IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-590
[2022] NZHC 308

BETWEEN	IDEA SERVICES LTD Applicant
AND	ATTORNEY-GENERAL in respect of the Minister of Workplace Relations First Respondent
	ATTORNEY-GENERAL in respect of the Chief Executive of Ministry of Business Innovation and Employment Second Respondent
	E TU INCORPORATED Third Respondent

Hearing:	14 and 15 February 2022 [Further submissions received 17 February 2022]
Counsel:	A S Butler and P A McBride for Applicant K Stephen and R Thornley for First and Second Respondent P Cranney, and G V A Iddamolgoda for Third Respondent S R Mitchell for New Zealand Council of Trade Unions Intervener P T Kiely and A M Kamphorst for Business NZ Intervener
Judgment:	28 February 2022

JUDGMENT OF ISAC J
[Application for judicial review]

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Introduction

[1] This case raises an important question about the duration of emergency powers exercised by the executive branch of Government. In contrast to a number of recent decisions of this Court examining the legality of the Government's response to the COVID-19 pandemic, its focus is not on vaccine mandates.[1]

[2] In 2006, Parliament passed the Epidemic Preparedness Act 2006. The Act provides ministers with the power to modify or suspend requirements contained in statute as part of a response to an epidemic.

[3] In April 2020, the Minister for Workplace Relations and Safety recommended to Cabinet that an immediate modification order should be made under the Epidemic Preparedness Act suspending a 12-month sunset provision in s 53(3) of the Employment Relations Act 2000. In simple terms, the effect of the order was to maintain collective employment agreements that would have otherwise expired until revocation of an epidemic notice issued by the Prime Minister. As the Prime Minister has consistently renewed the epidemic notice every three months since 24 March 2020, the order has continued in force down until today.

[4] The applicant, IDEA Services Ltd, is a party to a collective employment agreement with a union, E tū. The collective agreement was due to expire on 18 October 2020,[2] but as a result of the immediate modification order continues in force, and will continue in force for a further 12 months after revocation of the order.

[5] IDEA Services challenges the legality of the order. It says s 53(3) of the Employment Relations Act is not a "requirement or restriction" capable of

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1 *Nga Kaitiaki Tuku Iho Medical Action Society v Minister of Health* [2021] NZHC 1107; *GF v Minister of COVID-19 Response* [2021] NZHC 2526; *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064; *NZDSOS Inc and NZTSOS v Minister for Covid-19 Response* [2021] NZHC 3071; *MKD v Minister of Health* [2022] NZHC 67; *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.

2 Subject to being extended for a further 12 months pursuant to s 53 of the Employment Relations Act 2000.

modification under the Epidemic Preparedness Act. It also argues the statutory triggers required for making and maintaining an immediate management order no longer exist, and the failure of the Minister to review the order against a statutory requirement of ongoing necessity renders it ultra vires. It seeks declarations holding part of the order invalid and declaring the collective employment agreement between itself and E tū at an end.

[6] In order to understand the issues requiring determination it is helpful to begin with the statutory context of both the Employment Relations Act and the Epidemic Preparedness Act.

Employment Relations Act 2000

[7] One of the objects of the Employment Relations Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment relationship.[3] The Act expressly acknowledges that this object is achieved by promoting collective bargaining, while also protecting the integrity of individual choice,[4] such as an employee's choice to become a member of a union or not.[5] And, an "employment relationship" subject to a good faith duty includes the relationship between a union and an employer, as well as a union and a member of a union.[6]

[8] The good faith duty imposed by the Act also applies to bargaining for a collective agreement, as well as matters relating to initiation of any such bargaining.[7] There is also a duty to conclude a collective agreement unless there is a genuine reason not to.[8]

[9] As noted, s 53(3) is a sunset provision preserving a collective agreement for a period of 12 months after its expiry to permit negotiation for a new agreement. It is in these terms:

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3 Employment Relations Act 2000, s 3(a).
4 Employment Relations Act 2000, s 3(a)(iii) and (iv).
5 Employment Relations Act 2000, s 7.
6 Employment Relations Act 2000, s 4(2)(b) and (c).
7 Employment Relations Act 2000, s 4(4)(a).
8 Employment Relations Act 2000, s 33(1).

> **53 Continuation of collective agreement after specified expiry date**
>
> (1) A collective agreement that would otherwise expire as provided in section 52(3) continues in force—
>
> (a) if subsection (2) is complied with; and
>
> (b) for the period specified in subsection (3).
>
> (2) This subsection is complied with if the union or the employer initiated collective bargaining before the collective agreement expired and for the purpose of replacing the collective agreement.
>
> (3) The period is the period (not exceeding 12 months) during which bargaining continues for a collective agreement to replace the collective agreement that has expired.

[10] If a further collective agreement cannot be negotiated within the 12 months, it will come to an end. In that case, the employee is employed under an individual employment agreement based on the collective agreement and any additional terms and conditions they may have negotiated with the employer.[9]

Epidemic Preparedness Act 2006

[11] The Epidemic Preparedness Act confers sweeping emergency powers on the executive branch of Government in times of crisis.

[12] It began its Parliamentary life as the Law Reform (Epidemic Preparedness) Bill 2006. It was this country's response to the outbreaks of avian influenza (or "bird flu") in 1997 and 2006.

[13] The principal purpose of the Act is to ensure that there is adequate statutory power for government agencies to prevent the outbreak of epidemics in New Zealand, to respond to epidemics, and to respond to the possible consequences of epidemics.[10]

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9 Employment Relations Act 2000, s 61(2).
10 Epidemic Preparedness Act 2006, s 3(1).

[14] The Act also has the purpose of enabling the relaxation of some statutory requirements that might not be capable of being complied with, or complied with fully, during an epidemic.[11]

[15] The chief mechanism through which the executive is empowered to deal with an epidemic is through a cascading series of notices, starting at a very general level and moving down to the more specific. The principal and most important mechanism by which the emergency powers are activated is by an "epidemic notice" issued by the Prime Minister acting with the agreement of the Minister of Health.[12]

[16] An epidemic notice can only be issued where the Prime Minister is satisfied that the effects of an outbreak of a quarantinable disease are likely to disrupt "essential governmental and business activity in New Zealand…".[13] If not renewed, an epidemic notice expires on the earliest of three months after its commencement, a day stated in the notice or a day stated for the purpose by the Prime Minister by further notice.[14]

[17] Section 8 of the Act then provides for the activation of other measures while an epidemic notice is in force. These "epidemic management notices" can be used to activate what the legislation refers to as "prospective modification orders", or PMOs. I will return to PMOs in greater detail later but for now it is sufficient to record that just like an epidemic notice, epidemic management notices, and therefore PMOs, are subject to on-going obligations of review by officials (including the Director-General of Health) to ensure that the effects of the outbreak warrant the continuing exercise of powers under the Act.

[18] Importantly, the Act does not impose a review obligation in relation to a third type of instrument, an immediate modification order, which is the focus of this case.

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11 Epidemic Preparedness Act 2006, s 3(2)(b). While the section refers to the "relaxation" of a statutory requirement, s 15(1), which gives life to this aspect of the Act's purpose, enables the *modification* of any statutory requirement or restriction. Given the Act also defines the term "modify" to include "suspend and waive", it seems clear that the Act empowers ministers to go beyond mere relaxation of a requirement.

12 Epidemic Preparedness Act 2006, s 5(1).

13 Ibid.

14 Epidemic Preparedness Act 2006, s 5(3).

[19] The key provision for the purposes of this proceeding is s 15, the relevant parts of which are set out below:

> **15 Immediate modification of statutory requirements and restrictions to enable compliance during epidemic**
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> (1) While an epidemic notice is in force, the Governor-General may, by Order in Council made on the recommendation of the Minister of the Crown responsible for the administration of an enactment, modify any requirement or restriction imposed by the enactment.
>
> (2) The Minister must not recommend the making of an order unless he or she—
>
> (a) has received from the chief executive of the department of State responsible for the administration of the enactment concerned a written recommendation stating that, in the chief executive's opinion,—
>
> (i) the effects of an epidemic of the quarantinable disease stated in the notice are, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with; and
>
> (ii) the modifications it makes go no further than is, or is likely to be, reasonably necessary in the circumstances; and
>
> (b) is himself or herself satisfied that—
>
> (i) the effects are, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with; and
>
> (ii) the modifications go no further than is, or is likely to be, reasonably necessary in the circumstances.
>
> (3) Subsection (1) does not authorise—
>
> (a) a modification of a requirement—
>
> (i) to release a person from custody or detention; or
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> (ii) to have any person's detention reviewed by a court, Judge, or Registrar; or
>
> (b) a modification of a restriction on keeping a person in custody or detention; or
>
> (c) a modification of a requirement or restriction imposed by the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicial Review Procedure Act 2016, the New Zealand Bill of Rights Act 1990, or the Parliamentary Privilege Act 2014, or by this Act.

…

(5) A modification of a requirement or restriction—

(a) may be absolute or subject to conditions; and

(b) may be made—

(i) by stating alternative means of complying with the requirement or restriction; or

(ii) by substituting a discretionary power for the requirement or restriction.

(6) Subsection (5) does not limit subsection (1).

(7) An order under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

Parliament was concerned to limit the duration of emergency powers in the Act

[20] The Law Reform (Epidemic Preparedness) Bill was presented to the House in May 2006. It sought to modernise New Zealand's emergency health legislation which was at the time governed by the outdated Health Act 1956.

[21] The Bill was the product of broad cross-party engagement and support. The Chair of the Select Committee described the process as a "rare opportunity for Parliament to be involved in legislation that had no politics in it", in which it took a "completely multipartisan approach".[15]

[22] The parliamentary materials chronicling the Bill's progression through the House shed light on Parliament's intentions and concerns. Two competing themes emerge. On the one hand, there was clear consensus that the Government required adequate statutory power to respond to and manage outbreaks of infectious disease. The powers needed to be broad and flexible enough to enable effective management of epidemics in fast changing and unpredictable circumstances. Parliament was cognisant of the serious danger that infectious diseases such as the avian influenza posed the population, especially Māori. It was accepted that the general public's health

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15 (5 December 2006) 636 NZPD (Law Reform (Epidemic Preparedness) Bill – Second Reading, Shane Ardern).

interests may require the curtailment of some fundamental rights and freedoms. As the Law Commission put it:[16]

> In times of national emergencies, such as an epidemic that poses a grave threat to human life, "normal constitutional principles may have to give way to the overriding need to deal with the emergency." Individual rights and freedoms on such occasions have to be limited by the need to serve the collective good and save lives.

[23] On the other hand, there were significant concerns that the proposed legislation risked conferring too much unfettered power on the executive. The ability to amend or suspend primary legislation by an Order in Council, commonly referred to as an Henry VIII clause, allows the executive to override Parliament and should therefore be subject to strict controls.[17] The Bill, as originally drafted, was criticised as being too broad, too vague and lacking sufficient controls on executive power. Parliament recognised the need to ensure that emergency powers could only be exercised to the extent strictly necessary.

[24] During the first reading, members speaking on the Bill expressed a common desire to restrict the scope of the powers conferred on ministers, to impose short and clear temporal limits on their duration, and to maximise parliamentary scrutiny and ministerial accountability in the exercise of such powers. These central objectives were reflected in several significant amendments to the Bill. For instance, modification of certain enactments, such as the Bill of Rights Act 1990 and the Electoral Act 1993, was prohibited.

[25] The most fundamental change to the Bill, following the Select Committee process, was the introduction of the two separate mechanisms for creating emergency regulations discussed above: prospective modification orders and immediate modification orders.

[26] PMOs are created in advance of an epidemic and lie dormant until activated by an epidemic management notice. The Law Commission considered that the bulk of emergency regulations could and should be prepared in advance of an epidemic.

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16 Law Commission *Law Reform (Epidemic Preparedness) Bill – Advice to the Cabinet Policy Committee* (24 August 2006).

Benefits of this approach included increasing parliamentary scrutiny, providing a greater opportunity for officials to consider what emergency powers would be required during an epidemic, allowing affected stakeholders to understand what would be expected of them in such an event, improving compliance with emergency powers, and promoting the values of participation, clarity and accountability.

[27] The other mechanism, IMOs, can only be created while an epidemic notice is in force. Parliament recognised that it would be impossible to foresee every power that might be required during an epidemic, and therefore an ability to create emergency regulations on the move was required.[18] However, given the nature of such a power, Parliament also considered it necessary to retain supervision and control over emergency regulations. Accordingly, IMOs are disallowable instruments.[19] An IMO must be presented to the House as soon as practicable and Parliament may, within six sitting days, resolve to disallow it.

[28] And importantly for this case, it is also evident that Parliament intended the bulk of emergency regulations to be created as PMOs. IMOs were to be used only as a "last resort", or a gap filler.[20] The distinction between the two forms of order, and their intended use, was helpfully captured in the Hon Brian Connell's speech to the Committee of the whole House:[21]

> I want to draw out this distinction for members of the Committee. Advance orders [ie, PMOs], as the name suggests, are where we can plan in advance, and through the due process of parliamentary oversight we can make those legislative changes, but during a pandemic, an outbreak, when the country is in crisis, it may be necessary to make decisions on the run. … I have to say that this is one of those issues that exercised the grey matter of the select committee. What we were planning for here was the possibility of decisions being made without parliamentary oversight. It goes right to the heart of the role of the House of Representatives. Our view, finally, was that it was a last resort. A pandemic would have to be raging before this took place.

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18 Government Administration Committee *Law Reform (Epidemic Preparedness) Bill* (17 November 2006)at 4.

19 Epidemic Preparedness Act 2006, s 18.

20 (5 December 2006) 636 NZPD (Law Reform (Epidemic Preparedness) Bill – Second Reading, Pete Hodgson, Minister of Health).

21 (6 December 2006) 636 NZPD (Law Reform (Epidemic Preparedness) Bill – In Committee, Brian Connell).

Unfortunately, the epidemic preparations envisaged by Parliament did not happen. Not a single PMO has been created since the Act came into force in 2006. As a result, all modification orders in response to the COVID-19 pandemic have been IMOs. Since the Epidemic Notice was issued on 24 March 2020, a total of 11 IMOs have been promulgated.[22]

[29] Parliament was also wary that emergency powers should be exercised only for as long they remained necessary. The Select Committee recommended that "[t]he response should be proportional to the actual threat faced" and that as the threats posed by an epidemic receded, immediate modification orders should be "scaled back gradually to facilitate society's return to normality".[23] The Committee observed:[24]

> To facilitate this graduated approach, we recommend that an epidemic notice should remain in force for as long as the Prime Minister, with the agreement of the Minister of Health, on the recommendation of the Director-General of Health, is satisfied that the effects of an outbreak of a specified disease continue to disrupt governmental and business activity in New Zealand, or parts of New Zealand.
>
> As the threat posed by the epidemic recedes, those immediate modification orders that are no longer required should gradually be removed from operation. The Director-General of Health should keep the epidemic notice under continual review, and keep the Prime Minister and Minister of Health briefed.

[30] So it would seem the Select Committee considered IMOs should be kept under review and revoked when no longer necessary. It is surprising, then, that the Act contains no express review mechanism in relation to IMOs. Instead, the only temporal limit on the duration of an IMO is the existence of the epidemic notice itself. It is

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22 Epidemic Preparedness (Customs and Excise Act 2018—Appeals) Immediate Modification Order 2020; Epidemic Preparedness (Employment Relations Act 2000—Collective Bargaining) Immediate Modification Order 2020; Epidemic Preparedness (Medicines Act 1981—COVID-19) Immediate Modification Order 2021(; Epidemic Preparedness (Medicines Act 1981—COVID-19) Immediate Modification Order 2022; Epidemic Preparedness (Local Government Act 2002) Immediate Modification Order 2020; Epidemic Preparedness (Oaths and Declarations Act 1957) Immediate Modification Order 2020; Epidemic Preparedness (Protection of Personal and Property Rights Act 1988—Enduring Powers of Attorney) Immediate Modification Order 2020; Epidemic Preparedness (Sale and Supply of Alcohol Act 2012—Licence Application Inquiries) Immediate Modification Order 2020; Epidemic Preparedness (Social Security Act 2018—Temporary Additional Support) Immediate Modification Order 2020; Epidemic Preparedness (COVID-19—Te Awa Tupua (Whanganui River Claims Settlement) Act 2017—Term of Appointments to Te Pou Tupua) Immediate Modification Order 2020; Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020.

23 Government Administration Committee, above n 18, at 4–5.

24 At 5.

unclear why there is no explicit requirement to review IMOs. Given the parliamentary debates, it is possible it was an oversight.[25]

[31] In contrast, PMOs are subject to an on-going review requirement. Section 10(1) of the Act requires the chief executive responsible for the administration of an enactment affected by an epidemic management notice to keep the operation of the enactment under review. If no longer satisfied that a PMO is reasonably necessary due to the effects of the outbreak, the Prime Minister must revoke the part of the epidemic management notice which activates the PMO.[26]

[32] Against that legislative backdrop I now turn to the circumstances of this case.

An Immediate Modification Order is made

[33] In early 2020, COVID-19 was quickly developing into a global pandemic. On 30 January and 11 March 2020, Orders in Council declaring novel coronavirus and COVID-19 notifiable infectious diseases and quarantinable diseases under the Health Act 1956 came into effect.[27]

[34] On 24 March 2020, the Prime Minister issued an epidemic notice under the Epidemic Preparedness Act 2006 which came into effect the following day. The Notice has been renewed every three months and remains in force. As a result, s 15(1) of the Epidemic Preparedness Act is triggered, enabling the Governor-General to modify enactments by Order in Council.

[35] On 26 and 31 March 2020, the Ministry of Business, Innovation and Employment (MBIE) provided advice to the Minister for Workplace Relations and Safety regarding the impact of COVID-19 on collective bargaining processes. The advice outlined the framework and legal requirements for making modifications to

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25 Brian Connell speaking to the Committee of the whole House, above n 21, said, "I would not be surprised if, in the unfortunate situation that this bill gets tested, we find things that have not been dealt with and that we will have to revisit. But with the best will in the world by the parties—and I mean that; I think it has been with the best will in the world—this is the best legislation we can put before the Committee for consideration at this point in time.

26 Epidemic Preparedness Act 2006, ss 8(2) and 10(2).

27 The beginning of the pandemic, and New Zealand's initial public health response to it, is set out in the Court of Appeal's decision in *Borrowdale v Director-General of Health* [2021] NZCA 520 at [27]–[83].

enactments under s 15 of the Epidemic Preparedness Act. The advice recommended, among other things, modifying the requirement in s 53 of the Employment Relations Act that a collective agreement continue for a period of up to 12 months if, before expiry, one of the parties initiated collective bargaining for a replacement agreement. The advice recommended that s 53 should be modified to exclude from the 12-month period any period of time during which the Epidemic Notice was in place.

[36] On 9 April, in accordance with s 15(2)(a), the Chief Executive of MBIE provided a written recommendation to the Minister that, in her opinion, the statutory requirements for making an IMO were met.[28] The recommendation noted that:

> The [Employment Relations Act] enables expired collective agreements to continue in force, where bargaining has been initiated, for up to 12 months to enable parties to bargain and ratify a new collective agreement to replace the expired agreement. Due to the restrictions in place unions are unable to arrange meetings with their members in person, and all may not have access to electronic means in which to communicate. In some cases, employers and unions will be focused on immediate priorities relating to the COVID-19 response meaning resources are unavailable for bargaining during this period. It will be impractical or impossible for some employers or unions to conclude collective bargaining and ratify a collective agreement while an Epidemic Notice (EN) is in place. This may mean that some collective agreements expire, despite a willingness to conclude negotiations and ratify an agreement.

[37] The emphasis on the impact of the then Level 4 lockdown restrictions on the collective bargaining process was also emphasised in a paper of 7 April 2020 by the then Minister of Workplace Relations and Safety to the COVID-19 Group of Ministers. In it the Minister noted:

> …the [Employment Relations] Act requires that when collective bargaining has been initiated, parties to that bargaining must take certain actions within specific limits. Some of those limits are impractical while the epidemic notice is in place, as both employers and unions face significant disruption *due to the closure of some workplaces and the requirements to work from home*.
>
> The ER Act also requires that a union must ratify a collective agreement in accordance with procedures it notified to the other party at the beginning of bargaining. This may be impracticable because many unions hold an in-person

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[28] These were, in terms of s 15(2)(a) Epidemic Preparedness Act, that:
(a) the effects of COVID-19 were, or were likely to be, such that certain requirements or restrictions in the Employment Relations Act, including that collective agreements continue in force up to 12 months where bargaining has been initiated, was impossible or impracticable to comply (or comply fully) with; and
(b) the modifications the Immediate Modification Order made would go no further than was, or was likely to be, reasonably necessary in the circumstances.

> meeting to vote on ratification of the collective agreement. *Such meetings are impossible during lockdown* and inadvisable for public health reasons during the epidemic.
>
> (emphasis added).

[38] On 14 April 2020, the Epidemic Preparedness (Employment Relations Act 2000—Collective Bargaining) Immediate Modification Order 2020 (the Order) was made.[29] Clause 8, which is the subject of this challenge, provides that s 53(3) of the Employment Relations Act:

> …has effect as if the period excludes any days during which the Epidemic Notice is in force".

[39] In other words, cl 8 of the Order stops the clock on the calculation of the 12-month negotiation period prescribed by s 53(3) of the Employment Relations Act.

[40] The balance of the Order, running to only 9 clauses, suspends other statutory time-frames imposed on collective bargaining by the Employment Relations Act.[30] Importantly, clause 9 relates to revocation of the Order, and states:

> This order is revoked immediately after the expiry of the 3-month period that starts on the date on which the Epidemic Notice expires or is revoked.

[41] There is no provision in the Order requiring periodic consideration of whether it remains necessary in the event the Epidemic Notice is renewed.

[42] The Order is also accompanied by a statement of reasons — which records the reasons why the Minister was satisfied that the matters required under s 15(2)(b) of the Epidemic Preparedness Act had been met. In relation to cl 8, the statement of reasons echoes the Minister's 7 April Cabinet briefing:

> When collective bargaining has been initiated, the Employment Relations Act 2000 requires parties to that bargaining to take certain actions within specific time frames. *Some of those time frames are impracticable while the Epidemic Notice is in place, as both employers and unions face significant disruption due to the closure of some workplaces and the requirements to work from home*.

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29 The Order came into force on 16 April 2020.

30 Clauses 4–7 suspend requirements in relation to notifying employees that bargaining has been initiated, requesting and accepting consolidation of bargaining where multiple unions are involved, and complying with ratification procedures.

…

> The Employment Relations Act 2000 also requires that a union must ratify a collective agreement in accordance with procedures notified to the other party at the beginning of bargaining. This may be impracticable because many unions hold an in-person meeting to vote on ratification of the collective agreement. *Such meetings are impossible during lockdown and inadvisable for public health reasons during the epidemic*.
>
> The Employment Relations Act 2000 enables expired collective agreements to continue in force, where bargaining has been initiated, for up to 12 months to enable parties to bargain and ratify a new collective agreement to replace the expired agreement. *Due to the restrictions in place unions are unable to arrange meetings with their members in person, and not all members may have access to electronic means in which to communicate*. In some cases, employers and unions will be focused on immediate priorities relating to the COVID-19 response, meaning resources are unavailable for bargaining during this period. It will be impractical or impossible for some employers or unions to conclude collective bargaining and ratify a collective agreement while the Epidemic Notice is in place. This may mean that some collective agreements expire, despite a willingness to conclude negotiations and ratify an agreement.
>
> (emphasis added).

[43] These passages, and in particular the highlighted sections, indicate that the Minister's reasons closely linked the existence of the Epidemic Notice, and the lockdown which at the time the entire country had entered, with the statutory requirements of s 15(2)(b) supporting the Order. As we know, while the country has continued to be significantly affected at times by public health restrictions, for long periods — especially at Alert Level 1 — these restrictions did not exist.

The present case

[44] IDEA Services is a disability service provider. It employs approximately 3,900 staff, of whom about 2,800 are members of the third respondent, E tū, a registered union. IDEA Services and E tū are parties to a collective employment agreement (the collective agreement) which contains a term specifying the agreement would expire on 18 October 2020.

[45] On 9 September 2020, before the collective agreement expired, E tū initiated bargaining with IDEA for a replacement CEA. The effect of this was to trigger the 12-month extension under s 53 of the Employment Relations Act. But for the Order, the collective agreement would have expired on 18 October 2021, and as no replacement

collective agreement has been negotiated, all of IDEA Services' current employees who are union members would revert to an individual employment contract.

[46] IDEA Services filed these proceedings on 22 October 2021, four days after it submits the collective agreement ceased to exist. It says that the parties' ability to engage in collective bargaining was not significantly hampered by COVID-19 related restrictions. IDEA Services says that the parties had ample time and ability to bargain, and did in fact engage in extensive bargaining during 2021, but were unable to agree on a new collective agreement for reasons unrelated to the pandemic. The evidence filed by E tū puts that claim in issue.

[47] The evidence filed by the second and third respondent suggests that consideration of a continuing requirement for the Order first arose in June of 2021, and again following an enquiry by the Ministry of Education in September 2021. At that time, no issues had been identified with the operation of the Order by either employers or unions. Given at that time Auckland remained at Alert Level 3, MBIE decided it would not recommend to the Minister revocation of the Order. That was reported to the Minister in a weekly report on 21 October 2021.

[48] The position changed, however, on 22 October 2021. The evidence for the first and second respondents, which was not challenged by the applicant, was that on that date two things happened:

> The first, and most significant, was that the Government announced the shift to the New Protection Framework. The second was the receipt of the Statement of Claim from IDEA Services which prompted the Ministry to reconsider whether the potential impacts the Order might be having on bargaining parties in light of the altering circumstances. After further internal discussion and a preliminary discussion with the Minister, on a no surprises basis, on 26 October [2021], the Ministry considered it was appropriate to reassess whether the Order would still be needed under the new COVID-19 Protection Framework that was being developed by Government. That consideration resulted in a briefing to the Minister on 17 November.
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> …
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> In response to the 17 November briefing, the Minister came to a similar view as the Chief Executive …[that] he would recommend to Cabinet the Order be revoked in February 2022.

[49] The Hon Michael Wood, the current Minister for Workplace Relations and Safety, has deposed that:

> While I accepted my officials' advice that the s 15 conditions might not be met once the new COVID-19 Protection Framework was operating, I was aware that the COVID-19 pandemic required a dynamic response. An example of that is the arrival of the Omicron variant. In my view, a balance needed to be struck between revoking the Order while the Epidemic Notice is still in place and the criteria in clause 9 of the Order had not been met, and moving too quickly while uncertainty remains. For that reason, I decided to implement the revocation process next month.

[50] The Minister's evidence highlights an important question: at what point in time does the Court consider whether the statutory requirements are met? When the Order was made or at some later point? And if it is the latter, at what point in time?

Grounds of review

[51] IDEA Services advances five causes of action. All of them are based in illegality. The applicant says that cl 8 of the Order is ultra vires because:

(a) Section 53(3) of the Employment Relations Act does not impose any relevant "requirement or restriction" that could be modified under s 15(1) of the Epidemic Preparedness Act.

(b) If a relevant requirement or restriction did exist, there is no evidence that it was, would be, or still is "impossible or impracticable" to comply with that requirement or restriction under ss 15(a)(i) and 15(b)(i).

(c) The Order went further than was, or was likely to be, reasonably necessary in the circumstances under ss 15(a)(ii) and 15(b)(ii).

(d) The Order infringes on the freedom of association under the New Zealand Bill of Rights Act 1990 and is therefore ultra vires s 15(3)(c) of the Epidemic Preparedness Act. Alternatively, the Order is an unjustifiable limit on its freedom of association.

(e) There is an implied requirement to review immediate modification orders which the first and second respondents failed to observe.

[52] In addition to submissions from the respondents, on 27 January 2022 I granted leave to Business NZ and the New Zealand Council of Trade Unions to intervene. Both made helpful submissions. Their applications were not opposed by the respondents. I was satisfied, having regard to the principles articulated by the Court of Appeal in *Ngāti Whātua Ōrākei Trust,*[31] and given the issues and ability of the interveners to provide a broader context, that the balance of considerations favoured leave. In particular, the determination of the central issue in this case — the validity of cl 8 of the Order — is likely to affect in the realm of 200 collective agreements, and the employers and unions who are parties to them. In those circumstances, a wider perspective is helpful to the proper determination of the issues.

[53] I now turn to consider the causes of action advanced in light of the statutory context.

First cause of action: is s 53(3) a "requirement or restriction"?

The parties' cases

[54] IDEA Services argues that s 53(3) of the Employment Relations Act contains no relevant "requirement" or "restriction" on which s 15 of the Epidemic Preparedness Act can bite. A requirement means something that "must be done" or something that is "essential, needed or necessary." And a restriction is "a limit" on the ability to do something.

[55] Section 53(3) of the Employment Relations Act does none of these things. Its purpose is to extend an employment relationship status for a defined period. All that is needed is for a union, or an employer, to give notice within time to commence bargaining. That amounts to an option, but not a requirement, to initiate bargaining towards a replacement collective agreement. If that option is taken, the period of the

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[31] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 183 at [11], cited with approval in *Borrowdale v Director-General of Health* (Applications to Intervene) [2020] 2 NZLR 927, [2020] 2 NZLR 927 at [20].

relationship extension is fixed at a maximum of 12 months. That extension is itself an indulgence, or maximum extension, and not a requirement to be complied with. There is then nothing left for the party to do: effluxion of time is all that follows, within which there is an opportunity to bargain.

[56] The applicant also points to the repeated use of the words "comply with" in s 15 in relation to a requirement or restriction. These words indicate that not all requirements or restrictions fall within s 15. Only those that are required to be complied with — or that require some positive action — do. So, a requirement that merely goes to the legal status of a document (here a collective agreement), is not a requirement that "must be complied with".

[57] The respondents argue that the period specified by s 53(3) restricts the duration of the collective agreement extension, when bargaining has been initiated, to no more than 12 months. It is therefore a restriction and a qualification on acting. That restriction is then modified by the Order to exclude any days during which the Epidemic Notice is in force.

[58] The third respondent also argues that s 53 imposes a requirement, namely that a collective agreement continue in force for 12 months after its expiry date in most circumstances. The Order modifies this requirement by excluding from the 12-month period any days that the Epidemic Notice is in force.

Consideration

[59] The meaning of s 15 must be ascertained from its text and in light of its purpose and context.[32]

[60] The text of the Act, and in particular s 15, provides some guidance as to the scope of the expression "requirement or restriction".

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[32] Legislation Act 2019, s 10(1). See also *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 at [23].

[61] Neither term is defined. However, the structure of s 15 indicates that subs (1) casts a wide net, while subss (2) and (3) are designed to balance constitutional concerns by placing strict limits on the application of the s 15(1) power.

[62] Subsection 15(1) is the empowering provision in which the term "requirement or restriction" is first used. The subsection empowers ministers to modify "any" requirement or restriction. There is generally no limit on the enactments that might be subject to modification, except the small group of constitutional documents identified in s 15(3)(c). Moreover, s 15(2), which places limits on the power conferred in s 15(1), expressly refers back to s 15(1) as defining "*the* requirement or restriction". And, pursuant to s 4, the interpretation section, the word "modify" includes "suspend and waive". This is another indicator of a broad drafting palette. It seems unlikely, then, as the applicant argued, that there may be some requirements or restrictions in legislation that do not come within the reach of s 15(1).

[63] Purpose and context provide more emphatic guidance.

[64] The Epidemic Preparedness Act contains sweeping emergency powers to deal with a national health crisis. Section 3 of the Act makes it clear that the principal purpose of the Act is to ensure "there is adequate statutory power for government agencies…to respond to epidemics in New Zealand; and to respond to certain possible consequences of epidemics". And s 3(2)(b) confirms another purpose is:

> …to enable the relaxation of some statutory requirements that might not be capable of being complied with, or complied with fully, during an epidemic.

[65] The context surrounding the enactment of the 2006 legislation was the outbreak of avian influenza. It was a reminder of the profound effects an epidemic could have on the health, economic wellbeing and continuity of communities. The sparse and expansive language used in s 15(1), and non-prescriptive drafting, reflects Parliament's desire to ensure that there was an adequate breadth of power to deal with a state of emergency when one arose. The sweep of statutory requirements capable of modification was, therefore, all encompassing.

[66] The need for limits on emergency powers was addressed through restrictions imposed under ss 15(2)–(3), rather than through limiting those restrictions that might qualify under s 15(1). This approach strikes the intended balance between ensuring the Epidemic Preparedness Act was fit for its intended purpose while also addressing the constitutional concerns arising from such significant executive power.

[67] I consider the narrow interpretation of s 15(1) advanced by IDEA Services would frustrate a clear parliamentary intention to ensure that government agencies were equipped to manage and respond to a health emergency in the short term. It would deprive the Act of its intended remedial effect and create significant uncertainty as to the nature of requirements and restrictions that could be relaxed or modified.

[68] I accept the first and second respondents' submission that s 53(3) of the ERA restricts the duration of the collective agreement extension, when bargaining has been initiated, to not more than 12 months. And given the statutory purpose of s 53 is to preserve a collective agreement for a defined period to enable negotiation of a new agreement, it amounts to a requirement to conclude those negotiations within 12 months.

[69] Section 53(3)'s effect is not, as IDEA Services submitted, merely directed to the status of a document. But even if it was, that is also a requirement or restriction captured by s 15(1).

[70] Nor do I consider that the words "complied with" excludes s 53(3) of the Employment Relations Act from the remedial scope of s 15(1) as the applicant contended. It is clear that the effects of an epidemic may prevent the completion of collective bargaining for a new collective agreement, successful or not, within the extended 12-month period required under s 53(3). In that sense, the effects of an epidemic are, or are likely to be, such that the requirement to engage in good-faith bargaining during the relevant period is impossible or impracticable to comply (or comply fully) with.

[71] In light of this conclusion, the applicant's first challenge to the Order based on illegality must be dismissed.

Second cause of action: impossible or impractical to comply with s 53(3)?

The parties' cases

[72] Next, IDEA Services contends that the Order is ultra vires the Act because, as noted, s 15(2) requires that the effects of the epidemic are, or are likely to be, such that the requirement or restriction is "impossible or impracticable" to comply with. The applicant says it was not impossible or impracticable to continue with negotiation of a replacement collective agreement while the Epidemic Notice was in force and, therefore, the Order is ultra vires the empowering provision.

[73] The applicant submits that triggering the 12-month extension under s 53(3) required no more than a "purely clerical task", involving E tū simply giving notice of a requirement to engage in bargaining under s 53(2) of the Act. It did so in September 2020 — when the Order was in force — with no difficulty at all.

[74] The applicant points to extensive engagement that occurred with E tū in late 2020 and early 2021, all directed to furthering negotiations toward a collective agreement. The fact these negotiations were able to occur undermines the suggestion that the pandemic is the reason for the lack of a concluded agreement. Rather, it simply points to the inability of the parties to reach an agreement.

[75] Expert evidence was also provided for the applicant by Dr Stephen Blumenfeld, a senior lecturer and director of the Victoria University of Wellington Centre for Labour, Employment and Work.

[76] Dr Blumenfeld's evidence is that there were 627 collective agreements set to expire in the six months after COVID-19 began affecting New Zealand in late February 2020. Of those, 449 collective agreements, or 71.6%, have been renewed notwithstanding the impact of the pandemic. He concluded that despite COVID-19, "there was settlement of a substantial number of [collective agreements] in the 2020 year, and initial indications are of a similar situation in the 2021 year." In part Dr Blumenfeld put the success rate for the conclusion of collective agreements after the pandemic began to a shift to remote technology such as Zoom, Skype and MS Teams to carry out negotiations.

[77] Dr Blumenfeld also opined that one reason for the reduced number of concluded collective agreements might in fact be the Order itself, rather than the pandemic. That is because parties who consider the terms of an existing collective agreement to be favourable to them may be incentivised to sit on their hands. This was a concern reflected in submissions by Business NZ. Mr Kiely, with some force, submitted that the Order has distorted the normal statutory scheme, where parties were aware there was a drop-dead date for the conclusion of collective bargaining. The effect of the Order in the present case was to extend the duration of a collective agreement made on 21 October 2018 for at least four years, when the parties had likely only contemplated the agreement subsisting for three (a two year express term, plus a one-year extension in terms of s 53(3)). The concern expressed by the intervener was the apparently indefinite duration of the Order, and the fact that the entire period since 14 April 2020, when the Order was made, will be excluded from the calculation of the 12-month period in terms of s 53(3). In the present case, if the Order was revoked tomorrow, IDEA Services will still be bound by the terms of the collective agreement for a further 12-month period as the statutory time-frame was only triggered in September 2020, after the Order was already in effect.[33]

[78] Unsurprisingly, the respondents and the Council of Trade Unions as intervener take a different view. At the risk of doing a disservice to the extensive evidence filed by the union,[34] two key themes emerged.

[79] First, while it is quite correct that some negotiations have certainly continued, and resulted in a large number of collective agreements, it would be wrong to think that the impact of COVID-19 on collective bargaining is limited only to the ability of employers and unions to negotiate. The effect of the pandemic on collective bargaining was described in evidence and submissions in these terms:

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33 In fact, the period is likely to be 15 months, given cl 9 of the order specifies that it only ceases to have effect three months after revocation of the Epidemic Notice.

34 Affidavits were provided by: Michael Peters, General Manager – People and Culture, New Zealand Health Group Limited; Rachel Mackintosh, Assistant National Secretary, E Tū; Richard Wagstaff, President, New Zealand Council of Trade Unions; Samuel Jones, Organising Director, E Tū; Craig Harrison, National Secretary, Maritime Union of New Zealand; Dennis Maga, General Secretary, FIRST Union Incorporated; Michael Wood, Minister for Workplace Relations and Safety; Tracy Mears, Policy Director, Workplace Relations and Safety; Paul Mackay, Manager – Employment Relations Policy, Business NZ.

(a) Union officials as well as members have had long periods in lockdown. With the onset of the Omicron variant, both businesses and unions expect large numbers of staff will be ill or required to isolate.

(b) The pandemic has been characterised by numerous legal and regulatory changes over time, and changes in public health requirements. A snapshot at any particular time does not necessarily fairly reflect the long periods when there have been significant barriers to negotiation.

(c) For some low-paid groups of employees, there is a "digital disadvantage", as many may lack the ability to participate in virtual meetings or discussions required for ratification and mandate in collective bargaining.

(d) In some industries, such as aviation, there have been large-scale redundancies involving thousands of employees. In some industries redundancies caused changes in advocates and negotiating team members, sometimes more than once. Some negotiating teams were laid-off entirely.

(e) Meetings of members and access by union officials to workplaces has been significantly affected and during lockdowns, impossible.

(f) Employers, unions and employees have been focussed on more immediate priorities, particularly the COVID-19 response, with fewer resources to commit to bargaining. For some employers and businesses the primary focus has been on managing the impact of the pandemic on their continuing financial viability. And for unions, dealing with the need for vaccination and mandates in some workforces has been an overwhelming focus, as well as dealing with hesitancy and misinformation.

[80] Second, Mr Cranney, for E tū, sought to place a different complexion on Dr Blumenfeld's evidence. He submitted that Dr Blumenfeld's data reveals that as late

as February 2022, 30 per cent of collective agreements which but for the Order would have expired long ago remained unrenewed. A full two years after the start of the pandemic, the picture reveals a crisis in collective bargaining that cannot simply be attributed to the Order or a disinclination by unions to conclude collective agreements. Instead it is a clear reflection of the "effects of the epidemic", contemplated by s 15(1) of the Epidemic Preparedness Act.

Consideration

[81] Parliament clearly meant to ensure there were tight controls on the exercise of the emergency power contained in s 15(1). As noted, this is achieved through the absolute limits on the power expressed in ss 15(2) and (3).

[82] It is useful to note again the relevant statutory language. Subsection (2)(a) stipulates that the Minister "must not" exercise the s 15(1) power "unless":

> (a) the Minister has received in writing *an opinion* of the appropriate chief executive that "the effects of an epidemic…are, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with"; and
>
> (b) the Minister is *personally satisfied* that "the effects are, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with".

[83] Of course, the opinion of the chief executive, and the need for the Minister to be personally satisfied of certain matters, introduce subjective rather than objective preconditions to the exercise of the s 15(1) power. I will return to this shortly.

[84] I also accept the first and second respondent's submission that the "impracticability" triggering emergency legislation must be taken to mean something that is practically impossible. And, as Mr Butler submitted, if there is a shade of differing meaning between something that is impossible, and something that is practically impossible, it must be the slightest possible distinction. This view has some

support in the decision of the Court of Appeal in *Exchange Commerce Corp Ltd v New Zealand News Ltd*.[35]

[85] The difficulty with this ground of review, however, is that it is an invitation to consider a disputed question of fact — whether collective bargaining was or is impossible or impracticable — and in doing so it seeks a review of the merits of the Minister's decision rather than its legality. The claim relies on the benefit of hindsight, rather than the material before the Minister at the time it was made.

[86] In its written submissions, IDEA Services submitted that the matters upon which the Minister and Chief Executive must be satisfied in terms of s 15 "are to be evaluated objectively; subjective satisfaction is necessary but not itself sufficient." I do not consider that is a correct statement of the approach on judicial review.

[87] Section 15(2) does not contain objective criteria that can be separated from matters of evaluation and judgment for both the chief executive of the relevant department of state and the Minister.

[88] Section 15(2)(a) requires a written recommendation from a chief executive setting out the chief executive's *opinion* that that the requirements in ss 15(2)(a)(i) and (ii) are met. And s 15(2)(b) does not contain an objective requirement that the effects of the pandemic are such that the requirement or restriction is impossible or impracticable to comply with. Instead it again requires an evaluation by the Minister, who must be personally *satisfied* that the relevant criteria have been met.

[89] This element of discretion is also reflected in s 5, conferring a power on the Prime Minister to declare "that he or she is satisfied that the effects of an [epidemic] are likely to disrupt…essential governmental and business activity in New Zealand … significantly."

[90] Although it is clear that the statutory requirements in ss 15(2)(a) and (b) are strict preconditions of the exercise of the power, this framing indicates Parliament nevertheless intended to reserve a field of judgment for the Minister. In a different

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35 *Exchange Commerce Corp Ltd v New Zealand News Ltd* [1987] 2 NZLR 160 (CA) at 163.

context, the Supreme Court observed in *Unison Networks Ltd v Commerce Commission* that:[36]

> Ascertaining the purpose for which a power is given is an exercise in statutory interpretation which is not always straightforward. This is partly because legislative regimes differ in the specificity with which they grant powers. In this area the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case. They must be careful to avoid crossing the line between those concepts.

[91] And in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, a majority of the Supreme Court approved Lord Mustill's statement of principle in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd*, where his Lordship drew a distinction between the correct identification by a decision maker of the relevant legal test to be applied, and his or her subsequent evaluation of whether that test had been met:[37]

> The nature of the interpretative problem in the present circumstances and the caution which must be exercised before it can be said that an interpretation is in error, or before it can be said that a statutory provision has been misapplied, is well illustrated in the judgment of Lord Mustill, speaking for the House of Lords in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd*. What was in issue was much less complicated than "net cost" in the present case. It was the construction of the words "a substantial part of the United Kingdom" in statutory criteria applying to the investigation of mergers of transport services. Lord Mustill drew attention to the "protean nature" of the word "substantial", ranging from "not trifling" to "nearly complete". He cautioned against taking an inherently imprecise word and "by redefining it thrusting on it a spurious degree of precision". Accordingly, he concluded that the area referred to as "a substantial part" must only be "of such dimensions as to make it worthy of consideration for the purposes of the Act". Applying that test (the criterion) to the facts involved asking, first, whether the Monopolies Commission had misdirected itself and, second, whether its decision could be overturned on the facts.
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> His Lordship said that it was quite clear that the Commission had reached an appreciation of "substantial" which was "broadly correct". Speaking generally about how a question of the nature of the second question should be approached, his Lordship said:

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36 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74 at [54].

37 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [54]-[55] per Blanchard, McGrath and Gault JJ. See also Elias CJ at [17] and Tipping J at [80]. See too *Equus Trust v Christchurch City Council* [2017] NZCA 200 at [7]. Lord Mustill's description of the term "substantial" as protean is also apt to describe the expression "significantly" in s 5 of the Epidemic Preparedness Act, conferring a power on the Prime Minister to issue an epidemic notice.

> Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v Bairstow* [1956] AC 14.

Lord Mustill said that *South Yorkshire* was such a case:

> Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment.

(footnotes omitted).

[92] The distinction between a decision maker's correct identification and application of the relevant legal test, as opposed to the decision maker's evaluation of the situation against the legal test, has been lost in the second cause of action.

[93] While the complete absence of a written recommendation from a chief executive would clearly be a missing statutory precondition for the making of an Order in Council under s 15(1) and amenable to judicial review, the merits of the opinion of the chief executive contained within such a written recommendation, absent an error of law, is not. The same distinction applies to the decision of the Minister under s 15(2)(b).

[94] The second cause of action advanced by IDEA Services fails to observe this important distinction made within the statutory text. That text does not impose objective legal preconditions on the exercise of the power. Instead it imposes requirements on the Minister. It is not open to me to assess, based on conflicting evidence, whether at the time the order was made the effects of an epidemic were, or were likely to be, such that the requirement in s 53(3) was impossible or impracticable

to comply (or comply fully) with.[38] Those are matters reserved for the Chief Executive and the Minister.

[95] But even if I am wrong in reaching that view, based on the evidence I am satisfied that at the time the Order was made there was sufficient information before the Minister to have concluded that compliance with s 53(3) was impossible or impracticable. The entire country had entered an unprecedented lockdown requiring all but essential workers to remain at home. The duration of the lockdown was unknown. In that context it was clearly impracticable, if not impossible, for collective bargaining to continue, given the requirements of mandate and ratification, and the obvious priorities of both businesses and unions dealing with the sudden and profound impacts of the pandemic and the public health response.

[96] Finally, I have considered whether, in the context of emergency powers comprising a Henry VIII clause, the Court ought to apply a more exacting standard of review. On one view, as the authorities dealing with subjective empowering clauses appear to suggest,[39] a wholly unfettered Ministerial discretion to promulgate secondary legislation begins to look very much like a privative clause, a trend that has been firmly rejected. But even those authorities recognise that where an evaluation turns on a question of fact, the courts are more inclined to defer to the assessment of the decision maker, the question being whether the decision maker "could reasonably have formed any opinion, on law or on fact, which is set up as a foundation of the regulations."[40]

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38 A similar view of the applicant's claim for illegality was reached in *MDK v Minister of Health* [2022] NZHC 67, where Ellis J, at [57], observed:

> …the applicants' challenge in the present case is of a very different order. Although it is also directed at the "lawfulness" of the provisional consent, the alleged illegality is said to lie in the factual contention that the Minister's conclusion as to relative therapeutic value and potential risks of the paediatric vaccine was wrong, as a matter of science. It is only in the rarest of cases that this Court on review will engage with such a merits-based attack. As a matter of both law and logic, in a case where more than one view of the facts can reasonably be held, and the decision-maker has turned their mind to and applied the relevant statutory test, such a challenge cannot succeed. A merits-based challenge will, in effect, only succeed if the impugned decision is demonstrably irrational.

39 See in the context of emergency powers, *McEldowney v Forde* [1971] AC 632 (HL) at 651 and 661; *Reade v Smith* [1959] NZLR 996.

40 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed), Thomson Reuters, 2021 at [26.5.11], citing *Reade v Smith* [1959] NZLR 996 at 1000–1001.

[97] Given Parliament was well aware of the constitutional implications of conferring such broad powers on Ministers, but chose nevertheless to provide for a more nuanced position combining both significant restraints on the power with an element of discretion, I conclude that the nature of the power in play does not justify the merits based review implicit in the applicant's case. Such an enquiry would, in my view, go beyond the balance struck within the statutory framework.

[98] In my assessment, the real gravamen of the applicant's case is not the Minister's initial decision to engage the emergency power, but whether the continuing exercise of the power — in the form of the Order — is appropriate. That is an important question to which I return when considering the fifth cause of action.

[99] For these reasons the applicant's second cause of action is dismissed.

Third cause of action: did the Order go further than reasonably necessary?

The parties' cases

[100] IDEA Services' third cause of action seeks to challenge the Order on the basis that it goes beyond the limit imposed in ss 15(2)(a)(ii) and (b)(ii) — namely that that the modification must not go further than is reasonably necessary in the circumstances.

[101] Mr Butler emphasises that the word "necessary" is a high threshold but has been breached on several grounds.

[102] First, s 52 of the Employment Relations Act contemplates that a collective agreement may not always remain in force after its expiry. So it is difficult to see how an indefinite or open-ended extension of the collective agreement could properly be necessary as a result of the COVID-19 pandemic.

[103] Second, the extension effected by cl 8 of the Order goes well beyond anything that could have been considered necessary to respond to whatever the effects of the pandemic might have been thought to have been. In short, the Order extends a collective agreement by a period that is "plainly longer than necessary." The open-ended duration created by the Order could have been avoided by providing for a fixed-

term extension to the 12-month bargaining period in s 53(3) of the Epidemic Preparedness Act.

[104] Third, any resourcing difficulties for Et tū and other unions are common in a normal industrial context; it is the pandemic that must have rendered compliance impossible or impracticable.

[105] Fourth, if the Minister's concern was that some collective agreements might expire despite a willingness to conclude negotiations and ratify an agreement, then an alternative form of Order could have been drafted which extended the period in s 53(3) where both parties to an existing collective agreement agreed to the extension. This was not done, and, it is said, cl 8 of the Order is ultra vires s 15 on this basis as well.

[106] Finally, it is said that the Order pivots on the assumption that no bargaining whatsoever can occur while the Epidemic Notice is in force. That of course is not correct and must go to the question of whether the modification goes further than is, or is likely to be, reasonably necessary in the circumstances.

[107] In response to all this, the respondents point to the circumstances at the time the order was promulgated. Mr Cranney submitted that the Minister was required to make a decision prospectively (in contrast to the retrospective assessment urged by the applicant), "in the face of possible mass-death scenarios". Counsel for the first and second respondents argued that the extension of time period in s 53 was proportionate and was not an indefinite delay given that the term of the Order was linked to the Epidemic Notice. So, in effect, the first and second respondents argue that the Order itself is subject to three monthly terms.

Consideration

[108] IDEA Services' third cause of action suffers from the same difficulties as the second. Underlying it is a hindsight challenge to the factual assessment of the Minister rather than the legal framework he applied. For the reasons set out above at paragraphs [85]–[94], I do not consider it is open to the Court, or appropriate, to undertake a merits review in the absence of demonstrable irrationality. It is inconsistent with the empowering provision's acknowledgment of ministerial judgment.

[109] But more fundamentally, once again I am satisfied that at the time the Order was made its scope fell within the four corners of the power. The Order is not indefinite in its duration, as IDEA Services argued. Its term is expressly linked to the term of the Epidemic Notice. It will be recalled that clause 9 of the Order provides:

> This order is revoked immediately after the expiry of the 3-month period that starts on the date on which the Epidemic Notice expires or is revoked.

[110] And the Epidemic Notice, by virtue of its terms and ss 5(3) and 7(1) of the Act is itself subject to expiry every three months. The Order has only continued to subsist because the Prime Minister has exercised a power to renew the Epidemic Notice before its expiry.

[111] Given the uncertain circumstances that existed at the time the Order was made, linking its duration to the life of the Epidemic Notice, being three months only, did not go further than would be likely to be necessary in the circumstances.

Fourth cause of action: an unjustified infringement on freedom of association?

The parties' cases

[112] Section 15(3) of the Epidemic Preparedness Act carves out from s 15(1) two groups of enactments which are not capable of modification. The first is any requirement to release, or keep, a person in custody or have their detention reviewed by a court.[41] The second, which is in issue, removes specified constitutional enactments, including the New Zealand Bill of Rights Act 1990 (BORA), from s 15(1)'s reach.[42]

[113] Section 17 of BORA provides that everyone has the right to freedom of association. And in an industrial context, it is commonly recognised that freedom of association for employees includes a right to be free from association with other employees in a union. This negative right is expressly recognised by the Employment

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41 Epidemic Preparedness Act 2006, ss 15(3)(a) and (b).
42 Epidemic Preparedness Act 2006, s 15(3)(c).

Relations Act, which includes amongst its objects the building of productive employment relationships "by protecting the integrity of individual choice."[43]

[114] Against this legislative framework, IDEA Services claims that it has a right under s 17 of BORA to be free from a requirement to associate with E tū.[44] The applicant argues that the effect of the Order is to require the employer to continue to associate with the union contrary to its right not to do so, and the Order is therefore ultra vires s 15(3)(c) of the Epidemic Preparedness Act.

[115] The applicant says there are two possible interpretations of s 15(3)(c): first, it places a "complete ban" on any immediate modification order that infringes a right or freedom guaranteed by BORA; second, it may only prohibit a modification that would amount to an unreasonable limit on a BORA right or freedom (the "justified limit approach"). IDEA Services' case is that s 15(3) imposes a complete ban on any modification infringing BORA rights but even if it does not, the modification in this case is not demonstrably justified under s 5 of BORA. Mr Butler points to the fact that, at a bare minimum, IDEA Services and E tū will be involuntarily in a relationship for a period of 16 months, or 33 per cent longer than the maximum statutorily mandated period. The respondents' justification for this is the effects of the pandemic, but as previously argued the pandemic cannot credibly account for all of "such a lengthy involuntary association". It follows that the Order is disproportionate to any legitimate requirement.

[116] In response, the first and second respondents say that the plain meaning of the s 15(3)(c) proviso is that an immediate modification order cannot be made which modifies a requirement or restriction imposed by BORA itself. This is supported by the exhaustive list of other constitutional statutes listed in s 15(3)(c).

[117] The implication of IDEA Services' argument — that the s 15(3)(c) proviso means any restriction or requirement that engages in any way a right in BORA is proscribed — would ignore s 6 of the BORA (which requires that whenever an

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43 Employment Relations Act 2000, ss 3(a)(iv) and 3(b), reflecting New Zealand's commitment to the International Labour Organisation Convention 87 on Freedom of Association.

44 Section 29 of BORA provides that the provisions of the Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

enactment can be given a meaning consistent with the rights and freedoms in the Bill of Rights, that meaning is preferred to any other meaning). A similar argument was rejected by this Court recently.[45] The usual test under s 6 applies to this case. The Court must assess, first, whether the Order limits rights under BORA and, if so, whether it is a justified limitation under s 5.

[118] The respondents also argue that the applicant's asserted s 17 BORA right does not exist. IDEA Services' claimed freedom from association with E tū is incompatible with its employees' right of association in a union, and right to bargain through their union with the applicant. Even if s 17 were engaged by the Order, s 6 of BORA requires s 15 to be read consistently with the Bill of Rights. Finally, any limitation on the claimed right is demonstrably justified.

Consideration

Does IDEA Services have a right to be free from association with E tū?

[119] Counsel for the applicant did not refer me to any authority in which an employer had successfully argued it was entitled to a right under BORA to be free from association with its employees' union.

[120] It is common for rights in constitutional instruments such as BORA to be broadly framed and abstract. One reason for this is to ensure adequate coverage of the protection given the wide range of circumstances in which rights might be engaged in a free and democratic society.

[121] But abstract drafting also causes rights to butt-up against each other. Absolute rights of the individual do not exist. One citizen's right to absolute freedom of movement can only come at the cost of another's. So all fundamental rights have limits between those entitled to them.[46]

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45 *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3063 at [40]–[50].

46 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, per McGrath J at [186]; *R v B* [1995] 2 NZLR 172, per Richardson J at 182.

[122] Rights and freedoms also have a core and a penumbra. The extent to which state intrusion into a right might be demonstrably justified may depend on the context, and whether the limitation strikes at the core or periphery of the right.

[123] It is questionable whether IDEA Services' right to freedom of association, or to be free of association, extends to a right to be free from association with its employees' union. It seems to me that such a right is the antithesis of the fundamental right of its employees under s 17 to associate with each other in a union, and through that union to associate with their employer. And beyond that, an employer's asserted right to be free of association with its employees' union is at best at the very margins of the right, if it falls within the scope of it at all.

[124] If it is permissible to view an employment relationship as a species of contract, one might characterise the role of a union, broadly, as the agent of its members. Both Mr Butler and Mr McBride were at pains to argue that unions are not agents in a contractual sense because, under the Employment Relations Act, they are a separate party to a collective agreement and because unions hold personal rights beyond those of their members. While that may be true, I do not consider that changes the overall characterisation of a union as the agent of its members. Union rights and entitlements under a collective agreement or the Employment Relations Act ultimately exist for the benefit of its members, not the union itself. Employees who wish to exercise their right to collectively bargain with their employer through a union necessarily have an employment relationship with the employer through the auspices of the union.

[125] Beyond the inconsistency between IDEA Services' claimed right and the rights of its employees, s 17 does not, in my view, constitutionalise freedom of contract. This includes IDEA Services' efforts to be free of a collective agreement with E tū.[47] As this Court has found, freedom of contract may be inhibited or prohibited by valid statutory or regulatory provisions which do not have freedom of association implications. [48] The Employment Relations Act is a good example of that.

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47 See generally *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 at [71]–[75]. At [74], White J cited with approval a statement by Iocabucci and Bastarache JJ in *Canadian Egg Marketing Agency v Richardson* [1998] SCR 157 at 57. There, the Supreme Court noted, and rejected, the sweeping effect recognition of fundamental rights in commerce would have.

48 *Turners & Growers Ltd v Zespri Group Ltd (No 2)*, above n 47, at [74].

[126] For these reasons, I am not persuaded by IDEA Services' submission that the Order engages a s 17 BORA right.

Does s 15(3) impose a complete ban on modification?

[127] Given this finding, it is unnecessary to consider whether s 15(3) imposes a complete ban, or a more limited form of proscription, as the applicant contended. But out of deference to the careful submissions of the parties, I make some brief observations on the point.

[128] It is clear that s 15(3) imposes an absolute ban on any direct modification of the provisions of the constitutional documents listed. So far so good. But I also accept Mr Butler's submission that an indirect modification affecting a constitutional document — for instance an amendment to the Immigration Act ousting the judicial review jurisdiction of the Court — could render the proscription in s 15(3) meaningless. In this sense, I would accept that the clear language of s 15 proscribes any modification of the named constitutional documents through a non-constitutional enactment. Consideration of a justified limitation does not arise because the effect of the empowering statute is clear.

[129] Where the applicant goes too far, however, is in its submission that the "complete ban" approach also excludes the effect of s 5 of BORA — justified limits — when considering modification of non-constitutional enactments that nevertheless indirectly engage BORA rights. Such a proposition is not supported by the text of s 15(3), and would amount to an implied repeal of s 5 of BORA itself. I agree with Palmer J's view of the law concerning the combined effect of ss 5 and 6 of the Bill of Rights.[49] His Honour considered the correct position following the Supreme Court decisions in *Hansen* and *New Health New Zealand* is that if a limit in an order is reasonable, prescribed by law and demonstrably justified in a free and democratic society under s 5, "s 6 does not require the usual purposive interpretation of the empowering provisions to be narrowed to mean the order is outside its scope". He reasoned that:

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[49] *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3063 at [50]–[51].

> Applying s 6 to interpret the meaning of legislation to uphold a right or freedom, irrespective of whether Parliament intended the right or freedom to be subject to a limit that is reasonable and demonstrably justified in a free and democratic society, would involve applying only half of the Bill of Rights to interpretation. It would involve requiring that legislation which, interpreted according to its text and in light of its purpose and context, empowers decisions to limit rights in a way which is reasonable and demonstrably justified in a free and democratic society, must be read down to invalidate those decisions. That would engender a more frequent and hostile constitutional dialogue between the executive, the judiciary and Parliament. I doubt it would bode well for the long-term sustainability of human rights in New Zealand.

[130] Given BORA itself expressly acknowledges the rights and freedoms within it are subject to reasonable limits, in the absence of express language in the Epidemic Preparedness Act I would not find BORA impliedly amended in the way the applicant contends.

Is any limitation demonstrably justified?

[131] Even if I am wrong, and the Order engages IDEA Services' freedom of association, the right is heavily qualified by the Employment Relations Act itself.[50] Those qualifications, which have already been noted in this judgment,[51] include an obligation to engage in good faith bargaining with E tū, as well as a positive obligation to conclude a collective agreement with the union unless there is a genuine reason, based on reasonable grounds, not to.[52] Given this, the circumstances in which employers can lawfully be free of a collective agreement are very limited.

[132] Given the truncated nature of any right, and the circumstances existing at the time the Order was made,[53] I would have found that the Order constituted a reasonable limitation on the right to freedom of association.

[133] The question whether the passage of time, and lack of review by officials and ministers until late last year, rendered the Order invalid will be considered in the context of IDEA Services' fifth cause of action, to which I now turn.

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50 IDEA Services did not suggest the Employment Relation Act's limits on the asserted right were not demonstrably justified.
51 See above at [7]–[10].
52 Employment Relations Act 2000, s 33(1).
53 See above at [76]–[80].

Fifth cause of action: an implied requirement to review the Order?

The parties' cases

[134] IDEA Services points to the scheme of the Epidemic Preparedness Act and parliamentary materials to support the conclusion that ongoing periodic review is an essential element of the scheme of immediate modification orders. A requirement for ongoing periodic review of epidemic notices and epidemic management notices is explicit in the Act.[54] Those notices must be revoked at the time of review if they are no longer necessary.

[135] The applicant says that the requirement for ongoing review of a s 15 IMO is implicit in the Act. The parliamentary debates indicate that IMOs were intended to be a last resort, and that the justification for the Order in this case was the existence of the Level 4 lockdown. That had changed by 13 May 2020 when New Zealand moved into Level 2, and the significant disruption referred to in the statement of reasons no longer existed.

[136] Despite this, it is alleged that the duration of the Order is indefinite. Its term is linked to the Epidemic Notice, which has been renewed every three months. This has occurred without any consideration by officials or ministers of whether the statutory requirements for the existence of the Order — impossibility of compliance and reasonable necessity — continue to be met.

[137] IDEA Services pleads that the failure to undertake a periodic review of the Order renders the order invalid.

[138] In response, the first and second respondents submit that the Act does not expressly require review of IMOs that are in effect. The primary review mechanism is s 9 of the Epidemic Preparedness Act, relating to an epidemic notice. That notice is regularly reviewed and, by implication, so too is the Order. They also point to the recent review, and the Minister's decision late last year to recommend to Cabinet revocation of the Order this month.

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54 Epidemic Preparedness Act 2006, ss 9 and 10.

Consideration

[139] I have already addressed the passage of the Epidemic Preparedness Act through Parliament.[55] Both the debates and the scheme of the Act reveal an intention to control the constitutional risks created by Henry VIII powers by ensuring either that notices (such as an epidemic notice) are self-terminating after a fixed period, or must at least be subject to ongoing review (as is the case with an epidemic management notice).

[140] And related to the constitutional safeguards within the Act was the introduction by the Select Committee of a strong preference for prospective modification orders, where the terms of the order would be subject to public consultation and publication well in advance of an epidemic. Immediate modification orders were only ever intended to be gap-fillers, used sparingly. And yet the record is that Parliament's intention was never achieved: not a single PMO was promulgated before the COVID-19 pandemic. All modification orders so far have been in the form of an IMO, and outside any express statutory requirement for review.

[141] This omission has rule of law consequences. On the evidence available it does not appear there has been any ministerial reconsideration of the ongoing necessity for the Order in terms of the s 15 requirements until November 2021, some 18-months after the power was first invoked.[56] Merely linking the duration of the Order to that of the Epidemic Notice without separate consideration of the Order's ongoing necessity is a significant intrusion into the principles of parliamentary sovereignty and executive accountability to the Parliament, especially when the exercise of an emergency power suspending statutory requirements is in issue.[57] Such a result could not have been intended.

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55 Above at [20]–[31].

56 The evidence for the first and second respondents of some engagement with the Order by officials in June, September and October 2021 does not satisfy me that there was a consideration of the necessity for the Order against the statutory requirements in s 15. An affidavit of Tracy Mears, Policy Director at Workplace Relations and Safety, reveals that a briefing note was provided to the Minister on 21 October 2021 which noted the extended timeframes for collective bargaining introduced during Level 4 lockdown were not necessary during lower alert levels. Despite this, it concluded that no action was required at that stage. There was ostensibly no consideration of whether the requirements under s 15 continued to be met.

57 *Regina (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [41]–[47].

[142] The absence of an express statutory requirement for review of IMOs is likely to be due to one of two possibilities: an expectation that as gap-fillers their use would be limited and only for short periods of time; alternatively, it was an oversight.

[143] Given the text of the enactment and its purpose, the speeches in the House, and the report of the Select Committee, I am satisfied Parliament intended the power under s 15 is to be exercised consistently with a requirement for periodic review. A temporal limit on the scope of statutory powers under the Health Act 1956 was similarly recognised to arise by the Full Court from the scheme of the Act in *Borrowdale v Director-General of Health*:[58]

> As well, the powers [in s 70 of the Health Act] have temporal limits, albeit partly unspecified. For example, where the relevant trigger is an epidemic notice, the powers are only exercisable while the notice is in force. But as a matter of wider principle, the s 70 powers are intended to facilitate an immediate and urgent response to a public health crisis. They cannot sensibly be regarded as providing the framework for a longer term response. When a public health crisis is ongoing, the democratic nature of our constitution means that there comes a point when Parliament ought to pass bespoke legislation to ensure that critical policy decisions are made by ordinary Cabinet decision-making. That is, in fact, exactly what happened here, when Parliament enacted the COVID-19 Public Health Response Act 2020 on 13 May.
>
> All of this is important for the purposive interpretive exercise required by s 5 of the Interpretation Act 1999. It is, of course, important to acknowledge that the exercise of the s 70 powers may well limit NZBORA rights and freedoms. But while that might, ordinarily, dictate a more narrow and literal approach to the text, we think the matters just mentioned all point in the other direction. A fair, liberal, and remedial construction better recognises the fact that the powers are exercisable only in an emergency of a kind that, as a matter of international law, justifies restrictions on individual rights. And the internal restrictions and temporal limits on the exercise of the powers gives further assurance that it is safe to adopt such a construction, by limiting the potential for abuse.

[144] Quite apart from the Act's requirement for review, as a matter of constitutional principle all emergency powers exercised by the executive are subject to reasonable temporal limits and the requirement of ongoing necessity. This is to ensure the maintenance of Parliamentary sovereignty and ensure the executive remains accountable to the Parliament. And such a principle is all the more important in the absence of adequate (or express) statutory safeguards.

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58 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [102]–[103]. The Court of Appeal, above n 27, did not disturb this statement on appeal.

[145] Given the absence of an explicit statutory review requirement, IMOs ought as a matter of good practice to include a fixed date of termination which would require their timely review. A three-month fixed term appears appropriate, and would be in keeping with the review periods for epidemic notices and epidemic management notices. Although the case was not presented in this way, it may have been open to argue that a fixed-term, or renewal mechanism within the Order, were mandatory considerations. But even if that was correct, the likely remedy would not be invalidity, but a direction to the Minister to reconsider that aspect of the Order.

[146] I am unable to accept the first and second respondents' submission that the review of the Epidemic Notice is sufficient to meet the constitutional requirement of continuing necessity of the Order. Nor is it sufficient that the Order was presented to the House and subject to its scrutiny pursuant to ss 16 and 18 of the Epidemic Preparedness Act. That process involves parliamentary scrutiny within six sitting days after the day an IMO is made. If we have learned anything from the COVID-19 pandemic, it is that circumstances can change rapidly. What was appropriate in April 2020 may no longer be warranted in February 2022.

[147] Accordingly, linking the duration of the Order to the Epidemic Notice without further specific consideration of necessity was unlawful. I do not find that such illegality arose ab initio. Had the Order been revoked within three months of its promulgation there could be no real argument its making fell within the empowering provision and met the purposes of the Act. The problem has arisen due to the absence of a self-terminating date independent of the Epidemic Notice, and the absence of any ministerial review until November 2021. The next question is, what if any relief ought to follow?

Relief?

[148] IDEA Services seeks a declaration of invalidity in relation to cl 8 of the Order. It seeks a consequent declaration that there is no collective agreement with E tū, given the effect of the first declaration would result in the expiry of the collective agreement in October 2021. Mr Butler submitted that the application was not brought prior to the

putative expiry date of the collective agreement because the relief sought had nothing to bite on prior to that date.

[149] The applicant submits there is no reason that would justify declinature of relief. The impact on third parties of setting aside the Order is no reason to decline it.[59]

[150] For the first and second respondents, Ms Thornley submitted that the situation in the present case is very different from that in *New Zealand Employers Federation Inc v National Union of Public Employees*. Invalidity of the current Order would not only affect the immediate interests of the third respondent, but also its members. Beyond them, it could also affect up to 200 other collective agreements, thousands of employees and very many employers, some of whom may well support and rely on the continuing effect of the Order.[60] Beyond that, invalidity may have knock-on effects in relation to the other IMOs that remain in force. The consequences of any declaration holding the Order invalid would "be significant and unpredictable, potentially causing considerable disruption to collective agreements".

[151] Next the respondents point to the applicant's delay in bringing this proceeding. Given its case is that the Order was unlawful and invalid from the outset, there was no need to delay bringing the proceeding until after the putative date the collective agreement expired. That delay will have caused real prejudice to the third respondent and its members if the relief sought is granted; they have, after all, been entitled to rely on the effect of the Order.

[152] Moreover, it is said that the Minister intends to recommend to Cabinet revocation of the Order. A declaration of invalidity at this point would serve no useful purpose.

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59 Relying on *New Zealand Employers Federation Inc v National Union of Public Employees* [2002] 2 NZLR 54 (CA).

60 Michael Peters, General Manager at New Zealand Health Group Ltd, a company which employs over 10,000 staff in the health and disability sector and has nine collective agreements, deposed that it had been very difficult to negotiate collective agreements since March 2020 due to the effects of the pandemic. Mr Peters said his organisation has no issue with the intent of the Order which has had the effect of extending several of its collective agreements.

Consideration

[153] One of the challenges presented by the pandemic is the rapidly changing circumstances both Government and the community have had to deal with. The applicant's case was, unsurprisingly, backward looking, to the long periods during which New Zealand was COVID-19 free, and the requirements of necessity for the Order tenuous. By contrast, the respondents look to the immediate future, and the fact that in practical terms the most significant impact of the pandemic is only just about to be experienced.

[154] This illustrates the difficulty with the applicant's delay in bringing its proceeding. The relief it sought would still have bitten in April 2020, but its effects would have been different. E tū would have been made aware that without the Order, the 12-month clock was counting down in terms of expiry, and the first and second respondent would have been prompted to consider the question of necessity again.

[155] Beyond the impact of delay, as I noted above at [98], the applicant's grievance is really about the failure of officials and the Minister to review on-going necessity for the Order in a more timely way. Had the applicant sought to challenge the failure of the Minister to exercise a power to revoke the Order, the relief sought would not have been invalidity, but an order declaring the failure to consider revocation unlawful.

[156] Given:

(a) the delay in commencing the proceeding;

(b) the potentially wide-ranging and unintended effects of invalidity both on the immediate parties but also a much wider span of interests;

(c) the applicant's ability to challenge the Minister's failure to consider revocation of the Order (a "review" requirement); and

(d) the element of ministerial judgment inherent in s 15 and the fact that the Government is best equipped to identify and assess the wide-range of factors relevant to revocation —

I have concluded that while it is appropriate to vindicate the applicant's claim with meaningful relief, the appropriate order is a declaration that the failure to undertake a review of the necessity of the Order against the statutory requirements before November 2021 was unlawful.

Conclusion and orders

[157] There will be a declaration that the first and second respondents' failure to undertake a review of the Order against the requirements of s 15 of the Epidemic Preparedness Act prior to November 2021 was unlawful. I direct the first and second respondents to complete reconsideration of the Order against the requirements of s 15 within 14 days of the date of this judgment.

[158] Leave to apply is reserved.

[159] Costs would ordinarily follow the event. My current inclination is to grant costs to the applicant on a 2B basis, certifying for second counsel. If the parties are unable to agree on costs memoranda may be filed.

Isac J

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