

CLEW'D IN

Newsletter of the Centre for Labour, Employment and Work (CLEW)

Issue 2016/5 – December 2016

Temporary relocation for CLEW

Following the 14 November earthquake we are temporarily out of our offices in Rutherford House. We hope to return in late January but in the meantime we are located in Room 118 on the 1st floor of the Hunter Building at the Kelburn campus. Our usual phone number (04 463 5143) is redirected to my mobile phone and we have full access to emails.

The office is closed from the end of business on December 20 and will reopen at 9am on Monday January 9, 2017.

We wish all our subscribers and supporters a very happy, stress free Christmas and holiday period and we look forward to a successful 2017.

Sue Ryall and Stephen Blumenfeld

Inside CLEW'd IN

Pg 1 - Report on LEW2016 Conference

Pg 3 - Pay Equity Working Group Recommendations accepted

Pg 4 – RESEARCH UPDATE: Precarious Work at odds with Corporate Responsibility

Pg 6 – RESEARCH UPDATE: Outstanding workplace award reconsiders corporate social responsibility

Pg 9 - LEGAL UPDATE: Seasonal workers' rights continue under collective agreement

2016 LABOUR, EMPLOYMENT AND WORK CONFERENCE BIG SUCCESS

Overview by Stephen Blumenfeld, Director, CLEW

A 7.8 magnitude earthquake struck near Hanmer Springs, South Island at 12.02am on 14th November 2016, followed by a series of aftershocks. The shaking was felt across the country, and has resulted in damage to a number of buildings within the Wellington region, including Rutherford House, the intended venue for the 2016 Labour, Employment and Work Conference. Despite this occurring just two weeks out from its opening, the Conference was relocated to the Hunter Building on the (main) Kelburn Campus of Victoria University and proceeded as planned with a full programme of keynote addresses and paper presentations.

Close to 100 people attended the two-day LEW Conference, and there was general consensus among those in attendance that the papers presented were of a high standard. A highlight was the opening keynote address by Professor of Law at the University of Waikato, Margaret Wilson, **Challenges for a New Regulatory Environment**. Professor Wilson discussed the basis for the current public policy and regulatory framework governing labour, employment and work in New Zealand, arguing that 'the statutory framework reflects the objectives of economic policy'. She went on to raise the question of whether the public policy and regulatory frameworks being developed will benefit all New Zealanders or does this evolution – or, as some would contend, revolution – foreshadow a less egalitarian New Zealand in which only a handful of elite reap the majority of any benefits accruing from those policy and regulatory changes.

Professor Wilson's proposals include enactment of a minimum employment standards framework that would effectively serve as a workplace constitution, elaborating the rights and responsibilities of workplace citizens. She further argues for regulating the extension of these rights beyond simply those currently defined

under New Zealand's employment legislation as 'employees', to both dependent contractors and the self-employed. To this end, Professor Wilson asserted:

'Changing work practices made possible by technology have resulted in further legal challenges and, I would argue, raise the fundamental issue whether the current distinction between employees and contractors is sustainable and whether the time has not come to rethink the whole purpose of employment standards and to whom they should apply.'

This first keynote set the tone for conference sessions on the migrant workforce, the precariat, vulnerable workers, New Zealand's changing labour market, and evolution and change in workplace regulation.

The second keynote address was from David Foden of Eurofound (the European Foundation for the Improvement of Living and Working Conditions), a research and policy arm of the EU. David reported on the data from the European Jobs Monitor, which shows some of the trends in employment and in particular the changes in employment by job-wage quintiles (jobs classified in five bands of wages).

The main part of David's presentation was a discussion of the results of Eurofound's recently released Working Conditions Survey report, the sixth in the series. This survey focuses on job quality, while continuing to provide an overview of working conditions and a portrait of the workforce in Europe, as have previous European Working Conditions Surveys conducted by Eurofound. Job quality, in this sense, is gauged along a number of constructs, including the physical work environment, work intensity, working time quality, the social environment, skills and discretion (autonomy), labour market prospects (including career and job security) and earnings. A key finding of this research is that job quality is multidimensional and that each dimension of job quality supports a positive experience of working life. There are also important differences between demographic groups (such as gender and ethnicity), occupations, and countries that make it hard to see one dimension or component of job quality as being more important than any other. Importantly, the most recent Eurofound report reveals that only limited progress on job quality has been made in the last ten years.

Notwithstanding its focus on quantitative survey results, David Foden's keynote address on Eurofound's Working Conditions Survey and the measurement of job quality provided a good lead in to other sessions at the LEW Conference in which papers reported findings from qualitative research on workplace wellbeing, workplace capability and training, and equity in the workplace. David's keynote also complemented the excellent workshops

NOTICES

Employment Agreements Update 2015/2016

If you were not able to make it to our seminars you can purchase the latest book 'Employment Agreements: Bargaining Trends and Employment Law Update 2015/2016' which is available now.

The annual update of the book is seen as the essential reference for employment relations experts and the key source of information on current provisions in employment agreements.

Download the [order form](#) from our website.

Survey of Public Sector Employees released


In 2016 CLEW partnered with the NZ Public Service Association (PSA) in a major survey of its members, to describe and analyse the status and dynamics of public sector workplaces in New Zealand. A total of 14,125 useable surveys, representing a 25 percent response rate, were included in the analysis.

The report was released at the 2016 Labour, Employment and Work Conference and is now available on our website along with Dr Geoff Plimmer's summary of the results as presented at the launch. A future edition of CLEW'd IN will include a discussion by Geoff, co-author of the report, on the key findings from the survey.

organised by Statistics New Zealand on the redeveloped House Labour Force Survey (HLFS) and on the Integrated Data Infrastructure (IDI). Both of these sessions included papers illustrating the use of official data around interesting research and policy projects in government ministries.

The final keynote speaker, Professor Adrian Wilkinson, overviewed research on employee voice and looked at what employee voice is and how it operates. Professor Wilkinson is an internationally recognised scholar in this area and we were delighted to have him present at the conference. His presentation was followed with a session of three papers on employee voice and a further session on unions and collective bargaining.

Two awards were presented at the conference. The first of these was the Martin Jenkins Award for Best Post-graduate paper at LEW2016. This was awarded to Dawn Duncan, a PhD candidate at Victoria Law School. Dawn's paper, 'Regulating to better meet the health and safety needs of women workers', was considered to stand out for its contemporary significance and review of existing research on the gendered nature of work patterns in New Zealand, was well written and set out clear policy implications and calls for regulatory reforms. The second award was for the Best Paper



Two awards were presented at the conference. The first of these was the Martin Jenkins Award for Best Post-graduate paper at LEW2016. This was awarded to Dawn Duncan, a PhD candidate at Victoria Law School. The second award was for the Best Paper at the LEW2016 Conference and was awarded to Charlotte Chambers, research officer at the Association of Salaried Medical Specialists.

at the LEW2016 Conference and was awarded to Charlotte Chambers, research officer at the Association of Salaried Medical Specialists. Charlotte's paper 'Burnout in the New Zealand senior medical workforce: stories from the clinical frontline' was presented in the Wellbeing at Work session and was commended for the excellent scholarship it demonstrated with a good review of the extant literature on this important OHS issue while progressing the understanding through a survey study of senior medical workers and a sound critical approach in the discussion of the findings. This award was presented jointly by MPower (Massey University) and CLEW.

Some of the papers from the conference are available as are many of the presentations. Contact CLEW with enquiries. The full list of papers and abstracts is still available on our [website](#). We thank our supporting sponsors for their contributions to the conference – Statistics NZ, Ministry for Business, Innovation and Employment, Martin Jenkins, MPower and of course Victoria University of Wellington.

PAY EQUITY WORKING GROUP RECOMMENDATIONS ACCEPTED BY THE GOVERNMENT

The recommendations of the Joint Working Party on the Pay Equity Principles were presented to the Government in June and it has been a long wait for the Government announcement that they accept the recommendations. The changes will mean employees will be able to raise a pay equity claim with their employer on the basis that they work in an occupation where pay rates are suppressed because it is primarily a female occupation.

This is historic decision began with care workers but will have implications across occupational groups such as nurses, clerical and administration employees.

We putting together a seminar early in 2017, to explore the implications for employers and employees. If you are interested contact us with your details and we can be sure to keep you in touch with details.

RESEARCH UPDATE: PRECARIOUS WORK AT ODDS WITH CORPORATE SOCIAL RESPONSIBILITY

Esme Cleave, Honours Student, School of Management

There are two current trends in employment. The first is the use of contingent and often precarious work arrangements. This is efficient and convenient for employers, but often unsatisfactory for workers. The second is an increasing emphasis on employer branding and corporate social responsibility (CSR) reflected in discussion about triple bottom line reporting, international standard-setting and other ethical and brand management initiatives. The two different approaches of US companies, Costco and Sam's Clubs illustrate the benefits of extending corporate social responsibility to your employees.

Genuine CSR win-win for Costco and employees

A comparison of two large US retail chains – Costco and Sam's Club, a Walmart subsidiary – illustrates the practical value in providing alternatives to precarious work. Both are large employers of low-paid retail workers. Drawing on principles of stakeholder theory, retail giant Costco looks beyond its responsibility to serve its shareholders and acknowledges its ethical responsibilities to other stakeholders, primarily employees and customers (Cascio, 2006a; Simmons, 2008).

Costco compensates its employees at a rate 48 percent higher than Sam's Club, one of its strongest competitors (Carré, Tilly & Denham, 2011). As well as fairer remuneration, Costco recognises 'the value of its employees and makes their welfare a priority' (MMR, 2014). Over 86 percent of its top positions are filled through internal promotions, and long-term employees cannot be fired without senior-level approval (Cascio, 2006a). These considerations pay off. The organisation's turnover is low, less than half the industry average (Lower-Basch, 2007; Cascio, 2006b). Costco's workforce is also very productive. Its employees have generated approximately \$5 billion more in sales than Sam's Club in 2005, with 38 percent fewer workers (Cascio, 2006a).

Costco focuses extensively on training sales staff, which pays off in lower turnover and better performance. In contrast, Sam's Club's low-wage strategy results in high turnover and low productivity levels. As a market-leading company, this approach has wide societal effects. As well as reducing living standards, it transfers costs to taxpayers and other companies (Cascio, 2006b).

CSR reporting frameworks do not pay much attention to non-standard, or contingent work, and its potentially harmful effects. Contingent work is not always harmful, but at its worst, can be very precarious. It increases employer flexibility and keeps wage costs low and workforces controllable and malleable. But, for workers, it often means uncertain work hours and incomes (Conley, 2006). Their capacity to 'control their working conditions and maintain a stable wage' is limited, which in turn makes it harder to plan for the future, secure long-term accommodation and have access to basic employment protections (Lopes & Dewan, 2014; Tweedie, 2013, p. 298).

Workers managed 'on demand' are susceptible to both underemployment and overwork. Many want a regular 40-hour work week that is hard to find, so their productive capacity is underused (Feldman, 1996; Khan & Morrow, 1991). They are also at risk of being overworked. In precarious arrangements, they are sometimes pressured to agree to all work offered because it is financially better than having no work at all (Underhill & Quinlan, 2011). This in turn raises the risk of burnout, injury and fatigue.

Precarious, or contingent, work usually has limited health and wellbeing entitlements, limited training and development opportunities, and weak health and safety measures (Marín, 2013; NZCTU, 2013). These conditions can trap employees on the margins of the labour market, giving them little opportunity to move into more secure, skilled work.

Recent claims that concerns about precarious work have been addressed require close scrutiny. An attempt has been made through legislation to mitigate uncertainty around guaranteed hours, for instance. Guaranteed hours of work must now be 'agreed' upon by both parties and written into an employment agreement (MBIE, 2016). This change may give employees more agency and power but ignores subtle pressures on them (likely to be driven by power imbalances) to accept proposals made by employers (Bacharach & Lawler, 1976). This forces us to consider other ways to address precariousness. CSR is one of those avenues.

In principle, precarious work runs in stark contrast to corporate socially responsible employment practices because of the harm it can cause workers, a primary stakeholder group.

In principle, precarious work runs in stark contrast to corporate socially responsible employment practices because of the harm it can cause workers, a primary stakeholder group. CSR practices are 'company activities demonstrating the inclusion of social and environmental concerns in business operations, and in interactions with stakeholders'

(van Marrewijk, 2003). Employment activities of CSR organisations should be consistent with this, and concerned with maintaining responsible and productive relationships with workers (Dahlsrud, 2008; Pedersen, 2015; Schwartz, 2011). In reality, this is unlikely to be the case. However, there are alternatives to contingent work that retain competitiveness and that employers might want to consider. They could then claim CSR with more legitimacy.

References

- Carré, F., Tilly, C., & Denham, D. (2011). Explaining variation in the quality of US retail jobs. *Unpublished manuscript, University of Massachusetts Boston*.
- Cascio, W. (2006a). Decency means more than "always low prices": A comparison of Costco to Wal-Mart's Sam's club. *The Academy of Management Perspectives*, 20(3), 26-37.
- Cascio, W. (2006b). The Economic Impact of Employee Behaviors on Organizational Performance. In *America at Work: Choices and Challenges*. E. E. Lawler III and J. O'Toole (eds.), 241-256. New York: Palgrave MacMillan.
- Conley, H. (2006). Modernisation or casualisation? Numerical flexibility in public services. *Capital & Class* (89), 31-54.
- Costco strives to maintain unique culture*. (2014, May 26) *MMR*, 31(8), 71.
- Dahlsrud, A. (2008). How corporate social responsibility is defined: an analysis of 37 definitions. *Corporate Social Responsibility and Environmental Management*, 15(1), 1-13.
- Feldman, D. C. (1996). The nature, antecedents and consequences of underemployment. *Journal of Management*, 22(3), 385-407.
- Khan, L. J., & Morrow, P. C. (1991). Objective and subjective underemployment relationships to job satisfaction. *Journal of Business Research*, 22(3), 211-218.
- Lopes, A., & Dewan, I. (2014). Precarious pedagogies? The impact of casual and zero-hour contracts in Higher Education. *Journal of Feminist Scholarship*, 7(8), 28-42.
- Lower-Basch, E. (2007). *Opportunity at work: improving job quality*. CLASP.
- Marín, E. (2013). Precarious work: An international problem. *International Journal of Labour Research*, 5(1), 153-168.

- Ministry of Business, Innovation, and Employment. (2016). Addressing zero-hour contracts. Retrieved from <http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/addressing-zero-hour-contracts>
- NZCTU. (2013). *Under pressure: a detailed report into insecure work in New Zealand*. Retrieved from: <http://union.org.nz/sites/union.org.nz/files/Under-Pressure-Detailed-Report-Final.pdf>
- Pedersen, E. R. G. (2015). *Corporate social responsibility*: SAGE Publications.
- Schwartz, M. S. (2011). *Corporate social responsibility: An ethical approach*. Broadview Press.
- Simmons, J. (2008). Ethics and morality in human resource management. *Social Responsibility Journal*, 4(1/2), 8-23
- Underhill, E., & Quinlan, M. (2011). How precarious employment affects health and safety at work: The case of temporary agency workers. *Relations Industrielles*, 66(3), 397-42
- van Marrewijk, M. (2003). Concepts and definitions of CSR and corporate sustainability: Between agency and communion. *Journal of Business Ethics*, 44(2/3), 95-105.
- Tweedie, D. (2013). Precarious work and Australian labour norms. *The Economic and Labour Relations Review: ELRR*, 24(3), 297.

RESEARCH UPDATE: OUTSTANDING WORKPLACE AWARD RECONSIDERS CORPORATE SOCIAL RESPONSIBILITY

... Because so far we haven't been able to rely on measures of CSR

Esme Cleave, Honours Student, School of Management

One of the surprising things about prizes, awards and recognition for socially responsible employers is that many involve elite knowledge workers and, if they do involve vulnerable workers, they often seem insincere. This raises the question of whether socially responsible employers receive adequate recognition, and those who appear to be socially responsible, but aren't, are rewarded unjustifiably. Good work benefits all employers and employees, especially workers in contingent, potentially precarious, employment arrangements. The Human Resources Institute of New Zealand has addressed this issue in their new Outstanding Workplace Award which aims to reward good employers – at all ends of the labour market – for good employment practices.

The HRINZ award is guided by the work of Coats (2007) who argues that work should satisfy and transcend foundational human wants and desires in order to achieve productivity and competitiveness in a socially responsible way. The award recognises that good work means more than mere compliance with decent work standards. Beyond job security, safety and fair remuneration, it promotes worker participation, voice, autonomy and flexibility. These features empower employees to grow and contribute productively. They are key elements of a high-involvement workplace (PSA & Coats, 2016).

The Outstanding Workplace Award recognises the following criteria as 'good work': (HRINZ, 2016)

- Job stability and safety
- Individual worker control and autonomy over work
- Fair work demands
- Flexible working arrangements
- Employer promotion of health, safety and wellbeing
- Prevention of isolation and discrimination, and promotion of inclusion
- Sharing of information

- Reintegration of programmes for the sick and disabled
- Visibility of senior leadership
- Appropriately trained managers
- Integrated programmes for health, health promotion, and illness prevention
- Empowerment of workers for self-care of health
- Enabling staff to achieve
- Monitoring and measuring all criteria above

So how does this differ from the traditional Corporate Social Responsibility (CSR) awards and how should CSR be measured? Described by Chelli and Gendron (2013) as ‘creators of meaning’, CSR rating agencies are one key way in which standards are set. Adherence to such standards is a new way for organisations to legitimise their CSR claims. However, there are significant disparities both within and between CSR rating frameworks in terms of credibility, standards and measures, and the assurance that these are met. Through these disparities, rating agencies have created a context where ‘a variety of disclosure practices and different standards of reporting are being developed and promoted’ (Chelli & Gendron, 2013).

Environmental concerns are the predominant focus of CSR reporting. Of the most common standards used by nine global CSR rating agencies, environmental dimensions accounted for nearly 50 percent, while social dimensions (including employment standards) made up only 25 percent (Rahdari and Rostamy, 2015). While environmental reporting is obviously very important, employment conditions may not be getting much attention. In addition, rating agencies vary widely in perceived credibility as shown by GlobeScan and SustainAbility’s 2013 survey of 18 prominent global CSR rating agencies with ‘sustainability experts’. The table below shows the credibility levels for four of these organisations and lists the CSR employment standards they each measure.

Agency rating system	Credibility ranking/degree of credibility by percentage <i>(GlobeScan & SustainAbility, 2013)</i>	Coverage of CSR employment standards
Dow Jones Sustainability Index	2/63%	Supplier assessment for labour practices; employee compensation disclosure; employee turnover disclosure; inclusion of human rights clauses
Financial Times Stock Exchange 4Good Index	4/55%	Flexible working arrangements; child labour; equal employment systems; diversity and inclusion systems; CEO-to-average worker pay
Oekom	5/54%	Supplier assessment for labour practices; flexible working arrangements; equal employment systems
Corporate Knights Report	12/45%	Employee compensation disclosure; employee turnover disclosure; occupational health and safety; CEO-to-average worker pay

Table 1: CSR rating agency coverage of CSR-related employment standards, illustrating inconsistencies between agency systems. Adapted from Rahdari and Rostamy (2015).

Further confusion and disparities arise because some rating agencies operate a declarative system and others only a solicited one. Declarative ratings are not requested by organisations but are based on publicly-available information and data collected from stakeholders. Reports of these ratings are sold to NGOs, insurance companies and investment banks. Solicited ratings are funded by the organisation which provides its own data to the rating agency for analysis and a sustainability report (Chelli & Gendron, 2013). This creates issues around conflicts of interest and rating accuracy (Finch, 2004).

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Employers have considerable freedom and flexibility in the way they present their sustainability because CSR rating agency standards are not absolute or binding. This includes the practices and measures they choose to emphasise or, alternatively, downplay. There is also little accountability, such as external verification, around adherence to good practice (at least according to their websites). The various practices of organisations claiming CSR are also poorly integrated.

These issues affect the consistency of socially responsible engagement by organisations claiming CSR. They strongly suggest such organisations cannot be expected to engage in genuine and credible CSR-related employment practices, and are unreliable agents in preventing precarious working arrangements.

Precarious work therefore remains an issue, not just across the board, but also in organisations that identify as CSR. This forces us to question CSR legitimacy further and put thought into addressing precarious work beyond reliance on CSR and its so-called principles. Better recognition of employers who are genuinely responsible and treat vulnerable workers well is also necessary, something that HRINZ have responded to with the introduction of their Outstanding Workplace Award in 2017. The award recognises, and has criteria consistent with, the underlying principles of good and decent work. It signals a necessary step to mitigate the presence of precarious work in our workforces by genuinely recognising socially responsible employers.

Effective employment relationships drive competitiveness. Since these relationships rely on a functional connection between humans – the employee and the employer – ‘good work’ recognises employment practices and conditions as things that are not merely ‘transactions’. When we see work as a relational, human activity, it becomes clear that ‘good work’ is essential for effective employment relationships.

If good work can benefit the employee and the employer, the CSR movement provides a useful platform to promote such work – one it has not yet taken up widely. All organisations need further education, encouragement and incentives to genuinely provide decent work for employees. This would clarify a CSR organisation’s obligations as a decent employer and provide other organisations with adequate information, and models, of how to provide decent work while remaining competitive. The new HRINZ award is an excellent place to start. It will enable all organisations to claim socially responsible employment practices with more legitimacy.

If good work can benefit the employee and the employer, the CSR movement provides a useful platform to promote such work – one it has not yet taken up widely. All organisations need further education, encouragement and incentives to genuinely provide decent work for employees.

References:

- Air New Zealand. (2015). *Sustainability report/2015*. Retrieved from:
<https://www.airnewzealand.co.nz/assets/PDFs/J004845-Sustainability-Report-2015.pdf>
- Bacharach, S. B., & Lawler, E. J. (1976). The perception of power. *Social Forces*, 55(1), 123-134.
- Chelli, M., & Gendron, Y. (2013). Sustainability ratings and the disciplinary power of the ideology of numbers. *Journal of Business Ethics*, 112(2), 187-203.
- Coats, D. (2007). Respect at Work: Just how good are British workplaces? In Bolton, S. (ed), *Dimensions of Dignity at Work*. London: Butterworth Heinemann.
- Finch, N. (2004). International rating agencies and sustainability. Available at SSRN 658082.
- Ghai, D. (2003). Decent work: Concept and indicators. *Int'l Lab. Rev.*, 142, 113.
- GlobeScan/SustainAbility Survey. (2013). Rate the Raters: the 2013 Ratings Survey Polling the Experts. *GlobeScan/SustainAbility Survey*.
- HRINZ. (2016). *NZ 2017 HR Awards: Award for Outstanding Workplace*. Retrieved from:
<http://nzhrwards.co.nz/wp-content/uploads/2016/09/21092016-Award-for-Outstanding-Workplace.pdf>
- International Labour Organisation. (2012). Decent Work Indicators: Concepts and Definitions. *International Labor Office, Geneva*.
- Public Service Association & Coats, D. 2016. *Beyond Human Resources: Towards the high-involvement workplace*.
- Rahdari, A. H., & Rostamy, A. A. A. (2015). Designing a general set of sustainability indicators at the corporate level. *Journal of Cleaner Production*, 108, 757-771.
- Ricoh New Zealand. (2015). *Our story 2015: A 360 degree look at Ricoh*. Retrieved from:
<http://www.ricoh.co.nz/about/pdf/CSR2015/book.swf#p=1>

LEGAL UPDATE: SEASONAL WORKERS' RIGHTS CONTINUE UNDER COLLECTIVE AGREEMENT

Peter Kiely, Partner, Kiely Thompson, Caisley

On 6 October 2016 the Court of Appeal released its decision¹ in AFFCO's appeal of the Employment Court judgment holding that AFFCO had unlawfully locked out union members and breached good faith.²

The Court of Appeal disagreed with the Employment Court that the employees were engaged on indefinite employment agreements which were not terminated between killing seasons but agreed that they had been unlawfully locked out.

Background

Meat workers are employed under a collective agreement to work killing seasons. At the end of each meatpacking season, the employees cease working at the plant and their employment terminates. The employees are then hired back at the commencement of the new season strictly according to seniority.

¹ *AFFCO New Zealand Ltd v NZ Meat Workers and Related Trades Union and ORS* [2016] NZCA 482.

² *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204.

The collective employment agreement expired on 31 December 2013. The employees continued to be employed under IEAs with the same terms and conditions as the expired collective agreement. Before the start of the 2015/2016 season, AFFCO advised employees it would not re-engage them for work unless they accepted terms and conditions of employment in new IEAs it was offering.

The Union challenged this in the Employment Court. It found there was a continuous employment relationship during the off-season and that the employees were unlawfully locked out when AFFCO refused to re-engage them in employment at the commencement of the 2015/2016 killing season other than on terms and conditions of employment contained in IEAs offered by AFFCO.

The Court of Appeal Decision

The Court of Appeal disagreed that there was a continuous employment relationship in the off-season. It found

The Court of Appeal disagreed that there was a continuous employment relationship in the off-season. It found that the Employment Court had failed to adopt the correct starting point for contractual interpretation of the collective agreement - the long standing understanding that employees would not be employed in the off-season.

that the Employment Court had failed to adopt the correct starting point for contractual interpretation of the collective agreement - the long standing understanding that employees would not be employed in the off-season. This was confirmed by the case law and practice of the parties. In failing to understand that point, the Employment Court failed to interpret the collective agreement correctly and found ambiguity where there was none.

Instead the Court of Appeal found that the collective agreement provided for inter-seasonal termination of employment and that many clauses in the collective agreement were only explicable if the parties intended to terminate employment at the end of each season.

However, this decision was not decisive in the determination of the appeal. This was because the Court of Appeal agreed with the Employment Court that the employees had been (unlawfully) locked out. The question as to whether there was a 'lockout' hinged on whether the workers whose employment had been terminated for the off-season were "employees" within the meaning of section 82 of the Employment Relations Act 2000 which governs lockouts.

The Court of Appeal agreed that the meat workers fell within the definition of "employee" in this section because the collective agreement created ongoing enforceable contractual rights and duties including the obligation to re-employ employees according to seniority. It considered the application of section 82 to employees who had continuing obligations owed to them during the off-season was "obvious".³

The Court of Appeal agreed that the meat workers fell within the definition of "employee" in this section because the collective agreement created ongoing enforceable contractual rights and duties including the obligation to re-employ employees according to seniority. It considered the application of section 82 to employees who had continuing obligations owed to them during the off-season was "obvious".

The Court of Appeal was also critical of AFFCO. It stated that it was:

"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

³ [2016] NZCA 482 at [63].

fragment the future bargaining strength of the workforce by isolating individual 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...”⁴

Conclusion

The Court of Appeal concluded that although the collective agreement contemplated that employees' employment would terminate in the off-season, the unlawful lockout provisions in section 82 extend to and protect former employees who enjoy existing contractual rights to an offer of re-employment.

CLEW – WHO ARE WE?

The Centre for Labour, Employment and Work (CLEW) is situated in the School of Management at Victoria University of Wellington. Our research and public education programme are centred on three pillars of research:

Organisational dynamics and performance

- What happens in organisations matters. From strategies, business processes, management practices, worker experiences to knowledge sharing, collaboration, innovation, productivity, engagement and trust – these all impact how individuals and organisations perform.

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Employment rights and institutions

- What is the role of trade unions and of collective bargaining in New Zealand's contemporary economy and society? Is the current system of employment rights and the institutions and processes for enforcement of those rights in New Zealand still relevant? Is it efficient, and does it contribute to overall productivity growth?

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Changing nature of work and the workforce

- Rapid and increasing change in the external environment of organisations has fundamentally changed the world of work. Factors shaping how we organise and participate in work include rapid technological development, intensifying environmental and resource pressures, globalised markets, mobile workforces and changing demographics.

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⁴ At [66].