

‘Seasonal’ workers protected under employee lockout provisions

On 6 October 2016 the Court of Appeal issued its judgment in *AFFCO New Zealand Limited v NZ Meat Workers and Related Trades Union Inc* [2016] NZCA 482, upholding an earlier Employment Court decision in favour of the union. The basis for that decision is explained below, but was essentially that AFFCO’s ‘seasonal’ workers had the same status as “employees” under the lockout provisions of the Employment Relations Act 2000 (*ERA*), even although they were between engagements during the off season when alleged lockouts at meat processing plants occurred. Post-employment obligations under the collective agreement, but more particularly to re-employ according to seniority, constrained AFFCO’s future conduct transforming its refusal to offer re-employment into an unlawful lockout.

Facts

The meat processing industry operates on a seasonal basis. During the off season, which according to the judgment can last between two and six months, AFFCO and other meat processors do not pay slaughter and processing personal and others associated with seasonal operations. These ‘seasonal’ workers are free to find employment elsewhere while the plants are closed.

AFFCO and its seasonal workers had been party to a collective employment agreement in 2013 until it technically expired on 31 December 2013, whereupon it continued by operation of statute for a further year as individual agreements between the company and each worker. Before the 2015/2016 season commenced, AFFCO advised the workers that it would not re-employ them for work unless they each signed a new, individual agreement. The union alleged that the company’s actions were coercive and amounted to an unlawful lockout of its workers.

A Full Court of the Employment Court agreed, and ruled that the workers and AFFCO had a continuous employment relationship which subsisted through the off season. If they were wrong about that, the Employment Court judges said AFFCO’s refusal to engage ‘prospective employees’ was also an unlawful lockout.

Issues on appeal

The key issues on appeal were:

1. Whether the Employment Court erred in finding that AFFCO engaged the seasonal meat workers on employment agreements of indefinite duration; and
2. If not, whether the Employment Court erred in finding AFFCO that unlawfully locked out the workers in terms of s82 of the ERA, notwithstanding there was no employment relationship between AFFCO and the meat workers in the off season.

First issue - and first principles

In determining the true construction of the contract(s) of employment, the Court held the express terms are the central focus, but the Court must consider the words used within the context in which these particular parties have chosen the language.

Here, the Court noted the central feature of the context and genesis of the collective agreement was the body of case law which has determined disputes about continuity of employment in the meat processing industry. The Court took as its starting point the 1990 decision of the Court of Appeal in *New Zealand Meat Processors etc IUW v Alliance Freezing Co (Southland) Limited (Alliance 1990)*. There, an assurance of “all year round” employment in a contractual provision could not prevail over a statutory award which included provisions for seasonal lay-offs.

Rightly or wrongly, *Alliance 1990* established that seasonal lay-off amounted to a termination of the employment of a meat worker who had been employed during a particular season, a finding was later underscored by Full Court decisions of the Employment Court, one in 1992 the other in 2006. This affirmed an industry standard, that is to say, seasonal lay off and termination at the end of each season. As the Court of Appeal said, “[These cases] provided the relevant background of discontinuity against which this collective agreement was negotiated. The parties must be assumed to have bargained on that understanding of the law....”

Put simply, the parties in this case had control over the language they used and chose to accept seasonal lay off, in full knowledge of the three decisions establishing that standard. The Employment Court was required to construe the contract in that context, and

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its failure to do so was a reversible error. Properly construed, the Court held there was no ongoing relationship when 'seasonal' workers were allegedly locked out by AFFCO.

Second issue: definition of "employee" dynamic

Given its finding on the first issue, the Court turned to consider whether AFFCO had unlawfully locked out its workers even though they were not in an employment relationship during the off season. Lockouts are defined in detail in section 82 of the ERA. It says a lockout is the act of an employer in refusing to engage employees for any work for which the employer usually employs the employee.

Obviously enough, one cannot be the target of a lockout unless one has the status of an employee. A lockout must also have a specific purpose or motive of compelling employees to comply with the employers demands or accept terms of employment, but that element was not in issue in the present case.

The Court ruled that the Employment Court was wrong when it had held that AFFCO's seasonal workers fell within the extended definition of an "employee" as a person intending to work. But it said although the ERA defines an "employee" as one either employed or intending to work, it also makes it clear that the definition is qualified by the words "unless the context requires otherwise". In other words, by statutory direction, the word "employee" is dynamic and can have different meanings based on context.

The question for the Court was therefore whether the statutory context of the lockout provisions required the definition of employee to be expanded to include seasonal workers who are not continuously employed by the employer.

On this point, while the Court, as we have seen, said that the collective agreement characterised each seasonal engagement as a separate contract, it still created ongoing an enforceable contractual rights and duties, including redundancy rights and AFFCO's obligation to re-employ according to seniority.

Because AFFCO's conduct worked to defeat these existing rights of the workers, and did so with the purpose of undermining workers' long-standing rights and bargaining strength, "*the contractual and legislative context*" required the word "employees" in s82 to include the seasonal workers in this case.

Comment

As to the means for interpreting documents, the judgment is useful in confirming the need for parties to use clear language if they wish to depart from industry standards; in this case, of inter-seasonal termination of employment recognised by earlier decisions. As the Court recognised, decisions on disputes between certain parties are not determinative of the interpretation of other parties at a later date. Yet the Courts have long-recognised that "*regard to the course of earlier judicial authority and practice on the construction of similar contracts*" is permissible. That is particularly so when it comes to standard form contracts such as standard forms of building contract but, as this decision demonstrates, the proposition may extend to other types of contracts depending on their factual and legal context.

On the issue of the lockout provisions in the ERA, the Court has significantly expanded their coverage. Despite the Court's forceful rejection of the employer's concerns about the "absurd" implications of this expansive approach, the boundaries of the definition of "employee" not only under section 82, but elsewhere in the ERA, for example under the personal grievance provisions, remain to be explored and will likely lead to litigation.

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