IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 7/06
CRC 2/05

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND MEATWORKERS' UNION INC Plaintiff
AND	ALLIANCE GROUP LIMITED Defendant

Hearing: 3 and 4 November 2005
Submissions received from the plaintiff on 11 November 2005
Submissions received from the defendant on 21 November 2005
(Heard at Invercargill)

Court: Chief Judge G L Colgan
Judge B S Travis
Judge A A Couch

Appearances: Christine French and Simon Mitchell, Counsel for Plaintiff
Richard Cunliffe and Ken Smith, Counsel for Defendant

Judgment: 16 August 2006

JUDGMENT OF THE FULL COURT

Introduction

[1] The issue in this case is whether, for the purposes of the Holidays Act 2003, meat workers who work on a seasonal basis resume work as new employees or as continuing employees. If they are regarded as new employees, they must work for six months before they become entitled to the sick leave and bereavement leave benefits of the Act. If they are regarded as continuing employees, they retain those benefits from season to season.

[2] This issue affects the terms of employment of many thousands of seasonal meat workers. The plaintiff's claim challenges the correctness or current application of judgments of a full Court of the Employment Court in 1992 and of the Court of Appeal.

[3] The matter came to the Court for hearing at first instance by way of a removal from the Employment Relations Authority.

Background

[4] Although we heard some evidence from knowledgeable and experienced witnesses for each of the parties, the facts on which the questions of principle must be decided are largely uncontroversial.

[5] Alliance owns and operates seven meat works in the South Island and one in the southern North Island. Most operate for only part of each year. Different plants kill and process different products. The availability of stock, together with climatic, market-related and other factors determine the start and finish dates at each plant. The period for which a plant operates is known as the "season". The period when the plant is not operating is known as the "off season".

[6] Seasons rarely start and finish for all employees at a plant on the same dates. During the season, the volume of work available varies. The usual pattern is that it builds up to a peak and then tapers off towards the end of the season. Occasionally, production may cease altogether temporarily during a season. As the volume of work available increases and decreases, workers are progressively taken on or laid off.

[7] At some plants there are groups of workers such as freezer hands, rendering workers, yard gangs and pallet store workers who continue working throughout the year. It is also common for some staff who would otherwise be laid off to be retained to do cleaning and maintenance work. However, the majority of the workers are laid off on a seasonal basis. Many find alternative employment during the off season or, if unable to do so, may receive the unemployment benefit.

[8] Start up practices at the beginning of each season vary a little from plant to plant, but the usual practice is that the defendant notifies individual workers of their start up date and gives them a set period of time to confirm that they will be

returning. At the beginning of each season, the returning workers go through an induction process. This includes a briefing session to tell them about changes since the last season, the state of the defendant's business, the markets and what they can expect in the new season.

[9] Most of the meat workers employed by the defendant at its various plants located throughout New Zealand are members of the plaintiff union. Many of the plaintiff's members have spent much or all of their working lives in the meat processing industry and members with 20 years or more seniority are quite commonplace. They return to the same plant year after year and regard their work as a career. They turn up for work each season at the date notified to them by the defendant. They return to an established position on an established chain wearing the same work gear they wore the previous season. They frequently retain the same locker season after season. At many plants, the workers store their work clothing and boots in their lockers during the off season and in some cases also their knives and steels.

[10] When they confirm that they will be returning for a new season, workers are required to sign an application form which states that they wish to be considered for employment in the next processing season and concludes:

> *I acknowledge and accept that if I am offered employment in the _____ processing season my employment will be on such terms and conditions as are offered to and accepted by me at the time of my employment.*

They also sign a starting advice form accepting their engagement when they commence work.

[11] Many of the terms of employment of members of the union who are employed by the defendant are contained in a collective employment agreement. The most recent collective agreement negotiated between the parties was a three year document commencing on 1 October 2002 and expiring on 30 September 2005 ("the collective agreement"). This explicitly recognises the industry as a seasonal one. In addition to this company wide collective agreement, terms and conditions of employment are also contained in what are described as "*departmental contracts*" in each individual plant. These departmental contracts contain details of manning, incentive payments etc and are generally negotiated on the site between plant management and union site representatives.

[12] One of the most important aspects of the employment of the plaintiff's members is what is known as the *"seniority system"*. The manner in which this operates varies slightly from plant to plant. At the Mataura plant, seniority is determined across the whole plant. At other plants, seniority is determined within departments. Seniority lists are maintained which rank the workers in order of their initial start date in the department or, in the case of Mataura, their initial start date at the plant. These seniority lists determine the order in which workers are called in at the beginning of each season and the order in which they are laid off at the end of the season. The higher the seniority, the longer the season, and hence the greater an employee's earnings will be. As a general rule, work for the new season is offered to workers who worked at the plant in the previous season before it is offered to others. The seniority list is also sometimes used to determine who is offered off-season work.

[13] Under the collective agreement, workers are entitled to long service leave based on their years of *"continuous service"* with the defendant. Clause 10(d) of the collective agreement defines *"continuous service"* as including service by a seasonal worker who has worked at least two months in each season.

[14] There is a redundancy agreement covering members of the union. This applies to workers who are *"currently employed, seasonally laid off, or on approved leave"*. The definition of *"redundancy"* in the agreement specifically excludes seasonal lay-offs.

[15] The defendant also participates in two superannuation schemes which are available in the meat industry. Approximately 50 percent of the plaintiff's members employed by the defendant belong to one or the other of those schemes. During the off season both the employer and employee contributions to the superannuation schemes are suspended but no withdrawal benefit is payable. Deductions continue for those workers who remain employed by the defendant during the off season.

[16] The defendant offers casual contracts to a number of its seasonal workers in the off season. The form of these documents states that no guarantee of continuous or regular employment is given nor does the agreement or any extension or renewal of it imply that there will be continuous or regular employment. They also provide

that, due to its temporary nature, the employment may be varied, shortened, or terminated on one hour's notice.

[17] During the season, the union receives subscriptions from its members by way of weekly deductions from the members' wages. During the off season, workers continue to be members of the union and retain all the rights of membership but cease paying subscriptions unless they continue to be employed in the meat processing industry.

[18] During the off season, the defendant has no contact or involvement with workers who are laid off on a seasonal basis. They are entitled to take up alternative employment and, as noted earlier, many do so. The defendant does not necessarily offer work each season to every worker who worked in the previous season. This will usually be because an individual's work record indicates that they were not competent or were unsatisfactory. Workers with poor records are generally warned before the end of the season that they are at risk of not being invited back in the following season. Approximately 18 to 20 percent of the defendant's seasonal workforce at the start of each season is entirely new in the sense that these employees have not previously worked for the defendant.

[19] Mr Eastlake, the general secretary of the plaintiff union, gave evidence that at least one of the plants operated by the defendant appeared to be for practical purposes an all year round operation. However, we prefer the evidence of Mr Brader, the general manager, processing, of the defendant, that all plants still close for an off season when no killing occurs and necessary maintenance takes place. We find that it has never been previously suggested by the union that the employees at those plants are permanent all year round workers and they have always been treated by the defendant as seasonal workers in terms of the collective agreement.

[20] The defendant operates as an accredited employer under the ACC partnership programme to deal with the management of ACC claims. We find that this only applies to work during the season. The defendant has no involvement at all in the management of claims or payment of compensation for those workers suffering injury during the off season and who are not physically employed at one of its plants at the time.

[21] Another feature of the relevant history is the very substantial similarity, if not identity, of a succession of prior collective employment instruments, including employment agreements, collective employment agreements, and awards going back at least as far as the 1980s. These provided many, but not all, terms and conditions of employment of unionised meat workers including terms and conditions that have for a long time affected the questions now at issue in this case. The key provisions for present purposes dealing with the seniority of returning seasonal workers are substantially the same as the old award clauses with the few changes mainly being additions. In most plants, it is likely that the workers having the highest seniority will work more than six months continuously in each season. In some plants a large proportion of meat workers will work six months or more each season.

The issue

[22] Section 63 of the Holidays Act 2003, like its 1981 predecessor, requires that employees be employed continuously by the same employer for a period of six months before they become entitled to the benefit of the paid sick leave and bereavement leave provisions of the Act.

[23] Independent of the Holidays Act, the collective agreement also makes provision for sick leave and bereavement leave. Paid sick leave is available immediately upon employment. Bereavement leave is available after one month's employment.

[24] An important difference between the Holidays Act and the collective agreement is the rate of pay for sick leave and bereavement leave. The collective agreement which expired in 2005 provided that all such leave was to be paid at a fixed rate of $10.477 per hour. Section 71(1) of the Holidays Act 2003 provides:

> *(1) An employer must pay an employee an amount that is equivalent to the employee's relevant daily pay for each day of sick leave or bereavement leave taken by the employee that would otherwise be a working day for the employee.*

[25] "*Relevant daily pay*" is defined in s9 of the Holidays Act and is based on the amount the employee would have received had the employee worked on the day taken as leave. This includes productivity payments and overtime rates.

[26] It was common ground that, in most cases, the relevant daily rate of pay for members of the union working for the defendant in its meat processing plants is considerably more than $10.477 per hour.

[27] Where the Holidays Act provides a superior benefit to that of a parallel collective agreement, the statutory provision prevails over the collective agreement. It follows that the amount of pay that workers receive when they are sick or on bereavement leave depends on whether or not they are entitled to the benefit of the Holidays Act provisions.

[28] Whether the relevant provisions of the Holidays Act do apply to any particular employee of the defendant at any particular time depends on whether that employee has completed six months' continuous employment with the defendant at that time.

[29] The Holidays Act 2003 came into force on 1 April 2004. Initially, the defendant treated the employment of its staff as continuing during the off season for the purposes of qualifying for sick leave and bereavement leave under the Act. Thus, any worker who had first been employed by the defendant more than six months previously and had returned to work when invited to do so following the seasonal lay-off was immediately regarded as being entitled to payment for sick leave and bereavement leave on the basis of relevant daily earnings rather than the lesser fixed rate under the collective agreement. Such workers also continued to accrue further entitlements to sick leave and bereavement leave under the Holidays Act on an annual basis.

[30] On 27 October 2004, the defendant wrote to the union saying that it intended to change that practice with effect from 1 November 2004. The key paragraph of the letter was:

> *For new employees and employees returning after seasonal termination from the previous season, entitlement to sick leave for the period from their seasonal start date until 6 months continuous employment has been completed is provided by the appropriate CA. This is in respect to accrual of sick leave over the first 6 months as well as all accumulated sick leave from previous seasons.*

[31] This change in practice was based on the defendant's view that the period between the lay-off in one season and the start of work in the next season should not be taken into account as "*current continuous employment*" for the purposes of the Holidays Act. The issue we must decide in this case is whether that view was correct.

Case for the plaintiff

[32] At the outset, Miss French stated clearly that the union was not challenging the defendant's right to lay off employees when the work runs out. Rather, the issue was whether the lay-off amounts to a termination of employment so that the employee returns as a new employee, or whether it is simply a temporary suspension or hiatus in the continuing employment relationship. It is the union's case that the employment relationship continues through seasonal lay-offs.

[33] In support of that proposition, Miss French relied on the ordinary meaning of the expression "*lay-off*", the provisions of the collective employment agreement, the conduct and practices of the parties and the meaning of the Holidays Act in light of what she submitted was its true intention.

[34] Miss French submitted that, as a matter of normal usage, the term "*lay-off*" indicates something that is inherently temporary in nature and drew support for this view from the dissenting judgment of Goddard CJ in *NZ Meat Workers Union Inc v Richmond Ltd* [1992] 3 ERNZ 643 at 656. Miss French submitted this must especially be so where the resumption of work is highly predictable and where, through the seniority provisions, there is a specific obligation to maintain aspects of the employment relationship. She referred to the evidence that many members of the union have worked for many years in the same position on the same chain at the same works wearing the same gear and consider this their career. She also noted that they commonly have their wages paid through direct crediting arrangements which continue from year to year. Miss French submitted that these were important indications that, in sending employees away at the end of the season, the defendant did not intend to permanently terminate their employment.

[35] Turning to the collective agreement, Miss French relied on the following aspects of it:

(a) The term of the agreement was expressed to be for three consecutive years, not seasons.

(b) Clause 2 provided:

> *The intention of this Agreement is to … Provide for conditions of employment which are fair and equitable to workers that are employed, and the employer, and which safeguards their various interests while providing maximum possible security of employment in a seasonal industry.*

(c) Clause 9(i)(i) provided for an additional week's annual leave "*Upon completion of six years' continuous service with the Alliance Group Ltd*".

(d) Clause 10 provided for long service leave and defined "*continuous service*" as service by a seasonal worker who has been employed by the employer for a period of at least two calendar months in each season in each of 12, 25, 35, 40 or 45 consecutive seasons. If the employer can only offer a period less than two calendar months' work, that lesser period qualified. There then appeared the following note:

> *…If a person terminates employment in any one season (other than by seasonal layoff or by mutual agreement with management to retain seniority) and is subsequently re-employed the following season, the period of 'continuous' employment will be deemed to be from the date of re-employment; continuous employment provisions set out in clause 10(d) will not apply.*

(e) Clause 11(c) dealt with sick leave and defined *"a season"* as the period from 1 October in any one year to 30 September in the next succeeding year.

(f) Clause 25 stated that protective clothing and other equipment must be returned to the defendant by the worker on the termination of employment. Miss French submitted that the fact such items are not required to be returned at the end of the season at most plants favours the view that the seasonal lay-off was not intended to operate as termination of the employment.

(g) Clause 30(j) dealt with final warnings lapsing after two years and was not linked to seasonal lay-offs.

(h) Clause 31 which dealt with seniority and provided in subclause (c):

> *The employer acknowledges the benefits of a stable, competent workforce which is familiar with and trained in the employer's requirements. Employees seasonally laid off the previous season will be offered the first opportunity of re-employment at respective plants for the new season and the first opportunity of re-employment prior to the engagement of new employees, subject to:*
>
> *(i) Re-employment being consistent with individual plant's requirements and departmental needs and the individual's competency; and*
>
> *(ii) Departmental and positional skills/experience requirements and a satisfactory work record.*
>
> *Layoffs and re-employment will be based on departmental and/or plant seniority.*

(i) Clause 31(f)(i) also provided that the seasonal lay-offs should not break seniority rights. Seniority was, however, broken by voluntary leave or being discharged from employment or failing to return from a lay-off after 10 days' notice.

(j) Clause 31(a) deals with acquiring and retaining seniority according to the date of commencement of employment of workers and, in Miss French's submission, would not make sense if each new season was the commencement of employment. She also submitted that subclause (g) of

clause 31 made a clear distinction between being discharged and laid off. The former broke seniority, as did the failure to return from a lay-off after the defendant's allowance of 10 days. This, she submitted, was identified by Goddard CJ in *Richmond* at p660 as one of the several occasions on which the former award framed in similar terms recognised continuity from season to season.

(k) Clause 60 dealt with superannuation and provided that, during the off season, workers were not required to withdraw from the superannuation scheme but were permitted and required to remain as members.

(l) Clause 61 contained a linkage to the redundancy agreement. Miss French submitted this had applied to the Ocean Beach plant when it closed during an off season and the amount of redundancy compensation paid was based on years of service. She submitted this was consistent with the provision of the agreement that a seasonal lay-off did not amount to termination so as to give rise to redundancy compensation rights.

[36] Miss French submitted that all of these clauses are indicative of a continuing relationship and that they are therefore inconsistent with any intention to permanently terminate the employment relationship at the end of each season. As other indicators of the continuing relationship she pointed to the personalised lockers and the retention of clothing during the off season.

[37] After dealing with what she described as *"countervailing factors"*, Miss French then turned to s63 of the Holidays Act. As noted earlier, this provides that an employee must complete six months' "*current continuous employment*" to become entitled to the benefits of the sick and bereavement leave provisions of the Act. She submitted that the word "*continuous*" means unbroken or uninterrupted and that seasonal workers' employment is unbroken if they accept all of the work offered by the employer from season to season, notwithstanding that the work itself is interrupted by the season ending when the work is suspended.

[38] Miss French submitted that "*current*" has a meaning of happening now which she contended meant that employees whose employment was current at the time of the sickness or bereavement were entitled to payment. She referred to s71(1) which imposes an obligation on the employer to pay only if the day on which the employee is sick would otherwise be a working day for the employee. She submitted this was significant because it showed that the Act clearly contemplated employees having entitlements arising or subsisting at times when they are not actually expected to work. She submitted that there was nothing inconsistent with employees remaining

employed during a seasonal closure and an interpretation of the Act that only requires payment by an employer when the employee would actually be at work.

[39] Miss French also submitted that the union's case was consistent with the general purpose and intention of the Holidays Act. She referred to the Hansard record which showed that, in introducing the Bill at its first reading, the Minister of Labour stressed that the purpose was to provide universal entitlements for all employees regardless of their employment arrangements and working patterns. She submitted there was never any suggestion that seasonal workers should be permanently deprived of the full benefit of the statutory provisions.

[40] Miss French went on to submit that it was significant that it was a decision involving seasonal meat workers which was the catalyst for the introduction of the relevant daily pay provision in the Act. She submitted that the legislative intent in enacting s9 of the Holidays Act defining relevant daily pay was to overcome the effect of the Court of Appeal's judgment in *Greenlea Premier Meats Ltd v Horn* [2002] 1 ERNZ 380. Given the clear legislative intent to overturn that decision, she submitted that it would be surprising if Parliament provided relevant daily pay for sick leave while at the same time intending to deny the full benefit of that provision to the very category of employees who were the subject-matter of the Court of Appeal decision.

[41] Miss French sought to distinguish the decisions in *Richmond* and in *NZ Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd* [1987] NZILR 537 as being decided under different legislative regimes and different contracts even though some of the contractual clauses have remained the same. She noted that in none of those previous cases was the Court called upon to consider a contract which was expressed to be for a three year term. In the alternative, Miss French submitted that the reasoning in the 1987 *Alliance* decision and in the *Richmond* case was flawed and overly influenced by consideration of the fact that, during the off season, no work was offered or done and that meat workers were not "*required*" to report to work at the beginning of the season.

[42] In the 1987 *Alliance* case, the facts were that, when the meat processing season was due to begin, the slaughtermen did not attend and workers who were employed to prepare machinery for the season were suspended on the basis that the

slaughtermen were on strike. The union argued that, as there was no contract of employment with the slaughtermen in existence before they returned to work, there could not have been strike action. The Court accepted that argument.

[43] In that case, the Court accepted the submissions made on behalf of the union that the currency of the applicable award did not establish the existence of contracts of employment during the off season, that the seniority list arrangement did not create or contribute to an employment relationship and that it was no more than a matter of practice that each individual slaughterman was given an assurance that work would be offered in each new season in a certain, clearly determined order. If a slaughterman chose not to avail himself of the offer, an employment contract did not come into being. The Court held that the award was part of the contract of employment when one existed but that it did not create a contract of employment or preserve the employer/employee relationship during the off season if no work was offered or done.

[44] This conclusion was supported by the wording of clause 29(g) of the award which provided that, when engaging labour at the commencement of each season, the employer should give priority to applications for work from competent and satisfactory employees who had worked during the previous season and who were willing and able to commence employment when the employer required. Clause 29(g) of the award, which is set out at page 543 of the report of the 1987 *Alliance* case is in similar terms to clause 31(c) of the present collective agreement.

[45] Miss French then turned to the *Richmond* decision. In that case, seasonal workers previously employed on individual employment contracts had been called back to various plants in accordance with the seniority provisions that had formed part of their individual employment contracts in the previous season. They had then been presented with new terms of employment as a condition of their re-engagement. The issue was whether this amounted to unlawful lockouts which in turn depended upon whether or not the individual employment contracts had terminated at the end of the previous season. A majority (Finnigan and Palmer JJ) concluded that the contract of employment of a worker who was seasonally laid off did not continue through the off season and that being laid off terminated the employment relationship.

[46] Miss French submitted that the majority in *Richmond* relied too heavily on the same factors relied on in the 1987 *Alliance* case, particularly the existence of a seniority clause regulating re-engagement for a new season. She submitted that the conclusion reached by the majority did not follow logically from a consideration of this clause. She submitted that the seniority system was necessary to determine an order for offering work to staff when it was not possible for all of the work force to start at once and that the parties had decided that seniority was the fairest way to do it. Viewed in that context, she submitted that it ought not have been significant in the decision of the case.

[47] Miss French then turned to the Court of Appeal decision in *New Zealand Meat Processors IUOW v Alliance Freezing Co (Southland) Ltd* (1990) ERNZ Sel Cas 834. That case concerned six workers who for some years had worked in the general services department of a plant and were not affected by seasonal lay-offs. When they were then laid off, they alleged that this was an unjustifiable action affecting their employment to their disadvantage. In the decision of the Labour Court reported in [1989] 2 NZILR 309, the majority held that the employer did not unjustifiably lay off the workers as there was nothing in their contracts of employment which assured them of "*all year round*" employment.

[48] On appeal, the issue was whether there was any inconsistency between an assurance of continuous employment and the award. The Court of Appeal held that the award must prevail and that the seasonal engagement of workers was a basic premise underlying it. It was therefore inconsistent with the co-existence of a contractual provision for the continuous employment of staff. The Court concluded:

> ***Inconsistency between award and assurance***
>
> *The award is designed for a seasonal industry. The seasonal engagement of workers is a basic premise underlying the awards. That is clear from clause 29(g), clause 30 and the leave provisions earlier referred to. Thus clause 30(c) providing for lay offs and re employment to be based on departmental and/or group seniority, and clause 30(d) requiring a seniority list to be prepared for each department or group prior to the commencement of seasonal lay offs, necessarily govern the position of general services department workers. In order to uphold the claim of unjustifiable termination as advanced for the 6 workers, it would be necessary to disregard those award provisions. They are truly inconsistent with the co-existence of a contractual provision for permanent employment.*

[49] Miss French contended that the Court of Appeal in that case was not called upon to decide whether the seasonal lay-off was a termination or a suspension but

rather, assuming there was a term of the contract providing for all year round work, whether that term could prevail in the face of the provisions of the award empowering the company to lay off workers seasonally. She invited us to distinguish the decision on the grounds that the right of the defendant to lay off the workers seasonally was not in dispute here and referred us to the decision of this Court in *Ussher v Te Kuiti Meat Processors Ltd* [1995] 2 ERNZ 612. She submitted that the Court in the present case was therefore free to decide the issue afresh in the light of a new legislative regime but, more importantly, with the ability to examine the true essence or substance of the relationship.

[50] In *Ussher,* the employees had applied for a renewal of an interim injunction preserving their employment until trial. The employees had been seasonally laid off and believed they would be called back to work for the new season under the same terms and conditions. They were told by the employer that they would only be offered work if they signed a new collective employment contract and, on their refusal to do so, it did not call them back for the new season. The employees claimed that the employer was under a contractual obligation to take them back and that, by refusing to do so, it was either unjustifiably dismissing or unjustifiably disadvantaging them. The employer claimed that the employees had no more than a contractual right to be offered work according to their seniority and that this did not extend to preservation of the previous terms of employment. The central question was whether the employees had an arguable case that their individual contracts were continuous contracts and had not terminated at the end of the previous season. The employees accepted that they would have to distinguish the *Richmond* case.

[51] The Court held that the employees had an arguable case that the Employment Contracts Act 1991 provided for employment relationships which were different to those under the award system which was the subject of the *Richmond* case. The Court also held there was an arguable case that the particular terms of the individual employment contracts created a continuous employment relationship and that the employer was in breach of an implied term in their contracts by refusing to provide them with work at the commencement of the new season. The Court observed there were certain similarities between the cases because in *Richmond* the employees had been on individual contracts of employment based on a previous expired award and had been called back to work in accordance to seniority provisions. The Court then

noted that it was common ground in both cases that the work of employees in the meat industries is seasonal, that the employer was entitled to lay off its staff until the work became available and that the issue was whether workers laid off in the previous season had a contractual right to work for the employer again on the same terms. As in the present case, the employees in *Ussher* were permitted to remain in the superannuation scheme during the off season, allowed to take home certain equipment belonging to the employer and that some equipment remained in personalised lockers or bags at the employer's plant.

[52] The Court analysed the majority judgments of Finnigan J and Palmer J in *Richmond*. It found that it was critical for Finnigan J that, at the commencement of each successive season, each worker had the opportunity and the right to decline, without notice, the employer's offer of a resumption and that the worker had no right to be offered the work other than in accordance with the seniority list and the employer's needs. The award did not create a continuing employment contract and ongoing arrangements such as the order of seniority, the superannuation scheme, the holiday pay and gear storage arrangements could not by themselves supply the essential elements of a continuing and enforceable employment contract. Palmer J held that, because the employment was seasonal, employees were lawfully dismissed when they were laid off at the conclusion of each season and there was no employment continuity. Palmer J considered he was obliged to follow the Court of Appeal in the 1990 *Alliance* case where it held that a seasonal lay-off was a termination of employment.

[53] In *Ussher*, the Court found it was arguable that the Employment Contracts Act 1991 created a very different legislative regime to that relied on in the earlier decisions. It considered that the expired collective employment contract was not materially identical to, or otherwise linked with, the earlier award provisions which were binding on the parties. Further, it noted that the term of the expired collective employment contract was not based on the seasonal lay-offs, but straddled two seasons. It found it was arguable that the parties would have negotiated a collective contract that concluded at the end of the season if they had intended the employment relationship to end then or at least have settled a contract that was not inconsistent with that position.

[54] The Court also held that the expired collective employment contract did not relate seniority to re-engagement for a new season. This was something which Palmer J in *Richmond* had found to be a compelling incident of discontinuous employment and that, in turn, was in favour of an argument for continuous employment over the off season. The Court also analysed a number of clauses in the expired collective contract which it held appeared to contemplate continuity of employment. These included clauses which referred to security of employment and an equitable sharing of benefits and responsibilities and long service benefits based on years of continuous service. Although matters of seniority were dealt with in the expired collective employment contract, the Court held it was notable that this was not in the context of re-engagement at the beginning of a new season and that these were arguably as consistent with the concept of continuous employment as they were with the defendant's notion of discontinuous employment. The judgment in *Ussher* applied interim injunction principles and, in particular, required only that an arguable case had to be established to support temporary relief.

[55] It was a key aspect of Miss French's overall argument that the Court had the ability to examine the true essence or substance of the relationship. In support of this, Miss French referred to s6(2) of the Employment Relations Act 2000. Section 6(2) provides that, for the purposes of determining whether a person is employed by another person under a contract of service, the Court must determine the real nature of the relationship between them. Subsection (3) of s6 provides that the Court must consider all relevant matters, including matters that indicate the intention of the persons, and that the Court is not to treat, as a determining matter, any statement by the parties that describes the nature of their relationship.

[56] Counsel were invited to file supplementary memoranda regarding s6(2) and in relation to the criteria for unemployment benefits received by meatworkers during the off season. Miss French accepted that s6(2) is expressly directed at a specific issue, namely whether the relationship between the parties is that of employment or of independent contractors, and that this is not in issue in this case. She submitted that s(6)(2) is nonetheless relevant because it reflects the intention of Parliament that inquiries of this nature should be broad and should focus on the "*real nature*" of the relationship. She submitted that it provides useful guidance to the Court in

determining the nature of the relationship between the defendant and its employees in this case.

[57] As to the unemployment benefit, Miss French noted that the entitlement is regulated by ss89 and 90 of the Social Security Act 1964. Under s89 she submitted that the principal criteria for eligibility are that an applicant must not be in full time employment and must have no income or an income of less than the amount that would fully abate the benefits. There is a definition in s3 of the Social Security Act 1964 which defines employment as "*paid employment*". Miss French also drew our attention to the provision which allows a person on the unemployment benefit to earn up to $80 gross per week without it affecting the benefit. As the plaintiff's case is that the employment relationship continues during the off season on an unpaid basis, she submitted that there is no inconsistency between that case and the receipt of the unemployment benefit by meat workers during the off season.

Case for the defendant

[58] Mr Cunliffe confirmed that the manner in which the defendant applies the provisions of the Holidays Act to its seasonal workforce is:

a) For new workers and workers returning after a seasonal lay-off, the entitlement to sick leave and bereavement leave is that set out in the collective agreement and is paid at the rate provided for in the collective agreement.

b) Those employees that continue beyond the six months' current continuous employment accrue five days statutory sick leave which they can access and in accordance with s71 is paid on the basis of relevant daily pay.

c) The defendant runs dual balances for its seasonal workforce showing the contractual leave entitlement under the collective agreement and the statutory entitlement under the Holidays Act of five days. They are treated independently of one another. After six months they are not "*run*" together but remain separate.

d) The collective agreement balance accrues as if the Holidays Act had not been passed and is treated as an additional benefit. At the end of the season, any unused statutory entitlement which has accrued is not paid out, which is in accordance with the provisions of the Holidays Act, but the contractual balance is carried forward to the following season in accordance with the collective agreement, assuming the employee returns.

e) A similar approach is adopted for bereavement leave.

[59] The effect of the approach adopted by the defendant is that:

a) Those seasonal workers employed in a season who do not complete six months' current continuous service have no entitlement under the Holidays Act but receive their entitlements under the collective agreement;

b) Those seasonal workers who complete six months' current continuous service receive their entitlements under the collective agreement and the minimum statutory entitlement under the Holidays Act.

[60] The defendant acknowledges that there are various groups of employees such as freezer hands, rendering workers, yard gangs and pallet store workers who continue working during the off season and who are treated as all year round employees. They receive both their contractual entitlement to sick leave and bereavement leave under the collective agreement and the minimum statutory entitlement under the Holidays Act. If they remain in year round employment, they carry forward both entitlements. Other workers are engaged on casual contracts during the seasonal lay-off and may be subsequently re-engaged in accordance with their seniority rights for the new season. He submitted that the existence of these casual contracts, their particular terms and the fact that the parties enter into them is entirely consistent with there being no subsisting employment agreement at the time during the off season.

[61] Mr Cunliffe referred to three potentially relevant categories of meat workers:

a) Seasonal meat workers taken on for the first time and who are therefore "*brand new*" to the defendant at the start of the season and who make up approximately 18 to 20 percent of the defendant's seasonal workforce;

b) Seasonal workers who are in their second or subsequent seasons with the defendant who are taken on in accordance with the seniority provisions in the collective agreement and who are laid off again in accordance with those provisions subject to the procedures at the various plants; and

c) Meat workers covered by the collective who work year round but may be laid off sometime in the future.

[62] He submitted that this case is not about determining which particular members of the seasonal workforce fall into one or other of those categories but the appropriate treatment of those workers in the first two categories in respect of their sick leave and bereavement leave.

[63] The defendant's position is that a seasonal worker's employment finishes at the end of the season and is not continuous from season to season. In support of this

position, Mr Cunliffe relied on the 1987 *Alliance* case, the 1990 *Alliance* decision of the Court of Appeal and the majority decision in *Richmond*.

[64] Mr Cunliffe examined the relevant provisions of the Holidays Act, namely ss6 and 9 and subpart (4) of Part 2. He observed that the Act did not define the term "*current continuous employment*" and submitted that one interpretation of that phrase is being physically present at the workplace continuously. He submitted that this interpretation derives support from s63(1)(b).

[65] He submitted that as a matter of fact during the off season there is no obligation to pay the employees who have been laid off or to provide them with work, nor could it be seriously argued that the defendant could compel the employees to work. Many of them would be unable to work for the defendant because they have off season jobs elsewhere. Even if the minority opinion in *Richmond* was to be accepted, there is a suspension of their employment relationship and a distinct break in the current work undertaken in employment.

[66] Mr Cunliffe observed that s16(2) sets out periods which are included in the calculation of 12 months' continuous employment for the purposes of the accrual of annual holidays. These include unpaid sick leave, unpaid bereavement leave or unpaid leave for any other purpose for a period of no more than one week. Section 16(2)(b) specifically provides that, unless otherwise agreed, any other unpaid leave is not to be taken into account. He observed that there is no similar provision which applies to subpart (4) of Part 2 of the Holidays Act.

[67] Counsel submitted that, as the seasonal break is a period when no work is done and no payment made to seasonal workers, it constitutes a break as a matter of fact in the continuous employment of the worker. The worker therefore has to requalify for the benefits under the Holidays Act in the next season.

[68] Mr Cunliffe submitted that the provisions of the award relied on by the Court of Appeal in their 1990 *Alliance* decision, namely clause 29(g) and clause 30, and especially clause 30(c) and clause 30(d), have been carried through the subsequent collective agreements and have applied to employees of the defendant during the period 1992 to 2005. The equivalent provisions are now clause 30(g) and clause 31. Although the seniority clause has changed, this has been by the inclusion of some additional subclauses which were not in the award. Those changes first appeared in

the period 1994 to 1996. The additional clauses which were not in the awards are as follows:

> ***31*** …
>
> *(c) The employer acknowledges the benefits of a stable, competent workforce which is familiar with and trained in the employer's requirements. Employees seasonally laid off the previous season will be offered the first opportunity of re-employment at respective plants for the new season and the first opportunity of re-employment prior to the engagement of new employees, subject to:*
>
> *(i) Re-employment being consistent with individual plant's requirements and departmental needs and the individual's competency; and*
>
> *(ii) Departmental and positional skills/experience requirements and a satisfactory work record.*
>
> *Layoffs and re-employment will be based on departmental and/or plant seniority.*
> …
>
> *(g)* …
> *A worker's seniority shall not be broken if such worker(s) refuses to return to work after being laid off one or more times in a particular season, provided that the recall is not due to an early start to a new season.*
>
> *Where no suitable workers with seniority are available to maintain full manning within a plant(s), replacement workers may be employed. The nature of employment for a replacement worker shall be on a day to day basis and employment shall terminate when a suitable worker with seniority becomes available for work or on seasonal layoff. A replacement worker shall not receive seniority and on cessation of employment shall not be entitled to redundancy compensation.*
>
> …

[69] Mr Cunliffe submitted that these additional subclauses render the seniority provisions of the collective agreement even less amenable to an interpretation of continuous employment than the provisions of the awards. He submitted that, if the seniority clause was meant to result in a different conclusion than that of the majority in *Richmond*, the word "*re-employment*" would not have been used. He also submitted that the use of that term was inconsistent with continued employment.

[70] Mr Cunliffe referred to the "*continuous service*" definition in relation to long service leave which was examined by the Court of Appeal in the 1990 *Alliance* decision, the sick day entitlement in clause 9(c) of the award and the right to manage provision in clause 30(j). These have all been retained in the collective agreements as clause 10 – long service leave, clause 11 – sick leave, and clause 33 – management. He referred to the conclusion of the Court of Appeal that, in order to

uphold the claim for unjustifiable termination in respect of the six workers, it would be necessary to disregard these award provisions which were based on the seasonal engagement of workers. These provisions were found by the Court of Appeal to be truly inconsistent with the co-existence of a contractual provision for permanent employment.

[71] Mr Cunliffe analysed the judgments in *Richmond* and submitted that Palmer J's assessment of the Court of Appeal decision was correct and binding on the Court insofar as it concluded that a seasonal lay-off involved the termination of employment of a meat worker during the particular season. The Court of Appeal had decided that, conceptually, seasonal employment cannot be permanent employment of an uninterrupted character because the lay-off of a seasonal worker is a termination of the contract of employment pending re-employment at the commencement of the new season. He submitted that the clauses in the award, and now in the collective agreement, provide express governing terms for lay-offs and re-employment to be based on department and/or group seniority. Had the Court of Appeal found that a seasonal lay-off was something less than a termination of employment, it would not have found that a contractual provision guaranteeing year round employment was inconsistent with the award provisions.

[72] Mr Cunliffe also analysed the dissenting judgment of Goddard CJ in *Richmond*. He noted the dictionary definitions relied on by the former Chief Judge and offered others which refer to "lay-offs" as the suspension of workers from employment with the intention of re-employing them at a later date, being a period of imposed unemployment and the discontinuance or discharge of employment permanently or temporarily owing to a shortage of work. He submitted that the term "lay-off" can have a meaning which supports either side of the argument as either a suspension or a ceasing of employment altogether, even if it is temporary. He observed that the decision of the full Court was delivered in 1992, that it has remained the law since that time and that no other authority has challenged it.

[73] In dealing with the decision in *Ussher*, Mr Cunliffe noted that, unlike that case, the collective agreement in this case retains terms which are identical to the previous awards. On this basis, he submitted that the decision in *Ussher* could be distinguished but that, because of the similarity of terms, the decisions in *Richmond* and *Alliance* cannot be distinguished. The parties could have moved away from the

original award provisions if they had considered that *Richmond* was wrong or inconvenient.

[74] Mr Cunliffe referred us to *Gray v Crown Superannuation Fund* [1991] 1 NZLR 129 where the Court of Appeal considered the effect on a superannuation fund when seasonal workers were not rehired the following season. At the time of the seasonal lay-off, the employees were aware that they would not be engaged if certain renovations were not carried out and the plant did not re-open. Eventually clerical and management staff were dismissed for redundancy and the fund was terminated. The plaintiffs were treated as having resigned at the time of the seasonal lay-off and therefore were not paid out their full redundancy entitlements. The Court of Appeal found that, at the time of the seasonal lay-off, when there was no stock and no work for the employees in a normal year, this would not constitute redundancy because their jobs would be open for them again when the season recommenced. It held that the circumstances were not normal and, having regard to the nature of the deed and its benefits, the permanent closure of the works was within the concept of redundancy as defined. The question posed was whether the cessations in this case were due to redundancy when they occurred in circumstances in which the works were closing for a period which might be a permanent stop.

[75] The Court of Appeal found that dismissal with the possibility of re-engagement could be regarded as redundancy but much would depend on the circumstances of each case. The seasonal workers had been treated throughout by the employer and the trustees of the fund as being in the full time employment of the employer for the purposes of the deed and, against this background pattern of many years' standing, the superannuation deed was intended to operate as a benefit all employees, including the seasonal workers. The pattern was suddenly interrupted by the need to close for renovating, the permanent closure which involved the wholesale dismissal of all staff and the failure to re-engage all seasonal workers. At the time of the seasonal lay-off, neither the workers nor the employer knew whether the jobs would ever become available again. It was therefore held that the cessation of work with the possibility that the plant would close permanently was redundancy for the purposes of the superannuation trust deed.

[76] Mr Cunliffe urged us to distinguish the approach taken in the *Gray* case on the basis that it relied on the particular wording of the superannuation trust deed which

was materially different to the two superannuation schemes available to employees working at the defendant's plants, the wording having been changed in light of this decision. The superannuation trust deeds open to employees of the defendant specifically provide that a seasonal lay-off is not to give rise to a redundancy.

[77] Overall, Mr Cunliffe submitted that the cases upon which the defendant relied were correctly decided and their outcomes were explicable having regard to the facts and the seasonal nature of the workers' engagement. He submitted there was no basis for reconsidering them. He also submitted that the Court was bound by the *Richmond* decision, based as it was on the *Alliance* case.

[78] Mr Cunliffe then analysed certain clauses in the collective agreement. Clause 13, dealing with parental leave, contains a reference to female workers not being eligible for maternity leave "*due to a seasonal lay-off*". This is based on the requirement under the Parental Leave and Employment Protection Act 1987 that an employee be continuously employed for 12 months in order to qualify for parental leave. Mr Cunliffe submitted that this clause would have no meaning or purpose if employment was regarded as continuous during seasonal lay-offs.

[79] Mr Cunliffe referred to the amendments to clause 31 relating to seniority. He submitted that, if the employment was deemed to be continuous from the time employees were first engaged by the defendant until they ceased being engaged as opposed to being seasonally laid off, the complex seniority provisions, including its new clauses, would not be necessary. He stressed the particular wording used in clause 31 and, in particular, the repeated reference to "*re-employment*" as opposed to "*engagement*". He submitted this use of terminology was not consistent with continuous employment and that the right to be offered the opportunity of employment is subject to individual plant requirements, departmental needs, an individual's competency and a satisfactory work record.

[80] Mr Cunliffe referred us to clause 37 which provides for minimum weekly payments to workers. It was common ground that workers are not paid at all during the off season and Mr Cunliffe submitted that this was consistent with the employment ceasing at the end of each season.

[81] Mr Cunliffe relied on the dictionary definitions of "*employ*" as meaning to engage or make use of the services of a person in return for money and "*re-*

employment" as meaning to employ again and to take back into employment. He submitted the wording of the collective agreement reinforced his submission that the common intention of the parties was to operate an agreement which recognised the reality that the seasonal lay-off was a termination of employment.

[82] He also submitted that this was consistent with the actual practice at the defendant's various plants during the off season including the engagement of some staff on a casual basis and the process for re-engaging employees. He submitted that the processes in place at the recommencement of the season are consistent with the conventional process of offer and acceptance and are inconsistent with continuous employment.

[83] Mr Cunliffe cited two cases decided after *Richmond*. In *Cruickshank v Alliance Group Ltd* [1992] 3 ERNZ 936, the Court allowed an appeal against the Employment Tribunal's finding that the seasonal lay-off was a suspension rather than a termination with an obligation to offer re-employment. Applying *Richmond*, Palmer J found that nurses employed by the defendant and laid off during the off season had their employment terminated.

[84] The second case was *Teague v Wallace Corporation* [2002] 2 ERNZ 830. This involved a challenge to a collective employment contract presented on a take it or leave it basis during the off season as having been procured by harsh and oppressive behaviour. One of the issues was whether there had been a lockout. The Court concluded that the defendant was entitled to apply the decision of the majority in *Richmond* and to conclude that the employment of each of the plaintiffs had terminated at the end of the season.

[85] As to the application of s6(2) of the Employment Relations Act, Mr Cunliffe submitted that it was not relevant in the present case where there was no issue that the workers were engaged on a contract of service. He submitted it provided no analogy or guidance because the issue for the Court in this case was the interpretation of the Holidays Act rather than the nature of the contractual relationship between the defendant and its staff.

[86] As to the unemployment benefit, Mr Cunliffe referred to s3 of the Social Security Act 1964 which defines full or full time employment in terms requiring the person "*to work, whether on time or piece rates, no less than an average of 30 hours*

each week". He then referred to s89(1)(a) which requires, as part of the eligibility criteria, that the applicant is not in full time employment but is seeking it, is available for it, is willing and able to undertake it and is taking reasonable steps to find it. He submitted that the plaintiff's concept of being in *"unpaid employment"* over the off season does not fit easily alongside the definition of full time employment and the requirement that, to be eligible for the unemployment benefit, a person must not be in such employment. He also observed that the collective agreement does not contemplate the concept of "*unpaid employment*" and that if workers are employed by the defendant during the off season they would be entitled to the minimum contractual payment contained in clause 37 of the collective agreement which is payable whether or not work is carried out.

Discussion

The Holidays Act 2003

[87] The first point we must decide is the meaning of the term "*current continuous employment* [with an employer]" in the context of s63 of the Holidays Act 2003. To do so, we must construe the words used in light of the purpose of the legislation. We also have regard to the scheme of the Act and to related provisions within it. The Holidays Act 2003 contains specific object provisions. Section 3 provides that its purpose is to *"promote balance between work and other aspects of employees' lives"* and, to that end, to provide employees with minimum entitlements to sick leave and bereavement leave to assist employees who are "*unable to attend work*" because of illness or injury or because they have suffered a bereavement.

[88] An *"employee"* is defined by s5 of the Holidays Act as having the same meaning as in s6 of the Employment Relations Act 2000 with the exception of that part relating to "*a person intending to work*". For this purpose, s6 of the Employment Relations Act provides that an employee *"means any person of any age employed by an employer to do any work for hire or reward under a contract of service"*.

[89] Section 6 of the Holidays Act 2003 provides that its entitlements are minimum ones and there is no prohibition on an employer providing an employee with enhanced or additional entitlements on a basis agreed with the employee. Likewise,

s6(3) provides that an employment agreement cannot exclude, restrict, or reduce an employee's entitlements under the Act.

[90] Sub-part 4 of Part 2 of the Act deals with sick leave and bereavement leave. Section 62 sets out its purpose, being *"to provide all employees with a minimum entitlement to paid leave in the event of their sickness or injury, or of sickness, injury, or death of certain other persons."*

[91] Section 63, which is at the heart of this case, provides:

> ***63 Entitlement to sick leave and bereavement leave***
>
> *(1) An employee is entitled to sick leave and bereavement leave in accordance with this subpart—*
> *(a) after the employee has completed 6 months' current continuous employment with the employer; or*
> *(b) if, in the case of an employee to whom subsection (1)(a) does not apply, the employee has, over a period of 6 months, worked for the employer for—*
> *(i) at least an average of 10 hours a week during that period; and*
> *(ii) no less than 1 hour in every week during that period or no less than 40 hours in every month during that period.*
>
> *(2) Sick leave and bereavement leave must be provided—*
> *(a) to an employee to whom subsection (1)(a) applies, for—*
> *(i) the 12-month period of continuous employment beginning at the end of the 6-month period specified in that subsection; and*
> *(ii) each subsequent 12 months of current continuous employment:*
> *(b) to an employee to whom subsection (1)(b) applies, for—*
> *(i) the 12-month period of employment beginning at the end of the 6-month period specified in that subsection; and*
> *(ii) each subsequent 12-month period of employment as long as the circumstances referred to in subparagraphs (i) and (ii) of that subsection continue to apply.*
>
> *(3) However, an employer and employee may agree that—*
> *(a) the employee may take sick leave or bereavement leave in advance; and*
> *(b) in the case of sick leave taken in advance, the amount of leave taken is to be deducted from the employee's entitlement under this section.*

[92] As noted earlier, s71 provides that payment for sick leave is to be an amount equivalent to the employee's relevant daily pay for each day of leave as calculated in accordance with ss9, 10 and 11 of the Act.

[93] The notion of continuous employment is addressed to an extent in s85. This provides a statutory presumption that employment will be continuous if an employee is dismissed and then re-employed within one month. The deemed continuity is for the purposes of the employee's entitlements under the Act.

[94] We accept Mr Cunliffe's submission that, other than to the extent it is dealt with in s85, the Holidays Act does not define the term "*current continuous employment*" for the purposes of sick leave and bereavement leave. The existence of the presumption of continuity up to one month in s85, however, suggests that, if an employee is dismissed and re-employed more than one month later, the employment ought not to be treated as continuous.

[95] We regard the relationship between paragraphs (a) and (b) of s63(1) as an important indication of the meaning to be given to the expression "*current continuous employment*". Section 63(1)(b) provides that, "*in the case of an employee to whom subsection (1)(a) does not apply",* an employee may qualify for sick leave and bereavement leave by working intermittently for an employer provided the hours of work exceed the minimum requirements set out in the paragraph. The logical inference to be drawn from this is that Parliament regarded employees whose work patterns met the minimum requirements of s63(1)(b) as not falling within s163(1)(a) and therefore not engaged in "*current continuous employment"*. The work patterns of seasonal employees of the defendant fall well short of the requirements of s163(1)(b) during the off season. Thus, even if their employment relationship with the defendant did continue in the off season, that would not qualify them under s163(1).

[96] Section 16(2) deals with the concept of "*continuous employment"* for the purposes of entitlement to annual holidays. It defines the required qualifying period of 12 months as including volunteers leave, unpaid sick leave, unpaid bereavement leave or unpaid leave for any other reason for a period of no more than one week. Section 16(2)(b), however, provides specifically that, unless otherwise agreed, any other unpaid leave is not to be taken into account. The provisions of s16(2)(a) deeming various absences to be included in the 12 month qualifying period suggest that, in the absence of these provisions, such absences would not have been regarded as part of "*continuous employment*".

[97] The inclusion of volunteers leave under the Volunteers Employment Protection Act 1973 is of some significance. That Act provides that, where an employee is undertaking protected voluntary service, such as service in the territorial forces, that person's employer is deemed to have granted the employee leave without pay. The effect of this is that the employment relationship remains intact but the employer is

not obliged to provide work and the employee is not entitled to payment. This statute therefore creates an employment relationship very like the *"unpaid employment"* which Miss French urged us to find was the nature of the relationship between the defendant and its employees during the off season. That Parliament considered it necessary to deem this to be part of *"continuous employment"* for the purposes of qualifying for annual leave suggests that, otherwise, it ought not to be regarded as such.

[98] As Mr Cunliffe noted, there is no provision comparable to s16 in the Act relating to the qualifying period for sick leave and bereavement leave but, given the similarity of wording between *"continuous employment"* in s16 and *"current continuous employment"* in s63, we nonetheless regard the indication given by s16 as significant.

[99] Having noted the similarity between the terminology in s16 and s63, some account must also be taken of the difference, being the use of the word "*current*" in the expression *"current continuous employment"* in s63. The dictionary definition of *"current"* is "*belonging to the present time; happening now*" (Concise Oxford Dictionary, 8th ed 1990). Having regard to the applicable statutory meaning of *"employee"* as being a person engaged to do work for hire or reward, it would not accord with common usage to regard a meat worker who has been laid off during the off season as being *"currently"* in employment with the defendant. This would especially be so if the meat worker was employed at the time by another employer or was receiving an unemployment benefit.

[100] We also have regard to the Concise Oxford dictionary definition of "*continuous*" which is "*unbroken, uninterrupted, connected throughout in space or time*". In the off season, seasonal employees are not required to perform any work for the defendant and are not paid. This may be contrasted with the situation during the season where the employees are required to perform specific work and are paid accordingly. Again, in common usage, it would be difficult to categorise the employment as being "*continuous*" in the sense of unbroken, uninterrupted, or connected throughout the off season.

[101] Overall, we find the Holidays Act favours the defendant's position.

The case law

[102] We are not persuaded by Miss French's submission that we should adopt the dissenting judgment of Goddard CJ and reject the majority judgments in *Richmond*, the judgments of the Court of Appeal in both *Alliance* cases and the individual judgments of Finnigan J in the 1987 *Alliance* case and Palmer J in *Cruickshank*.

[103] 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.

[104] Although, as Miss French submitted, the Court of Appeal and the majority of the Employment Court reached their conclusions in part because of the seniority provisions of the relevant award, the cases also demonstrate an acceptance of the proposition that, if there is no longer any work or any right to payment and the workers are sent home, the employment has in fact ceased.

[105] Mr Cunliffe very properly referred to the decision in *Gray,* although it appeared not to support the defendant's case. The aspect of the decision which has potential significance for this case is the conclusion that seasonal workers could be regarded as having been in continuous employment notwithstanding seasonal lay-offs. We agree with Mr Cunliffe that the decision can be distinguished on the grounds that it relied on the particular terms of the superannuation trust deed which differed markedly from those in this case. Further, it appears to have been recognised by the Court of Appeal that, if the parties had not always treated seasonal workers as "*full-time*" employees, and therefore full members of the superannuation fund, the seasonal lay-off would have been regarded as a termination of their employment. This was what McGechan J had found at first instance. In this way, the decision in *Gray* can be seen as supportive of the defendant's position.

[106] We also accept Mr Cunliffe's submissions that the provisions of the collective agreement relating to seniority that were not present in the earlier award strengthen

the defendant's argument that laying off staff for the off season terminates their employment. The amended provisions talk in terms of "*re-employment*" which we find must mean the entering into of an employment contract with someone who was previously employed but whose employment contract has terminated. That accords with the dictionary definition of re-employ as "*employing again*". As was said in the earlier cases there would be no need for such a provision, protecting as it does the seniority rights, if the employment remained continuous throughout the off season.

Current Practices

[107] The conclusion we have reached essentially accords with the current practice of the defendant. We find that, for all relevant purposes, the employment of members of the union employed by the defendant should be regarded as having been terminated when they are laid off for the off season. Those employees are then free to engage in any other employment, including employment with competitors, or to apply for the unemployment benefit. The defendant is also freed from the obligation to pay the employees, including the minimum rate of pay which all workers currently in employment are entitled to in terms of the collective agreement.

[108] We find also that the process by which the defendant invites applications for re-engagement and the forms of offer and acceptance that are signed by the defendant and its employees are all consistent with a new employment contract being entered into for each season.

[109] 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. Until they re-establish their right to sick leave and bereavement leave under the Holidays Act by being continuously employed for six months, they are entitled only to the sick leave and bereavement leave provided by the collective agreement which forms the basis of the terms and conditions of their re-employment for the new season.

[110] We therefore conclude that meat workers employed by the defendant and covered by the collective employment agreement who are laid off on a seasonal basis are not employed by the defendant during the off season and that the period of time during the off season cannot be taken into account as part of "*current continuous employment*" for the purposes of sub-part (4) of Part 2 of the Holidays Act 2003.

Costs

[111] Costs are reserved.

B S Travis
Judge
for the full Court

Judgment signed at 9.30am on Thursday, 17 August 2006

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