IN THE SUPREME COURT OF NEW ZEALAND

SC 124/2011
[2012] NZSC 69

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

Hearing: 26 July 2012

Court: Tipping, McGrath, William Young, Gault and Blanchard JJ

Counsel: P Cranney and T Oldfield for Appellants
B A Corkill QC, P A McBride and G A Ballara for Respondent

Judgment: 9 August 2012

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made by the Court of Appeal are set aside.

C The orders made by the Employment Court are reinstated.

REASONS

(Given by Tipping J)

Introduction

[1] This appeal concerns the circumstances in which employees may bargain for redundancy entitlements pursuant to pt 6A of the Employment Relations Act 2000. It is convenient to set out the relevant statutory provisions before coming to a brief description of the factual background. I will then address the issues which the appeal raises.

The legislation

[2] Part 6A deals with continuity of employment if the work of employees is affected by restructuring. Subpart 1 of pt 6A applies in the case of specified categories of employees. It applies in this case because the employees involved are within one of those categories.[1] The object of subpart 1, as stated in s 69A, is to provide protection to qualifying employees if, as a result of a proposed restructuring, their work is to be performed by another person, meaning another employer. In that situation the legislation is designed to give:

> (a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment; and
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> (b) the employees who have transferred a right,—
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> (i) subject to their employment agreements, to bargain for redundancy entitlements from the other person if made redundant by the other person for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and
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> (ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.

[3] The purpose of para (a) above is fulfilled by s 69I which gives qualifying employees the right to elect to transfer to the new employer. Under s 69J, the employment of an employee who so elects is to be treated as continuous. Section 69M applies if an employee who elects to transfer to a new employer is a

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[1] See sch 1A. The employees provided cleaning services within para (f).

member of a union and bound by a collective agreement and the new employer is not already a party to the collective agreement that the union is a party to.[2] In that situation, which exists in the present case, the new employer becomes a party to the collective agreement but only in relation to, and for the purposes of, the transferring employee.

[4] Next comes s 69N. It is this provision that has given rise to the two issues that require resolution. The section provides:

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

[5] Subsequent sections set out what happens if the bargaining process required by s 69N(3) does not result in agreement. It is unnecessary to refer to all the details. The ultimate position is that, if agreement cannot be reached, the Employment Relations Authority settles the matter by determining the redundancy entitlements due to the relevant employees. This is a form of compulsory arbitration.

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[2] As s 69M puts it.

The background

[6] The employees in this case, who were supported by the appellant union, were all cleaners at Massey University. The contracts between their original employers and the University were due to expire on 30 June 2010. In anticipation of that expiry, the University put its cleaning contracts from January 2010 in respect of its Massey sites out for tender. The respondent, OCS, was the successful tenderer. The employees in question elected to transfer to OCS as their new employer. In August 2010 they were informed by OCS that their work would cease unless they were prepared to accept different and less beneficial terms and conditions of employment. Issues then arose as to their entitlements under s 69N. That is a sufficient sketch of the factual background to put the legal issues in context.

The issues

[7] The first issue concerns the correct interpretation of para (c) of s 69N(1). It is common ground that paras (a) and (b) of the subsection are fulfilled. The second issue concerns the extent to which the collective employment agreement in this case excludes redundancy entitlements.

First issue

[8] The question is whether subparas (i) and (ii) of s 69N(1)(c) are to be read alternatively or cumulatively. The employment agreement in the present case expressly excludes "redundancy payments", they being a form of redundancy entitlement. Mr Cranney, for the appellants, argued that despite his clients failing to satisfy subpara (ii), they did satisfy subpara (i) because the employment agreement did not provide for redundancy entitlements (because they were excluded). Hence, because his clients could fulfil subpara (i), that was enough to satisfy para (c) as a whole.

[9] This argument was accepted by the Chief Judge of the Employment Court but not by the Court of Appeal. We consider the Court of Appeal was correct. As

Mr Cranney was constrained to accept, if his argument were correct subpara (ii) would become redundant. This is because, on the posited interpretation, an express exclusion under subpara (ii) would always be defeated by the fulfilment of subpara (i). If express exclusion is treated as being the same as not providing for redundancy entitlements, the subparas would be inherently contradictory and the right to bargain could never be excluded by agreement. We cannot accept that Parliament intended to achieve this result. Nor can we accept that Parliament has legislated in such a way that a discrete and substantive part of para (c) must be treated as redundant.

[10] We reach this conclusion while fully recognising, as Mr Cranney emphasised, by reference to s 237A, that subpart 1 is designed to protect vulnerable employees. A cumulative reading of the two subparas is the only way to make sense of para (c) as a whole. Importantly, such a reading is also consistent with s 69A(b), which demonstrates that the right to bargain was intended to be subject to the relevant employment agreement. It is the right to bargain that is so subject, not the bargaining itself, as Mr Cranney submitted. Even if it were the latter, the purpose of the legislation must, in substance, be the same. The right, and hence the bargaining, are subject to the employment agreement. In other words, they are subject to whatever contractual provisions there are in the employment agreement on the subject of redundancy entitlements. If the appellants' argument were correct, the Authority could require a new employer to pay redundancy compensation when the employment agreement provided there was to be no entitlement to any such compensation.

[11] In order to satisfy s 69N(1)(c) the employee must show not only that there is no provision for redundancy entitlements in the employment agreement but also that the agreement does not expressly exclude redundancy entitlements. This is effectively what the Court of Appeal held and their decision in this respect was correct. The rationale is that if the agreement does make provision for redundancy entitlements, there is no need for a right to bargain; the agreement dictates what is due. If the agreement expressly excludes redundancy entitlements, the employees' position gets no better on transfer to the new employer. Mr Cranney invited us to read down the terms of s 69A(b). But we can see no proper basis for doing so, even

giving full credence to the fact that employees of the kind with which the legislation deals are likely to be vulnerable and possess little bargaining power both originally and in the face of the restructuring.

Second issue

[12] That brings us to the second issue which concerns the effect of the employment agreement in this case. The relevant clause in the agreement is cl 25.2 which provides:

> The parties to this employment agreement agree that no claims for redundancy payments will be made as a result of loss of employment due to downsizing of client contract or loss of client contract.

[13] The Chief Judge interpreted this provision as follows:[3]

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

[14] A little later he said:[4]

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

[15] In his summary the Chief Judge repeated the second of these passages by saying:[5]

> The plaintiffs are entitled to "redundancy entitlements" under s 69N(2) and (3) but not including monetary compensation for redundancy which is excluded by cl 25.2 of the collective agreement.

[16] By reference to the first of these passages Mr Cranney sought to make a distinction between the employer making a payment (which was precluded) and the employee making a claim for a payment (which was not). That, with respect, is an

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3 *Service and Food Workers Union Nga Ringa Tota Inc v OCS Ltd* [2010] NZEmpC 113, (2010) 8 NZELR 39 at [54].

4 At [58].

5 At [73].

extremely fine and unpersuasive distinction. In any event, reading the judgment of the Chief Judge as a whole we consider he was clearly interpreting cl 25.2 as an express exclusion of any right to have financial compensation for redundancy and hence to bargain for it.

[17] The Court of Appeal accepted that interpretation, as it was obliged to.[6] The crucial question is the extent to which cl 25.2 excludes bargaining for redundancy entitlements. As is apparent, the Chief Judge was of the view that the employees were entitled to redundancy entitlements other than monetary compensation and were therefore entitled to bargain on that basis. The Court of Appeal on the other hand held that the exclusion of "redundancy payments" meant that all redundancy entitlements were excluded.[7] In this respect we consider the Chief Judge was correct and the Court of Appeal was in error.

[18] The expression "redundancy entitlements" is defined in s 69B to *include* redundancy compensation. This clearly demonstrates, as was common ground, that redundancy entitlements can take forms other than payment of monetary compensation. A right to retraining was given as an example in argument. Taking that example without indicating what might be appropriate in this or any other case, it could not be right that the express exclusion in an employment agreement of any right to retraining should be treated as also excluding any right to monetary compensation. The position cannot logically be different where it is monetary compensation that is excluded. An express exclusion of a right to monetary compensation cannot be regarded as an express exclusion of redundancy entitlements which do not involve paying the employee monetary compensation.

[19] The legislature's use of the language of *express* exclusion in s 69N(1)(c)(ii) is significant. We cannot accept Mr Corkill QC's argument for OCS that the Court of Appeal was justified in regarding its conclusion as being supported by the legislative history. Nor do we consider the fact that restructuring is not mentioned in s 69O(3) supports the Court of Appeal's conclusion. The text and purpose of the Act make it

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6 In terms of s 214.

7 *OCS Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2011] NZCA 597, [2012] 1 NZLR 394 at [35]–[36].

plain that only forms of redundancy entitlement that are expressly excluded by the employment agreement cannot be the subject of the bargaining regime.

[20] The Court of Appeal considered that s 69N(1)(c) was intended to limit the right to bargain for redundancy entitlements to situations where the employment agreement had failed to address the matter.[8] That statement does not reflect the whole of para (c). It simply reflects the situation addressed by subpara (i). Subparagraph (ii) must, however, be brought to account on this issue as well as on the first issue. In doing so, it must be recognised that there are different forms of redundancy entitlement. If all forms are excluded by the agreement, there can be no bargaining at all. But if, as here, only one form is excluded (redundancy payments) there can be bargaining in respect of other forms that are not excluded.

[21] We do not consider the Court of Appeal was correct in its conclusion that the fact the employment agreement "addressed the issue of redundancy entitlements" precluded bargaining for a form of redundancy entitlement not expressly addressed by way of exclusion.[9] We do not consider the expression "redundancy entitlements" in para (c)(ii) was intended to be read in a generic way. Exclusion of some entitlements does not exclude all.

[22] Parliament's making of the bargaining regime subject to the employment agreement must mean that it is subject to the employment agreement as properly interpreted. The Chief Judge interpreted the agreement as precluding only financial compensation. That was the bargain of the parties. It must have been Parliament's intention that para (c)(ii) be interpreted consistently with the contractual position. That is effectively what the Chief Judge did. The appellants must succeed on this point.

Conclusion

[23] The appeal must therefore be allowed to the extent of the appellants' success. The orders made by the Court of Appeal must be set aside. The orders made by the

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8 At [34].

9 At [36].

Employment Court should be reinstated. But, as the appellants have failed on the first point, there is no basis for amending the Employment Court's order so as to remove the embargo against bargaining for monetary compensation. In view of the outcome of the appeal, there should be no orders for costs either in this Court or in the Court of Appeal.

Solicitors:
Oakley Moran, Wellington for Appellants
McBride Davenport James, Wellington for Respondent