IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA213/2017
[2018] NZCA 562

BETWEEN	AFFCO NEW ZEALAND LIMITED Appellant
AND	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED First Respondent
	CLARRY AGNEW AND OTHERS Second Respondents

Hearing:	14 August 2018
Court:	Winkelmann, Asher and Brown JJ
Counsel:	G P Malone and M A C Williams for Appellant C R Carruthers QC and P Cranney for Respondents
Judgment:	6 December 2018 at 12.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] At the beginning of the 2015/2016 meat processing season, seasonal workers at the appellant's (AFFCO) plant were unlawfully locked out. As they had not yet been re-engaged for the new season, AFFCO did not pay them wages. AFFCO's stance was that the workers' remedy was limited to a claim for damages for breach of the obligation to re-engage them.

[2] The Wages Protection Act 1983 (WPA) constrains an employer from making deductions from wages payable to a worker. The issue on this appeal is whether seasonal workers, whom an employer had a continuing obligation to re-engage at the start of a new season but who were unlawfully locked out prior to re-engagement, have an entitlement to wages which the WPA protects from employer deductions.

Relevant background

The employment agreement

[3] The slaughtering and (at least initial) processing of livestock has traditionally been seasonal in New Zealand so that most of those who work in meat slaughtering plants 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.

[4] The employment arrangements of the several meat slaughtering plants of AFFCO were of that nature. A collective agreement between AFFCO and the first respondent (the Union) incorporated several terms of employment reflecting that seasonal character including:

> **29. SEASONAL EMPLOYMENT**
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> a) Seasonal employees are employed for a season and shall be given five (5) calendar days' notice of seasonal lay off such notice to be given on or before 10.00 am of the first day of such period.
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> …
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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).

…

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

30. SECURITY OF EMPLOYMENT

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

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

31. SENIORITY

a) Employees shall have seniority in accordance with the date of their commencement of employment with the Company and in accordance with the provisions of this Agreement.

b) All things being equal, layoffs and re-employment will be based on departmental and/or site (as appropriate) seniority and will operate on a last on first off basis, subject to the experience, employment record, competency and skills of the individuals, also the need to maintain an efficient, balanced workforce. (The Department Supervisor shall consult with the Union Delegate prior to lay-offs of employees before making a recommendation to the Plant Manager.)

c) A seniority list shall be prepared for each department and/or site and be made available to the delegate each season prior to the commencement of end of season lay-off and again at re-engagement at the commencement of the season.

…

[5] Seasonal employees were to be contrasted with casual employees who pursuant to cl 32 had no guarantee of work for any period but in certain circumstances could convert to become a seasonal employee.

[6] The specified currency of the collective agreement was from 1 May 2012 to 31 December 2013 but it continued in force until 31 December 2014 pursuant to s 53 of the Employment Relations Act 2000 (ERA). From that point in time workers at AFFCO 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 agreement.[1]

[7] When the seasonal workers presented themselves for work at the beginning of the 2015/2016 season, AFFCO required them to agree to new individual employment agreements containing terms that were substantially less favourable than those contained in the expired collective agreement and which carried over into their individual employment agreements. Consequently the workers claimed that they had been unlawfully locked out.

The litigation

[8] The Union and certain members of the Union brought proceedings against AFFCO seeking a declaration AFFCO had unlawfully locked out those members from a number of its plants and compliance orders requiring AFFCO to re-engage the members in the positions in which they would have been employed but for the unlawful lockout.

[9] In a judgment dated 18 November 2015 the Full Court of the Employment Court made the declaration but reserved the remedy of compliance orders for later determination by a single judge if that was required.[2] The decision on the lockout cause of action was based on two discrete conclusions: first, that the members' employment was continuous and not discontinuous and hence the members were employees of AFFCO when seeking to be re-engaged at the end of their seasonal lay-off.[3]

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1 See the Employment Relations Act 2000, s 61(2).
2 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, [2015] ERNZ 1033.
3 At [194].

[10] Alternatively, even if the members were not employees of AFFCO after the end of the 2014/2015 season, they were nevertheless locked out unlawfully when they were required to agree to individual employment agreements as stipulated for by AFFCO to begin work for the new 2015/2016 season.[4] AFFCO's actions amounted to a lockout under s 82 of the ERA, specifically by refusing or failing to engage employees for work for which an employer usually employs employees, with a view to compelling employees to accept terms of employment or comply with the employer's demands (s 82(1)(a)(iv) and (b) of the ERA). We note at this point that the Union and 164 of its members who normally worked at AFFCO's Wairoa plant (the members), subsequently sought compliance orders on the basis of these findings. Those members are the second respondents on this appeal.

[11] On 13 April 2016 this Court granted AFFCO leave to appeal under s 214(3) of the ERA on questions of law which included:[5]

1. Did the Employment Court err in finding the second respondents were engaged by AFFCO New Zealand Ltd on employment agreements of indefinite duration with the result that employment was not terminated when they were laid off at the end of the season?

2. Did the Employment Court err in holding that s 82(1)(a)(iv) of the Employment Relations Act 2000 applied even if there was no employment relationship between AFFCO New Zealand Ltd and the second respondents in the off season?

[12] In a judgment dated 8 September 2016 Judge Corkill ruled that the illegal lockout had resulted not only in the members not being re-engaged but also in their not receiving wages payable to them in accordance with the expired collective agreement.[6] The failure to make those payments was held to be an unlawful deduction from wages payable to the members which was recoverable under s 11 of the WPA.

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4 At [195].

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

6 *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 117, [2016] ERNZ 356 [8 September 2016 decision] at [24].

No duty to mitigate arose in respect of a claim for wages under the WPA. That conclusion was reiterated in a further judgment of Judge Corkill dated 24 March 2017, the subject of the grant of leave for the present appeal to this Court.[7]

[13] In a judgment delivered on 6 October 2016 this Court ruled that the Employment Court had erred in concluding that seasonal meat workers were continuously employed during the off-season. However it upheld the Employment Court's conclusion on the applicability of s 82(1)(a)(iv).[8]

[14] Because this Court's decision was delivered subsequent to Judge Corkill's September 2016 judgment, AFFCO filed an application for recall of the judgment. However because AFFCO had applied for leave to appeal to the Supreme Court from this Court's decision, the recall application was adjourned until after the various proceedings in the senior courts had been resolved. This accounts for the fact that the application for leave to appeal to this Court the subject of this judgment was in relation to Judge Corkill's judgment of 24 March 2017 rather than the judgment of 8 September 2016.

[15] On 9 March 2017 the Supreme Court granted AFFCO's application for leave to appeal. The approved question was whether this Court was correct to find that a breach of s 82 of the ERA had occurred when AFFCO required seasonal workers to enter into new individual employment agreements before commencing work for the 2015/2016 season.[9] The Supreme Court ruled that the word "employee" was used in ss 82(1)(a) and 82(1)(b) in a different sense from that within the s 6 definition in the ERA and dismissed AFFCO's appeal.[10]

[16] On 13 October 2017 this Court granted leave to AFFCO to appeal on the following point of law:[11]

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7 *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2017] NZEmpC 33 [24 March 2017 decision] at [49]–[50].

8 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 482, [2016] ERNZ 225 [Court of Appeal decision] at [72].

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

10 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 [Supreme Court decision].

11 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZCA 453.

> Are any entitlements of [the members] arising from being unlawfully locked out entitlements to wages under the Wages Protection Act 1983?

The Employment Court reasoning

[17] In his judgment of 24 March 2017 Judge Corkill expressed his conclusion on the WPA issue in this way:[12]

> [48] … this Court has already determined in the September judgment that the claim made by the affected plaintiffs is one for unpaid wages. The plaintiffs' claim is an action of debt, and not an action for damages. Wages were payable under the based-on iea because the workers were illegally locked out when they should have been employed under that agreement. The claim is different from one which is for damages arising from a failure to provide work; there was a failure to pay wages under the applicable agreement. Consequently, the claim is properly considered under the [WPA].

[18] In his September 2016 judgment, after referring to this Court's decision in *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc*[13] Judge Corkill said:[14]

> [18] In short, wages are payable if there is a liability for such payment under the relevant employment agreement, but for the breach. The question is what the affected employee would have been paid had the agreement been complied with in other respects. That is why, as the Court of Appeal in *Spotless* held, there must be a focus on what wages were payable in terms of the relevant agreement.

[19] Then, after referring to cls 30 and 31 of the collective agreement[15] and the argument for AFFCO that during the off-season and until re-engagement the members had no contractual right to wages but only a claim for damages for breach of the obligation to re-engage them, the Judge concluded:

> [24] I do not accept that the affected employees' claim is simply the "failure to re-engage". The illegal lockout and conduct led not only to the result that the employees were not re-engaged, but also to the result that they did not receive their wages in accordance with the expired collective agreement.
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> [25] The plaintiffs' claims are not for lost opportunity — which if brought might have been characterised as a claim for the damages.

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12 24 March 2017 decision, above n 7 (footnotes omitted).

13 *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609.

14 8 September 2016 decision, above n 6.

15 Set out above at [4].

[26] As was recognised in *Schilling v Kidd Garrett Ltd*:

> … the loss of an opportunity to which a person is entitled by [contract], to obtain or retain employment … is recognised as a proper head of damage for breach of contract.

[27] Such a claim involves an evaluation of contingencies, which might have been appropriate if the focus of the claims was on a failure to re-engage. But that is not the type of claim which is currently before the Court. The present claim is in respect of the payment which the parties agreed would be paid for the performance of work; that payment is defined in s 4 as "wages".

[28] In summary, payments for the performance of work would, but for the illegal lockout and conduct, have been payable under the collective agreement. Where those payments were not made there was an unlawful deduction which may be recovered under s 11 of the [WPA].

(Footnotes omitted).

The parties' submissions

AFFCO's case

[20] For AFFCO Mr Malone contended that:

(a) wages for the purposes of the WPA means salary or wages which an employer has agreed to pay to a "worker"

(b) the term "worker" in the WPA has the same meaning as that given to the term "employee" by s 6 of the ERA;

(c) in the ERA an employee means a person employed by an employer to do any work under a contract of service; and

(d) during the off-season there was no employment agreement in existence between AFFCO and the members pursuant to which any wages were payable.

[21] Consequently the Employment Court erred in failing to apply this Court's conclusion that there was no continuous employment of the seasonal workers who at the time of the lockout were not employees within the meaning of s 6 of the ERA.

Spotless was distinguishable because the employees there held current employment agreements and hence had a statutory right to wages pursuant to those agreements.

The Union's case

[22] For the Union, Mr Carruthers QC submitted that AFFCO's argument proceeded on a misinterpretation of Judge Corkill's decision, for the reason that the Judge did not proceed on the basis of the Employment Court's conclusion that there was a continuous contract but rather in accordance with this Court's October 2016 judgment.

[23] His argument involved the following limbs:

(a) The members' entitlement to re-engagement as employees meant they were entitled to remuneration under the collective agreement and the relevant Site Agreement. The consequence of the Supreme Court's decision was that workers as "employees" in terms of s 82 are entitled to remuneration (which includes wages) for the duration of the lockout.

(b) The members' entitlements clearly fall within the categories of payments identified in the definition of "wages" in s 2 of the WPA.

(c) The definition of "worker" is subject to the qualification "unless the context otherwise requires". A clear object of the WPA is to protect payments to employees. There can be no rationale for distinguishing between the protection required for a s 6 employee and a s 82(1) employee. Hence to achieve the object of the legislation it is necessary to interpret "worker" in the WPA as including s 82(1) "employees".

(d) Alternatively the legislature in enacting the definition of "worker" in s 2 of the WPA has failed to recognise that there is another relevant category of "employee" namely the s 82(1) employee. In this respect the legislature has misfired.

Analysis

[24] As the parties' submissions reflected, the approved point of law involves two limbs:

- What is the nature of any "entitlements" of the unlawfully locked out members?

- Does the WPA apply to such entitlements?

The nature of the members' entitlements

[25] AFFCO's argument has an attractive simplicity. Because during the off-season there were no employment agreements in existence, the members were not employees and hence they had no entitlement to wages. We agree that *Spotless* is not determinative of the present matter because the workers there locked out were employed under contracts of service.

[26] However it does not follow from this Court's finding in its 6 October 2016 judgment, namely that the Employment Court erred in finding that AFFCO engaged the seasonal workers on employment agreements of indefinite duration, that there was an error in the Employment Court's conclusion as to the applicability of the WPA to the present circumstances. This Court's conclusion on the indefinite duration proposition commenced with a discussion of what has been described as a "permanent employment clause":[16]

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

[16] Court of Appeal decision, above n 8 (footnotes omitted). The term "permanent employment clause" was used in the Supreme Court decision, above n 10, at [76].

> pursuant to the terms of this contract, although some may not be required to attend work nor to be entitled to receive any remuneration during seasonal lay-off. Therefore, the employer shall continue to engage every employee in each season, subject only to the provisions for termination and redundancy.
>
> (Our emphasis.)

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

[27] The focus of the Supreme Court's decision was on the meaning of "employees" in s 82(1)(b). However, having earlier remarked that it seemed something of a stretch to describe a person, who had left his or her name with AFFCO at the end of the season, as a person within the phrase "a person intending to work" as defined in s 5 of the ERA,[17] the Supreme Court undertook a close analysis of the relationship between AFFCO and the members.

[28] In the context of a consideration of the "carry-over" provisions in the collective agreement and in the individual employment agreements, the Supreme Court engaged with the submission for AFFCO that, despite AFFCO's agreement that it was contractually obliged to offer re-employment for the 2015/2016 season in accordance with the seniority provisions in the individual employment agreements, nevertheless other apparently continuing provisions in the agreements did not apply after termination. Noting cl 30(b) relating to the process of re-engagement[18] as perhaps the most significant example the Court said:[19]

> 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.

[29] The Supreme Court then addressed AFFCO's contention that the continued application of cl 30(b) would mean that employment, although seasonal, was

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17 Supreme Court decision, above n 10, at [52].
18 Set out above at [4].
19 At [70].

effectively perpetual with the consequence that, 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. Questioning why that raised any difficulty of principle the Court said:

> [72] … 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.
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> [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).

[30] Then, in considering and rejecting AFFCO's submissions on the meaning of "employees" in s 82(1)(b) the Court stated:

> [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. 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, 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.
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> [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 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).
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> (Footnotes omitted and emphasis added).

[31] In our view, those observations of the Supreme Court, in particular the highlighted passages, indicate that such seasonal workers comprise a special category of worker. Such workers, while not a party to a continuous contract of service, have an entitlement to employment which a mere applicant for employment does not.

[32] The special nature of seasonal workers' "employment" is reflected in several other provisions of the collective agreement. First we draw attention to the final element of the "Intent" provision in section 2, cl 9(f), which addresses the objectives of the agreement:

> The parties to this agreement are committed to safeguarding the safety, health and welfare of the employees and providing conditions of employment and payments which are fair and equitable to employees and the Company, and which safeguard their various interests *while providing maximum possible continuity and security of employment.*
>
> (Emphasis added).

[33] We then note that within section 4 (remuneration) there is provision for a minimum weekly payment for all employees other than casuals.[20] Thus this provision applied to seasonal workers. Specifically with reference to employees who are re-engaged the calculation of payment was stated as follows in cl 16(d):

> In the week where employees are laid off or re-engaged, the weekly minimum payment shall be reduced pro-rata to the number of working days remaining in that week, provided seven calendar days' notice of layoff has been given.

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[20] As well as one other exception that is not relevant for our purposes.

[34] Provision was made in the agreement for long service leave to employees after completion of various periods of continuous service with AFFCO. In respect of such entitlements, cl 23(d) stated:

> "Continuous service" shall also mean service by any seasonal employee employed by the Company for a period of at least two calendar months in each consecutive season. Where the Company can only offer employment for less than two calendar months, this lesser period shall suffice, provided the employee has not refused an employment offer earlier in the season.

[35] The implications for the payment and receipt of remuneration during a lockout are addressed in s 96 of the ERA:

> **96 Employer not liable for wages during lockout**
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> (1) Where any employees are locked out by their employer, those employees are not entitled to any remuneration by way of salary, wages, allowances, or other emoluments in respect of the period of the lockout, unless the employer's participation in the lockout is unlawful.
>
> (2) On the resumption of work by the employees, their service must be treated as continuous, despite the period of the lockout, for the purpose of rights and benefits that are conditional on continuous service.

[36] Having regard to the provisions of the collective agreement that provided for seniority and continuous service with reference to the AFFCO seasonal workers, we consider that s 96(2) is to be construed as applicable to those seasonal workers.

[37] Had there been no unlawful lockout by AFFCO at the beginning of the 2015/2016 meat processing season, then the members would have been re-engaged and they would have been paid wages. Their service would also be treated as continuous for the purpose of the relevant provisions of the collective agreement as continued in the individual employment agreements.[21]

[38] In our view for workers in that special category as described by the Supreme Court at [30] above the appropriate remedy to compensate for the unlawful lockout is the wages which would otherwise have been payable to them. We do not

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[21] See above at [6].

consider that damages for breach of an obligation to offer re-employment is the appropriate response in the context of this special category of worker.

Does the WPA apply to wages payable during an unlawful lockout?

[39] The relevant statutory obligation is the requirement in s 4 of the WPA that an employer must pay without deduction the entire amount of wages payable to a worker and the corresponding entitlement to recover any deduction from the employer under s 11 of the WPA.

[40] The issue here is whether the references to "wages" in the WPA are confined to wages payable under a contract of service or extend to include the wages which we have held should have been paid to the seasonal workers who were unlawfully locked out by AFFCO. The answer is to be determined by the text and purpose analysis directed by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*.[22]

Text

Section 2 of the WPA contains the following definition of wages:

> **wages** means salary or wages; and includes time and piece wages, and overtime, bonus, or other special payments agreed to be paid to a worker for the performance of service or work; and also includes any part of any wages

[41] Mr Malone's point is that the wages are to be paid to a "worker", which is defined in s 2 of the WPA as having the same meaning as that given to the term "employee" by s 6 of the ERA. Hence he argued that wages in the WPA are confined to payments made under a contract of service. Mr Carruthers points to the contextual qualification of "unless the context otherwise requires" which is contained in both the WPA interpretation section (s 2) and the definition of "employee" in s 6 of the ERA. He contends that the clear object of the WPA is to protect payments to workers, whether they be permanent employees or seasonal workers.

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[22] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

[42] Mr Malone's argument may have had greater traction in relation to earlier versions of the statute. However we consider that the relationship between the WPA and the ERA, indeed one might say the integration between them, is of moment on this issue.

[43] Significantly s 4 of the WPA is subject to s 6(2) of the WPA which states:

> **6 Employer may recover overpayments in certain circumstances**
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> …
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> (2) Notwithstanding anything to the contrary in any collective agreement within the meaning of the Employment Relations Act 2000 but subject to subsection (3), an employer who has made an overpayment to any worker may recover the amount of that overpayment from any wages to the payment of which by that employer that worker subsequently becomes entitled.

[44] An overpayment is defined as meaning any wages paid to a worker in respect of a "recoverable period" which is defined in s 6(1) of the WPA as follows:

> **recoverable period**, in respect of any employer and any worker, means a period in respect of which that employer is not required by law to pay any wages or (if the employer is entitled to make a specified pay deduction under section 95B of the Employment Relations Act 2000) any part of any wages to that worker, by virtue of that worker's having—
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> (a) been absent from work without that employer's authority; or
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> (b) been on strike (within the meaning of section 81 of the Employment Relations Act 2000); or
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> (c) been locked out (within the meaning of that subsection); or
>
> (d) been suspended.

[45] We digress to note that the reference in (c) to "that subsection" is a drafting error. That reference was originally to the definition of lockout in s 2(1) of the Industrial Relations Act 1973. However there was no related amendment to (c) when in 1991 an amendment was made to (b) to refer to s 2 of the Employment Contracts Act 1991.[23] Nor was (c) amended in 2000 when (b) was amended again to refer to

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[23] Wages Protection Amendment Act 1991, s 2.

s 81 of the ERA.[24] We consider that the reference in (c) to "that subsection" should be now construed as a reference to s 82 of the ERA.

[46] This overpayment recovery provision introduced by the WPA, which is an exception to the general principle in s 4 of that Act, is complementary to s 96(1) of the ERA[25] which provides that employees are not entitled to remuneration during a lawful lockout. If, notwithstanding s 96, such employees in an unlawful strike or lawful lockout scenario receive remuneration, the employer may recover the overpayment by a deduction within the parameters of s 6 of the WPA.

[47] The significance for present purposes is that the WPA recognises and addresses the scenarios of strikes and lockouts and in that context qualifies the primary prohibition on deductions from wages. We do not consider that in so doing it should be construed as applying to permanent employees but not to seasonal workers in the nature of the AFFCO workers. If the situation was reversed, and the lockout was lawful and the seasonal workers were erroneously paid wages, we would expect that AFFCO would and could invoke the recovery procedure provided in s 6.

[48] In our view, the text of the WPA is consistent with the reference to "wages" applying not only to wages payable under a contract of service but also to wages payable to seasonal workers in the category explained by the Supreme Court.

Purpose

[49] The source of the WPA can be traced to the early United Kingdom Truck Acts which provided protection for workers' wages by the requirement that payment be made in current coin rather than equivalents (presently reflected in the requirement in s 7 of the WPA that payment of wages be in money only).

[50] An argument that the prohibition in the Truck Acts against employers making deductions from workers' wages went beyond the mischief to which the legislation was directed was rejected by the House of Lords in *Williams v North's Navigation*

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[24] Employment Relations Act, s 240 and sch 5.
[25] At [35] above.

Collieries (1889) Ltd.[26] However as Bowen LJ observed in *Hewlett v Allen & Sons* the legislation drew its "line of tutelary shelter" at a prohibition on deductions, leaving open all legal and equitable rights to the employer in any civil action.[27]

[51] The policy underlining the wages deduction prohibition was explained by Chilwell J in *McClenaghan v Bank of New Zealand*:[28]

> Parliament clearly intended to place a restriction upon employers in exercising a remedy by way of deduction from wages payable. Inconvenience to employers was intended. Parliament must have been prepared to tolerate some anomalies in the interest of the overriding objectives of the statute one of which was to prevent the employer from being judge, jury and enforcement officer in his own cause (see Lord Atkinson in *Williams'* case [1906] AC 136, 145).
>
> I accept Mr Vaver's submission that the Act deprives every employer of his ability to exercise an arbitrary power to make deductions from wages at a time which suits him best and for his convenience. It ensures that the periodic pay of a worker comes to him regularly on due date undiminished so that the worker can securely undertake his daily financial commitments. The scheme of the Act is to shift it to the worker to decide when it is convenient for him to have his wages diminished in the event that he is indebted to his employer.

[52] We do not discern any basis for the proposition that the legislative purpose relates only to permanent employees and does not contemplate seasonal workers of the nature in this case. Both categories are deserving of the protection which the WPA provides.

[53] As pointed out in the discussion of text above, the WPA adjusted the balance in favour of employers in the context of strikes and lockouts. We consider that the policy which that adjustment reflects should be taken as indicating that the WPA applies to all workers whose entitlement to wages may be affected by a lockout.

[54] We conclude that the wages which we consider were payable by AFFCO to the unlawfully locked out seasonal workers constituted wages to which the WPA applied. Hence AFFCO's refusal to pay these wages was in contravention of the prohibition on deductions in s 4 of the WPA. We consider that the concerns voiced by Mr Malone

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26 *Williams v North's Navigation Collieries (1889) Ltd* [1906] AC 136 (HL) at 147 per Lord Atkinson.

27 *Hewlett v Allen & Sons* [1892] 2 QB 662 (CA) at 668.

28 *McClenaghan v Bank of New Zealand* [1978] 2 NZLR 528 (SC) at 542.

about the practical implications of that interpretation for cases where employers may need to seek reimbursement from employees are answered by *McClenaghan.*[29]

Result

[55] The appeal is dismissed.

[56] The appellant must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Oakley Moran, Wellington for Respondents

[29] At 542, set out above at [51].