IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 33
EMPC 152/2015

IN THE MATTER OF	an application for compliance orders
BETWEEN	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED First Plaintiff
AND	ROBERTA KEREWAI RATU AND OTHERS Second Plaintiffs
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing:	16 February 2017, and on submissions filed on 21 February and 1, 6 March 2017)
Appearances:	P Cranney, counsel for the plaintiffs P Wicks QC, counsel for the defendant
Judgment:	24 March 2017

JUDGMENT (NO 3) OF JUDGE B A CORKILL

Introduction

[1] This decision considers issues as to the correct methodology to be adopted in calculating wages allegedly lost by up to 164 workers who were illegally locked out from the Wairoa plant of AFFCO New Zealand Ltd (AFFCO), from 9 September 2015 to 22 February 2016.

[2] These issues raise mixed questions of fact and law. They arise from three previous judgments of the Court which deal with other aspects of the illegal lockout.[1]

Background

[3] On 18 November 2015, the full Court held that AFFCO had unlawfully locked out multiple members of the New Zealand Meat Workers and Related Trades Union (the Union) at certain of its plants, and that it had in numerous respects breached its good faith obligations in bargaining (the full Court judgment).[2]

[4] Subsequently, the Union and its locked out members who normally work at AFFCO's Wairoa plant sought compliance orders on the basis of the findings of the full Court. Their primary application was for an order compelling AFFCO to re-engage them in the positions in which they would have been employed but for the unlawful lockout and breach of good faith obligations.

[5] This issue was resolved in a judgment which I delivered on 11 February 2016 (the February judgment).[3] I recorded that the affected second plaintiffs had been offered re-employment, but as a group on the night shift. Whether this was permitted required a consideration of the relevant provisions of the applicable expired collective agreement (based-on iea).[4] I found that re-employment of those persons as a group on the night shift as offered by AFFCO would not without their consent be in accordance with the relevant provisions of the based-on iea. In particular, it would infringe the applicable seniority provisions. The application of these provisions would have resulted in the second plaintiffs being engaged on the day shift. Those duties were being performed by other workers so that there was an infringement of s 97 of the Employment Relations Act 2000 (the Act).

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1 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204; (2015) 10 NZELC 79-057; *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 7, [2016] ERNZ 20; *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 117.

2 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2015) 10 NZELC 79-057.

3 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 7, [2016] ERNZ 20.

4 AFFCO New Zealand Core Employment Agreement, 1 May 2012 to 31 December 2013.

[6] I also concluded that any analysis as to the circumstances which would have applied at the commencement of the season had to proceed on the basis that the conclusions of the full Court were respected. That is, the Court had to assume that AFFCO would not have acted in bad faith or in breach of the based-on iea. In that context I considered a claim made by the plaintiffs that reasonable wages be paid for the duration of the lockout. I found it was premature to make such an order, because the parties were still exchanging information with a view to calculating lost remuneration for each affected employee.

[7] The parties exchanged memoranda on this issue, and ultimately agreed that there were preliminary legal issues relevant to the calculation of quantum.

[8] Some of these were dealt with in a further judgment of 8 September 2016 (the September judgment), as follows:[5]

a) The first issue related to the status of the claims made by each worker who had been locked out. I found that each such claim was one for unpaid wages under the Wages Protection Act 1983 (WP Act), and was not a claim for damages.[6]

b) Secondly, the Court was required to consider whether lost remuneration should be calculated without regard to an employee working elsewhere, being on holiday or on a benefit that showed incapacity to work. I held that the circumstances of individuals would have to be assessed on a case by case basis. What was required was a consideration of whether the employee would have been ready, willing and able to recommence work but for the employer's breach. If so, wages would be payable without deduction. That said, an assertion by the employer that a particular employee was not, in fact, ready, willing and able to be re-engaged would need to be based on reliable evidence to that effect.[7]

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5 *New Zealand Meat Workers & Related Trades Union v AFFCO New Zealand Ltd* [2016] NZEmpC 117.
6 At [28].
7 At [36].

c) Finally, I held that the provisions of the WP Act were such that the entire amount of unpaid wages had to be paid and that it was an offence not to do so. Accordingly, a duty to mitigate would not arise in respect of a claim for wages under that Act.[8] Common law principles as to mitigation would not apply having regard to the language of the statutory provision.

[9] I also noted that there were potentially further issues as to how each claim would be calculated which the Court would need to resolve.

[10] On 6 October 2016, the Court of Appeal issued its judgment after considering an appeal brought by AFFCO against the full Court judgment. It concluded that the Court had erred in finding that AFFCO engaged seasonal meat workers on employment agreements of indefinite duration.[9] It followed that the parties intended that termination of the employment agreement would occur mechanically at the end of the period of seasonal employment, subject to surviving rights that they be offered employment for the next season.[10]

[11] However, the Court of Appeal went on to hold that AFFCO's conduct in mid 2015 had effectively defeated the existing rights of seasonal employees to re-employment on terms set out in the collective agreement, as incorporated within the individual agreements that followed it.[11] This meant that the unlawful lockout provisions of the Act would extend to and protect former employees – in this case, seasonal workers. The refusal or failure to engage those workers for any work for which they were usually engaged was done for the purpose of compelling them to accept proposed terms of employment. The Court of Appeal also concluded there had been an illegal lockout.[12]

[12] Subsequently, AFFCO sought leave to appeal against the Court of Appeal judgment with regard to the findings it made against AFFCO, which was to the effect

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8 At [38].
9 AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc [2016] NZCA 482, (2016) 10 NZELC 79-067 at [54].
10 At [51].
11 At [64].
12 At [70] – [71].

that seasonal workers had been unlawfully locked out. That application was determined by the Supreme Court on 9 March 2017, when leave to appeal to that Court was granted.[13]

[13] AFFCO also filed an application for a judicial review of the full Court judgment, asserting that the Court had relied on findings of fact that were not comprised in, or able to be reasonably inferred from, the evidence which was properly before the Court, so that it had acted outside its jurisdiction by embarking on a factual enquiry beyond that which had been agreed. This application to the Court of Appeal is now the subject of an application for strikeout which is to be heard shortly.

[14] On 26 February 2016, an application was made to the Court of Appeal for leave to appeal this Court's February judgment. Because of other developments, the application for leave stands adjourned to the end of March 2017.

[15] After the Court of Appeal issued its judgment on 6 October 2016, AFFCO applied for recall of this Court's September judgment. It was submitted that because the Court of Appeal had determined that seasonal meat workers were not employed on agreements of indefinite duration so that their employment was terminated when they were laid off at the end of a killing season, the claims should not be dealt with under the WP Act. Any claim available to those locked out would be one for damages where common law principles as to mitigation of loss would apply. The application was opposed by the plaintiffs on the grounds that there was no proper basis for recall.

[16] In a minute of 28 November 2016, I recorded that the Court of Appeal judgment was, at that stage, the subject of the application for leave to appeal to the Supreme Court; and the full Court judgment was the subject of an application for judicial review. Since both of these proceedings had yet to be determined, it was premature to consider an application for recall of the September judgment. It was unclear whether the outstanding proceedings would have an impact on the Court of

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

Appeal judgment which was relied on by AFFCO. I accordingly adjourned the recall application until after the various proceedings in the senior courts have been resolved.

[17] The final procedural matter to which reference should be made is that no application has been made to stay any of the previous judgments which are relevant to the issues I must now consider – that is, the full Court judgment of November 2015, and the remedies judgments of February and September 2016.

[18] In short, given the outstanding applications in the senior courts and the absence of an order of stay of any of the judgments of this Court which are relevant to the remedies issues I must now consider, it is appropriate to continue to apply the earlier findings made in this Court.

[19] It is against that rather complex procedural background that I must now consider the parties' competing contentions as to methodology for the calculation of lost wages.

[20] There are multiple points which require consideration. I shall summarise the parties' competing contentions when dealing with each issue.

Relevant facts

[21] First it is necessary to summarise the salient facts – either as found in previous judgments, or as arise from the further evidence that was led at the hearing in respect of the present issues.

[22] When re-opening its plants for the 2015/2016 season, AFFCO wrote to employees who had previously worked at those plants, inviting them to an introductory presentation for individual employment agreements which the company wished to adopt (the company's IEA). At those meetings that document was distributed for completion.[14]

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[14] *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 2, at [21].

[23] When the Union learned from its members in early June 2015 of AFFCO's processes and documentation, it objected on their behalf.

[24] Initially, an interim injunction was sought restraining AFFCO from offering the second plaintiffs work on the basis of the company's IEA, on the basis that to do so constituted an unlawful lockout. The application was declined.[15] The substantive proceeding, however, was soon after timetabled for prompt disposition by a full Court.

[25] Following the subsequent hearing, the full Court held that the Union's objections as to AFFCO's process and the proposed agreement had been effectively ignored. This was despite AFFCO being aware that a significant number of employees were Union members and despite the fact it was then in collective bargaining for an agreement which was intended to operate in the coming season.[16]

[26] The Court went on to hold that the second plaintiffs were employees of AFFCO when seeking to be re-engaged at the end of their seasonal layoff, since their employment was continuous and not discontinuous;[17] it was this conclusion which the Court of Appeal held was in error.

[27] The full Court held, alternatively, that even if the second plaintiffs were not employees after the end of the 2014/2015 season, they were nevertheless locked out when AFFCO required them to agree to ieas as stipulated for by AFFCO to begin work for the new 2015/2016 season.[18] It was also concluded that AFFCO had undermined bargaining and the authority of the Union in multiple respects.[19] As already stated, this finding was upheld by the Court of Appeal.

[28] I turn now to summarise the chronology with regard to events that took place at the Wairoa plant. This differed from what occurred at other AFFCO plants, where the majority of Union members agreed to sign the terms of the company's IEA so as

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15 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, [2015] NZEmpC 94, (2015) 10 NZELC 79-056.

16 New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd, above n 2, at [23].

17 At [194].

18 At [195] and [197].

19 At [202] – [211].

to get back to work; this was without prejudice to the right of those workers to claim subsequently that they should have been re-employed under the based-on iea, if the courts so ruled.

[29] Mr Gerrard, a director of AFFCO, gave evidence at the hearing. He said that the company assumed a similar commencement arrangement would apply at Wairoa as applied at other plants. Accordingly, AFFCO planned to operate a day shift and a night shift from the start of the season. The weekly minimum term of the company IEA was lower than that of the based-on iea. Mr Gerrard said this meant workers could be engaged through the period of lower livestock availability which pertained in the Hawkes Bay from early September 2015. He said that had the terms of the based-on iea been applied, workers could not have been re-employed until some weeks later; by that time livestock availability would have increased so as to cover the higher weekly minimum of the based-on iea.

[30] In fact, members of the Union at Wairoa were not willing to accept the offer to work on the basis of the company IEA. They chose to wait for the judgment of this Court, which as indicated earlier was delivered on 18 November 2015.

[31] On the day which followed the delivery of that judgment, Mr Cranney, counsel for the plaintiffs, wrote to Mr Wicks QC, counsel for the defendants, stating that members who were still locked out at Wairoa would shortly be presenting themselves for work in an organised manner and would expect to be re-engaged.

[32] After he obtained instructions, on 23 November 2015 Mr Wicks confirmed that all members who were seasonally laid off at the end of the previous season and who had to yet to be re-employed, would be re-engaged on the terms of the based-on iea. The Union was requested to confirm the names of the members who wished to be re-employed. At this stage, no reference had been made to the possibility of members at Wairoa being re-employed only on a night shift. A response was sought by 27 November 2015.

[33] On 24 November 2015, Mr Cranney advised that a complete response could not be given by that date, but the Union would provide whatever information it had been able to obtain.

[34] On 26 November 2015, a list of employees who it was said were currently locked out of the Wairoa plant and who were seeking re-engagement was provided on behalf of the Union.

[35] On 27 November 2015, Mr Wicks stated that the submitted list was inaccurate and incomplete in several respects. Some of the persons on the list were covered by a company IEA during the previous season; some preferred to continue to work on those terms and conditions, and some were known to have abandoned their employment completely and would not be seeking re-engagement. An accurate list was requested.

[36] AFFCO proposed to re-engage these employees in the following week, with an induction on 30 November 2015 in anticipation of commencement the next day.

[37] Mr Wicks also stated that it was not practical to integrate the workers into a single day shift at Wairoa, and that at the outset all Union members about to be re-engaged would be employed on a specially created night shift. This was described as an interim measure. It was indicated that to provide the right balance of skill and efficiency non Union members would be required to move from the day shift to the night shift, and similarly some Union members would be transferred to the day shift. This was the first indication that the locked out workers would all be required to restart on a night shift.

[38] In an email of 30 November 2015, Mr Cranney took strong exception to the proposal that all Union members would commence work on a night shift. This was not considered to be in accordance with the full Court judgment, which had referred to a duty to "restore the second plaintiffs to the situations in which they would have been, had those breaches not occurred".[20]

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[20] At [211].

[39] On the record mediation between the parties occurred on 3 and 4 December 2015, which was followed by further exchanges between the parties. Two issues had emerged by this time. The first related to the accuracy of the list of returning workers as already described; but a further issue developed which related to whether the seniority positions of the based-on iea should apply.

[40] Chief Judge Colgan reviewed progress on 8 December 2015. Amongst the various directions which were then made, the Court stated that there should be a practical methodology for establishing the identity of those Union members of Wairoa who wished to return to work under the terms of the based-on iea. Efforts would have to be made first by local Union officials to identify returning workers, which would then need to be checked by local AFFCO management.[21]

[41] The parties met again for mediation on 10 and 11 December 2015, and for further discussions on 12 and 13 December 2015. Thereafter, settlement proposals were exchanged between the parties.

[42] On 21 December 2015, I considered the Union's application for an interim injunction requiring unionised employees to be reinstated at the Wairoa plant. It was apparent that there was still uncertainty as to the identity of some persons who wished to return to work. Although some of those issues had been resolved, I stated that it was unclear how much actual communication had taken place between the Union and individual members to confirm their desire to restart.[22] I declined the application for an interim injunction, but determined that there would be a substantive hearing with regard to the return to work arrangements on 25 January 2016. I directed that an accurate list of the individual members who wished to restart was to be filed and served by 20 January 2016.[23]

[43] In the judgment which followed the hearing (the February judgment), I concluded that both the Union and AFFCO could have made more effort to resolve

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21 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 219 at [5] and [6].

22 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 233 at [64].

23 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 3, at [47] – [49].

the various uncertainties as to precisely who wished to return to work. However, I also concluded that the difficulties over lists was a side issue, because the key problem related to the correct application of the seniority provisions, a topic which was resolved in that judgment as explained earlier.[24]

[44] The final matter to mention in this summary of relevant events is that following the issuing of the February judgment, the affected plaintiffs recommenced work at Wairoa on 22 February 2016; the seniority provisions of the based-on iea were applied to determine on which shift returning workers should be engaged.

[45] For the purposes of the present application, I received evidence not only from Mr Gerrard, but also from six sample plaintiffs as to their individual circumstances. Four of those persons were re-engaged on the day shift, and two of those persons were re-engaged on the night shift. The Court also received detailed evidence as to what payments those persons would have received according to the various methods of calculation the parties advocate for the lockout period; that information has been of assistance in clarifying the different approaches.

First issue: Was there a duty to mitigate?

[46] Although I dealt with the question of whether principles of mitigation could apply to a claim under the WP Act in the September judgment, AFFCO again argued that the relevant plaintiffs did not mitigate their losses in several respects. It is necessary therefore to refer to this issue again.

[47] In his evidence, Mr Gerrard discussed several scenarios which he said were relevant to mitigation. The first of these related to the company IEA. He said that after the interim injunction proceedings of mid 2015, it was understood that the Union would instruct its members to sign the terms of the company IEA so as to get back to work. He said that AFFCO understood this position would apply for the Wairoa plant, as well as to others. Had this occurred, all of the second plaintiffs could have started work when the plant reopened on 9 September 2015. Not to do

[24] At [5] above.

so, he said, amounted to an unreasonable refusal on the part of the affected Union members not to mitigate their losses.

[48] There are two points to be made regarding this assertion. The first is that this Court has already determined in the September judgment that the claim made by the affected plaintiffs is one for unpaid wages.[25] The plaintiffs' claim is an action of debt, and not an action for damages.[26] 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.[27] Consequently, the claim is properly considered under the WP Act.

[49] I have already found that a duty to mitigate losses does not arise in respect of a statutory claim for wages under that Act.[28] This is for good and proper reasons. Section 4 of the WP Act states that the employer shall, when any wages become payable to a worker, pay the entire amount of those wages to the worker without deduction. It is well established that parties cannot contract out of this power;[29] it cannot be overridden, for instance, by the Court's power to act in equity and good conscience.[30] The statutory provisions impose an absolute obligation to pay wages.[31]

[50] In summary, a duty to mitigate does not arise where a claim for unpaid wages is made under the WP Act.

[51] But even were such a duty to exist, and applying established mitigation principles,[32] I would not have concluded that it was unreasonable for the affected

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25 New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd, above n 5, at [8] – [28].

26 Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [1-005].

27 The distinction was discussed by the Court of Appeal in *Spotless Services (NZ) Ltd v Service and Food Workers' Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609 at [68] and [78] – [79].

28 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 5, at [38].

29 *Bell (Inspector of Award & Agreements) v Broadley Downs Ltd* [1987] NZILR 959 (CA).

30 *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2011] NZCA 571, [2012] 1 NZLR 733 at [23] – [26] per Harrison J.

31 At [40] per Harrison J. To similar effect are the judgments of Arnold J at [42] and Chambers J at [67].

32 The relevant principles as to mitigation were recently reviewed by the full Court in *Xtreme*

second plaintiffs to decline to work under the terms and conditions of the company IEA, even on a without prejudice basis, given the strong findings that had been made by the full Court about that document in the full Court judgment.[33]

[52] That Court found that the company IEA contradicted the based-on iea's terms and conditions in many respects. The full Court also found that AFFCO was seeking to short-circuit collective bargaining by attempting to impose the terms and conditions of the company IEA. In doing so, AFFCO had acted in breach of its duty of good faith in several respects.[34]

[53] I find that a return to work on these terms and conditions as at 9 September 2015 at Wairoa would have achieved AFFCO's objective to undermine and compromise the unresolved collective bargaining. Given that context it could not be right that the employees had a duty to accept such an offer, even on a without prejudice basis.

[54] Given these findings, I reject the submission that a decision not to return to work on the basis of the company IEA could be said to be unreasonable.[35]

[55] The next and related contention advanced by AFFCO is that the affected workers should have accepted the offer of employment which was made in late November 2015: as already explained, it was proposed that all the locked out employees should return to work on a night shift.[36] By the time this proposal was advanced, the full Court's judgment had been issued which resolved the issue as to the applicability of the based-on iea.

[56] The contention made for AFFCO was that the affected employees unreasonably refused to mitigate their losses in refusing to start then, and that this too should be taken into account when determining the extent of lost wages.

Dining Ltd t/a Think Steel v Dewar [2016] NZEmpC 136, (2016) 10 NZELC 79-069 at [93] – [96].

33 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 2, at [91] – [108].

34 At [201] – [209].

35 *Xtreme Dining Ltd t/a Think Steel v Dewar,* above n 32 at [93] – [96].

36 At [37] above.

[57] I reject this contention for similar reasons as have already been discussed.

[58] First, I have already found that the principles as to mitigation of loss do not apply where a claim is made under the WP Act.

[59] Secondly and alternatively, I would not have concluded that those principles applied in any event. I have already set out the chronology of events which followed the issuing of the full Court judgment. It became protracted and difficult.

[60] The first issue which arose related to the issue of identity of the locked out members who wished to return to work. It is unsurprising there were significant uncertainties given the controversial circumstances which gave rise to the illegal lockout.

[61] As I held in the February judgment both the Union and AFFCO could have made more effort to resolve the various uncertainties, but the difficulties over lists was a side issue, because the key problem which had emerged related to the correct application of the seniority provisions, an issue which was resolved in the plaintiffs' favour in that judgment.[37]

[62] Even had it been appropriate to consider mitigation principles, then, I would have concluded that there was a significant issue as to the application of the related seniority provisions, so that it was not unreasonable for the locked out Union members whose work was being carried out by other workers in breach of s 97 of the Act to decline the offer that they all return to work on the night shift. This is because AFFCO proposed to proceed on the basis that it was not required to apply the seniority provisions of the based-on iea. It said this was for pragmatic reasons; but when it came to the point of reinstatement, it was able to and did apply the seniority provisions correctly. I am not persuaded that the affected second plaintiffs had a duty to go along with a proposal where AFFCO did not propose to apply a contractual provision which the Union made very clear was important.

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[37] *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 3, at [53].

[63] The third contention raised by AFFCO is that any worker who was eventually placed on the night shift is disentitled to any arrears of wages for dates after 30 November 2015; it is argued that such a person should have accepted the offer to work on the night shift as from that date.

[64] This also appears to involve an application of the principles as to mitigation of loss, which do not apply to the second plaintiffs' claims.

[65] In any event, as was submitted by Mr Cranney, the offer which was made required *all* workers to work the night shift, after which some transitioning would occur. Furthermore, at that stage, the central dispute between the parties was whether the provisions as to seniority would apply. It was quite unclear who might be transferred to the day shift and who would remain on the night shift. In these circumstances it is not reasonable in my view to conclude that some of the affected workers should have accepted the return to work on a vague and uncertain basis, particularly when no such option was offered.

[66] The result is that none of the mitigation contentions which have been raised are applicable, either as a matter of law or fact.

Methodology issues

[67] For the affected Union members, Mr Cranney submitted that the correct approach to the assessment of lost wages is to adopt the average weekly earnings for each worker over the previous two seasons, and to apply that to the full period of the illegal lockout, 9 September 2015 to 22 February 2016. He said that an allowance should then be made for public holidays, 10 per cent holiday pay, and interest on the unpaid amount.

[68] As already mentioned, AFFCO's position was outlined in evidence from Mr Gerrard. He first suggested that all workers could and should have returned to work on 9 September 2015 on the basis of the company's IEA, albeit on a without prejudice basis. Not to do so, he said, amounted to an unreasonable refusal to mitigate loss. I have already rejected this particular approach.

[69] Mr Gerrard's alternate contention was that if AFFCO had applied the terms of the based-on iea, then the process of re-engagement would have been considerably different. He said the plant was only able to open on 9 September 2015 due to the favourable weekly minimum payment provided for in the company IEA. This permitted workers to be engaged through periods of reduced livestock availability. He went on to say that there had been a decline in the availability of lamb stock over successive seasons. This was due to drought conditions in the Hawkes Bay that caused reduced feed, and an inability to bring stock to a weight suitable for slaughter. Farmers consequently removed stock to areas beyond Hawkes Bay which had not experienced the same weather conditions. The result was a significant reduction in stock. Mr Gerrard said that having regard to the minimum payment criteria of the based-on iea, the day shift for lamb and beef would not have commenced until 19 October 2015, and the night shift for lamb until 30 November 2015.

[70] He also said that these dates might be compared with what occurred in other seasons. He produced the following comparative table:

Shift Start Date	Lamb		Beef
	Shift One	Shift Two	Day Shift
2013/2014	25-09-13	27-01-14	03-10-13
2014/2015	27-10-14	03-11-14	27-10-14
2015/2016 (hypothetical)	19-10-15	30-11-15	19-10-15
2016/2017	13-10-16	09-11-16	13-10-16

[71] Mr Gerrard said that each season had to be assessed differently, and in isolation. The difficulty, he said, with the approach adopted by the plaintiffs was that seasonal averaging erroneously presumed stock availability would be the same for each season. He considered that applying an average seasonal approach to the 2015/2016 season would produce a figure for each second plaintiff that was well in excess of an amount that would have been earned by each of them but for the lockout. In summary, workers would be obtaining an entitlement to payments based on years when there were higher production figures, when compared with the lower production period of 2015/2016.

[72] It was accordingly argued that the correct approach was to assess when the plant would have opened on the basis of actual stock availability, and to calculate entitlements under the based-on iea accordingly.

[73] Mr Cranney disputed this approach. He submitted that such a methodology would mean that although workers had been illegally locked out from 9 September 2015, their assessment of lost wages would not commence until mid October 2015. He submitted this would be wrong and unfair. Mr Cranney said there were some Union members who had signed the company IEA and returned, and who were later transferred back to the based-on iea. Their wages would now be reassessed on the basis of the latter agreement. He argued that the locked out workers were entitled to be paid on the same basis as these persons. They should be reimbursed for the period for which they were locked out; they would thereby be placed in the same financial position as those Union members who did return to work when the plant actually commenced operations.

[74] From the foregoing evidence and submissions, the following issues arise:

a) Which methodology should be adopted when assessing unpaid wages?

b) For what period should the assessment be conducted?

Which methodology?

[75] The difficulty which arises with regard to the proposition that wages should be based on previous seasons is the uncontradicted evidence that when a season begins is primarily determined by stock availability, as well as price and operating costs. Mr Gerrard's evidence was that having regard to the provisions as to minimum wages which would apply under the based-on iea, and having regard to the availability of stock in the Hawkes Bay, the Wairoa plant would not have reopened until 19 October 2015. No evidence was called to contradict the assertion that AFFCO could or would have exercised its prerogative as to select a commencement date. Also uncontested is the evidence that plant start-ups occurred on varying dates in successive seasons as indicated earlier – this evidence lends credence to the

proposition that the analysis should focus on the circumstances that applied in 2015.[38]

[76] From this evidence, it is obvious that the application of average weekly earnings derived from previous seasons does not take account of seasonal fluctuations. The company's counter-factual permits an accurate calculation based on the volume of stock which was actually available at the relevant times.

[77] Accordingly, I find that the methodology advanced by AFFCO is essentially correct; however, the calculations will need to provide for public holidays, holiday pay and interest.

The relevant period of assessment: supplementary submissions

[78] As summarised above, Mr Cranney argued that the assessment should begin as from 9 September 2015, when the plant in fact reopened; Mr Wicks argued that the assumptions contained in Mr Gerrard's evidence should apply, with the earliest commencement date being 19 October 2015.

[79] At the hearing, I indicated to counsel that the issue as to a correct date for the commencement of any assessment was one of some difficulty and that the Court needed to be provided with further submissions which referred to relevant authorities. An opportunity for the filing of supplementary submissions on this topic was accordingly given.

[80] In his supplementary submissions, Mr Cranney emphasised that there were Union members who signed the company IEA, and returned; later, these persons were transferred back to the based-on iea. He said that these persons were now entitled to be paid any differential between the company IEA and the based-on iea. He went on to argue that the locked out workers were entitled to be paid on the same basis as this class of worker.

[81] As will be explained more fully shortly, Mr Cranney also submitted that to do otherwise would provide a discriminatory outcome; the Court of Appeal had found

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[38] See [69] above.

that this was inappropriate in such circumstances: *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)*.[39]

[82] Mr Cranney also submitted that work was available on 9 September 2015, being work for which the employer usually employed the affected second plaintiffs. He said that by unlawfully failing or refusing to engage the second plaintiffs on the basis of the based-on iea and the law, they were denied wages. It was submitted that AFFCO was then arguing for a counter-factual in which no such breach was committed; however, the whole purpose of a counter-factual would be to assess quantum of loss arising from a breach; not to create a self-serving scenario in which there was none.

[83] Mr Cranney emphasised that AFFCO's objective was as described by the Court of Appeal when it considered the matter in these terms:[40]

> It is obvious that AFFCO's objective was to undermine or compromise the parallel process of negotiating a collective agreement which was then underway with the Union. The company's purpose was to fragment the future bargaining strength of the workforce by isolating workers. By this means it took advantage of the inherent inequality of its relationship with the seasonal workers who were members of its captive workforce and to whom it owed existing duties to offer re-employment. …

[84] With regard to this dicta, Mr Cranney submitted that the denial of wages from 9 September 2015 was real, and had a purpose; restoration of the denied wages was accordingly the appropriate remedy.

[85] In his submissions, Mr Wicks referred to principles governing the correct measure of damages for breach of contract. He referred to the orthodox proposition that the correct approach is to restore a plaintiff to the position that person would have been in had a breach not occurred.[41] He said this principle applies equally in the employment field, citing *Bickerstaff v Healthcare Hawkes Bay Ltd*.[42] There the defendant unlawfully suspended a number of junior doctors on the basis they were

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39 *Tranz Rail Ltd v Rail Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA).

40 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 9, at [66].

41 *Robinson v Harman* (1848) 1 Exch 850; John Burrows, Jeremy Finn and Stephen Todd Law of Contract in New Zealand (5th ed, LexisNexis, Wellington, 2016) at 789 – 790.

42 *Bickerstaff v Healthcare Hawkes Bay Ltd* [1996] 2 ERNZ 680 (EmpC).

on strike, when in fact they were not. The Court held they had an entitlement to damages in these terms:[43]

> The measure of their damages, in accordance with normal principles governing the assessment of damages, is the difference in the value of the contract to them between what they should have earned if they had not been suspended in breach of contract and what they would have in fact received.

[86] Mr Wicks submitted that the company's position was consistent with this principle.

The relevant period of assessment: discussion

[87] In determining the correct approach in principle, it is necessary first to emphasise again that the present claim is not one for damages for breach of contract, but for lost wages under the WP Act.

[88] As I explained in the September judgment, the correct question to ask is what affected employees would have been paid had their agreement been complied with.[44] Another way of putting it is to identify what sums would have been payable under the collective agreement, but for the illegal lockout and conduct.[45]

[89] It is necessary therefore to start with the provisions of the relevant collective agreement. The document reserved to AFFCO the power to manage and control its own business. That included the ability to determine when a shift should commence having regard to production and business needs, subject to any applicable provisions of the Act.

[90] The evidence establishes that a factor which the company takes into account when determining such issues, includes minimum payment criteria. For the years

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43 At 691. Counsel submitted that to similar effect are the decisions of *Service and Food Workers' Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd (No 3)* [2007] ERNZ 686 (EmpC) at [35], along with on appeal *Spotless Services (NZ) Ltd v Service and Food Workers' Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609 at [62] and [63]; and *Mana Coach Services Ltd v New Zealand Tramways and Public Transport Employees' Union Inc* [2015] NZEmpC 44, (2015) 10 NZELC 79-053 at [155] and [164].

44 *New Zealand Meat Workers & Related Trades Union v AFFCO New Zealand Ltd*, above n 5, at [18].

45 At [28].

2013/2014, 2014/2015 and 2016/2017, the start dates of the various shifts varied accordingly.[46]

[91] As I have already found, no evidence was called and no submission was made to the effect that the terms of the based-on iea did not normally permit the company to exercise management prerogative in this way.

[92] The Court must accordingly accept AFFCO's submission that if the company were to employ persons under the based-on iea, the plant would not have reopened until 19 October 2015.

[93] On the face of it, that is the date from which lost wages must be assessed.

[94] I turn to the submission raised by Mr Cranney with regard to those Union members who decided to return to work at the start of the season, albeit on a without prejudice basis. They are in a different category to those who did not do so. Although no detailed evidence has been placed before the Court with regard to those persons, the submission may well be correct that they are entitled to be reimbursed in respect of any shortfall of wages which arises between the company IEA and the based-on iea, if that issue is ultimately resolved in their favour. My provisional view is that it would seem logical for those persons to be paid for the entire period of the lockout at the correct rates, because that is the period they worked under the particular agreement they reached with AFFCO at the commencement of the season.

[95] The position of the locked out workers, however, is different. They chose not to return to work unless this was under the terms and conditions of the based-on iea – a choice they cannot be criticised for making.

[96] Mr Cranney referred to a finding made in the February judgment that had AFFCO complied with all the relevant obligations of good faith as at 9 September 2015 or before, the parties would have discussed these issues constructively, and that it was probable the present dispute would not have developed. I found that the parties would either have reached a mutually acceptable

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[46] See [69] above.

agreement; or the dispute would have come to the Employment Court for resolution.[47] He said it was not hard to see potential resolutions that could have been reached as at 9 September 2015, had discussions actually occurred which were compliant with good faith obligations.

[97] Those findings, however, did not determine when the plant would have reopened, a topic which has now been the subject of evidence. Mr Gerrard was not challenged as to the date when he said the plant would have recommenced its operation, although I accept that the Union does not necessarily agree with his approach.

[98] Next, I consider the findings made in *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc),*[48] to which Mr Cranney referred. There the Court of Appeal considered the provisions of a performance-based incentive scheme, where non-striking employees were paid a higher bonus than those who were striking. The issue was whether those who had been paid a lesser bonus were the subject of a discrimination grievance having regard to the provisions of ss 27 and 28 of the Employment Contracts Act 1991.

[99] The Court of Appeal agreed with the Employment Court that in making the additional payment to non-strikers, the company did not afford the strikers the same terms of employment and benefits which were made available to other employees. Accordingly, the grievance was established; the consequence was that the Employment Court's conclusion remained, which was that the applicants had lost remuneration as a result of their grievance; they were accordingly entitled to the difference between the amount they received and the amount that non-striking workers received.[49]

[100] Mr Cranney submitted that in *Tranz Rail,* the Court of Appeal favoured a counter-factual scenario which gave an answer that did not discriminate. This meant, he said, that this Court should adopt a similar approach and should search for

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47 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*, above n 3, at [120].

48 *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)*, above n 39.

49 *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EC) at 503.

a counter-factual assessment that acknowledges the consequences of wrongdoing, and not one that allows an employer to take advantage of wrongdoing. It was his contention that the counter-factual could not eliminate the breach.

[101] The findings made with regard to whether a discrimination grievance is established and, if so, what remedies should be awarded, are not binding – or even applicable – to a claim of a different nature, such as a debt action brought under the WP Act.

[102] Mr Cranney's submission to the effect that the affected employees should be paid wages which were denied from 9 September 2015 would require a conclusion that notwithstanding the fact that they would not have been employed under the based-on iea until 19 October 2015, the illegal lockout from an earlier date meant there was nonetheless a compensatable claim because their statutory rights were accordingly violated. The essence of the submission is that the workers should receive wages to reflect the vindication of their right not to be illegally locked out because they had declined to accept the terms of the company IEA.

[103] In principle, such a breach may give rise to a claim which recognises the affront which is asserted in respect of the nearly six weeks involved. I express no view as to the merits of that possibility, except to say that in the absence of a provision in the based-on iea for the payment of wages during an illegal lockout, such a claim would be one for damages and not an action of debt. A claimant may also seek relief under alternative heads, such as through those statutory remedies which may be available under the Act. However, such possibilities are not before the Court and should not be considered as an aspect of a claim for lost wages under the WP Act.

[104] I find that the second plaintiffs cannot argue that wages became payable to them, for the purposes of a claim under the WP Act, for the period 9 September 2015 to 18 October 2015 because there is no such statutory remedy for this period. Their individual claims for unpaid wages can, however, be considered for the period

thereafter, using the methodology which AFFCO has proposed to the Court but subject to a calculation of the additional entitlements mentioned earlier.[50]

Other matters

[105] Mr Gerrard was cross-examined as to the position regarding freezing workers at the Wairoa plant. None of the six sample plaintiffs were freezing workers; I do not have direct evidence regarding their circumstances. There may need to be separate consideration of a question as to whether the foregoing principles apply to any of the second plaintiffs who are freezing workers.

Conclusion

[106] It is anticipated that these conclusions will allow the parties to advance the necessary calculations of lost wages for each second plaintiff.

[107] The Registrar is to establish a telephone directions conference with counsel in four weeks time to review progress on this process. On that occasion counsel will need to advise whether there are any further issues requiring resolution by the Court.

[108] I reserve costs with regard to the issues considered in this judgment.

B A Corkill
Judge

Judgment signed at 2.20 pm on 24 March 2017

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[50] See [77] above.