IN THE SUPREME COURT OF NEW ZEALAND SC 124/2011

[2012] NZSC Trans 10

BETWEEN SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC AND OTHERS

Appellants

AND OCS LIMITED

Respondent

Hearing:	26 July 2012
Court:	Tipping J McGrath J William Young J Gault J Blanchard J
Appearances:	P Cranney and T Oldfield for the Appellants B A Corkill QC, P A McBride and G Ballara for the Respondent

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CIVIL APPEAL

MR CRANNEY:

If the Court pleases, my name is Cranney and I appear with Mr Oldfield for the appellant.

TIPPING J:

Yes, thank you, Mr Cranney.

MR CORKILL QC:

If the Court pleases, I appear with my learned friends, Messrs McBride and Ballara, for the respondent.

TIPPING J:

Thank you, Mr Corkill. Yes, Mr Cranney, we'll hear you, thanks.

MR CRANNEY:

Thank you, your Honour.

TIPPING J:

You can take it that the Court is familiar with the broad –

MR CRANNEY:

Yes, Sir.

TIPPING J:

– background of the case and has read the submissions.

MR CRANNEY:

Indeed. I don't, your Honour, intend to spend a great deal of time on the facts but just to make a few broad comments about them. The cleaners, there's about 40 of them, who are appellants, cleaning Massey University, and most of them at the time of these events on full-time 40-hour a week work, getting paid around about the minimum wage or just above it. $13.10 an hour was the rate in the contract and giving them on a 40-hour week about $27,000 a year, and although they were employed by two cleaning companies, Spotless Services Limited and Total Property Services, at the time of transfer, in one sense at least they were loyal servants of the University. These were the people who cleaned the toilets, polished the floors, washed the windows and kept the place spick and span, day in and day out, for the institution.

Now the reason why I make that point is that there is an issue in this case, which really is a fundamental issue of human equality, about how people should be treated under the law and under employment agreements, and the – what occurred was that the contracts were terminated with Spotless and Total Property Services and these people elected their rights to transfer to the new employer, and eventually, within a very short period, by August the 30th 2010, they faced very significant cuts in hours, which are referred to in the judgments, the removal of periods of the year which they work, a reduction in hours for many of them and, of course, a corresponding

reduction of income. So poor people already, if you like, on $27,000 a year or thereabouts, but made potentially or significantly much poorer and more difficult as a result of the changes.

Now the reason why that is important is to highlight the context in which these sections exist. The Act at section 237A, the Employment Relations Act, gives some clue as to the purpose of the sections and this particular section unfortunately was not referred to because it was essentially –

TIPPING J:

237.

MR CRANNEY:

237 capital A.

TIPPING J:

I've got marked simply there Part 6A. Could you just help me by directing me to where we find that particular section?

MR CRANNEY:

The section, your Honours, is not included in the bundle but you'll find it – there's a supplementary bundle of cases, which your Honours will have, filed on the 18th of July, tab 2, paragraph 51. Now this section – unfortunately the whole section's not in there but the criteria listed in the section are criteria which the Minister –

TIPPING J:

Is it something that we should have, the whole section, or is this all we need?

MR CRANNEY:

I'm afraid you do need the whole section, your Honours.

TIPPING J:

Well, why isn't it here?

MR CRANNEY:

Well, I presumed your Honours would have the whole Act.

TIPPING J:

We don't necessarily come in with whole Acts. We tend to focus on those parts of it that counsel refer to. Yes, thank you.

McGRATH J:

Don't worry. You go on, Mr Cranney.

MR CRANNEY:

The section is the criteria by which the Governor-General may – by ordering the Minister – may make a recommendation for adding groups of workers to schedule 1A, which is the schedule to whom this Part 6A applies. And you'll see there that it refers, at paragraph 4 of that section, to whether the employees concerned are employed in a sector in which restructuring of an employer's business occurs frequently, whether the restructuring of employers' business in the sector concerned has tended to undermine the employees' terms and conditions of employment, and whether the employees concerned have little bargaining power. So that's the criteria for adding to the section.

McGRATH J:

They're called vulnerable workers on account of these criteria, are they?

MR CRANNEY:

Yes, although the phrase "vulnerable workers" is not in the statute. It's –

McGRATH J:

No, but that's the way it's referred to.

MR CRANNEY:

It's the way, I think, in a previous iteration the phrase "vulnerable workers" was used. But that is the criteria, and the phrase is probably apt, even though it's not in there, because what it – if you look at what happened here, these people on very minimal wages and conditions and very minimal protections found themselves in the position of being supplicants with the new employer to seek additional work with them. So they transferred over and then they face cuts in their income and hours at the University. And it highlights the contrast between workers in this particular part of the labour market and others because if, for example, the Vice Chancellor had decided

to sack 40 lecturers or to turn them into term by term workers or to reduce their hours of work and so on obviously this kind of Part 6A is not necessary.

TIPPING J:

Is this all part of a submission that we should treat the language of the Act, where relevant, and the language of the contract liberally, if you like, in favour of the statutory purpose?

MR CRANNEY:

Yes.

TIPPING J:

Is this why you're referring to all of it?

MR CRANNEY:

Yes, yes, yes and I think we're basically on all fours about how the social purpose of the legislation should be taken into account in interpreting it.

TIPPING J:

Yes.

MR CRANNEY:

And this is the purpose.

TIPPING J:

Yes, thank you.

MR CRANNEY:

Or at least it sheds a great deal of light on the purpose. The sorts of workers that Part 6A applies to includes those who have little or no bargaining power in New Zealand society and therefore need some statutory intervention according to this Act.

Now the question in respect of which leave was given is whether and to what extent the collective agreement precludes the right to bargain under section 67N, and I want to refer your Honours to the collective agreement, which is in the case on appeal at

paragraph 44, sorry, at page 44, and the relevant contractual provisions are at page –

WILLIAM YOUNG J:

60.

MR CRANNEY:

60.

TIPPING J:

Para 25, I think…

MR CRANNEY:

Para 25.

TIPPING J:

25?

MR CRANNEY:

Yes. And so I want to – your Honours – to just come directly to the question upon which leave has been given and that is whether or not the contract precludes bargaining under section 67N. And the important comment to make is that the question really is talking about the employment agreement as interpreted by the Employment Court and whether the employment agreement, as so interpreted, precludes the use of section 67N and so, for that reason, it is important to look at what the Chief Judge said about what these clauses mean in the contract.

TIPPING J:

Is it 25.2 that is the particularly central one?

MR CRANNEY:

That's the central one, your Honour.

WILLIAM YOUNG J:

But the reference to 25.3 and .4 is to address the point that the provision for non-compensation in clause 25.2 only partially covers the redundancy ground.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

Whereas the Court of Appeal seems to have thought that in conjunction with 25.3 and 25.4 the ground was, in substance, covered although that wasn't absolutely fundamental to their approach.

MR CRANNEY:

Yes and we are saying that contradicted what the Employment Court said about those clauses.

TIPPING J:

So you are saying that there is still a window. It is not as big a window as your clients might like, but there is still a window.

MR CRANNEY:

Well, I am saying the window is completely open.

WILLIAM YOUNG J:

And, in the alternative, is partly open.

MR CRANNEY:

Yes and, in the alternative, was partly open. But if I can just deal with the first question first, which is the 25.2 question. And the Chief Judge referred to this clause at paragraph 46 of his judgment, which is in the case at page 18, page 34. Thank you, Mr Corkill, I was looking at the –

WILLIAM YOUNG J:

I am sorry, but where?

MR CRANNEY:

Page 34.

WILLIAM YOUNG J:

Para 34.

MR CRANNEY:

Page 34, paragraph 46. Now what he, the important phrase I want to highlight about the Chief Judge's interpretation is where he says that "I have" – the third or fourth line – "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." That's the first comment of interpretation.

TIPPING J:

So "payments" is linked to money?

MR CRANNEY:

Yes, yes. So he is, what he is, he is interpreting the agreement to say it means that the, it is a euphemism or a coded expression for the parties' intention that there will be no payments of monetary compensation.

McGRATH J:

That they have agreed there will be no payments for monetary compensation.

MR CRANNEY:

Yes, he is saying that it is a euphemism for that intention – the parties' intention.

McGRATH J:

Whether it is a euphemism or not isn't really the point, is it? The question is: what he is saying is its meaning that you are focussing on?

MR CRANNEY:

Yes.

TIPPING J:

It means you can't get paid any money for redundancy.

MR CRANNEY:

Yes, that's part of it.

TIPPING J:

Isn't that what it means and exactly what it says.

MR CRANNEY:

I just want to come on and further comment on it. Paragraph 54 of the same judgment. He says there that, paragraph 54, he says, "Clause 25.2 operates...to preclude the second defendants from claiming redundancy payments." And then he goes on to say, "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." So he is not precluding the possibility that they can pay it, but he is saying that the –

TIPPING J:

There is no contractual obligation to pay it.

MR CRANNEY:

There is no contractual obligation to pay. And then, and then he goes on to, if you look at paragraph 46 of the judgment, back to paragraph 46, he talks there about, he is rejecting the literal interpretation of the words, which would negate what he is satisfied is the purpose of the clause. So he really is saying that the purpose of the clause is to relieve the employer of any obligation to make redundancy payments. He is saying they can do it if they are asked but he is saying they don't have to do it.

TIPPING J:

I can't see what the mystery is of course. It seems to me that it is pretty straightforward; that that is what the clause was intended to achieve.

MR CRANNEY:

Yes, it was designed to say contractually.

TIPPING J:

So your clients can't get any money.

MR CRANNEY:

Pursuant to the contract.

TIPPING J:

Pursuant to the contract.

MR CRANNEY:

So that's that –

TIPPING J:

Where does that take us?

MR CRANNEY:

Well, where it takes us to is that there is nothing in that contract which precludes the parties, the union and the workers from seeking to exercise their full rights under section 67N.

WILLIAM YOUNG J:

What you are saying is – what you are trying to say is, that one way or another, that the union is entitled or the workers are entitled to bargain for redundancy compensation?

MR CRANNEY:

Yes, and there is nothing in the contract that prohibits that.

WILLIAM YOUNG J:

Except that they – it does say they won't make a claim for compensation.

MR CRANNEY:

Yes, but what he has said is I am not. He has interpreted it slightly differently. He has rejected the literal meaning and said, really, what it really is, is a clause which relieves them from any obligation to pay.

WILLIAM YOUNG J:

But they didn't – don't have an obligation to pay.

MR CRANNEY:

Yes, and that's what the contract is saying.

WILLIAM YOUNG J:

But they wouldn't –

TIPPING J:

Well, how can they negotiate for something they are not entitled to contractually?

MR CRANNEY:

Of course they can.

WILLIAM YOUNG J:

Well, they can negotiate for compensation as a sort of inchoate right.

MR CRANNEY:

Well, no, people –

WILLIAM YOUNG J:

If there was no clause –

MR CRANNEY:

If they were entitled to it, there would be no need for any negotiation.

WILLIAM YOUNG J:

Well, the word entitlement is part of the problem here because they are normally – there may be an entitlement to redundancy in a very literal sense.

TIPPING J:

Isn't a clear clue to what is going on here, section 69A, the first section in this part?

MR CRANNEY:

Yes.

TIPPING J:

Para (b) – The purpose of all this is to give the employers who have transferred a right, subject to their employment agreements to bargain.

MR CRANNEY:

Yes and the real – one issue in this case is, whether or not this employment agreement restricts that right to bargain and clearly it doesn't, as interpreted by the Chief Judge.

GAULT J:

I understood from the Chief Judge's judgment that he considered that they were entitled to bargain, but not for compensation.

MR CRANNEY:

Well, if that's – that is what he said but that's inconsistent with his interpretation of the agreement. He did not find that they were prohibited by the agreement from bargaining on his interpretation.

GAULT J:

They could bargain in respect of matters other than compensation, is as I understood it.

MR CRANNEY:

Yes, the –

BLANCHARD J:

Mr Cranney, on that point, can I refer you to paragraph 58 of the Chief Judge's judgment which seems to me contradicts what you have just said? "Entitled to 'redundancy entitlements' and to bargain for these, but that entitlement does not extend to monetary redundancy compensation because of cl 25.2." He is saying there is no right to bargain for monetary compensation.

MR CRANNEY:

I agree that that is what he is saying in that paragraph.

WILLIAM YOUNG J:

But he – I mean he can't really be taken to have said or concluded that the clause which precludes claims for redundancy, permits claims for redundancy.

MR CRANNEY:

Well, what he said was, he rejected a literal interpretation offer and he said it really is a statement that they are not obliged to pay it.

WILLIAM YOUNG J:

But wasn't it a rather different literal interpretation he rejected?

TIPPING J:

But what I thought he was doing was making a careful distinction between payments and other forms of entitlement, such as whatever they might be. He was saying that you can't get a payment of money, but there may be other forms of redundancy entitlement. And the definition of entitlement includes redundancy compensations, which suggests that there are other forms of entitlement than money. And that I thought, as my brother Blanchard said, that I thought was what he was really driving at.

MR CRANNEY:

Well, there's some contradictions in his conclusion that Justice, Judge Blanchard has just referred to and his interpretation of the agreement.

TIPPING J:

Well, we've got to read this judgment as a whole, and –

MR CRANNEY:

Well –

TIPPING J:

– it seems to me fairly patent that that was what the effect –

BLANCHARD J:

But he actually repeats those words at the beginning of paragraph 73 in his summary.

MR CRANNEY:

Well, in those parts that your Honour is referring to he's addressing what he sees as being the statute and the contract working together. But when he interprets the agreement he says in there that they can make the payment if they wish.

TIPPING J:

Your point seems to be that because the contract in terms doesn't say "no ability to bargain for that", one should read it that there is still an ability to bargain for something for which the contract says there's no entitlement.

MR CRANNEY:

Yes, of course there is.

TIPPING J:

Well, that's Alice in Wonderland.

MR CRANNEY:

Why is it Alice in Wonderland to say that you're entitled to bargain for something which is not in the contract? That's what bargain –

TIPPING J:

I was –

MR CRANNEY:

If it was in the contract, there would be no need for bargaining.

WILLIAM YOUNG J:

Well, can we leave section 214 out of it just for a moment because although it's important, it may be a bit of a distraction. Clause 25.2 goes back, does it go back before section 69N or not?

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

It does? All right. But in the context of 69N it might be thought that it addresses what will happen if there's a restructuring, a, what do you call it? A subsequent contracting, I think, is the statutory expression, and it would be a bit odd, and it's doing so in the context where the underlying premise is that the contract of the – the agreements of the employees effectively gets transferred to the new employer.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

So it's a bit odd if the Judge would have construed this provision as permitting a claim for redundancy compensation to be made against a new employer.

MR CRANNEY:

Well, the way in –

WILLIAM YOUNG J:

I mean, unless he – I understand the point you're making –

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

– but in reading his judgment as a whole, he's read it as an exclusion of claims, hasn't he?

MR CRANNEY:

Yes, he's reading it as an exclusion of an obligation. Anybody that's got an agreement is entitled to claim anything they want at any time.

WILLIAM YOUNG J:

Yes. Do you mean part of the problem is that the word "entitlement" is perhaps an unhappy word to use in the context of something that may either be a true entitlement, because it's provided for explicitly by the contract, or it may be something one can bargain for?

MR CRANNEY:

Yes. It's an inchoate thing and it means, the same word means a number of different things in the same sentence in this section, but we'll come onto that. But dealing with the –

TIPPING J:

Just a moment, Mr Cranney. I really do want to try and understand the point because I may be being obtuse. Is your point that because the agreement does not expressly exclude the right to bargain, the right to bargain is still there even though the agreement says you can't get a certain type of compensation –

MR CRANNEY:

Pursuant –

TIPPING J:

– under the agreement?

MR CRANNEY:

Yes. Pursuant to the agreement, you can't get it. There's no question about that.

TIPPING J:

But you can still ask for it.

MR CRANNEY:

You can ask for it. Of course you can.

TIPPING J:

But does your asking for it trigger all the statutory machinery which leads to an authority –

MR CRANNEY:

Yes.

TIPPING J:

– potentially ordering something which the agreement has said you can't have?

MR CRANNEY:

The agreement as he interpreted it doesn't say you can't ask for it. What it says is that you can't, the employer doesn't have to pay it, and that's quite obvious.

TIPPING J:

But the scheme as a whole surely is that if you've got the right to bargain for something –

MR CRANNEY:

Yes.

TIPPING J:

– and you can't reach an agreement –

MR CRANNEY:

Yes.

TIPPING J:

– then the mechanisms set out resolve it.

MR CRANNEY:

Yes.

TIPPING J:

Am I right?

MR CRANNEY:

Exactly.

TIPPING J:

But it can never resolve it consistently with the agreement.

MR CRANNEY:

Well, it can in terms of the Judge's interpretation of it and it can anyway. The scheme is this. The worker walks up to the employer and says, "Look, I want redundancy compensation," and the employer says, "I'm not prepared to pay it. I don't have to pay it and the Employment Court has said that the clause has to be read as being saying that I don't have to pay it, so I'm not going to agree to pay it," and that's fine. And then off we go to the Authority and you say to Authority, "We've had the bargaining and he says he's not going to pay it. He says the employment agreement says he doesn't have to pay it and he's not going to pay it." Now the Authority then has a look at the bargaining and goes through the steps in 67O.

WILLIAM YOUNG J:

Well, this –

BLANCHARD J:

69.

MR CRANNEY:

Sorry, 69O. Sorry, your Honour.

WILLIAM YOUNG J:

All right.

TIPPING J:

But your submission leads to the proposition I think inevitably, and it may be right that the Authority does have the power to order the employer, the new employer, to pay something which the contract says can't be claimed.

MR CRANNEY:

Yes.

TIPPING J:

All right, I –

MR CRANNEY:

That's exactly the position.

TIPPING J:

I understand what you're saying.

MR CRANNEY:

That is precisely the position. If –

WILLIAM YOUNG J:

If you could just look at section 69A –

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

– (b)(i).

MR CRANNEY:

Yes, Sir.

WILLIAM YOUNG J:

So that provides that "the employees who have transferred have a right, subject to their employment agreements, to bargain for redundancy entitlements".

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

Now clause 25.2 is construed by the respondents as saying that they can't bargain for redundancy entitlements. That's the substance of what the respondents are arguing, I think, isn't it?

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

All right, and what you're saying is, well, that's not what Judge Colgan said. He said something different.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

But if you look at the whole of this judgment, he is saying they can't bargain for redundancy entitlements. That that's the effect of clause 25.2.

MR CRANNEY:

Yes. He then, when he starts applying the statute to his earlier finding, he comes to that conclusion.

WILLIAM YOUNG J:

So…

MR CRANNEY:

But it's inconsistent with his earlier conclusion about what the contract means.

WILLIAM YOUNG J:

But shouldn't we read, take his interpretation of the statute, which I accept is basically controlling, subject to exceptions, interpretation of the agreement, by reference to the whole of the judgment, not just a line or two here and a line or two there?

MR CRANNEY:

Well, the trouble is the way in which it was done because he started off at paragraph – what he basically said in the judgment, he said, "I want to interpret the statute"…

WILLIAM YOUNG J:

Well, you say all he's saying: that he says clause 25.2 means there's no contractual entitlement to redundancy; that does not exclude an entitlement to bargain for redundancy.

MR CRANNEY:

Yes. Well, but then if you look at – look, for example, at paragraph 54 of the judgment, the last few words, he says "...on the true interpretation of that phrase, relieves OCS from making redundancy payments to the second defendant in these circumstances unless, of course, it agrees to do so which it does not." So if that's not bargaining, when somebody comes up and says, "Do you agree," and the employer says, "No, I don't," then what is?

TIPPING J:

He says that the clause precludes the second defendants from claiming.

MR CRANNEY:

But then he goes on to say "or, on the true interpretation of that phrase", so he's going back to his anti-literal approach. "[O]n the true interpretation of that phase," so he's correcting it. It relieves them from making payments for redundancy.

TIPPING J:

Well, it's cumulative. You can't claim and you can't be forced to pay.

MR CRANNEY:

Well, he's talking, he does use "on the true interpretation of that phrase" and that's referring back to his earlier, must be referring back to his earlier interpretation argument.

TIPPING J:

All right, well, I think we understand the point, Mr Cranney –

MR CRANNEY:

Yes.

TIPPING J:

– unless there's anything else in the case that you want to draw our attention to to support this proposition. I think it's a well-made proposition.

MR CRANNEY:

Yes.

TIPPING J:

Whether it's right or not remains to be seen.

MR CRANNEY:

Yes. Well, it's core, your Honour, to the whole case because the question in respect of leave, in which leave has been given, is does this contract preclude the section 67N –

TIPPING J:

Indeed.

MR CRANNEY:

– proposition?

TIPPING J:

All I'm saying is that if there's anything more you wish to say on this fundamental point –

MR CRANNEY:

On this? Well, the second point –

TIPPING J:

By all means.

MR CRANNEY:

The second point in relation to that is that even if the clause does rely on the literal meaning of the word "claim", which he said it doesn't, but let's presume for a minute it does, then there is nothing in the Act or the agreement that precludes access to section 69N because the agreement can be varied at any time pursuant to employment law and indeed – and that would include the very section which appears to preclude a claim and, indeed, the law requires that every collective agreement includes a term for its variation and this one does.

GAULT J:

I just don't follow this point about a possible variation. A variation of an agreement requires the agreement of both parties. Where is that here?

MR CRANNEY:

The point is not – the right under section 69A is only a right to bargain. It's not a right to get an agreement and what this is allowing us, anyone to do, is to bargain. So you can go to your employer and ask for whatever you like under section 69N.

GAULT J:

Oh well, I've heard the argument. I don't want to ask you anymore, thank you.

McGRATH J:

The right to bargain with an arbitration mechanism at the end of it –

MR CRANNEY:

Yes and the –

McGRATH J:

– or circuit breaker, as I think Justice Stevens called it.

MR CRANNEY:

Yes and so you're entitled – if you're one these workers that's referred to in 237A, you've got no bargaining power, et cetera and you get laid off and you go through this process. You're quite entitled to go up to your employer and say, "I want this dealt with. I want redundancy entitlements under 69N," and the employer is quite entitled to say no, under section, in 69O(i), when the bargaining takes place, the employer, well the employer is –

TIPPING J:

I'm sorry, I'm just not following this. Can you encapsulate in a couple of sentences what this variation point is, as simply and as shortly as you can? Because frankly, I don't understand it at the moment.

MR CRANNEY:

The collective agreement can be varied by agreement.

TIPPING J:

It can be, yes.

MR CRANNEY:

By agreement, at any time.

TIPPING J:

Yes.

MR CRANNEY:

The bargaining which is required by 69 –

TIPPING J:

You mean the bargaining might lead to a variation of the agreement that would let you in?

MR CRANNEY:

Of course, of course.

TIPPING J:

Oh, I see. Yes, I understand it now, thank you.

MR CRANNEY:

That's –

WILLIAM YOUNG J:

Say the employment agreement had said that in the event of a contract – what's the expression, subsequent contracting?

MR CRANNEY:

Subsequent contracting.

WILLIAM YOUNG J:

Yes. In the event of subsequent contracting the employees agree that they will not seek redundancy entitlements under section 69N. You say they still could because it would be within section 69N(1)(c)(i)?

MR CRANNEY:

Well, I say a number of things to that proposition. I do say that but I say that that would be inconsistent with the Act and you can't have anything in a collective agreement which is inconsistent with the Act.

WILLIAM YOUNG J:

Except that this is a case where the Act says it's subject to the agreement, effectively.

MR CRANNEY:

Well, the bargaining is subject to the agreement. It says you're entitled to bargain. You've got a right to bargain. Now look, if that's right, this whole Part 6A is useless and in fact –

WILLIAM YOUNG J:

Well no, it's not. I mean, well. sorry, well, it may be but I'm not persuaded yet that it is. I thought that there were possible redundancy entitlements other than compensation that might be bargained for.

MR CRANNEY:

Well, let's presume the clause says that you won't exercise any rights under 69N which is-

WILLIAM YOUNG J:

Well, let's put it another way. Say the contract, the agreement says that in no circumstances whatsoever will, in relation to a downsizing of a contract, using that loosely, will the employee seek redundancy, compensation, or anything else from the first employer?

MR CRANNEY:

From the second employer?

WILLIAM YOUNG J:

No, from the first employer.

MR CRANNEY:

Oh right, yes.

WILLIAM YOUNG J:

Is it the whole tenor of the Act that that sort of prohibition would carry on through the transfer?

MR CRANNEY:

It would –

WILLIAM YOUNG J:

That they don't get a better right against the new employer than they have against the old employer?

MR CRANNEY:

Yes, it would depend a little bit on the construction of the clause but the reason why I think the general proposition cannot stand is because, if you go back to 237A and look at those three factors which – well, the only reason why you're on the list is because you've got a –

WILLIAM YOUNG J:

There isn't much bargaining power.

MR CRANNEY:

You've got no, or little bargaining power and your terms have been undermined. If you then put someone on the list so that they can then use that little bargaining power to sign an agreement which excludes them from Part 6A, then the section is totally useless.

BLANCHARD J:

But section 69N contemplates the possibility of an expressed exclusion of redundancy entitlements.

MR CRANNEY:

Yes and if it is expressly excluded, then you are entitled to go to the authorities. You are entitled to the bargaining right.

WILLIAM YOUNG J:

But this renders, I mean, the whole structure of (c)(i) and (ii) a nonsense.

TIPPING J:

Well, I suggest we move on to that, Mr Cranney, that we now, because we have naturally come to it, that we address this, what seems to be fundamental point, as to the correct relationship of (c)(i) and (ii). Whether they are separate and individual, or whether they are cumulative.

MR CRANNEY:

Yes.

TIPPING J:

Or are there various other ways of putting the point?

MR CRANNEY:

Yes.

TIPPING J:

Would it be convenient to do that?

MR CRANNEY:

Yes, indeed. My submission on the point and I have said this often enough in the history of this case. The section is very difficult for a number of reasons but if you look at the word "or", it's (a), (b) and either (c)(i) or (c)(ii) and I'm coming in under (c)(i). I am saying that the agreement does not provide for redundancy entitlements and therefore I am entitled to access 69O.

WILLIAM YOUNG J:

What is the point of (ii) on that basis?

MR CRANNEY:

On the – (ii) is, it, well, to be honest, it's almost, it is one aspect of not providing for redundancy entitlements.

TIPPING J:

Well, though not providing is not the same as expressly excluding.

MR CRANNEY:

Yes, I don't know.

TIPPING J:

There has to be a distinction, otherwise the draughtsman has completely misfired.

MR CRANNEY:

Well, I think the draughtsman may have completely misfired but the question is, what do we do about it? And that's my argument is, it says (c)(i) and if you take out the whole – the purpose of (c) at the moment seems to – it makes more sense if you just add it on to (b).

TIPPING J:

What if there was an agreement that said, the parties hereby agree that the right to, or any claim for redundancy entitlements is expressly excluded? You would say that would have no effect because it would amount to not providing and therefore –

MR CRANNEY:

Yes.

TIPPING J:

– you were in on a completely self-contained independent limb one.

MR CRANNEY:

Yes, I think that (c)(ii) doesn't add anything to (c)(i).

TIPPING J:

So it becomes completely redundant, doesn't it?

MR CRANNEY:

It does.

TIPPING J:

I don't see how one can escape from that. You may be right. That has to be the consequence.

MR CRANNEY:

It does become redundant, which is why I haven't bothered with it, because I used to worry about it, a couple of years ago in this case, but in the end after tossing and turning and waking up at night, I've woken up and said it's (c)(i) only.

TIPPING J:

Well, I think the Court would have to have a very, very persuasive argument to simply say, well we will forget about (ii) because it adds nothing and the draftsman is you know, completely at miscarry.

WILLIAM YOUNG J:

It doesn't give much effect to section 69A(b)(i) either, does it, subject to their employment agreements to bargain. I mean what would be encompassed by this "subject to their employment agreements", which must be envisaged as being a restriction on what would otherwise be the right to bargain.

MR CRANNEY:

I would say that the rules for variation would be covered by that section. So if there were rules in the agreement about varying it, then that would fall within 69A(b)(i).

WILLIAM YOUNG J:

Why should people get a better right to redundancy from the new employer, than they have against the old employer?

MR CRANNEY:

Because that's the whole point of the section. The whole point of the part. Look –

WILLIAM YOUNG J:

I understand that if there is no restructuring, that there is a right to a compulsory arbitration process which is –

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

– an add-on, so it is not exactly the same as between old and new employer.

TIPPING J:

Isn't the – my reading, and I put this out for direction if it is wrong, is that the purpose of this is to make parties no better and no worse off, following the transfer, than they were under the first agreement?

MR CRANNEY:

No, no.

TIPPING J:

It is actually, on your submission, to enhance the position of the workers when there is a transfer.

MR CRANNEY:

Yes, if that were right, there would be no need – if that proposition were correct, there would be no need for section 69O or 69N. You would simply –

WILLIAM YOUNG J:

Why? Why?

TIPPING J:

Why?

MR CRANNEY:

Because you would simply negotiate with your original employer, with your limited – let's look at the hypothetical negotiation. The worker walks into the building and says, "I'll clean your toilets for so much an hour." That's the negotiation and that's what is written in the agreement and then the work is then contracted out and the employee then goes to the contractor and gets made redundant after the first day. That's the –

WILLIAM YOUNG J:

Well, say, in the absence of the Act, the worker would probably be made redundant on the termination of the original arrangement?

MR CRANNEY:

In the absence of the Act what – yes, what happened in the absence of these provisions was that people were that – was social misery in the sector.

WILLIAM YOUNG J:

Yes.

MR CRANNEY:

That people came and went according to which contractor was cleaning their building.

WILLIAM YOUNG J:

Yes. So that person either might or might not have a viable claim to redundancy, depending on the collective agreement?

MR CRANNEY:

The only way they could have a claim for redundancy would be in the collective agreement, or individually. Most of them would be on individual employment agreements.

WILLIAM YOUNG J:

All right. All right, well –

MR CRANNEY:

Or many of them, many of them.

WILLIAM YOUNG J:

So they would be entitled to claim either under the agreement, or to say well, the dismissal is not justified without making some fair provision for redundancy?

MR CRANNEY:

Well there's case law that says you can't do that and there's one of them –

WILLIAM YOUNG J:

McGavin.

TIPPING J:

Aoraki Corporation Ltd v McGavin [1998] 3 NZLR 276 (CA).

MR CRANNEY:

Is it *Aoraki*? I can't remember.

TIPPING J:

Mmm, *Aoraki v McGavin*.

MR CRANNEY:

It's the Court of Appeal case.

TIPPING J:

Yes.

MR CRANNEY:

The –

TIPPING J:

Some of us sat in it I think.

MR CRANNEY:

Yes, there's *GN Hale & Sons Ltd v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZLR 151, where the Court said that the fact that the money was paid made the dismissal more justified than if it hadn't been paid and that then became a kind of a line of cases in the Labour Court, to say that you have to pay redundancy, even though it's not in the contract, to make it fair and that was kyboshed.

WILLIAM YOUNG J:

I mean, I should know *McGavin* because I appeared in that case in the Employment Court but what was the end result of the Court of Appeal? That there could be no entitlement to –

MR CRANNEY:

There'd be no extra –

WILLIAM YOUNG J:

– claim unjustified dismissal on the absence of some sort of redundancy –

MR CRANNEY:

Yes, there could be no extra contractual entitlement to redundancy, compensation –

TIPPING J:

You could get no more than the contract allowed you. You couldn't say it was unfair dismissal because the contract didn't allow it.

MR CRANNEY:

That's right. That's exactly –

WILLIAM YOUNG J:

Okay.

MR CRANNEY:

– and this, we say, reverses that.

TIPPING J:

Do you say that this is designed to reverse that?

MR CRANNEY:

Well, it's designed to give a worker who is going to be made redundant an entitlement to –

WILLIAM YOUNG J:

A better claim: a claim which wouldn't otherwise be available.

MR CRANNEY:

Not only a claim, but a very powerful one because of the arbitration.

BLANCHARD J:

But is that only in the circumstances of transfer?

MR CRANNEY:

Yes. There is no right, apart from the circumstances of transfer –

BLANCHARD J:

So you say that the workers who elect to transfer, which is certainly a right given to them, are better off than they would be if there had been no transfer and they had simply been made redundant?

MR CRANNEY:

Yes. In terms of redundancy entitlements that's the whole idea of the section. It is to give people who lose their jobs and they – if they've got redundancy entitlements in their contract with the old employer, they have to waive those in order to transfer. That's in the Act.

BLANCHARD J:

Where's that?

MR CRANNEY:

Section – it's referred to in my submissions, my written submissions –

BLANCHARD J:

They have to waive the entitlements against the old employer.

MR CRANNEY:

Yes, that's right.

BLANCHARD J:

But they have, I would have thought, the same entitlements, such as they may be, against the new employer. It's section 69I(2)(c).

MR CRANNEY:

Yes, if they have them.

BLANCHARD J:

Yes and if they don't have them?

MR CRANNEY:

They've got the right to bargain for them. Look, leave aside section 69O and 69E, under this Act you can bargain about anything, anytime. It doesn't matter whether you're covered by a collective agreement or not. You can actually say, "I want more". The employer doesn't have to pay it. It's simply just ordinary contract law.

WILLIAM YOUNG J:

But what's different here is the compulsory arbitration process.

MR CRANNEY:

Yes and that's because they're vulnerable workers and the bargaining right would be useless without the arbitration process.

TIPPING J:

Is there anything else in the Act that helps us on, putting it very loosely, whether "or" in between (1) and (2) literally means "or"? In other words, making the two paragraphs completely independent or really means "and"?

MR CRANNEY:

I can accept that sometimes "or" does mean "and". I don't like lemonade and coca cola, sorry to advertise on the tape. But –

TIPPING J:

There is a lot worse that's gone on the tape.

MR CRANNEY:

But it obviously doesn't here and you would need to, I think, depart from the words of the statute to read "or" as "and".

TIPPING J:

Well, I am troubled by the redundancy of (ii) if your interpretation is correct.

MR CRANNEY:

And I am troubled by the redundancy of (i) and (ii) and the whole section, the whole part, if the other interpretation is correct.

TIPPING J:

Well, on the interpretation that is against you, there is a gap in the middle. There is either a positive provision, which must prevail, a negative exclusion that must prevail, and, in the middle, there is a situation where there is nothing either way. That's the interpretation against you. I hope I put that with accuracy.

MR CRANNEY:

Yes.

TIPPING J

Now there does seem to be a bit of logic to that because it preserves the sanctity of the bargain, which is the purpose of 69A.

MR CRANNEY:

Well, whether that's right or not, I don't know but I am relying on (i) and I understand that if the thing is read cumulatively, as the Court of Appeal does, there are ways of getting around that. The difficulty I see is this: these provisions, A to OG, these are provisions for the subpart, the schedule 1A, the vulnerable workers. Then you have got sub 69OH, from subpart 3 onwards, which is for everybody else. And the protections in subpart 3 don't apply to the vulnerable workers. They are excluded from them. Now if this Part 6A is to be read as a nullity, or read down, it means that they are worse off than the people covered by subpart 3, because subpart 3 protections don't apply to them.

TIPPING J:

Do I take it that there is nothing else in this part that you can point to, and if there isn't, there isn't, that would assist your submission as to the correct approach to these two subparagraphs?

MR CRANNEY:

My only – I am only just relying on the direct language of (i).

TIPPING J:

And on a wholly disjunctive meaning for the word "or". That's the key point, isn't it? There is no great difficulty with the language of either subparagraph. It's the relationship between them, is the issue that is thrown up.

MR CRANNEY:

Yes it does. Yes, I think it all must mean what it says, on its literal meaning.

TIPPING J:

Yes, well that's not a bad start.

MR CRANNEY:

I do, I mean, I do, I'm glad it is not and your Honour but –

TIPPING J:

I am sure you are.

MR CRANNEY:

– but if you look at subsection (2), "The employer is entitled to redundancy entitlements from his or her new employer," it is also a very old section. What does it mean by "entitled to redundancy entitlements"? And what does it mean – well, it seems to mean that you are entitled to bargain for them and settle, as part of this process, and if you don't settle, you are entitled to whatever the authority awards.

TIPPING J:

Is there any significance that subsection (2) is worded, "entitled to entitlements" as opposed to "bargaining for entitlements?"

MR CRANNEY:

I think, the meaning I take from it, because it uses the words "entitled to entitlements", is that that is the overarching purpose of it, is that you actually do get the entitlements and then there are different methods by which you get them. One of them is bargaining under the shadow of arbitration, which is powerful, and the other one is the arbitration itself. This is the last vestige of industrial arbitration in New Zealand, apart from one other section in the Act which is section 50J, relating to fixing the terms of collective agreements where there is bad faith. There are no other provisions in New Zealand's long and noble history left where you can go to the Court and say look, I think you should award this and the strongest point, I think, against this theory that the contract is king and that the contract is paramount, as my friend keeps saying in his submissions, or words to that effect, are section 237A because you only get into the section, you only get into it if you can't negotiate these redundancy entitlements on your own bargaining power. You don't get into the section. You only get into the section because you're weak and dispossessed and you're on $13.05 an hour when the minimum wage is $13.

TIPPING J:

Yes, well, I think we fully understand and see the force of the point that's being made, Mr Cranney, is the relationship between paras 1 and 2. Is there anything else you think you could usefully add on that aspect? Because, if not, I'll invite you to move on to the question of the meaning of the word entitlements and this distinction between payments and entitlements, the point that the contract refers to payments, appearing to leave open other forms of entitlement.

MR CRANNEY:

Yes. No, I don't think I can shed any further light on 69N.

TIPPING J:

Right, well let's move on to that.

MR CRANNEY:

It's partly because I've over thrashed it for many years but it's the best I can do at the moment.

TIPPING J:

Well, that's fine. What do you want to say on the, prima facie, quite persuasive point that the contract only excludes payments and if there are other forms of entitlement that are available then the contract doesn't exclude bargaining for them? I think I have the point.

MR CRANNEY:

Yes. I would say that the contract excludes payments but it doesn't exclude bargaining for payments which is referred –

TIPPING J:

All right, well, we know that –

MR CRANNEY:

– we've done that –

TIPPING J:

– we've done that –

MR CRANNEY:

– and it's as a right and in terms of the other entitlements yes, the –

TIPPING J:

But that is the point that's comprehended towards the end of your submissions, I think, isn't it?

MR CRANNEY:

Yes, yes.

TIPPING J:

Yes.

MR CRANNEY:

And the difficulty, I think, with the Court of Appeal's approach that if you simply mention redundancy entitlements in a collective agreement, then you've satisfied the section, is that it just would lead to ludicrous results. If you deal with the topic, it says, in the Court of Appeal judgment. That's not the language used in the statute.

If that's right then everybody will be dealing with the topic. You'll be getting your job to clean the toilets up and down the building and there will be something in there saying you'll be paid 10 cents for every year's service that you're made redundant and that will be it and you won't be able to go to the authority because you've dealt with the topic.

WILLIAM YOUNG J:

Well, you probably, I mean in truth, at least for the moment, you probably have dealt with the topic of payments in that situation.

MR CRANNEY:

Yes, but only as, without going back, only as interpreted by the Court, by the Employment Court.

TIPPING J:

Well, let's assume we're against you –

MR CRANNEY:

Yes, yes.

TIPPING J:

– on that because if we're not, this point doesn't arise.

MR CRANNEY:

Yes.

TIPPING J:

So hypothetically we're against you.

MR CRANNEY:

Yes.

TIPPING J:

Your new argument is that all the contract excludes is payment. If there are other forms of entitlement you can bargain for them.

MR CRANNEY:

Yes.

BLANCHARD J:

What are the other forms of entitlement? Can you give us an example?

MR CRANNEY:

I think, in my submission, I've referred to a number of them. It may be that –

BLANCHARD J:

Well, off the top of your head because you do this every day, what would another form of entitlement be?

MR CRANNEY:

Well, let's presume for a minute that you were a professor at the university and got dismissed, then you would have very significant entitlements. You would be given six months' notice, a very comprehensive consultation process prior to the final decision being made to dismiss you. You would be given extensive notice. You would be given the options of –

TIPPING J:

But professors at the university are not, at least immediately, strike one as being vulnerable workers under the –

MR CRANNEY:

Yes.

BLANCHARD J:

Well, they're not likely to get transferred.

MR CRANNEY:

Exactly. Unless we have OCS Professorial Limited.

TIPPING J:

Well, so it may not be the most sort of fertile ground –

MR CRANNEY:

Well, you know, the standard procedure is rights to be redeployed, rights to be retrained, alternatives to redundancy such as early retirement –

BLANCHARD J:

Mmm.

MR CRANNEY:

– dealing with the matter by attrition –

BLANCHARD J:

So if the contract said, "There shall be no entitlement to retraining," you're saying you wouldn't read that as covering the field of entitlements so as to exclude a redundancy payment?

MR CRANNEY:

Yes, I think you –

BLANCHARD J:

And therefore, if there is an exclusion of redundancy payment is not going to exclude an entitlement to retraining?

MR CRANNEY:

Yes.

BLANCHARD J:

Simple as that.

MR CRANNEY:

That's it and any other provision to deal with redundancy that I've mentioned. The –

WILLIAM YOUNG J:

Do I take that, I mean, the Chief Judge did direct bargaining as opposed to everything other than compensation. Did that ever get underway, or not?

MR CRANNEY:

Ah no, what happened – it did get underway but it didn't settle and in the end they got dismissed and re-engaged on lesser hours, lesser work, lesser – and they're still –

TIPPING J:

So the Chief Judge did anticipate that there could be further entitlements beyond payment?

MR CRANNEY:

Yes, but it was never settled.

WILLIAM YOUNG J:

So what happened? Did it go to the Employment Relations Authority?

MR CRANNEY:

Ah no, it came – because it was already in the Court it was appealed by both –

WILLIAM YOUNG J:

I'm looking at page 41 of the case.

MR CRANNEY:

Page 41, or para 41, page 41 –

WILLIAM YOUNG J:

Page 41.

MR CRANNEY:

Sorry, Sir, page 41, yes.

WILLIAM YOUNG J:

This is the order that the Chief Judge made. So he refers to bargaining before the Employment Relations – bargaining and, "thereafter to have the Employment Relations Authority investigate the bargaining". So did that not happen?

MR CRANNEY:

No, as a result of the appeal. I'm not sure if there was a formal stay but this decision was appealed, it went to the Court of Appeal and up here.

TIPPING J:

So if the appeal was dismissed, if, this order is still to be fulfilled?

WILLIAM YOUNG J:

The appeal would have to be allowed I think because the Court of Appeal –

MR CRANNEY:

Yes, if the appeal were –

TIPPING J:

Sorry, wrong way round –

MR CRANNEY:

– the most likely scenario –

TIPPING J:

– of course, yes, it would be allowed –

MR CRANNEY:

– if it were allowed –

TIPPING J:

– to that –

MR CRANNEY:

– it would be referred probably back to the Employment Court and, if I could hypothesise about it, what would happen would be that there would be an arbitration – there would be bargaining and so on first. If there was no agreement reached there would be an arbitration-type hearing where they would determine the redundancy entitlements and it would probably be, I think, one which involved the industry and that would become the arbitrated redundancy entitlements in these circumstances, or circumstances arising from it. And if anybody then got dismissed later and went to the Authority and tried to expand on that, they would have a very strong case for saying, well, this has already been dealt with –

TIPPING J:

Well, we don't need to worry about a lot of that.

MR CRANNEY:

No.

TIPPING J:

Our concern would be assuming – depends on what success you have on the appeal but if you succeed on this point, this order would be re-instated.

MR CRANNEY:

Yes. We would be back down to the Court.

TIPPING J:

If you succeed on the whole, the order would be re-instated without the words "but not including monetary compensation".

MR CRANNEY:

Yes. I would be back in the Authority. We could apply for it to be removed also. It could go to a Court, yes.

TIPPING J:

All right. I just wanted to clarify that that would be –

MR CRANNEY:

Yes, I think that is the remedy that would –

TIPPING J:

– the remedy –

MR CRANNEY:

– flow from a successful appeal.

TIPPING J:

Either in whole or in part, yes.

WILLIAM YOUNG J:

So the Judge made a stay, he effectively directed that the redundancy not then occur but was that later lifted?

MR CRANNEY:

Well, he only protected the workers for 20 days and then there was a...

WILLIAM YOUNG J:

Oh, I see.

MR CRANNEY:

Yes, and then it happened.

WILLIAM YOUNG J:

And the actual bargaining was overtaken by the appeal to the Court of Appeal?

MR CRANNEY:

Ah yes, the bargaining I think occurred but nothing else happened. It hasn't been investigated by the Authority or anything like that.

WILLIAM YOUNG J:

Thank you.

TIPPING J:

Well, does that take us to the – you seek a re-instatement of the Judge's order, either in whole or in part, if you like –

MR CRANNEY:

Yes.

TIPPING J:

– you know what I mean by that?

MR CRANNEY:

Yes, I want the whole –

TIPPING J:

You want the whole field –

MR CRANNEY:

– gamut –

TIPPING J:

– to be open –

MR CRANNEY:

Yes, yes.

TIPPING J:

– but at worst, you want the field beyond compensation to be open?

MR CRANNEY:

Yes.

TIPPING J:

Right.

MR CRANNEY:

And that will also raise interesting questions because if you are not allowed to bargain about redundancy compensation, you are entitled to bargain about financial issues such as periods of notice and so on, so it may be that it's a little bit artificial anyway.

TIPPING J:

Well, we'll have to wait and see what Mr Corkill says about that.

MR CRANNEY:

Now the other – it may be that we've actually dealt with everything I've dealt with in my submission.

TIPPING J:

I think we have, Mr Corkill, Mr Cranney, sorry. But I think you should have a moment or two, because the discussion has ebbed and flowed. You should have a moment or two, to make sure you haven't –

MR CRANNEY:

I am very grateful, your Honour, thank you.

TIPPING J:

You will have a reply, of course, Mr Corkill –

MR CRANNEY:

Indeed and I don't intend to try and anticipate the arguments because –

TIPPING J:

No, no I think that is actually quite sensible, if I may say so.

MR CRANNEY:

– because that's frowned upon here, I see, so I'll leave it at that and –

TIPPING J:

Yes, see what he says and how he gets on and then you will know –

MR CRANNEY:

As your Honours please.

TIPPING J:

– what to focus on in reply.

MR CRANNEY:

Thank you.

TIPPING J:

Yes, thank you, Mr Cranney. Mr Corkill?

MR CORKILL QC:

There are two introductory submissions for the respondents. The first is – relates to paragraphs 34 to 36 of the Court of Appeal decision which is at page 15 of the case on appeal and the respondent submits that the underlying, understanding of subsection 69N(1)(c) which the Court of Appeal set out in those paragraphs, gives a rational and clear explanation as to why para 1(c) is in the form that it is. In short, if the employees have already negotiated on the topic of redundancy, they don't need a statutory right to negotiate or to put it in the language that your Honour Justice Tipping used earlier. It preserves the sanctity of the agreement and so that issue is not adequately confronted by the appellant's argument because it doesn't recognise all the key indicators that there are in both the provisions of subpart (1) itself. I am thinking of section 69(1)A, sorry section 69A(b)(i) which refers to, "subject to the employment agreement". And two, the parliamentary materials which were referred to by the Court of Appeal. So sanctity of agreement is and has always, in the parliamentary materials, been clearly understood as being a precursor of access to these provisions.

WILLIAM YOUNG J:

But you are looking at more than adherence to the agreement. I mean it is a bit odd, because I know there is the game changing or role of the Employment Relations Authority. But you are saying that an agreement not to bargain for financial compensation excludes a right to bargain for other redundancy deals.

MR CORKILL QC:

Well, that gets us into the definition of redundancy entitlements and why it has been defined in the way that it has in section 69B and the points that the Judge and the Court of Appeal parted company on. The Judge held that even though you couldn't negotiate on redundancy compensation, you could negotiate or bargain on other matters, and the Court of Appeal in their para 36 last sentence found that even if the employment agreement only addresses the issue of redundancy compensation, it will have still addressed the issue of redundancy entitlements.

TIPPING J:

Well, I think that is your most difficult point in the case, Mr Corkill, if I may assist you in that respect.

MR CORKILL QC:

Thank you, your Honour. Well, that is why I am going to it now. And can I address it? The focus on monetary compensation in the definition must be regarded as deliberate by Parliament, for this –

TIPPING J:

But it says "includes"?

MR CORKILL QC:

Yes, for this reason. Yes, I agree "includes" doesn't mean that it can only be redundancy compensation, of course, but why is it there? I submit that the reason it's there is because there is no common law or statutory right to redundancy compensation and that was what the Court held in *Aoraki Corporation v McGavin*. It will be recalled that in that decision it was held that where – well, that the Tribunal and the Employment Court had no right under the provisions of the Employment Contracts Act to award, in effect, redundancy compensation. So you could get it by contract but you couldn't get it by any other means.

Now because of that contextual position, the definition of redundancy entitlements needed to cover off the fact that, in this regime, redundancy compensation was an option, or is an option either – for two reasons. The question of whether monetary compensation had been provided or not provided in an employment agreement would be relevant at the (1)(c) stage. So in other words, when you're debating or determining whether the employment agreement does not provide, or does not expressly exclude, inter alia, you are going to consider the issue of whether the agreement has provided for monetary compensation. But the second consequence of the statutory definition is that redundancy compensation can be sought in bargaining and can be ruled on under 69O by the ERA. Notwithstanding that compensation could otherwise not be sought in any other sense before the ERA.

Now, given the deliberate emphasis on monetary compensation in the definition which is obviously a key issue for all parties, money is a key issue for all parties when a redundancy occurs. It's submitted the Court of Appeal was correct to conclude, in effect, that if the parties had dealt with this topic they have dealt with redundancy entitlements –

WILLIAM YOUNG J:

So that the agreement had dealt with, had said, "On a redundancy there will be no claim for retraining"?

MR CORKILL QC:

Yes.

WILLIAM YOUNG J:

You say that that would exclude a claim for redundancy compensation?

MR CORKILL QC:

I do say that, your Honour, because there is no statutory indication that any other intention was to prevail. So for instance –

WILLIAM YOUNG J:

Well, it could, I mean, there is a bit. There's a sense I have from the statute that the old contract is meant to run through as far as possible –

MR CORKILL QC:

Mhm.

WILLIAM YOUNG J:

– and if the old contract excludes one thing but not another then it's sensible to treat the other thing as not excluded when it runs through to the new employer?

MR CORKILL QC:

In which case you would expect to see, in section 69O(3), among the various factors which the ERA can continue –

WILLIAM YOUNG J:

I agree, it doesn't deal with –

MR CORKILL QC:

It doesn't deal with it.

WILLIAM YOUNG J:

It doesn't deal with redundancy provisions associated with contract outsourcing or –

MR CORKILL QC:

And you would expect to see some indication – and this was commented on by the Court of Appeal when the Court of Appeal said that the Chief Judge had erred by making a direction that bargaining and ERA procedures could go ahead but not on redundancy compensation. "The fact," the Court of Appeal said at paragraph 49, "The fact that the Judge was required to impose a restriction on the scope of negotiation...is a further indication that [his] interpretation was in error." So I say there are these two statutory –

WILLIAM YOUNG J:

Well, the problem is the statute has expressly contemplated that redundancy compensation would be provided for. It's expressly contemplated that redundancy – sorry, that redundancy entitlements are provided for. It's expressly contemplated that redundancy entitlements will be excluded.

MR CORKILL QC:

Yes.

WILLIAM YOUNG J:

What it hasn't squarely addressed is, as it were, the hole in the middle, that redundancy entitlements might be partially but not completely addressed?

MR CORKILL QC:

And that is a policy matter for Parliament. If it is going to introduce those thresholds, or introduce that exception, or introduce that limitation, it needs to say so and –

TIPPING J:

It does seem odd, Mr Corkill, that they've used the word "entitlements" alongside "compensation" –

MR CORKILL QC:

Mhm.

TIPPING J:

– yet really, in your submission, all they were really talking about was compensation.

MR CORKILL QC:

Entitlements is used in the sense of just claim and the question is, and the starting point is in section 69(1)(c) whether the agreement has provided for that either by inclusion or express exclusion.

TIPPING J:

But do you accept or not that there are other forms of entitlement?

MR CORKILL QC:

Yes I do.

TIPPING J:

Than money?

MR CORKILL QC:

Absolutely, your Honour and this I submit. The Chief Judge commented on the plural versus singular issue which he, I think, said was confusing, which is part of the problem that is under discussion at the moment. Now what I say about that is that this is an example of the singular/plural problem we sometimes get into and which is resolved by section 33 of the Interpretation Act and I think your Honour actually touched on this in *Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189 with regards to the word "entitlement". That was the issue of the ACC entitlements in the Sentencing Act.

TIPPING J:

But that was just coincidental that it was the same word. It's not. It's not – you're not suggesting –

MR CORKILL QC:

No, no, I'm not attributing any significance to it –

TIPPING J:

No, no.

MR CORKILL QC:

– other than it will be an example that's familiar.

TIPPING J:

Bring it back, yes.

MR CORKILL QC:

And I say that, that applying that principle. Of course, that is all subject to context. The application of a section 33 analysis of singular and plural is subject to context. And I say the statutory context here, where the Parliament has placed so much emphasis on existing employment agreements, makes sense, that if there is one only example of a redundancy entitlements, then that will suffice.

WILLIAM YOUNG J:

Let us say that Massey University had not wished to change the contractor, but had simply said, "Well, we are downsizing. Your contract has come to an end. We are happy to give you a new contract, but it's got to be a smaller deal."

MR CORKILL QC:

Mhm.

WILLIAM YOUNG J:

And the Spotless, or whoever it was, then went to the employees and said, "Well sorry, but we are going to have to cut back a bit." There would have been nothing to stop them negotiating for redundancy entitlements, other than compensation?

MR CORKILL QC:

They could negotiate.

WILLIAM YOUNG J:

Yes.

MR CORKILL QC:

But these provisions would not apply.

WILLIAM YOUNG J:

Yes, because there is no transfer.

MR CORKILL QC:

Correct.

WILLIAM YOUNG J:
But they would be entitled to bargain.

MR CORKILL QC:
Yes.

WILLIAM YOUNG J:
Well, why can't they bargain when they are transferred to another employer?

MR CORKILL QC:
Well, it comes down –

WILLIAM YOUNG J:
Because their rights are being cut. I know. Whatever happens, their rights are going to be different.

MR CORKILL QC:
Mhm.

WILLIAM YOUNG J:
Because if, on I suppose, the proposition I am putting to you, they are going to get a right to bargain, plus something extra –

MR CORKILL QC:
Yes.

WILLIAM YOUNG J:
– which is the Employment Relations Authority getting involved.

MR CORKILL QC:
Mhm.

WILLIAM YOUNG J:
On your argument, they have just lost the right to bargain. They can't bargain at all.

MR CORKILL QC:

No, they can bargain but they can't bargain under these provisions. So just as the employee negotiating with the existing employer can't force an outcome, or can't force a particular process, on the employer in the example which your Honour cited, neither could an employee here, if he cannot meet the test in 69(1)(c). And indeed, the reverse is the problem here because – and I touched on this in the written submission – that there is a, if the interpretation favoured by the appellant is that, in fact, the transferring employee gets an enhanced right, a right to bargain, then a right to go to the ERA but the existing employee can't, then that is a, then one would say, "Well why did Parliament give a superior right to a transferring employee?"

WILLIAM YOUNG J:

Well, it has given a superior right though.

MR CORKILL QC:

Only if he can, if it is not covered in the manner –

WILLIAM YOUNG J:

But why can't we just read section 69(1)(c)(ii) when it refers to redundancy entitlements as meaning all industrial, all redundancy entitlements.

MR CORKILL QC:

Because Parliament hasn't expressly said that.

WILLIAM YOUNG J:

Well, it's left, it has used the general phrase which -

MR CORKILL QC:

The difficulty –

WILLIAM YOUNG J:

– leaves it open.

MR CORKILL QC:

– the difficulty –

WILLIAM YOUNG J:

You say an exclusion of one redundancy entitlement excludes all.

MR CORKILL QC:

Yes.

WILLIAM YOUNG J:

The corresponding counter argument may be that unless all are excluded, section (c) doesn't apply, but the bargaining would still have to be under the, subject to the contract and would exclude those which are excluded.

MR CORKILL QC:

Well, it would be inherently unlikely that all redundancy entitlements would be excluded and one would probably get into a discussion about the Act itself giving some rights through the good faith provisions which requires information and consultation and what have you. So that –

WILLIAM YOUNG J:

Well, should they be excluded then?

MR CORKILL QC:

Well, your Honour is postulating –

WILLIAM YOUNG J:

You're saying that there are really two types of bargaining. There is the bargaining which –

MR CORKILL QC:

Yes.

WILLIAM YOUNG J:

– occurs under the aegis of section 69N and O –

MR CORKILL QC:

Mhm.

WILLIAM YOUNG J:

– and there's general bargaining?

MR CORKILL QC:

Yes, yes.

WILLIAM YOUNG J:

I understand that.

MR CORKILL QC:

Now the second general point I want to make is to do with common law context and –

TIPPING J:

Just before you move on, Mr Corkill.

MR CORKILL QC:

Yes.

TIPPING J:

I think I may have not quite fully grasped your point about something not being covered by 69O. You were discussing with my brother Young and I'm not sure – and then you referred to the Court of Appeal as having weighed that into the balance –

MR CORKILL QC:

Oh no, there's two points, your Honour, and they're different points –

TIPPING J:

Right, well, that's maybe why I'm –

MR CORKILL QC:

Yes, the first point –

TIPPING J:

– a little –

MR CORKILL QC:

– is 69O subsection (3), the list –

TIPPING J:

Yes.

MR CORKILL QC:

– of matters that the Authority may take into account does not have a statement that it may take into account redundancy entitlements relating to restructuring if the employee has got through the gate to this point. And so what I'm submitting is that if Parliament intended that you could come through the gate and bargain and/or seek orders for redundancy entitlements other than those specifically dealt with in the agreement, you would expect to see a reference to that effect in 69(3).

TIPPING J:

Thank you, I understand that.

MR CORKILL QC:

And the other point I would make and I'll just give your Honour the shorthand reference to it, I was really just endorsing the point made by the Court of Appeal at paragraph 49 –

TIPPING J:

No, I got that. It was the first point that I hadn't quite digested. Thank you.

MR CORKILL QC:

Yes, thank you Sir. Now, in the written submissions, I've made a point which I'll just touch on in shorthand which is that in the – there's a general context here which is, first of all, starts with the proposition of well, what was the position at common law before there were any provisions at all? The position at common law was you can't transfer someone when a contract of employment comes to an end without that person's agreement and the Court will be well familiar with decisions such as *Noakes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 in the House of Lords and *Wellington City Council v Rasch* [1995] 2 ERNZ 91 (CA) in New Zealand. So that's a very well respected and understood common law statement.

Then you've got the second, what I might call common law provision, arising from *Aoraki v McGavin* which is that the Tribunal or Employment Court could not provide compensation for redundancy itself. Now, as a general proposition, those common

law principles were subject to any particular modification in an employment agreement, or in any statutory modification and, in the submissions, I have given a number of examples where particular statutory provisions have provided for either a transfer on the same terms and conditions as applied previously, or a transfer saying that the redundancy provisions will not be triggered by the fact of the transfer.

Now, there's a lot of examples of these kind of statutory mechanisms, not only in New Zealand but also overseas and again, I've touched on some of them in the appendix to the written submissions. So the short point is this, where protection measures have been introduced in statutes, whether in New Zealand or overseas, they have very often focused on the primacy of existing employment agreements and continuity of employment has been provided for on existing terms and conditions.

The scheme of Part 6A is to the same effect. The heading itself, the title to Part 6A is "Continuity of employment if employees' work affected by restructuring". Then the scheme of the first subpart: employees can elect to transfer on their existing terms and conditions. You get that from section 69A(b)(i) and from 69I. The right to bargain only arises if the existing terms and conditions do not expressly deal with redundancy entitlements. So I say that these well understood mechanisms in the past do have to be understood as a context within which Parliament was setting up a mechanism which does focus on transfer on existing terms and conditions.

What this submission really boils down to is to endorse the primacy of the employment agreement and if one accepts the logic of all of that then 69(1)(c) makes sense in the way in which the Court of Appeal applied it.

In the Court of Appeal judgment a key point, and it's respectfully adopted here, is really to do with the absurdity of an approach which on the appellants' argument would mean either that, as I hear it today, para (c)(ii) would be redundant or, as it was put in the way in which it was argued in the Court of Appeal, it would never apply. Now, neither of those – in its entirety because, one way or another, you would always get through the gate. Now, it doesn't need me to say that Parliament cannot have intended that outcome and this Court should not conclude that it is the outcome.

The discussion with my learned friend earlier about what the Chief Judge may or may not have meant is, I think, answered with two points. First of all, that this Court has

the same limitation on construing the employment agreement as did the Court of Appeal. So under section 214A(1) the discussion here is about the points of law. It is not about re-entering the debate on what the agreement meant and, as I think Justice Young indicated, the Employment Court's interpretation of the agreement is ordinarily, barring an error of principle, final. And it's reasonably clear, when one stands back and looks at the judgment of the Chief Judge, what was meant and again, I say the Court of Appeal did not err in its approach to its understanding of the findings made about clause 25.2.

My learned friend does make some criticism of the Court of Appeal with regard to its approach at para 48 of the judgment. This was the provision where the Court of Appeal made a determination not only as to 25.2 but also as to sub-clauses 3 and 4 and it was submitted by my learned friend that one had to construe that the Court of Appeal essentially was differing from the Employment Court on a matter of interpretation. Well, with respect, the Chief Judge did not actually make a determination as to whether sub-clauses 3 and 4 were or were not redundancy entitlements. He discussed what they meant but he didn't actually make a determination one way or the other and I say, as an aspect of section 234, the Court of Appeal, correcting the legal errors which it noted in its decision, was entitled to apply the corrected analysis to the terms of the agreement in the way that it did. So –

McGRATH J:

So it's a question of statutory interpretation –

MR CORKILL QC:

Yes.

McGRATH J:

– rather than of the meaning of the collective agreement?

MR CORKILL QC:

Indeed and an application of the corrected interpretation to the terms of the agreement which must surely be legitimate.

TIPPING J:

So it's not meaning but whether they represented a form of entitlement, is that the –

MR CORKILL QC:

Yes, yes.

TIPPING J:

– dichotomy?

MR CORKILL QC:

Yes.

TIPPING J:

Yes.

MR CORKILL QC:

They characterised it as alternative forms of entitlement and so they made the composite finding that actually all those three clauses – essentially what they have found is that clause 25.2 fell into – I'm looking at section 69C – fell into subpara (2), that is, redundancy compensation was expressly excluded, and 25.3 and 25.4 came under (c)(1). There was provision for redundancy entitlement so the Court of Appeal made a finding under each limb.

WILLIAM YOUNG J:

Well, they can't – it couldn't sensibly be said that clause 25 occupies the whole redundancy ground.

MR CORKILL QC:

No, no and that's not the issue.

WILLIAM YOUNG J:

And they weren't saying that.

MR CORKILL QC:

They weren't saying that.

WILLIAM YOUNG J:

And you say they don't, it doesn't have to occupy the whole ground?

MR CORKILL QC:

No, no. It's for those reasons or in those circumstances, so we are talking about the circumstances of restructure.

WILLIAM YOUNG J:

Oh sorry. Well, they may have misunderstood me.

MR CORKILL QC:

Mhm.

WILLIAM YOUNG J:

They weren't saying, or you are not, or sorry, perhaps you are, that the whole ground of any possible redundancy entitlement for contracting out or subsequent contracting, is covered by clause 25.

MR CORKILL QC:

No, no, they weren't saying that.

TIPPING J:

And you are not arguing that?

MR CORKILL QC:

No.

TIPPING J:

But you are arguing that the Court of Appeal was right in saying that once you have provided for one form of entitlement, if you like, you must be deemed to have provided for all of them?

MR CORKILL QC:

Indeed I am, Sir. And if that presents an unacceptable outcome, then Parliament needs to define the way in which parties will navigate that problem.

TIPPING J:

Yes, we certainly can't dwell on whether something is acceptable or not but we are entitled to consider whether Parliament could have intended that outcome.

MR CORKILL QC:

Yes, yes and for the reasons that I – the two reasons that I advanced earlier, I say that can't be so. I think those are the main matters I wanted to discuss in oral argument, unless there are any other matters your Honours.

TIPPING J:

No, thank you, Mr Corkill.

MR CORKILL QC:

I should perhaps just mention one procedural point and that is that I understand there are adjourned proceedings in the Employment Relations Authority relating to bargaining.

TIPPING J:

But does that affect anything we would have to do.

MR CORKILL QC:

No, no, I just wanted to indicate that that is the position.

TIPPING J:

Thank you.

MR CORKILL QC:

As the Court pleases.

TIPPING J:

Now, Mr Cranney, I don't want to put pressure on you, but are you able to address us in reply now and we will defer taking the adjournment? But if you preferred us to take the adjournment and then you come back –

MR CRANNEY:

I would be very grateful if your Honours would take the adjournment, and I appreciate that, so I need to just think about what has been said –

TIPPING J:

Yes.

MR CRANNEY:

– if I may.

TIPPING J:

I think we need to hear from you in reply

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.43 AM

TIPPING J:

Yes, thank you very much Mr Cranney.

MR CRANNEY:

Thank you, your Honours. Just three very brief points: the first point is a response to paragraph 37 of my learned friend's written submission where he refers to the potential difficulties for incoming contractors having certain obligations which are not imposed on outgoing contractors who will simply remain bound by the MECA and the short answer to that is that the – if this Court makes findings or conclusions that require some change to the MECA, or some arrangements as between companies, then that will simply flow from the judgment. It shouldn't impact upon how the judgment is made.

There's reference in some of the papers to "the big four" and I think it's reasonably common ground, this sector, this commercial sector is run by four or five big companies and some small ones and they will have to deal with whatever judgment comes out of this Court, the same as the Union will.

In terms of the more general points, it seems to me that there are two arguments that have been run by OCS. The first argument, which is that if there is a slightest reference to redundancy entitlements at all that eliminates completely any right to bargain for them, would, I submit, just completely negate the whole of this section. The smallest reference to a right, for example, to have time off to apply for other jobs, or anything like that, would simply destroy the whole of Part 6A for the worker concerned –

GAULT J:

I'm certainly very interested in that point but I wonder whether there's some middle ground here, some room to move. If in fact there is a potential conceivable point that might be negotiated but otherwise everything else is covered, it would seem to be rather harsh to impose all of the requirements for negotiation and arbitration, et cetera, for that point which is probably almost irrelevant in reality, so that while you can pick up your extreme situation on one side, I think there might be an extreme situation on another side and I just wonder in my mind how that would be dealt with practically because the –

MR CRANNEY:

In some ways – there are going to be some live issues about how the Authority would deal with such bargaining, or such an arbitrated position. How would it deal with it? If the parties came to it with an agreement which contained some minor redundancy entitlement then that is one of the factors, the minor nature of it for example, that could be dealt with under section 69O(3)(f) which says, "any other relevant matter that the Authority thinks fit."

So while I accept what's been said about the limited nature of the list in subsection 9O(3), there is also the general provision at the end, that any matter can be taken into account by the Authority and, in some ways, you could even say the A to E are surplus, are surplusage.

The argument that a very minor redundancy entitlement eliminates everything seems to me untenable because it means, as I've said, that the Part 6A people get less protection than the general workers in the second part of the subpart.

The second proposition, that the contract which says there will be no claims for redundancy pay as interpreted by the Chief Judge, the concern there is not only that the workers, if that argument is accepted, are not able to bargain for redundancy compensation but it's really an acceptance in principle that you can contract out of the whole section. You can say there will be no redundancy entitlements pay and that seems to me to be directly contrary to section 237A and the whole of the – I understand that there are two sides to the scale. We've got 69A on one side which I say should be read down. We've got 237A which I say, on the other side, should be read up because that's really the whole purpose of the section, is to protect the weak and if – my concern is not so much that I want to be able to go and negotiate

redundancy compensation all the time but I don't want to have a situation where you can simply write a contract saying that these provisions do not apply at all. And I've referred your Honours to section 54 which says you can't have anything inconsistent with the Act which is slightly different and this is section 54 which unfortunately is not in the materials but it says, "A collective agreement may not contain anything – inconsistent with this Act." So there's an issue there of consistency with the whole Act, not just 69A but with the whole of Part 6A and 237A and any interpretation of the Chief Judge of the contract should be read as being a contract which is consistent with the Act. And there are ways that you –

BLANCHARD J:

Did you say section 64?

MR CRANNEY:

Sorry, your Honour, section 54.

BLANCHARD J:

54.

MR CRANNEY:

Section 54(3)(b). Now there is a weaker version of that, or another version of it, at section 236 which says you can't contract out of the Act.

TIPPING J:

The difficulty I see with that argument is that section 69A –

MR CRANNEY:

Yes.

TIPPING J:

– brings, gives or appears to give paramouncy to the contract. So there isn't really an inconsistency with section 69 or the scheme of that part.

MR CRANNEY:

Unless you read down –

TIPPING J:

Yes, well, it has to be subject to the reading down.

MR CRANNEY:

I absolutely accept that. If you read 69A up or – it is rather strange wording because it doesn't say that nothing in any agreement –

TIPPING J:

But how exactly do you say we should read 69A down? I mean it's one thing to say we should read it down, but how do we read it down?

MR CRANNEY:

Well let me just refer your Honours to it. It is in the bundle.

TIPPING J:

Because I think this is an important point because it is an apparent obstacle in your clients' path.

MR CRANNEY:

Yes it is your Honour and I think the first thing is, it talks about – well, first of all, the words, "Subject to their employment agreement" are only in subs (i). So it seems to be that while, even if you read it up or in its strongest way, then you can only limit the right to bargain, which is what subsection (i) is about. You can't limit the right to go to the Authority if the agreement is, if the provisions are not agreed, so it is possible to read that. I fully accept that you can also read (1) and (2), you can also read the words, "Subject to their employment agreement" as applying to both (i) and (ii). In other words, if you take them out of (i) and add them to (b), which if I recall correctly may have been the old section under the 2004 provisions but I can't confirm that, then I suppose you could also exclude the authorities' jurisdiction under the section.

It just doesn't make sense, to read 69A in the context of this part, in a way which eliminates all of the rights under it, by contract. Although it's entitled continuity of employment, what happens here is what is the situation where there is no continuity. In other words, you jump over and you get sacked and that's the exception.

TIPPING J:

Yes I understand what you are saying about subject, thank you.

MR CRANNEY:

Yes and what I have said ties in with my argument. You could, it could be read, your Honours, to assist, to say that the bargaining must occur subject to the rules relating to bargaining in an employment agreement and there are some in this agreement, at the – you will see there that on case page 47, clause 5(1), "The terms of this agreement may be varied, any variation must be recorded in writing and signed by the parties affected by the variation. A variation may not be used to reduce the minimum ordinary rate defined in the wages clause", so that would include the right to vary the clause relating to no claims may be made. You could vary that as well.

TIPPING J:

What was the, sorry, I missed the reference to the paragraph in the agreement?

MR CRANNEY:

Page 47, paragraph 5.1. And that clause is in there because, under section 54 of the Act, you must have, it is mandatory to have a clause in a collective agreement providing how the agreement can be varied. And that's section 54(3)(iv). You must have a clause saying how it can be varied. So the idea is, that you can never have a totally rigid, as a matter of law, employment agreement and arguably, in my submission, a totally rigid clause in an employment agreement.

TIPPING J:

Well, you addressed us initially on this variation question. Is there some further aspect of it that derives from Mr Corkill's submissions that you –

MR CRANNEY:

No, only that 69A could be read as dealing with that process. That is subject – bargaining, the bargaining must be subject to the employment agreement. That's the words of section 69A. The right to bargain must be exercised subject to any rules for it in the employment agreement which are contained here.

TIPPING J:

Well, the natural reading is that the right is subject to the employment agreement.

MR CRANNEY:

I agree and I think the natural reading has to give way to section 237A and the purpose of the –

TIPPING J:

Ah, well, that's what I was endeavouring to get you to articulate what –

MR CRANNEY:

Yes –

TIPPING J:

– yes –

MR CRANNEY:

– that's a –

TIPPING J:

– the natural reading must be read down because of 237A?

MR CRANNEY:

Yes. Otherwise the vulnerable workers in the first part of the subpart have lesser protection than the ordinary workers in the second part which have a different scheme.

TIPPING J:

Yes, thank you.

MR CRANNEY:

And if your Honours please, unless I can be of any further assistance, those are my submissions.

TIPPING J:

No, thank you, Mr Cranney.

MR CRANNEY:

Thank you, your Honours.

TIPPING J:

Thank you both sides and we'll take time to consider our decision.

COURT ADJOURNS: 11.56 AM