockout under s 86B. The requirement to give notice does contemplate, however, that the notice will not only be to the Union but also to the Chief Executive (of MBIE), the purpose of which requirement is not simply to enable records to be kept of strikes and lockouts. It is also to prioritise mediation assistance to be given to parties in these circumstances. So I do not consider the legislation can be interpreted to allow notice to be so short as to preclude the facilitative arrangements that the Chief Executive of MBIE can and should make.

[89] The longstanding rationale for periods of notice of strikes and lockouts in essential industries and services has been two-fold. First, particularly in the case of strikes, that is to allow the affected employer an opportunity to make lawful arrangements for the continuation of the essential service. Second, but no less importantly, it is to allow the parties time to attempt to resolve their differences with the assistance of a mediator before the draconian consequences of a strike or lockout commence. There is no apparent reason to believe that Parliament's rationale for requiring notices now of all strikes or lockouts, was any different for all employment situations than it has been in relation to essential industries and services.

[90] In cases where parties have failed to give statutory notices of intention to strike or lock out, the Court has prohibited those acts by interlocutory injunction even if the position can be cured for the future by the giving of proper and lawful notice. To do otherwise would be to sanction parties breaking the law in anticipation of little effective sanction for doing so.

[91] In these circumstances, unless other elements of the balance of convenience dictate otherwise, the Court's response should be to prohibit further arguable unlawful lockout action by AFFCO until the required notice is given. That is not the position in this case however: other convenience factors favour the defendant. There are, however, other significant factors going to the assessment of that balance.

[92] If the circumstances of the second plaintiffs are typified by those several of them who have given affidavits (and I have no reason to doubt that they are), there are several grounds affecting the grant or absence of interim relief. The AFFCO works must be one of the major, if not the largest, employer in Te Puke and the surrounding area where the second plaintiffs live and work. At the end of the off-season, the second plaintiffs need work to resume having incomes at the level on which they have been dependent for a long time. In some cases, perhaps in many, the second plaintiffs are the sole or major income earners in their families and, in other cases, a number of whanau or family members have been employed at the plant. For those who have been without, or at a significantly lower level of, income throughout the off-season, their need to resume work at AFFCO is critical financially. Although many of the second plaintiffs have been able to obtain

alternative employment (for example in the kiwifruit industry), their earnings are likely to have been significantly less than at the AFFCO works. The second plaintiffs have arrangements with banks, landlords, credit agencies, and the whole range of individual and family financial circumstances that depend upon re-engagement at the AFFCO works at the commencement of each season. Many of the second plaintiffs have been long-term employees of the company, perhaps over the span of their working lives. Although they are skilled and experienced in meat slaughtering and processing, there will be not only a very limited range of alternative positions in the locality, but many at least are unlikely to obtain any alternative employment.

[93] Even if the plaintiffs are successful in their single and narrow cause of action against the defendant, where does the balance of convenience lie between now and the delivery of a judgment about this, at least several months hence?

[94] The balance of convenience favours, narrowly, declining the relief sought by interim injunction.

Overall justice

[95] This is the final discretionary test. It is usually applicable in circumstances where the Court has found that there is an arguable case and that the balance of convenience favours the applicant for injunction. Its application is with a view to confirming the appropriateness of an injunction in all the circumstances. It is rarely applied where the balance of convenience test is not satisfied by the applicant. I will, nevertheless, consider the overall justice question in this case because of the fineness of the balance of convenience.

[96] Amongst the considerations now applicable, is for the Court to attempt to give effect to the best and fairest industrial relations outcomes, balanced against the legal considerations just examined.

[97] Despite their tactical denials, in the background to this case is the parties' inability to conclude a new collective agreement covering the work of union member

employees at the Rangiuru plant and, indeed, elsewhere at other AFFCO plants in New Zealand. Those collective negotiations are ongoing, albeit in a very prolonged way, and there are apparently separate proceedings challenging the employer's compliance with statutory good faith obligations in bargaining. AFFCO is also very critical of the Union's bargaining tactics which may also connote the first plaintiff's bad faith in bargaining. In those circumstances, I will not comment upon the merits of the parties' cases in bargaining but should, nevertheless, produce an outcome that gives the best opportunity for a settlement of that bargaining, however that may be achieved and, of course, of production and the remuneration this generates. However, the overall justice of the case is against the grant of interim injunctive relief.

Decision and summary of judgment

[98] I conclude that the plaintiffs have an arguable case for trial that the defendant's actions in its re-engagement of the second plaintiffs amounts to an unlawful lockout. There is an arguable case for trial that, first, those actions constitute a lockout as defined in s 82 of the Act and, second, that such a lockout is unlawful. That arguable unlawfulness is for two reasons. The first is that no notice of the lockout has been given by AFFCO. The second ground of arguable illegality is that the lockout is not related to bargaining for a collective agreement.

[99] The balance of convenience is a fine one but, ultimately, favours the defendant's position that no injunction should be granted. That is for the following reasons. The first is the lack of strength of the plaintiffs' arguable case for trial. Next is the effect of the grant of an injunction on the majority of AFFCO's Rangiuru workforce who are not members of the Union and who have agreed to be re-engaged on new individual employment agreements in the expectation that they will commence work next week. The financial consequences to such non-Union employees are not covered by the Union's undertaking as to damages. Finally, I assess that the financial losses to AFFCO in the event that an injunction is granted but the company is ultimately successful, will be less easily calculated than will the monetary losses to the second plaintiffs in the event that they succeed at trial. Although potential financial loss is not the only consideration in this balancing

exercise, it is important not only for AFFCO but for the second plaintiffs if they are not able to start earning again soon.

[100] The overall justice of the case, again by a narrow margin, follows the balance of convenience and favours the defendant. What might be called the 'bigger picture' of future employment relations between the Union, its members, and AFFCO is an important factor. My assessment maintaining the status quo ante is that the parties are more likely to make progress both with their current bargaining for a national collective agreement and to maintain the employment and incomes of the second plaintiffs, albeit by their re-engagement on terms and conditions of which they are not enamoured. In assessing the overall justice, I take into account also that there are other plants owned by other meat processing companies in New Zealand which operate on the terms and conditions to which the plaintiffs take objection; for example, working 480-minute weeks rather than 450-minute weeks as has been the case at Rangiuru. I consider, also, that not granting the injunction sought will better promote the cause of revitalised collective bargaining and the chances of obtaining a collective agreement, with the assistance of mediation, than would be the case if the injunction was granted.

[101] For the foregoing reasons, therefore, the plaintiffs' interlocutory application for injunctive relief is refused.

[102] I should, however, warn AFFCO that many of the terms and conditions of its new individual employment agreements appear to be of dubious validity and may well be tested rigorously if they are applied in unmodified form and literally. The s 103A tests for justification of employer actions that may found personal grievances, trump unlawful and/or unreasonable decisions and directions by employers, even if their bases are enshrined in an individual employment agreement. AFFCO should not take the rejection by the Court of the plaintiffs' application, as being an endorsement of the validity or even of the wisdom of a number of those terms and conditions.

[103] Many of the plaintiffs regard these individual employment agreements as AFFCO's means of having a tightly controlled and compliant workforce and it is

difficult to dismiss that assertion. The Court urges AFFCO to re-examine, negotiate about, and improve its immediate relationships with a significant sector of its staff (and the Union) to achieve the statutory objectives of mutually trustworthy employment relationships contained in s 3(a) ("Object of this Act") of the Act. These objectives are:

- To build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –
    - 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 of good faith behaviour; and
    - by acknowledging and addressing the inherent inequality of power in a employment relationships; and
    - by permitting collective bargaining; and
    - by protecting the integrity of individual choice; and
    - by promoting mediation as a primary problem solving mechanism.

[104] There will be no orders for costs between the parties to this point.

[105] The Registrar is to arrange an a telephone conference early next week with a Judge to timetable the substantive proceedings to an early hearing.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Wednesday 17 June 2015