**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**[2010] NZEMPC 113**
**WRC 22/10**

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| IN THE MATTER OF | proceedings removed from the Employment Relations Authority |
| BETWEEN | SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC<br>First Plaintiff |
| AND | THE PERSONS IN SCHEDULE A<br>Second Plaintiffs |
| AND | OCS LIMITED<br>Defendant |

Hearing: 26 August 2010
(Heard at Wellington)

Appearances: Peter Cranney and Tim Oldfield, Counsel for Plaintiffs
Paul McBride and Tina Mitchell, Counsel for Defendant
Stephanie Dyhrberg, Counsel for Building Service Contractors of New Zealand Inc (appearing and heard by leave)

Judgment: 31 August 2010

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## JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This judgment deals with the entitlement in law of employees about to be dismissed for redundancy following a transfer of an undertaking as that concept is known under Part 6A of the Employment Relations Act 2000 (the Act). It interprets and applies for the first time some of the provisions of Part 6A affecting vulnerable employees who are proposed to be made redundant, after having transferred to a new employer, for reasons related to the circumstances of those transfers.

## The Relevant Facts

[2] The Service and Food Workers Union Nga Ringa Tota Inc (SFWU) has, as members, a number of cleaners who are the named second plaintiffs. Now, only some of them are affected by the issues for decision because the employment circumstances of others have changed. They are employed at Massey University (Massey) sites in Albany, Palmerston North, and Wellington. Until recently, their employers were other companies which lost their Massey cleaning contracts. OCS Limited (OCS) tendered successfully for that work and the second plaintiffs transferred to OCS as their new employer on the same terms and conditions of employment. So although the identity of the second plaintiffs' employer changed as did their work, the terms and conditions under which they performed these duties have continued, at least for a short period.

[3] The history of relevant events in this case is as follows. Before 1 July 2010, cleaning work at Massey's sites in Albany, Palmerston North and Wellington was carried out by two companies, Spotless Services Ltd (Spotless) and Total Property Services Group Ltd (Total). In January 2010 Massey put out for tender its cleaning contract or contracts at the three sites in anticipation of the expiry of Spotless's and Total's cleaning contracts on 30 June 2010. Tenderers were asked to submit tenders for reduced cleaning services when compared to those being performed by Spotless and Total under their contracts due to expire on 30 June 2010. In February 2010 OCS tendered for the cleaning contract with Massey based on Massey's specifications set out in the tender process. OCS was announced as the successful tenderer on 28 April 2010.

[4] Remarkably, in a commercial sense, the evidence for OCS discloses that it was only after becoming the successful tenderer that OCS first considered what staffing resources it would need to meet the contract specifications it had entered into. The evidence establishes that up to 80 per cent of a cleaning contract price is the cost of labour. It is therefore remarkable that it quoted for the Massey contract before it gave consideration to what staff it would need to perform that and, by implication, what would therefore be its labour costs.

[5] Although the defendant's witnesses speak of cleaning contracts being "transferred" between cleaning companies, that is an inaccurate description, at least of the legal and commercial position. Rather, a cleaning company tenders for, and is contracted to provide, specified cleaning services to a client for a specific period and on specified terms and conditions as to cost. Towards the expiry of that contractual period, clients such as Massey will often invite tenders from interested cleaning companies to provide cleaning services for a further contractual period following the expiry of the current contract. The specifications may or may not change but if the client wishes to have new cleaning specifications and thereby lower cleaning costs, then this is the time for it to implement them. In that sense, therefore, there is neither a "transfer" of a cleaning contract from one cleaning company to another cleaning company or even the transfer by the client (Massey) of one cleaning company's contract to another cleaning company. Rather, one legal transaction (contract) comes to an end and a separate legal transaction with another contractor begins on separate negotiated and settled terms and conditions.

[6] Although 1 July 2010 was the date on which OCS commenced its new cleaning contract with Massey and on which the second plaintiffs transferred from their previous employers to OCS, the defendant had been aware for at least the best part of the previous month that the terms and conditions of its cleaning contract with Massey would require a number of changes to the work of the cleaners. These included combinations of the following. Some cleaning that was done at night would be performed by day. There would be less cleaning work at the university premises during the 21 weeks per year outside university term times and there would be none during the two weeks per year that the university was closed completely. It was also clear from Massey's requirements of OCS that there would be significantly less work per week for a number of cleaners.

[7] Despite knowing of these changes and their effects on cleaning staff before it began work under its new contract with Massey and before it accepted the transfer of all relevant existing cleaning staff to it, OCS nevertheless took on as employees all of the second plaintiffs who wished to transfer to it as their new employer.

[8] After 1 July 2010 the second plaintiffs continued to work on the same terms and conditions as they had before that date, except as to amounts and timing of work. The employees and the plaintiff were nevertheless on notice from OCS that it intended to make changes to these terms and conditions of employment which, if they were not agreed to, might result in the redundancy of a number of the cleaners. Indeed, even before the 1 July changeovers, OCS began consulting with the second plaintiffs and with the union about how the changes to their work might be achieved. OCS regarded itself as required to undertake such consultations pursuant to cl 25(3) of the operative collective agreement. OCS began these consultations in mid June so that it could conclude them and put in place the changes that would have to be made as soon as possible after 1 July 2010.

[9] By 10 August 2010 OCS had completed its consultations with the union and employees and advised, as affected employees, some of the second plaintiffs of the cessation of their current employment on 31 August 2010 unless the cleaners were prepared to agree to vary their terms and conditions of employment significantly and, from the employees' point of view, disadvantageously.

[10] The union and OCS are parties to a multi employer collective agreement, the NZ Cleaning Contractors Multi-Employer Collective Employment Agreement 1 April 2010–31 March 2011 (the collective agreement). The collective agreement was negotiated and settled on behalf of a number of cleaning contractors by their industry organisation, Building Service Contractors of New Zealand Inc. That organisation was given leave to be represented and heard as the issues raised about its multi-employer collective agreement affect it and its other members engaged in the same field. OCS's cleaners who are members of the union have employment agreements incorporating relevant parts of the collective agreement so that because its term does not expire until 31 March 2011, these provisions, together with s 69N of the Act, are engaged by these circumstances. The cleaners' previous employers, which held the Massey cleaning contracts, and OCS are all employer parties to the collective agreement.

## The collective agreement and the statute

[11] Clause 25 of the collective agreement which is at the heart of the case, states:

> **25.** **SECURITY OF EMPLOYMENT/REDUNDANCY**
>
> **25.1** The parties to this agreement acknowledge that security of employment and continuity of employment for workers are of mutual benefit in developing a skilled and experienced work force within the cleaning industry. The parties also recognise that the employer has the right to manage its business and has absolute discretion to determine appropriate staffing levels.
>
> **25.2** The parties to this employment agreement agree that no claims for redundancy payments will be made as a result of loss of employment due to downsizing of client contract or loss of client contract.
>
> **25.3** In a situation of client contract downsizing or loss, the employer will, where practicable, give twenty working days notice to the workers involved and to the union where union members are employed. At the time such notice is given to the union the employer shall also provide the union with the relevant employment information of the union members involved. At the time of securing the commercial contract and in the event that the employer is aware union members are employed on that site, the incoming contractor shall advise the union of when it will be commencing.
>
> **25.4** The purpose of this consultation is that, in the event that redeployment with the outgoing contractor is not possible, the incoming contractor shall take reasonable steps to enable mutually agreed redeployment of those workers employed by the outgoing contractor who are represented by the union.

[12] Section 69N of the Act falls within Part 6A (“Continuity of employment of employees’ work affected by restructuring”) of the Act. Its interpretation is governed by s 69A which provides that the object of subpart 1 into which the employees fall:

> … is to provide protection to … employees if, as a result of a proposed restructuring, their work is to be performed by another person and, to this end, to give—
>
> …
>
> (b) the employees who have transferred a right,—
>
> (i) subject to their employment agreements, to bargain for redundancy entitlements from the other person if made redundant by the other person for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and

(ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.

[13] Section 69N provides:

> **69N Employee who transfers may bargain for redundancy entitlements with new employer**
>
> (1) This section applies to an employee if—
>
> (a) the employee elects, under section 69I(1), to transfer to a new employer; and
>
> (b) the new employer proposes to make the employee redundant for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and
>
> (c) the employee's employment agreement—
>
> (i) does not provide for redundancy entitlements for those reasons or in those circumstances; or
>
> (ii) does not expressly exclude redundancy entitlements for those reasons or in those circumstances.
>
> (2) The employee is entitled to redundancy entitlements from his or her new employer.
>
> (3) If an employee seeks redundancy entitlements from his or her new employer, the employee and new employer must bargain with a view to reaching agreement on appropriate redundancy entitlements.

[14] The case turns on two separate but linked interpretations of words or phrases that are not clear and are disputed. Those words and phrases are contained in the statute and in a collective agreement the terms of which form part of the employment agreements of the second plaintiffs. Although in some respects it might seem more appropriate to determine the meaning of the collective agreement before applying to it and other relevant facts, the statutory position as interpreted, I propose to interpret the statute first. That is because the relevant provisions of the Act may affect the interpretation of the parties' collective agreement which was, in its latest iteration, entered into after relevant statutory provisions were in force.

## Part 6A and s 69N of the Employment Relations Act 2000 Interpreted

[15] Section 5 of the Interpretation Act 1999 requires the following in statutory interpretation:

**5 Ascertaining meaning of legislation**

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[16] Part 6A of the Act was inserted in 2004, several years after the principal Act. There are statements about its scheme, both in the legislation and, from time to time, in judgments of the Employment Court. Although Part 6A was amended in 2006, the provisions at issue in this judgment were unaffected by that subsequent revisitation, at least in ways relevant to this case.

[17] Relevant to the interpretation of s 69N is s 3(a)(ii) which provides that the object of the Act is:

> … to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
> …
> … by acknowledging and addressing the inherent inequality of power in employment relationships; …

[18] The heading to Part 6A of the Act is relevant also to its interpretation and, in particular, to the interpretation of s 69N. It reads: "Continuity of employment if employees' work affected by restructuring".

[19] The object of Subpart 1 of Part 6A, which is at issue in this case, is set out at s 69A and is:

> … to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person and, to this end, to give—
> (a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment; and
> (b) the employees who have transferred a right,—
> (i) subject to their employment agreements, to bargain for redundancy entitlements from the other person if made redundant by the other person for reasons relating to the

transfer of the employees or to the circumstances arising from the transfer of the employees; and

(ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.

[20] Section 69B contains some relevant interpretations or definitions including, unless the context other requires: "**redundancy entitlements** includes redundancy compensation".

[21] The general scheme of Subpart 1 of Part 6A is to protect the employment of vulnerable employees, in circumstances such as in this case, in three broad ways. The first is to ensure that if such employees are to lose their employment as a result of a restructuring, they can elect to transfer to become employees of the incoming contractor on no less than the same terms and conditions on which they were employed previously.

[22] Next, if the new employer proposes to make those transferred employees redundant for reasons relating to the transfer, or to the circumstances arising from the transfer, and if what are called "redundancy entitlements" have not been addressed expressly in the employees' employment agreements, then the statute both provides for an "entitlement" to "redundancy entitlements" and to bargain for such appropriate redundancy entitlements with the new employer. It is this second protection and its application to the facts of this case that are in issue.

[23] The third protection is that if such bargaining is unavailing, either the employees or the new employer may apply to the Employment Relations Authority to investigate the bargaining and, potentially and ultimately, to determine those redundancy entitlements under s 69O. Again, this case does not examine the role, if any, of the Authority and therefore I will not address further s 69O.

[24] Because there is no question in this case that the second plaintiffs transferred lawfully to employment by the defendant pursuant to Subpart 1 of Part 6A, it is unnecessary to examine the statutory provisions underpinning that process.

[25] That brings me to s 69N with which this case is concerned. It raises several questions, the answers to which are unclear and are in issue in this case. These include:

- what are "redundancy entitlements"?
- does the phrase "redundancy entitlements" mean a single undefined redundancy entitlement, multiple undefined redundancy entitlements, or a potentially unlimited suite of redundancy entitlements?
- if bargaining for redundancy entitlements is permitted, does this include bargaining for such redundancy entitlements as have been addressed specifically by the parties in their employment agreements?

[26] In these circumstances of absence of legislative clarity, analysis of the process that led to the enactment of s 69N is appropriate.

[27] The explanatory note to the Employment Relations Law Reform Bill 2004 stated that the Bill was to make:

> … specific provision to ensure—
>
> … the protection of employees in restructuring situations, so that terms and conditions are not undermined and the new employer is encouraged to make the best use of existing talent. The Bill establishes a requirement that all employment agreements contain protective provisions describing what steps the employer will take in the event of any sale, transfer or initial contracting out of business to protect affected employees' interests. The details of such provisions are subject to negotiation. The Bill also identifies specific groups of employees who require special protection in restructuring situations, due to their particular vulnerability and lack of bargaining power. For such groups, the Bill provides the protection of a right to elect to transfer to the new employer on their current terms and conditions of employment. This protection also applies to situations where a new contractor replaces the existing one:
> …
> Elements of the service sector (cleaning, food, and laundry services) are prime examples of particularly vulnerable employees in terms of the above criteria and have therefore been included in a schedule of the Bill.
> …
> Recognising that the right to transfer for these vulnerable employees may be undermined for employees who transfer to a new employer, but who then face redundancy after the transfer, the Bill also establishes a requirement that the issue of redundancy entitlements be addressed in such situations.

> Where the employee's employment agreement already deals with the issue of redundancies caused by a restructuring situation, this will bind the parties after the transfer. However, if the employment agreement does not deal with this issue, the parties will be able to bargain over the matter. If the parties cannot reach agreement, the Employment Relations Authority can examine the matter and, ultimately, determine any redundancy entitlement, …

[28] The explanatory note to the Employment Relations Amendment Bill 2006, by which Part 6A was amended in that year, noted, under the heading "Clause by clause analysis":

> *New section 69N* gives a transferring employee an entitlement to redundancy entitlements from his or her new employer if the new employer proposes to make the employee redundant because the new employer, as a result of the transfer of employees, has surplus employees. This entitlement is subject to the employees' employment agreements not providing for redundancy entitlements or not expressly excluding redundancy entitlements.

[29] The explanatory note also stated:

> Where the employees' employment agreement already deals with the issue of redundancies caused by a restructuring situation, this will bind the parties after the transfer. However, if the employment agreement does not deal with this issue, the parties will be able to bargain over the matter.

[30] The "Bills Digest" (No. 1330) issued to assist comprehension of the Employment Relations Amendment Bill 2006 noted, under the heading "BACKGROUND", in relation to Subpart 1 of Part 6A, that "Employers [presumably, however, employees] are given the right: … subject to their employment agreements, to bargain for redundancy entitlements from the new employer if made redundant by that employer for reasons related to the restructuring of the previous employer's business; …".

[31] The report back to the House on the Employment Relations Amendment Bill from the Transport and Industrial Relations Select Committee in 2006 noted under a heading "Redundancy bargaining":

> New sections 69A and 69N as drafted may be incompatible with the common-law position regarding redundancy, and may also be unduly narrow. As it stands, the bill gives employees an express right to bargain for redundancy entitlements if made redundant because the employer has surplus employees. In fact, redundancy may occur for other reasons, such as economic reasons or the need to reorganise work. Amendment to the bill is

> required to ensure that employees who are made redundant for any reason arising from the transfer have a right to bargain for redundancy entitlements (and to have them determined by the Authority if no agreement can be reached).

[32] There were amendments to the Bill as introduced in 2006 to give effect to those recommendations. Because these altered subsections are not in issue in this case, I will not do more than note that Parliament made some changes to the sections as a result of the report of the Select Committee.

[33] On the second reading of the Employment Relations Amendment Bill on 30 August 2006, the acting Minister of Labour, in moving that the Bill be read a second time, said:

> The bill as introduced provided that, in certain situations, employees had a right to bargain for redundancy entitlements if their new employer proposed making employees redundant as a result of the transfer of employees. In response to concerns about consistency with the common law and the risk of the drafting being too narrow, the committee recommended amending the bill to reflect that this right to bargain for redundancy entitlements arises if the new employer proposes making employees redundant because of the circumstances or reasons arising from the transfer of employees. I agree with the committee's recommended amendment, and I will also be recommending a further amendment to clarify that where employment agreements have dealt with redundancy entitlements in those specific situations, those agreements will prevail.

[34] Mr Cranney told me that despite the acting Minister's stated intention, no such further amendment was proposed or certainly passed.

[35] Although, by Supplementary Order Paper dated 31 August 2006, the Minister of Labour did introduce a further amendment to s 69N, that was not the amendment foreshadowed by the acting Minister on the previous day and only had the effect of adding to subclauses (i) and (ii) of s 69N(1)(c) the words "for those reasons or" immediately before the words "in those circumstances" which had pluralised the original phrase in each, "in that circumstance". This case does not turn on those words and therefore the significance of that change.

[36] I find significant the words in s 69A(b)(i) "subject to their employment agreements". This phrase qualifies what is otherwise the right to bargain for redundancy entitlements in the specified circumstances. In other words, such

bargaining can only take place about matters not dealt with expressly in employees' employment agreements. So the philosophy of the scheme of s 69N is to provide additional protection for employees who have transferred their employment but which is at risk because of prospective redundancy only to the extent that the employees and their employer have not previously addressed the question of redundancy entitlements in their employment agreements. This includes, of course, in any applicable operative collective agreement because the provisions of such a collective agreement will be deemed to be the terms and conditions of employment of affected employees by virtue of their membership of the union.

[37] What did Parliament intend by using the words "entitlement" or "entitlements" when describing what might be provided to employees or bargained over or the subject of examination and determination by the Employment Relations Authority under ss 69N and 69O? Parliament did not use a word such as "benefit" but, rather, in using the word "entitlement", may seen to have intended something more in the nature of a right. It is not easy to reconcile the notion of bargaining where what is being bargained for is said to be an "entitlement". If something is an entitlement in the sense of a right, why not simply describe the entitlement and declare its availability?

[38] Although one of the meanings of the verb "entitle" is to give a person a right, another equally common meaning is to give a person a just claim. More difficulty arises under s 69N(3) when the statute speaks, in effect, of an entitlement to an entitlement. Does that mean a right to a just claim and, if so, is it logically consistent that this can be bargained about or even the subject of consideration and refusal by the Employment Relations Authority? These are questions the answers to which are not easily discernible from the Act, but which must be decided in practice and at very short notice.

[39] I conclude that by referring to "redundancy entitlements", Parliament intended to use this phrase in the sense of a just claim the precise nature of which is indeterminate until either agreed to or fixed by the Authority. That seems the most logical meaning of "entitlement" in the context of the Act.

[40] The next difficult question to decide is what are, or rather what "is", "redundancy entitlements". The apparently awkward mixing of singular and plural arises because of the way in which the phrase "redundancy entitlements" is defined in s 69B. That says that "redundancy entitlements includes redundancy compensation". Therefore, the phrase "redundancy entitlements" is to be regarded as a collective singular and not a series of separate things that might have been suggested had Parliament used the phrase "redundancy entitlements include redundancy compensation". So provision for the payment of monetary compensation for dismissal for reasons of redundancy is "redundancy entitlements".

[41] Does the express exclusion of monetary redundancy compensation provide a "redundancy entitlement", as is in issue on the facts of this case? To provide for a disentitlement to redundancy compensation is, in a technical sense, to address the issue but in a way that is the antithesis of an entitlement upon redundancy. I conclude that an express exclusion of them was not intended by Parliament to constitute "redundancy entitlements". In these circumstances the employment agreements do not provide for "redundancy entitlements" for reasons relating to the transfer of the employees or to the circumstances arising from their transfer. It follows that the negative test in s 69N(1)(c)(i) is established.

[42] Section 69N(1)(c)(ii) is, however, met in the circumstances of this case. That is because cl 25 of the collective agreement (as interpreted subsequently) does expressly exclude redundancy entitlements for the reasons or in the circumstances set out in subs (1)(b). The exclusion in the collective agreement of redundancy compensation is an exclusion of "redundancy entitlements" as defined. However, subs (1)(c)(i) and (ii) are alternatives and it is necessary for the plaintiffs to establish only one of the two alternative tests. Having done so in respect of subs (1)(c)(i), it is immaterial for the purpose of moving to s 69N(2) that subs (1)(c)(ii) operates as a bar for the plaintiffs in this case.

## The collective agreement interpreted

[43] The statute addresses the content of the employment agreements of the second plaintiffs. However, on this matter their terms and conditions of employment

are established by the collective agreement in all cases of union membership so that it is the collective agreement which requires examination and interpretation.

[44] Although by no means unique in this regard, cl 25 of the collective agreement is not expressed plainly and clearly. Except for the last sentence in cl 25.3 which was added by the parties in an earlier version, but some time after the enactment of Part 6A of the Act in 2004, cl 25 has remained unchanged in collective agreements since at least the year 2000.

[45] Clause 25 raises two issues of disputed interpretation for resolution. The first is its reference to "no claims for redundancy payments will be made" in cl 25.2. Do these words mean literally what they say? That is, in the relevant circumstances, employees or the union will not claim redundancy payments. If taken literally, the plaintiffs say that this would not preclude the Employment Relations Authority directing that the employees be paid redundancy compensation if, following failed bargaining for redundancy entitlements, the matter came before the Authority under s 69O.

[46] It is, I suppose, not impossible to imagine the employer offering in bargaining, or the Authority granting relief, that is not specifically claimed. But that fanciful possibility need not be considered because I have concluded that the reference to "no claims for redundancy payments" is a euphemism or coded expression for the parties' intention that there will be no payments of monetary compensation for redundancy in the circumstances outlined. This is a case where a strictly literal interpretation of the words used would negate what I am satisfied was the purpose of the clause. If literalism prevailed, it might lead to even more absurd arguments than those just mentioned in relation to bargaining or the powers of the Authority.

[47] That brings me to the second and less easily determined conundrum about the meaning of the phrase "downsizing of client contract" in cl 25.2. Mr Cranney submitted that the phrase means what it apparently says, that is where the contract of a client of the employer is reduced in size, or "downsized". Counsel contrasted this with the alternative of "loss of client contract" the meaning of which he said was

obvious, that is where an employer loses a cleaning contract with a customer, whether during its currency or at its expiry. Illustrating the difference, Mr Cranney submitted that whereas the second plaintiffs' previous employers had lost their client contracts with Massey, thus preventing the employees from claiming redundancy payments from those previous employers, OCS had neither lost its contract with Massey nor, more particularly, nor had the OCS contract with Massey been "downsized". That was because, from the commencement of that contract on 1 July 2010, the amount of cleaning work to be performed under it had not changed. Indeed, as Mr Cranney pointed out, there had been no change to the specifications issued by Massey several months previously and on the basis of which it had invited tenders and OCS had succeeded in obtaining the Massey cleaning contract.

[48] Mr McBride for the defendant submitted that a downsizing of a client contract means what had in fact occurred in this case, that is that the previous Massey cleaning contract, albeit with other employers, had been "downsized" and it was that reduced or downsized contract awarded to OCS which triggered the operation of cl 25.2. Mr McBride emphasised that a legalistic analysis of the word "contract" used by the parties was not a true indicator of what they, as non-lawyers, meant. So, counsel submitted, although the plaintiff's interpretation may be superficially attractive to lawyers, the absence of any downsizing of any relevant contract that OCS had with Massey was what the parties intended to be covered by cl 25.2. As I expressed at the hearing, I do not consider it can be said that a lawyerly interpretation must be ignored completely. Indeed, the concept of "contract" in business is also well known to entities such as the defendant. However, the object of interpreting the collective agreement is to decide what the parties meant by the words and phrases they used in context and at the time.

[49] I consider the answer to the conundrum lies in the rest of the clause of which subcl 25.2 is only a part. Clause 25.1 is, in a sense, an object rather than an operative clause. It seeks to balance the dual purposes of maintaining security and continuity of employment for employees and an employer's ultimate right to manage its business and determine appropriate staffing levels.

[50] Clause 25.3 provides what I conclude is the determinative indication of the parties' intention for the meaning of "downsizing of client contract". It, too, refers to the same concepts of "client contract downsizing or loss". Clause 25.3 provides for a consultation process between "the employer", being the employer at the time of the "downsizing or loss", and the union and its members. The last sentence of cl 25.3 extends those obligations to a new employer such as OCS in this case. The "securing the commercial contract" refers to "the incoming contractor", that is an employer in the position of OCS in this case.

[51] I accept the defendant's distinction between redundancies occurring in circumstances not attributable to an employer's customers in which case redundancy may be claimed and paid, as against redundancies in circumstances attributable to changes brought about by the employer's customers in which cases redundancy compensation will not be paid.

[52] So it follows that the concept of "client contract downsizing" extends beyond the circumstances facing a new incoming contractor such as OCS. By applying also to a previous contracting relationship, it addresses the reduction in work and not necessarily or only the employer of the employees at the time the reduction occurs.

[53] It follows, therefore, that the defendant's broader interpretation of the phrase "downsizing of client contract" in cl 25.2 is that which I conclude the parties intended.

## Decision of the case

[54] The reduction in Massey's cleaning contract specifications amounted, in the parties' words, to a "downsizing of client contract". Clause 25.2 operates, therefore, to preclude the second defendants from claiming redundancy payments from OCS or, on the true interpretation of that phrase, relieves OCS from making any redundancy payments to the second defendants in these circumstances unless, of course, it agrees to do so which it does not.

[55] That is not the end of the story, however, because the plaintiffs argue that if the statute gives them an entitlement to "redundancy entitlements", these may include compensatory payments despite the provisions of cl 25.2. I find against that argument, however, for the following reasons. The phrase "redundancy entitlements" in s 69N(1)(c) includes, but is not limited to, monetary redundancy compensation. I interpret s 69(1)(c)(i) to mean that the employees' employment agreement does not provide for one or more redundancy entitlements but only to the extent that those are not provided for. Clause 25.2 expressly excludes the redundancy entitlement of monetary redundancy compensation.

[56] Although, under s 69N(1)(c)(i), I accept that the employees' employment agreements do not provide for redundancy entitlements and that, therefore, the plaintiffs qualify for redundancy entitlements under s 69N(2), excluded from those "redundancy entitlements" to which they are "entitled" is monetary redundancy compensation. That is because, by cl 25.2, the employees are not "entitled" to that form of redundancy entitlement.

[57] That interpretation is confirmed by the object section, s 69A and, in particular, by the words at the start of s 69A(b), "subject to their employment agreements, to bargain for redundancy entitlements …". If that were in doubt, that interpretation is also confirmed by all of the legislative background material referred to earlier in this judgment.

[58] The second plaintiffs are entitled to "redundancy entitlements" and to bargain for these, but that entitlement does not extend to monetary redundancy compensation because of cl 25.2.

[59] Although the evidence suggests that OCS has been prepared to agree to some other redundancy entitlements for employees to be made redundant such as redeployment and the provision of financial advice, it is unclear whether there may be any other redundancy entitlements (excluding monetary compensation) for which the union wishes to bargain with OCS on behalf of its members. Sufficient (but not indeterminate) time should be allowed to establish whether that is so and, presuming

it is, to enable that bargaining to take place. I will allow for that at the conclusion of the judgment.

## Are the second plaintiffs precluded from relief by having accepted new terms and conditions?

[60] This was a very weak argument advanced for the defendant but maintained even when its weakness was exposed in submissions and so needs to be dealt with.

[61] Some of the second plaintiffs have signed a document presented to them by the company which it says binds them to employment on the company's preferred terms and conditions and so precludes them from claiming any redundancy entitlements.

[62] What the company says has concluded either new employment agreements with cleaners or, more probably, a variation to their existing employment agreements, was an individualised form letter dated 18 August 2010 and sent to employees. It was headed: "RE: YOUR EMPLOYMENT – DECISION OF REDUNDANCY AND OFFER OF ALTERNATIVE EMPLOYMENT – PALMERSTON NORTH". As with most documents in this case, materially similar versions were produced for each of the three sites and although this one, known as exhibit 14 to Fala Haulangi's affidavit, relates to cleaners at Palmerston North, I imagine that other versions will have been produced for relevant staff at Albany and Wellington.

[63] The letter is a lengthy one but says materially:

> I write to advise of the outcome of the consultation process that has been occurring over the last six weeks or so. As you are probably aware, Massey University decided that it required a lesser contractual specification than it previously did, hence less staffing hours.
> …
> At the conclusion of that process [referring to a consultative process that is not at issue in this case], we have decided that the most appropriate course (given that the union has advised that you do not agree to change your hours) is to make your existing role redundant.
>
> At the same time however OCS offers you employment in one of the new roles of part-time team cleaner or part-time team leader (although appointment as team leader will be subject to selection). For those

> employees who accept these new roles, we will work together with them over the coming months and year to seek to minimise any lost hours. Where we can do so, we will offer additional hours outside of the Massey Campus. Your previous service will be recognised. We will also work to assess the outcomes of working to the new specification, timeframes and methods and will continue to consult with you on any improvements that can be made.
>
> … The alternative positions will commence on 2nd September 2010. This letter serves as notice of the redundancy of your current position, which shall cease to exist as of 1st September 2010. Unless you take up one of the new roles, your employment will end on that date. It is the company's position that no redundancy pay is due, in terms of your employment agreement. As stated previously, if the outcome of the court case is different, we will do what the law requires.
>
> Please fill in and submit the attached form to indicate your interest in the various options available to you. [original emphasis]
>
> Should we not receive this reply, we will assume that you have chosen not to take up any new role with OCS, and have opted for redundancy from 1st September 2010.

[64] Attached to the letter, but intended to be detached and removed, there is then a form giving a number of options, the material parts of which are as follows:

> Expression of Interest
>
> In order to ensure that appropriate recruitment planning takes place, please tick one box (or both boxes) to signify your interest in the position/s and then sign and date the form. In the case of Team Leader posts, you would be added to the list for consideration. This does not guarantee that you will be appointed to a team leader role.
>
> Return this signed form to … by … Tuesday 24th August 2010.

[65] There is then provision for the name of the employee and a number of choices between "I am interested in employment in the position of:" or "I am NOT interested in the positions offered:".

[66] Among the "NOT interested" options is:

> I do not want further offers of employment and require no further action be taken by OCS after my redundancy on 1 September 2010. I will be paid any outstanding leave due to me, and will be offered counselling, which I am free to accept or reject.

[67] There is then provision for a signature and date.

[68] This is neither a form that, by its completion, is capable in law of constituting a new employment agreement or a variation of an existing employment agreement. Although there is a reference at the start of the letter to "OFFER OF ALTERNATIVE EMPLOYMENT", it is at best from the defendant's point of view clearly no more than an "Expression of Interest" in the possibility of further employment.

[69] Employees who were union members were advised wisely to seek to preserve their positions pending the outcome of this case and in all the circumstances there is no question that they may have compromised their entitlements in this litigation even if they had signed and sent in such expressions of interest.

## Where to from here?

[70] For the bargaining about what I am satisfied is the second plaintiffs' entitlement to "redundancy entitlements" (as defined in this case) to be effective, there must be a reasonable and appropriate period for such bargaining before any redundancy dismissals take effect. Unless that occurs, entitlements which may be bargained for will be worthless if dismissals have already taken place. In my assessment that bargaining period may be up to 20 working days (the same period allowed in the collective agreement for consultation), although it cannot, of course, be completely open-ended. If appropriate, mediation assistance in that bargaining can be sought by the parties or any of them.

[71] If no settlement through bargaining of the second plaintiffs' redundancy entitlements can be achieved, then they or OCS may apply to the Authority to determine these. Again, for the outcome to be meaningful for the second plaintiffs, it will be desirable that dismissals for redundancy not take place until after the Authority has determined the entitlements.

[72] Despite OCS's uncompromising stance to date against delaying even modestly the process of redundancy dismissals until this judgment, and acknowledging the entitlement of the union and the employees to seek restraint of the process by compliance order or injunction, I propose allowing the defendant the

opportunity to act in good faith in compliance with this judgment rather than coercing it to do so by compliance order or injunction. It remains open to the union and the employees, however, to seek enforcement of this judgment by compliance order or other appropriate mechanism at short notice if necessary.

## Summary of judgment

[73] The plaintiffs are entitled to "redundancy entitlements" under s 69N(2) and (3) but not including monetary compensation for redundancy which is excluded by cl 25.2 of the collective agreement. That entitlement includes a real but not unlimited opportunity to bargain for those entitlements over the next 20 working days, and thereafter to have the Employment Relations Authority investigate the bargaining and even to determine the entitlements if they cannot be agreed in bargaining. To give real as opposed to Pyrrhic victory effect to that statutory entitlement, dismissals of affected employees for redundancy should not take place as would otherwise occur today. Leave is reserved to the parties to apply on short notice if further directions about this are required. If urgent mediation assistance is beneficial to the parties, then I make a direction accordingly. I reserve costs.

GL Colgan
Chief Judge

Judgment signed at 10.00 am on Tuesday 31 August 2010

**SCHEDULE A**

| | |
|---|---|
| BRANS | Joan |
| BURN | Raymond |
| CHAN | Shwee Yee Phee |
| CHAN | Than Than |
| CHATTERTON | Ian |
| CHEN | Xiu Qi |
| COOTES | Arapere |
| COOTES | Kay |
| DANIELS | Kari |
| DOWNING | Mellame |
| FRYER | Jan |
| FOLAU | Percy Te Hira |
| FOTU | Alalva |
| FOTU | Lagisa |
| GUO | Baode |
| HAMPSON | Colleen |
| HOLMES | Harry |
| HUANG | Oriole |
| IVOGA | Seko |
| KEI | Po’oi |
| LAULALA | Tufue |
| MADSEN | Christine |
| MALLARD | Jaimee |
| MALLETT | John |
| MAXWELL | Chrissy |
| OHLSON | Mary |
| PANDEY | Anju |
| PANIORA | Barbara |
| POTAE | Chad |
| PURVIS | Lorraine |
| RAME | Tereora |
| RASTON | Paul |
| REEVES | Stephen Mark |
| ROPIHA | Ruth |
| ROSS | Gavyn |
| SEINI | Kei |
| SHI | Wei Dong |
| TALLENTIRE | Bryan |
| TAUPAU | Tululga |
| TELEFONI | Alisi |
| TE PEETI | Clive |
| TOAGA | Mau |
| TUFUGA | Tualagi |
| VAEAU | Sefina |
| WALTERS | Ross |
| WATSON | Steven |

| | |
|---|---|
| YOUNG | Crystal |
| YOUNG | Garry |
| YOUNG | Judi |
| ZAKIROVA | Inna |