IN THE COURT OF APPEAL OF NEW ZEALAND

CA865/2010
[2011] NZCA 597

BETWEEN	OCS LIMITED Appellant
AND	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC First Respondent
AND	THE PERSONS LISTED IN SCHEDULE A OF THE APPLICATION Second Respondents

Hearing: 1 November 2011

Court: Chambers, Randerson and Stevens JJ

Counsel: P A McBride and G A Ballara for Appellant
P Cranney and A J Connor for First and Second Respondents
S A Dyhrberg for the Intervener

Judgment: 30 November 2011 at 4:00 PM

JUDGMENT OF THE COURT

A The appeal is allowed.

B The following question (as varied by this Court) for which leave to appeal was granted is answered in the affirmative:

> **Did the Employment Court err in law in determining that s 69N(1)(c) of the Act allowed the second respondents to bargain for redundancy entitlements under the Employment Court's construction of the multi-employer collective employment agreement?**

C As a result of the answer to the above question the further questions, including the question for which leave was granted to cross-appeal, do not need to be answered.

D The respondents must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] This appeal concerns the interpretation of certain provisions of Part 6A of the Employment Relations Act 2000 (the Act) dealing with the continuity of employment if the work of employees is affected by restructuring. The appellant, OCS Ltd (OCS), appeals against a decision of Chief Judge Colgan in the Employment Court determining that the second respondents were entitled to "redundancy entitlements" and as a result, the employees and OCS as employer must bargain with a view to reaching agreement on appropriate redundancy entitlements.[1]

[2] OCS applied for, and was granted, leave by this Court to argue the following questions:[2]

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1 *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2010] NZEmpC 113.
2 *OCS Ltd v Services and Food Workers Union Nga Ringa Tota Inc* [2010] NZCA 532.

(a) Did the Employment Court err in law in determining that s 69N(1)(c)(i) and (ii) of the Employment Relations Act 2000 provided the second respondents with two, entirely independent, points of entry to bargaining?

(b) Did the Employment Court err in law in determining that s 69N(1)(c)(i) of the Act allowed the second respondents to bargain for redundancy entitlements under the Employment Court's construction of the multi-employer collective employment agreement?

(c) Did the Employment Court err in law in determining that the redundant second respondents were entitled to ongoing employment by the applicant, pending bargaining and determination of issues of redundancy entitlement by the Employment Relations Authority?

[3] In addition to the above questions, this Court also granted OCS leave to cross-appeal on the following question:

> Does s 69N, and in particular s 69N(1)(c)(i), of the Act properly construed create an entitlement to monetary redundancy compensation?

[4] As the hearing of the appeal developed, the key point of law in issue became focussed upon the meaning and interpretation of s 69N(1)(c) of the Act. We are in no doubt that the appeal can best be determined by interpreting that subsection in its statutory context. That requires the second question to be slightly reframed by broadening it to deal with that subsection generally, rather than dealing more narrowly with only one of the two sub-paragraphs in the subsection. Given our conclusions, an answer to the broader question is determinative of the appeal. Neither the other two questions, nor the question on the cross-appeal, need to be answered.

Factual background

The successful tender

[5] The facts are drawn largely from the findings of the Judge, which are not in dispute. The named second respondents were all employed as cleaners at Massey University (Massey) sites in Albany, Palmerston North and Wellington. They were employed by one of two companies: Spotless Services Limited (Spotless) and Total Property Services Group (Total). Spotless's and Total's cleaning contracts were due to expire on 30 June 2010. In January 2010 Massey put out for tender its cleaning contract for the Massey sites. In February 2010 OCS tendered for the cleaning contract with Massey, based on Massey's specifications set out in the tender proposal. OCS was announced as the successful tenderer on 28 April 2010.

[6] On 1 July 2010, OCS commenced its cleaning contract with Massey. On this date the second defendants transferred from their previous employers to OCS. However, OCS had been aware for some time that the terms and conditions of its cleaning contract with Massey would require a number of changes to the work of the cleaners. For example, some cleaning that was done by night would need to be done by day. There would be less cleaning work at the university premises during the 21 weeks per year outside university term times and no cleaning at all was to be done during the two weeks per year the university was closed completely. It also became clear that there would be significantly less work per week for a number of cleaners.

[7] After 1 July 2010 the second respondents continued to work on the same terms and conditions as they had before that date, except as to amounts and timing of work. They were nevertheless on notice from OCS that it intended to make changes to these terms and conditions of employment which, if these changes were not agreed to, might result in the redundancy of a number of cleaners. OCS had already commenced consultation with the first respondent, the Service and Food Workers Union (the Union), and the second respondents from at least May 2010 about how changes to the cleaners' work might be achieved. OCS hoped to put these changes in place as soon as possible after 1 July 2010.

[8] By 10 August 2010 OCS completed its consultations with the Union and the second respondents. It advised some of the second respondents that their work would cease at the end of August unless they were prepared to vary their terms and conditions of employment significantly and (from the cleaners' perspective) disadvantageously. By this stage dispute had already arisen between the Union and OCS as to whether, if redundancies did occur, the cleaners would be entitled to redundancy entitlements under s 69N of the Act. An application to the Employment Relations Authority (the Authority) was made in July to determine the matter. The essential issue in dispute was whether the cleaners who were made redundant were entitled to redundancy entitlements.

Collective agreement

[9] Both the Union and OCS are party to the NZ Cleaning Contractors Multi-Employer Collective Employment Agreement 1 April 2010 – 31 March 2011 (the collective agreement), which was negotiated and settled on behalf of a number of cleaning contractors by their industry organisation, Building Services Contractors of New Zealand Inc (BSCNZ). The employment contracts of the second respondents incorporate provisions from the collective agreement, including provisions relating to redundancy. BSCNZ has been given leave to intervene in the current case.

[10] The key part of the collective agreement relevant to the appeal is cl 25, which provides:

> **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.
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> 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.
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> 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.
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> 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.

Statutory framework

[11] The relevant statutory provisions appear in Part 6A of the Employment Relations Act under the heading: "Continuity of employment if employees' work affected by restructuring". Section 69A sets out the purpose of Subpart 1. It states:

> **69A Object of this subpart**
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> The object of this subpart 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
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> (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
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> (ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.

[12] Subpart 1 of Part 6A thus sets out a scheme which aims to protect vulnerable employees in specified categories[3] if, as a result of a proposed restructuring, their work is to be performed by another. Under s 69I, an employee to whom the subpart applies may elect to transfer to a new employer if their employment is threatened by

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[3] Schedule 1A of the Act specifies the employees to whom subpart 1 of Part 6A applies. They include, for example, employees who provide services such as cleaning, food catering, caretaking, or laundry services for the education sector in primary, secondary and tertiary institutions.

restructuring. If an employee elects to transfer to the new employer, then to the extent that the employees work is to be performed by the new employer, the employee becomes an employee of the new employer. The employee is employed on the same terms and conditions by the new employer as applied to the employee immediately prior to the transfer, and is not entitled to any redundancy entitlements from the previous employer because of the transfer.[4] The employment of an employee who elects to transfer to a new employer is to be treated as continuous, including for the purposes of service-related entitlements.[5]

[13] If the new employer proposes to make those transferred employees redundant for reasons related to the transfer, s 69N may provide the employees with a right to bargain for redundancy entitlements with the new employer. The term "redundancy entitlements" is defined in s 69B as including "redundancy compensation". For present purposes the critical provision is contained in s 69N(1), but we set out below the full section:

> **69N Employee who transfers may bargain for redundancy entitlements with new employer**
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> (1) This section applies to an employee if—
>
> (a) the employee elects, under section 69I(1), to transfer to a new employer; and
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> (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
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> (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.
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> (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.

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4 Section 69I(2).
5 Section 69J(1).

[14] If, as a result of the bargaining process mandated by s 69N(3), an employee and the employer fail to agree on redundancy entitlements, the employee or the employer may apply to the Employment Relations Authority (the Authority) to investigate the bargaining.[6] After concluding its investigation, the Authority must determine either:[7]

(a) if it is possible for the bargaining to continue, how further bargaining should occur; or

(b) if further bargaining is not warranted, the redundancy entitlements due to the employee.

[15] If the Authority is called upon to determine redundancy entitlements, then it may take into account one or more of the factors referred to in s 69O(3) as follows:

(a) the redundancy entitlements (if any) provided in the employee's employment agreement for redundancy in circumstances other than restructuring:

(b) the employee's length of service with his or her previous employer and new employer:

(c) how much notice of the redundancy the employee has received:

(d) the ability of the new employer to provide redundancy entitlements:

(e) the likelihood of the employee being re-employed or obtaining employment with another employer:

(f) any other relevant matter that the Authority thinks fit.

Employment Court decision

[16] On 23 July 2010 the respondents, in anticipation that redundancies might occur as a result of the restructuring, filed an application in the Authority, seeking a determination of their rights to redundancy entitlements under s 69N of the Act. They simultaneously filed an application for removal to the Employment Court, which was successful. The issue before the Court was whether, and to what extent,

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6 Section 69O(1).
7 Section 69O(2).

the second respondents could bargain for redundancy entitlements. This required the Judge to interpret s 69N of the Act and cl 25 of the collective agreement.

[17] The Judge first interpreted the phrase "redundancy entitlements", concluding that "entitlement" meant "a just claim the precise nature of which is indeterminate until either agreed to or fixed by the [Employment Relations] Authority".[8] Next the Judge considered 69B before moving on to s 69N.

[18] With respect to s 69N(1)(c), the Judge stated:

> [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.
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> [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 plaintiffs.

[19] The Judge then interpreted cl 25 of the collective agreement, concluding that the statement in cl 25.2 that "no claims for redundancy payments will be made" meant that the employer would not be required to pay monetary compensation for redundancy in the circumstances outlined by cl 25. As to the meaning of "downsizing of client contract" in cl 25.2, the Judge determined that it was broad enough to cover the reduced contract that had been awarded to OCS in the current case.[9] Because of this, cl 25.2 operated to relieve OCS from making any redundancy payments to the second respondents.

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8 At [39].
9 At [47]–[53].

[20] But this, the Judge noted, was not the end of the story. He explained:

> [55] … the plaintiffs argue that if the statute gives them an entitlement to "redundancy entitlements" [under s 69N], 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 [69N(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.
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> [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.
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> [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.

[21] In order to give effect to that finding, the Judge allowed a period of 20 working days for the respondents to bargain with OCS for redundancy entitlements before the matter could be referred to the Authority. The Judge directed that no dismissals of the second respondents should take place pending the Authority's determination.

Submissions of the parties

[22] Mr McBride for OCS refers to the legislative history of Part 6A of the Act[10] and submits that a key element of the statutory scheme is to give primacy to the employment agreement of the parties. This is evident, for example, from the use of the phrase "subject to their employment agreements" in s 69A(b)(i) of the Act when describing the object of the subpart as giving the right to bargain for redundancy

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[10] See [33]–[39] below.

entitlements to employees who have transferred to another employer if that employer makes the employees redundant. It is only where the parties have not addressed redundancy entitlements themselves that the Act gives the right to bargain under s 69N(2) and (3). Thus if either one of the alternatives in s 69N(1)(c) is not met, then the requirements of the sub-paragraph are unsatisfied and there is no entitlement to bargain for redundancy entitlements.

[23] Counsel therefore submits that, if the employment agreement does not provide for, or deal with, redundancy entitlements then there is a right to bargain. In other words, the relevant employment agreement must be silent on the question of redundancy entitlements. But where the parties have addressed and dealt with that issue, either by defining what the entitlement will be, or by expressly excluding such an entitlement (as in the present case), then there is no right to bargain in terms of s 69N.

[24] Counsel for OCS relies on the finding of the Chief Judge[11] that the employment agreement expressly excluded redundancy entitlements. Thus redundancy compensation for the second respondents is not permitted where there is a loss of employment due to downsizing of client contract or loss of client contract. Consequently, on the facts the second respondents cannot meet the third limb of s 69N(1) because the (c)(ii) requirement is not satisfied. Mr McBride submits that the Judge, having so found, wrongly concluded that because of the exclusion (or despite it) the parties had failed to provide redundancy entitlements.

[25] Although he contends he need not go this far, Mr McBride also submits that, with respect to the s 69N(1)(c)(i) requirement, it too was not satisfied. The Judge's conclusion to the contrary was not sustainable as a matter of law or on the facts. Clauses 25.3 and 25.4 provided for, or dealt with, certain redundancy entitlements other than redundancy compensation.

[26] Accordingly, as neither requirement was satisfied, the right of the second respondents to bargain for redundancy entitlements did not arise and the appeal should be allowed.

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[11] At [40]–[42].

[27] Ms Dyhrberg, for the intervener BSCNZ, submits that the decision of the Employment Court, if allowed to stand, would remove the certainty and security previously provided to the parties by the collective agreement provisions, as it would create the risk of extended bargaining over entitlements already dealt with by the parties in the agreement. The BSCNZ supports OCS's submission that s 69N was intended to be and is expressly subject to any contractual provisions. Ms Dyhrberg submits that the Judge's decision would grant to employees on transfer a right to renegotiate for redundancy entitlements, despite the fact that the employees and their employer had already negotiated their employment agreement and set out the respective rights and obligations of the parties in the circumstances covered by s 69N. In other words, the employees would end up, merely by the fact of transferring to a new employer, with an opportunity to have a second bite of the cherry. BSCNZ therefore submits that if either limb of s 69N(1)(c) is met, then s 69N does not apply.

[28] Ms Dyhrberg notes that s 69N is "somewhat awkwardly framed". She submits that before a right to bargain arises, each limb of s 69N(1) must be met and in the current case, only s 69N(1)(c) is in issue. With respect to the implications of the Employment Court decision, Ms Dyhrberg submits as follows:

> 20 The purpose of s69N is to ensure that redundancy entitlements have been or are addressed, either by contract or by the statutory process. To allow employees to bargain for entitlements already addressed by contract has the effect of conferring on transferring employees new rights which they would not have, had their former employer made them redundant because the work had been downsized. Submitted, that is a perverse outcome and not intended by Parliament.
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> 21 The result of the judgment, ie retaining and paying employees who have been given notice of termination for redundancy and having to negotiate, mediate and/or attend the Employment Relations Authority imposes financial burdens and risks on the new employer which, as the evidence of Mr Young stated, have never been factored into the tendering process or into contract pricing.
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> 22 The Employment Court decision could have the effect of significantly skewing the very competitive commercial contract tender processes. An incumbent contractor may tender on the basis that, if it secured a down-sized contract, it could rely on the MECA provisions and after consultation and redeployment, make any surplus employees redundant without paying redundancy compensation or having to negotiate (or litigate) about entitlements. Other tendering companies, on the other hand, would have to factor

> in the possibility of having to budget to pay redundant employees for an indeterminate time, pending resolution of entitlements, despite being covered by the same MECA.

[29] For the respondents, Mr Cranney submits that Part 6A, Subpart 1 applies to specified categories of vulnerable employees, of which the second respondents are one. The aim of the 2004 amendment that inserted s 69N into the Employment Relations Act was to provide that, if restructuring occurs and employees transfer to the new employer, the transferring employees have the right to bargain for redundancy entitlement. The words of s 69N(1)(c) must be interpreted literally and there is no warrant for the approach contended for by OCS and the intervener.

[30] Mr Cranney elaborates his argument by submitting that s 69N(1) requires either (c)(i) or (c)(ii) to be satisfied in order to access the benefits of s 69N(2). The section must be read as it is written and if either of the two alternatives is met, the section applies to the employee. Some employment agreements will meet both tests, while others will only meet one. In effect, the section applies to any employee who has elected to transfer to the new employer and who faces redundancy dismissal by the new employer for reasons relating to the transfer or to the new circumstances arising from it. The Employment Court was therefore right to conclude that s 69N(1)(c)(i) and (ii) are alternative gateways to access s 69N.

Discussion

[31] Section 69N is concerned with the circumstances in which an employee who has transferred to a new employer is entitled to redundancy entitlements from his or her employer.[12] This statutory entitlement is essentially an entitlement to negotiate with the employer.[13] If the new employer and the employee fail to agree, the Authority may investigate bargaining and determine redundancy entitlements.[14] In other words the Authority has the role of circuit-breaker. The employees who are entitled to the statutory entitlement to negotiate are defined by s 69N(1).

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12 Section 69N(2).
13 Section 69N(3).
14 Section 69O.

[32] The only employees who are entitled to the statutory redundancy entitlement are those who fulfil the three criteria in subsection (1). So far as the first and second criteria are concerned, it is common ground that the requirements of s 69N(1)(a) and (b) are met on the facts of this case. The sole question is whether the third criterion is met.

[33] As this question requires us to construe s 69N(1)(c), it is convenient to refer again to the wording of the subsection:

> (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.

[34] We consider that the subsection may be paraphrased as follows: the subsection is satisfied where the employment agreement does not expressly deal with the topic of redundancy entitlements. The reason for this third criterion is that employees who have already negotiated on the topic of redundancy do not need a statutory right to negotiate.

[35] Next we pose the question: how could an employment agreement expressly deal with the topic of redundancy entitlements? Logically, there are two ways this could occur. First it could deal expressly with the topic of redundancy if, by its terms, it provided for redundancy entitlements. The second way in which an employment agreement might expressly deal with the topic of redundancy is if it expressly provided that there would be no redundancy entitlements. That is exactly what has been spelt out in subparas (i) and (ii). We reject Mr Craney's criticism that such interpretation does not accord with the literal meaning of the words of the subsection.

[36] We consider it does not matter that the employment agreement may not deal with all conceivable redundancy entitlements. If it deals with the topic in any one or more respects, then the employment agreement has addressed the issue of redundancy entitlements and s 69N does not apply. This is supported by the

definition of redundancy entitlements in s 69B: "redundancy entitlements includes redundancy compensation". This suggests that, even if the employment agreement only addresses the issue of redundancy compensation, it will still have addressed the issue of "redundancy entitlements".

[37] Furthermore, if Mr Cranney's interpretation of the provision were correct, then subs (1)(c) would be unnecessary since, as he accepted, the gateway would always be met. For example, if the employment agreement prohibited redundancy entitlements, para (c)(i) would be satisfied as, under Mr Cranney's interpretation, redundancy entitlements have not been provided for. However, if the agreement expressly provided redundancy entitlements but did not exclude them, then para (c)(ii) would be satisfied. And if the agreement was completely silent on the topic of redundancy entitlements, then both paras (c)(i) and (ii) would be satisfied. So, whatever the employment agreement provides on the topic of redundancy entitlements, that will be sufficient under the respondents' interpretation to satisfy subs (1)(c) and access the benefits conferred by s 69N.

[38] In our view that cannot have been what Parliament intended. If it were, then subs (1)(c) would be essentially meaningless and of no utility.

[39] Section 69A(b)(i) stipulates that the right to bargain is expressly subject to the terms of the employment agreements of those employees who have elected to transfer. That provision and the applicable parliamentary materials make it clear that the legislature intended that the right to bargain in relation to redundancy entitlements would not be triggered where the parties had turned their mind to, and included in their agreement, what was to happen in the case of redundancy arising from restructuring as envisaged by Part 6A and thereby had addressed or dealt with the issue.

[40] Part 6A was inserted into the Employment Relations Act in 2004 and was subject to amendment in 2006. Despite amendment, the provisions of s 69N material to this appeal have remained unchanged. The explanatory note to the Employment Relations Law Reform Bill 2003, which introduced the regime in Part 6A, stated:[15]

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[15] Employment Relations Law Reform Bill 2003 (92-1) (explanatory note) at 11.

> 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, …

[41] Later, when Part 6A was amended, the explanatory note to the Employment Relations Amendment Bill 2006 provided:[16]

> *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 employee's employment agreement not providing for redundancy entitlements or not expressly excluding redundancy entitlements.

[42] The Bills Digest issued to assist comprehension of the Employment Relations Amendment Bill noted, by way of background, that under Part 6A, Subpart 1 of the Employment Relations Act:[17]

> [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 …

[43] The Employment Relations Amendment Bill was examined by the Transport and Industrial Relations Committee. When reporting back to the House of Representatives, the Committee noted, under the heading "Redundancy bargaining":[18]

> 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

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16 Employment Relations Amendment Bill 2006 (19-1) (explanatory note) at 7.
17 Bills Digest No 1330 at 1.
18 Employment Relations Amendment Bill 2006 (19-2) (select committee report) at 3.

> 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).

[44] There were amendments to the Bill to give effect to those recommendations.

[45] On the second reading of the Bill, the acting Minister of Labour, in moving that the Bill be read a second time, stated:[19]

> 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 the employees. In response to concerns about consistency with the common law and the risk of drafting being too narrow, the committee recommended amending the bill to reflect this right to bargain for redundancy entitlements arises if the new employer proposes making employees redundant because of 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.

[46] While no such further amendment was passed, it seems that the Minister only intended to "clarify" the situation that, where employment agreements have dealt with redundancy entitlements, there will be no right to bargain. Furthermore, s 69A(b) already met the Minister's objective, as bargaining for redundancy entitlements is expressly "subject to" the employment agreement.

[47] This parliamentary material suggests that s 69N(1)(c) was intended to limit the right to bargain for redundancy entitlements to situations where the employment agreement has failed to address the matter. The interpretation we have adopted is consistent with Parliament's intention. It achieves Parliament's objective as expressed in s 69A(b)(i): that employees have a right to bargain for redundancy entitlements "subject to their employment agreements".

[48] It follows that it was not open to the Judge to find that, although monetary compensation for redundancy was expressly excluded by the terms of the employment agreement, it remained open for other non-monetary entitlements to be pursued. Here the parties dealt with redundancy entitlements by expressly prohibiting monetary compensation under cl 25.2 of the collective agreement and by

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[19] (30 August 2006) 633 NZPD 5014.

the other provisions in cls 25.3 and 25.4, which set out alternative forms of entitlement in the event of redundancy. The employment agreement thereby addressed the topic of redundancy entitlements, meaning that subs (1)(c) remained unsatisfied. Consequently, the second respondents could have no right under s 69N to bargain with the new employer OCS for redundancy entitlements.

[49] We consider that the Judge was led to a conclusion for which the statute did not provide. Once an employee has established a right to bargain for redundancy entitlements the statute provides no fetter on what the parties may agree (under negotiation arising from s 69N(3)) or the Authority (under s 69O) may determine. The fact that the Judge was required to impose a restriction on the scope of negotiation (or the Authority's decision making) is a further indication that the Judge's interpretation was in error.

[50] The result is that s 69N does not apply in the circumstances of this case.

[51] As the correct conclusion is that the second respondents were not entitled under s 69N(2) to redundancy entitlements from OCS, it follows that the Judge ought not to have ordered that the employment of the second respondents should continue for the purposes of negotiation for 20 working days after the date of his judgment.

The remaining questions

[52] We are satisfied that our decision on the second (reframed) question is determinative of the appeal. It follows that the first and third questions for which leave to appeal was granted[20] do not need to be answered.

[53] Had our conclusion been different so that the second respondents were entitled to negotiate for redundancy entitlements, the question of whether, and for how long, their employment might have continued would have arisen. Whether the Judge should have made any order in those circumstances is a point upon which we prefer not to express any firm view for two reasons. First, although there is no

[20] Set out at [2] above.

express power to make such an order under ss 69N or 69O, there may be other provisions of the Act which could confer such a power. Secondly, there are further proceedings in train with regard to the dismissals of the second respondents which we know little about. Any views we express on this topic could impact on those proceedings in an undesirable manner.

Result and costs

[54] The appeal is allowed. The following question (as varied by this Court) is answered in the affirmative:

> Did the Employment Court err in law in determining that s 69N(1)(c) of the Act allowed the second respondents to bargain for redundancy entitlements under the Employment Court's construction of the multi-employer collective employment agreement?

[55] As a result of the answer to the above question, the further questions, including the question for which leave was granted to cross-appeal, do not need to be answered.

[56] The respondents must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
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