IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 2
EMPC 95/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE NORTHERN AMALGAMATED WORKERS' UNION OF NEW ZEALAND INCORPORATED Plaintiff
AND	FLETCHER CONCRETE AND INFRASTRUCTURE LIMITED T/A GOLDEN BAY CEMENT

Hearing:	3 and 4 September 2015 (Heard at Auckland)
Court:	Chief Judge G L Colgan Judge Christina Inglis Judge A D Ford
Appearances:	H White, counsel for the plaintiff P Muir and R Rendle, counsel for the defendant G Pollak and A McInally, counsel for the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc P Cranney, counsel for the New Zealand Council of Trade Unions
Judgment:	1 February 2016

JUDGMENT OF THE FULL COURT

Introduction

[1] The principal issue in this case is whether a particular provision in a collective employment agreement (the collective agreement) between The Northern Amalgamated Workers' Union of New Zealand Incorporated (the Union) and the

defendant, Fletcher Concrete and Infrastructure Limited trading as Golden Bay Cement (Golden Bay or the Company) which came in to force on 1 November 2013, conferred an unlawful preference on members of the Union contrary to s 9 of the Employment Relations Act 2000 (the Act).

[2] The matter first came before the Employment Relations Authority (the Authority) and in a determination dated 31 March 2015, the Authority upheld an application by Golden Bay for a declaration that the clause in question (cl 24 of the collective agreement) conferred an unlawful preference on members of the Union in terms of s 9 of the Act and therefore, by virtue of the provisions of s 10 of the Act, it had no force or effect.[1]

[3] The Union then elected to challenge the whole of the Authority's determination on a de novo basis seeking an order that cl 24 was lawful and should be enforced or, alternatively, an order that those features of the clause which did not infringe upon s 9 of the Act should be enforced. The challenge was opposed in all respects by Golden Bay. A full Court was convened to hear the challenge.

[4] On 15 May 2015, the Court, acting pursuant to cl 2(2) of sch 3 to the Act, granted intervener status in the proceeding to the New Zealand Council of Trade Unions and the New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc (EPMU) to appear and be represented at the hearing.

Background

[5] Golden Bay is a fully owned subsidiary of Fletcher Concrete and Infrastructure Limited. The Company supplies cement products throughout New Zealand from its Portland plant in Northland. The Court was told that the Portland site had 137 employees, made up of 76 members of the plaintiff Union, 18 members of the EPMU and 43 salaried employees who are not union members. The salaried employees comprise employees in management, team leaders and quality and engineering roles which fall outside the coverage of the two unions on site.

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[1] *Golden Bay Cement, a division of Fletcher Concrete and Infrastructure Ltd v Northern Amalgamated Workers' Union of New Zealand Inc* [2015] NZERA Auckland 98 at [59].

[6] The collective agreement between Golden Bay and the Union, which came into force on 1 November 2013 and continues in force until 31 October 2016, is the latest in a series of similar collectives which have been negotiated between the parties over the years both under the Act and its predecessors. The coverage provision in cl 1 provides, relevantly:

> **1. COVERAGE**
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> 1.1 This Collective Agreement shall apply to work that is usually carried out by employees of the Company who are members of the Union
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> AND
>
> Is directly or indirectly associated with cement manufacturing and/or dispatching and/or maintenance of production equipment
>
> AND
>
> is performed by employees who are based at Portland Works, Portland Quarry or Wilsonville Quarry.

[7] Clause 24, which is the provision allegedly conferring the preference (the highlighted words in particular), states:

> **24. SELECTION PROCESS AND TRAINING**
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> 24.1 When a job vacancy arises that has been traditionally covered by AWU members the job will be advertised on the works notice boards, then a selection process would take place with the following steps:
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> 1. *The vacancy will first be opened to applications from permanent GBC employees who are covered by the GBC/AWU Collective Agreement.* If the Company considers that none of the applicants are suitable and the Union agrees with this assessment then the following two steps will be followed.
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> 2. If no employee in section 1 above fills the vacancy, then applications will be called amongst other GBC employees including temporary or casual employees. A person who applies for the vacancy and who meets the requirements of the job will be appointed by the Company. In selecting a suitable person for the job due consideration will be given to a variety of relevant factors, including but not limited to any training and length of service with GBC.
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> 3. If no employee described in section 2 above is found to be suitable for the vacancy then applications will be called from other sources and the Company will appoint a suitable applicant.

24.2 Employees covered by the above named C.E.A who wish to advance to other positions will apply for pre-training.

24.3 Selected applicants will be pre-trained and ready for consideration for when those vacancies arise.

24.4 The Company *and a Union site representative* will jointly select people for pre-training.

24.5 Completion of pre-training does not mean that a person will automatically be offered a vacancy.

24.6 A person who applies for, is selected for and completes pre-training is then obliged to take up a relevant job if they are required to do so by the Company.

(emphasis added)

[8] Section 9 of the Act, which imposes the prohibition on preference, provides:

9 Prohibition on preference

(1) A contract, agreement, or other arrangement between persons must not confer on a person, because a person is or is not a member of the union or a particular union,–

(a) any preference in obtaining or retaining employment; or

(b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.

(2) Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.

(3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits–

(a) of a collective agreement:

(b) arising out of the relationship on which a collective agreement is based.

[9] For completeness, s 10 of the Act provides:

10 Contracts, agreements, or other arrangements inconsistent with section 8 or section 9

A contract, agreement, or other arrangement has no force or effect to the extent that it is inconsistent with section 8 or section 9.

[10] In its determination, the Authority Member made quite firm findings on the preference issue, stating:[2]

> [33] It seems to me that the terms of the relevant clause in the operative collective agreement could not be clearer, that where job vacancies occur on the site in work traditionally performed by the Union's members, members of that same Union get preference for those vacant positions over other persons, whether employees or not and that whole process is facilitated by the clear prescriptive rules for the pre-training of members of the Union so that they are effectively in a kind of holding pattern awaiting a vacancy to which they might aspire.
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> …
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> [38] Moreover, I am satisfied also that the preference that is conferred by clause 24 is a preference conferred by membership of the respondent Union. The only way that persons who were not currently in receipt of that potential benefit could have that benefit or potential benefit conferred is by becoming members of the respondent Union and put that way, it seems to me axiomatic that the provision infringes the rule in s 9(1) of the Act because it makes plain that the only way a preference can be conferred in respect of clause 24 is on the footing that the person seeking to obtain that benefit is a member of the respondent Union.
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> …
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> [41] I am satisfied that it does not put it too strongly to say, as counsel for Golden Bay Cement does in her submissions, that the effect of clause 24 is that members of the Union are given preference for vacancies and pre-training **because** they are members of the respondent Union. Once that factual finding is made (and I am satisfied on the evidence before me that that is the position), there is no need for any further inquiry into the parties' intentions in the original negotiation of the clause or indeed any attempt to discern a motive. …

Good faith

[11] Before the Authority, the Union contended that there had been a breach of good faith by Golden Bay in that the Company waited until after settlement of the collective agreement had been effected before seeking the Authority's determination as to the legality of cl 24, thus avoiding the prospect of strike action. The Authority rejected that contention and concluded that Golden Bay had been "absolutely explicit" in conveying to the Union prior to settlement that it intended to challenge the legality of cl 24.[3]

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2 *Golden Bay Cement*, above n 1.

3 At [57].

[12] In this Court, Mr Maurice Davis, the Secretary of the Union stated that Union members "feel gutted" that Golden Bay, having signed the collective agreement, was no longer honouring cl 24. However, counsel for the Union, Ms Helen White, confirmed in her closing submissions that there is no claim for breach of good faith. At the same time, counsel stressed that Golden Bay did sign the collective agreement containing cl 24 and she made the point that it was important that employees should be able to rely upon the terms of a settlement that had been agreed to and ratified by the Union.

The history of cl 24

[13] The evidence was that cl 24 (then numbered cl 25) first appeared in a collective contract under the Employment Contracts Act 1991 (the ECA) between Golden Bay and the Union which covered the period 1 November 1997 to 31 October 1999. The only material differences between cl 25 and the current cl 24 were:

(i) The first sentence in sub-clause 1, then read: "The vacancy will first be opened to applications from permanent GBC employees who are party to the GBC/AWU Process workers collective employment contract" whereas it currently reads: "The vacancy will first be opened to applications from permanent GBC employees who are covered by the GBC/AWU Collective Agreement."

(ii) The 1997 collective contract contained an additional provision which stated: "Training modules will be set up for areas, e.g. Plant Services, Quarry, Laboratory, Northland Service Centre and Shifts." That sub-clause does not appear in the current cl 24.

(iii) The original collective provided that "The company and union will jointly select people for pre-training" whereas the current collective agreement states that: "The Company and a Union site representative will jointly select people for pre-training."

[14] The Union pleaded that cl 24 (then 25) was introduced "as part of a raft of significant changes aimed at stabilising incomes and was promoted as a career pathway by management." There was evidence to this effect from Mr Raymond Bianchi, one of the Union witnesses. Mr Bianchi, a long serving Secretary of the Union, explained that in and around 1993 Golden Bay became involved in significant industrial unrest which led to strike action and a picket line. Mr Bianchi told the Court that cl 24 (then 25) was part of a series of changes to employment conditions initiated by Golden Bay in the years following that industrial unrest so as "to enhance productivity, including up skilling employees and to ensure a flexible work force." Mr Bianchi said that the proposals became known as "the career pathway". A stable income plan was introduced under which employees received a guaranteed income package and the opportunities for career advancement provided for in cl 24. Mr Bianchi said that his understanding was that the guaranteed income package which the workers agreed upon saved the company "and this is 20 years ago, about $250,000 a year".

[15] There was no dispute about the industrial unrest in the early 1990s or about the introduction of the stable income plan but Golden Bay's evidence was that the stable income plan was not linked to or dependent in any way on cl 24 of the collective agreement. Evidence in this regard was given on behalf of Golden Bay by the Company's former Human Resources (HR) Manager, Mr Alexander Gellatly. Mr Gellatly had been the HR Manager for Golden Bay between 1987 and 1989. He was then employed by Fletcher Construction from 1989 to 1994 and between 1994 and 2000 he provided consultancy services to a number of Fletcher Building subsidiaries. In that capacity, he had been engaged by Golden Bay as a consultant to assist in the introduction of the stable income plan.

[16] Mr Gellatly's evidence was that the stable income plan was introduced by Golden Bay in response to the Company's concerns about the significant cost of high levels of overtime, in particular about the fact that a certain number of employees were earning a large amount of overtime. Mr Gellatly explained that the stable income plan was designed to ensure that overtime was evenly spread between all employees. The witness described how the plan worked in practice but it is unnecessary for us to go into those details.

[17] In response to the allegation in the Union's statement of claim that the Union members agreed to accept a significant reduction in income in return for the benefits of cl 24, Mr Gellatly explained that while the incomes for employees did stabilise with the introduction of the stable income plan, they did not drop significantly as claimed by the Union. As the witness expressed it: "In fact, their incomes generally did not drop at all – rather they were guaranteed (or 'stable')."

[18] Mr Gellatly was not challenged on his evidence that the stable income plan was unrelated to the subsequent introduction of cl 24. The stable income plan was introduced by Golden Bay and agreed to by the Union in the 1996 collective employment contract which covered the period November 1996 to October 1997. Clause 24 first appeared as cl 25 in the collective employment contract covering the period November 1997 to October 1999.

[19] We will need to return to this aspect of the case involving the historical reasons for the introduction of the clause in question. Mr Gellatly moved to the South Island in 1997 and he was not involved in the negotiations of the 1997 collective contract.

[20] Turning to the more recent negotiations resulting in the inclusion of cl 24 in the current collective agreement, the evidence was that Golden Bay had been attempting to remove cl 24 from the collectives over a period of some 10 years. All such attempts had been strongly opposed by the Union.

[21] The first bargaining meeting for the new collective agreement took place on 13 November 2013. The previous collective had expired on 31 October 2013. Records and notes produced in evidence in relation to the bargaining process confirm that Golden Bay continued to maintain that cl 24 breached s 9 of the Act because it discriminated against non-Union members. Ms Lisa Maclean, who at the time was Golden Bay's HR Manager, recorded that Mr Davis' reaction was, "If you think the clause is discriminatory then take us to court". Golden Bay provided the Union with suggested amended wording for cl 24 and attempts were made to try and resolve the impasse through mediation but the mediation efforts proved unsuccessful.

[22] In reference to the suggestion made in para 14 of the Union's statement of claim that Golden Bay had offered a one per cent more pay increase if the Union members would accept the claim to alter cl 24, Ms Maclean agreed in evidence that such a proposal had been put forward as an option "as it would avoid the time/cost of seeking a declaration from the Authority and allow us to resolve all issues and have certainty at that time." The proposal was rejected by the Union.

[23] There was uncontested historical evidence, supported by relevant documentation, as to the practical operation of cl 24. Mr David Walker, Golden Bay's Operations Manager at the time, told the Court about an occasion in 2005 when the Company went through a recruitment process to create five new process controller positions. Employee A (as he was referred to in order to protect his anonymity as he is still employed by the company) applied for the role but was a salaried employee and did not come within the coverage of the collective agreement. He was not a member of the Union. Mr Walker explained that after he had discussed cl 24 with Mr Bianchi, the Company had to advise Employee A that, as he was not covered by the collective agreement, he could not be offered the role of process controller. Employee A withdrew his application.

Preference in employment

[24] The history of preference in employment was summarised in written submissions by Ms Phillipa Muir, counsel for Golden Bay, and is well documented in the reported authorities. It is not necessary for us to canvass the historical background apart, perhaps, from observing there has never been any suggestion that contractual preference provisions arising out of Union membership infringe upon areas of public policy or breach some rule of substantive law. As was noted in *Labour Law in New Zealand*, "…for the greater part of the history of industrial conciliation and arbitration in New Zealand unions have enjoyed certain benefits" the first of which was described as, "…a guaranteed membership by virtue of "preference" clauses in awards, providing that adult workers bound by the award must become and remain union members".[4]

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[4] John Hughes, *Labour Law in New Zealand* (The Law Book Company, Sydney, 1990) at [7.5].

[25] Section 9 of the Act, which sets up the prohibition on preference the present case is concerned with,[5] appears in Part 3 of the Act which has the heading: "Part 3 Freedom of association". The parliamentary explanatory note to this part of the Employment Relations Bill stated:[6]

> **Freedom of association**
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> Importantly, to maintain a balance between collective and individual employment rights, the Bill retains provisions for freedom of association, namely the voluntary membership of unions and prohibitions on any preference or undue influence in employment arrangements designed to influence the choice of whether to become or not become, remain or cease to be, a union member.

[26] The objects of Part 3 are set out in s 7 of the Act which provides:

> **7 Object of this Part**
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> The object of this Part is to establish that–
>
> (a) employees have the freedom to choose whether or not to form a union or be members of the union for the purpose of advancing their collective employment interests; and
>
> (b) no person may, in relation to employment issues, confer any preference or apply any undue influence, directly or indirectly, on another person because the other person is or is not a member of a union.

[27] In his submissions Mr Peter Cranney, counsel for the New Zealand Council of Trade Unions, invited the Court to consider s 7 in the context of s 3 of the Act which, as counsel expressed it, "is primary" and "identifies the objects of the entire Act".

[28] Mr Cranney stressed that the object of the Act expressed in s 3 is to build productive employment relationships through the promotion of good faith. Counsel made particular reference to the two methods of promoting good faith outlined in s 3(a)(iii) and (iv) of the Act respectively, namely, "by promoting collective bargaining" and "by protecting the integrity of individual choice". Mr Cranney also referred to the objective expressed in s 3(b) of the Act of promoting International Labour Organisation Conventions 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively. The scope and significance of the

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5 See para [8] above.

6 Employment Relations Bill 2000, (8-1) (Explanatory note) at 3.

two conventions were considered in some detail by the full Court in *National Union of Public Employees (Inc) v Asure New Zealand Limited.*[7] Convention 98 was referred to again by the full Court more recently in *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Limited*.[8]

[29] The forerunner of s 9 of the Act was s 7 of the ECA which provided:

> **7. Prohibition on preference** – Nothing in any contract or in any other arrangement between persons shall confer on any person, by reason of that person's membership or non-membership of an employee's organisation–
>
> (a) Any preference in obtaining or retaining employment; or
>
> (b) Any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.

Authorities on preference

[30] In *Air New Zealand Limited v Kippenberger*, which was a case decided under s 7 of the ECA, the High Court was concerned, relevantly, with whether the rules of a mutual benefit fund, which provided a form of insurance cover for pilots, contravened s 7 of the ECA by conferring on pilots, who were members of the New Zealand Airline Pilots Association, a preference in relation to terms and conditions of employment over pilots who were members of another union.[9] After considering the principles applicable to statutory construction and the meaning of the term "preference", the Court concluded that there was no breach of s 7 because substantially the same benefits were available to members of both unions.[10] Randerson J stated:[11]

> In my view, it is consistent with the scheme and object of the legislation to construe the word "preference" in s 7(b) of the ECA as meaning that the relevant contract or arrangement must confer some material advantage in relation to the terms or conditions of employment by reason of membership

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7 *National Union of Public Employees (Inc) v Asure New Zealand Ltd* [2004] 2 ERNZ 487 (EmpC).

8 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, at [189]-[193].

9 *Air New Zealand Ltd v Kippenberger* [2000] 1 NZLR 418, [1999] 1 ERNZ 390 (HC).

10 At 403.

11 At 402-403.

> or non-membership of a particular employees' organisation. Where the same or substantially similar terms or conditions of employment are also available to non-members of the relevant organisation, it cannot in my view be said that a preference in relation to conditions of employment has occurred within the meaning of the section.

[31] Both counsel in the present case cited the full Court decision in *National Union of Public Employees (Inc) v Asure New Zealand Limited*.[12] Asure, a state-owned enterprise providing meat inspection services, had 27 employees who were members of the plaintiff union (NUPE) and 775 employees who were members of the second defendant, the New Zealand Public Service Association (the PSA). Asure had negotiated an arrangement under its collective with the PSA designed to enhance its business, called the "Partnership for Quality" (PfQ) scheme. Under the PfQ members of the PSA would receive an extra payment (the PfQ dividend) above their normal wages. NUPE members were subsequently offered bonus remuneration, however, the bonus amount was less than the PfQ dividend. NUPE brought proceedings claiming that the PfQ dividend arrangement amounted to an unlawful preference in favour of PSA members contrary to s 9 of the Act.

[32] The Court analysed the High Court judgment in *Kippenberger* in some detail noting that it had been decided under the ECA and since the decision there had been two material changes:[13]

> First was the substantial change in the principal object of the Act. Where the ECA promoted an efficient labour market through freedom of association and choice, the ERA now seeks to build productive employment relationships by promoting collective bargaining and effectively strengthening the position of unions. The other material difference is the introduction of s 9(2). … We consider that subs (2) decision has been inserted to ensure that the conferring of different terms and conditions will not of themselves constitute an unlawful preference. Subsection 2 has the effect of focusing the Court's enquiry on the reasons for the preference.

[33] The Court held that nothing hinged on the difference in the wording between "by reason of" under the ECA provision and "because" under s 9 of the Act because they are "synonymous" in that they both involve not only issues of causation but consideration of the reasons or the motives for the preference.[14] It stated:[15]

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12 *National Union of Public Employees (Inc) v Asure New Zealand Ltd*, above note 7.
13 At [49].
14 At [54].
15 At [54].

> A preference cannot lawfully be conferred simply because a person is a member or non-member of a union. If it were conferred for some entirely different purpose, for example because the employee has conferred a greater benefit on the employer by agreeing to work extra hours, it would not amount to an unlawful preference for the purposes of s 9. In the end it is a matter of fact whether there is a preference and if so, what was its purpose.

[34] The Authority had found, and the finding was not challenged, that the PfQ was established to contribute to a better relationship between the parties and to improve and enhance Asure's business. The Court concluded:[16]

> The objectively verifiable difference in the values Asure believes the employee groups bring to their respective employment relationships, provides the critical motivation for the conferring of the preference. The evidence establishes that the preference has been conferred not because of the fact of membership, but because of the benefits that members of the PSA bring to this employment relationship. It is the collective and additional contribution of these employees (rather than their membership of a particular union) which earns them the preference. They are preferred for what they do collectively, although sometimes intangibility, in addition to their normal duties, rather than "because" they are members of a particular union.

[35] In *Eastern Bay Independent Industrial Workers Union Incorporated v ABB Limited*, some of the defendant's employees were members of the plaintiff union, others of the EPMU.[17] One of the plaintiff's causes of action alleged that in breach of s 9 of the Act, the defendant unlawfully preferred members of the EPMU to its own members by paying them additional remuneration known as a "relationship premium" which was not paid to members of the plaintiff union. The company's defence was that it was not an unlawful preference but rather it was a payment reflecting a better relationship between the company and the EPMU than that between the company and the plaintiff union. The company invoked the provisions of both ss 9(2) and 9(3) of the Act to justify the payment.

[36] The Court found that the "responsibility payment" contravened s 9(1)(b) of the Act in that it was an arrangement under which the defendant conferred on EPMU members a preference in relation to terms or conditions of employment based solely on their membership of that union.[18] The Court considered whether the payment

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16 At [57].

17 *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd*, [2008] ERNZ 537, (2009) 9 NZELC 93, 072 (EmpC).

18 At [73].

could be "saved" by virtue of s 9(2) or 9(3) of the Act.[19] In relation to s 9(2), the Court accepted that while it provided that a preference is not unlawful simply because terms and conditions are different from those of other employees, its factual finding was that the preference in the case before it was to influence overtly which union its employees would belong to.[20] Turning to s 9(3), the Court concluded that the subsection was not "engaged" because the responsibility payment was not included as a term in the EPMU's collective. The payment was provided for only in the terms of the settlement between the company and the EPMU which led to the collective. The Court held that its absence from the collective deprived the company and the EPMU of recourse to subs 9(3).[21]

[37] Two other authorities cited and relied upon by both parties were *New Zealand Meat Workers and Related Trades Union v Taylor Preston Limited*[22] and *Taylor Preston Limited v New Zealand Meat Workers and Related Trades Union*.[23] Taylor Preston operates a meat-works in Wellington which employees several hundred workers, approximately half of which were members of the Zealand Meat Workers and Related Trades Union (the MWU). The company and the MWU had been unable to negotiate a new collective agreement and, therefore, under the Act, upon the expiry of the old collective, the MWU member employees were deemed to be covered by individual employment agreements based on the terms (including pay rates) of the expired collective. In the meantime non-MWU employees, who had previously received the same pay rates as MWU members, had been offered and accepted written individual employment agreements with a pay increase of 10 per cent spread over three years.

[38] The case raised a number of issues but Judge Shaw isolated the principal question to be determined as being whether the pay increases offered to the non-MWU member employees amounted to a prohibited preference in breach of s 9 of the Act.[24] In this regard, the Court made reference to a notice the company had

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19 At [74].
20 At [74].
21 At [75].
22 *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd* [2009] ERNZ 54 (EmpC).
23 *Taylor Preston Ltd v New Zealand Meat Workers and Related Trades Union* [2009] NZCA 372.
24 *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd*, above n 22, at [15].

sent to its employees after bargaining for a new collective had come to an end which recorded that the company would not be offering the individual employment agreements containing the pay increases "to Union members".[25] Judge Shaw stated:[26]

> [58] I conclude at the point when bargaining ended and the company announced that union member employees would remain indefinitely on their existing terms and conditions while non-union member employees were offered and took increased pay rates, the preference was prohibited. It was expressly and unequivocally because of union membership.

[39] In considering s 9(3), Judge Shaw stated:[27]

> [43] Although s 9 prohibits a preference where it is conferred because a person is or is not a member of a union, s 9(2) acknowledges that mere difference in employment terms in the workplace does not make reference unlawful. Section 9(3) licences collective agreements to contain terms and conditions that recognise benefits. Different terms and conditions conferred on employees employed by the same employer may amount to preference but of itself this is not prohibited by s 9.
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> …
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> [45] … While subsection (3) is concerned with terms contained in a collective agreement and is not directly relevant to the facts of this case, it reinforces my view that one of the purposes of s 9 is to permit preferences which recognise benefits arising out of agreements between employers and employees.

[40] Judge Shaw referred to the *NUPE* and *ABB* decisions stating:[28]

> [49] Although the full Court referred to motive in its discussion of s 9, I do not read the *NUPE* decision as requiring an examination of the employer's subjective motives for conferring a preference to the extent urged on me by counsel. Motive is defined as "*a factor inducing a person to act in a particular way.*" Section 9 does not refer to motive but uses the word "*because*" which means "*for the reason that*." The question is to be determined as a matter of fact. In both *NUPE* and *ABB* the Court enquired into the real substance of the preferential payments, that is, the reason why they were conferred. The issue is what caused the preference to be conferred. If it was union membership then it is prohibited.

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25 At [25].
26 *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd*, above note 22.
27 *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd*, above note 22.
28 *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd*, above note 22.

[41] Taylor Preston unsuccessfully sought leave to appeal on a question of law, namely, as Ms Muir expressed it, "whether the preference was unlawful if the employer's subjective reason did not involve favouring non-union members." On this issue, the Court of Appeal stated:[29]

> As to the second question, this is also at odds with factual findings in the Employment Court that the preference was given to non-union members because they did not belong to the Union. That is sufficient to meet the test in s 9. There is no warrant in the wording of that section to require a further inquiry into subjective motive once the statutory test is met.

[42] The final authority referred to by counsel was *Pact Group (A Charitable Trusts) v Service and Food Workers Union Nga Ringa Tota Inc*.[30] Pact was a charitable trust which employed support workers to assist intellectually challenged people in the community. The majority of these support workers were members of one or other of two unions but although Pact also had a number of non-union employees. The issue was whether a pay increase agreed to in collective bargaining with the unions, but backdated only in respect of non-union employees, conferred an unlawful preference.

[43] Pact's case was that it offered the preference because it wished to maintain the traditional backdating of pay increases for non-union staff. The Court, relying in particular on the passage from the Court of Appeal decision in *Taylor Preston*,[31] concluded that intention and motive were relevant in determining causation ("because") under s 9.[32]

[44] The Court went further and held that even if motivation was a relevant consideration, it did not accept that the desire to maintain the traditional backdating process was even a significant factor in Pact's motivation. It referred to the "very difficult and even antagonistic employment relations which had characterised many

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29 *Taylor Preston Ltd v New Zealand Meat Workers and Related Trades Union*, above n 23, at [26].

30 *Pact Group (A Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZEmpC 119.

31 *Taylor Preston Ltd v New Zealand Meat Workers and Related Trades Union*, above n 23, at [26]. See above at [41] of this judgment.

32 *Pact Group (A Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc*, above n 30 at [60] and [61].

months of collective bargaining"[33] and it concluded that the preference was conferred on the non-union employees because they were not members of a union.[34]

[45] In a passage which has particular relevance to the facts of the present case, the Court in *Pact* stated:[35]

> [64] Statutory presumptions assist in deciding whether the preference of increased remuneration was conferred by Pact on its non-union employees because they were not members of a union. Since 2000 and the passing of the Act in that year, union membership and coverage by a collective agreement have been inextricably linked. So long as the work performed is covered by the collective agreement's coverage clause, a member of a union employed in a workplace where there is a collective agreement to which that union is a party, is covered by the collective agreement. It follows, as a matter of law, that the fundamental terms and conditions of employment of that employee are set by the collective agreement. Similarly, to be covered by a collective agreement, an employee must be a member of the relevant union.

The EMPU

[46] Mr Garry Pollak, counsel for the EMPU, explained in his submissions that the EMPU membership at Golden Bay is generally made up of tradespersons and for that reason the training and career opportunities that are the focus of the provisions in the collective agreement in the present case do not have relevance to EMPU members. Nonetheless, Mr Pollak confirmed the EMPU supported the Union's case submitting, in summary:

i) Clause 24 is not a preference whereby employees are differentiated on the basis of union membership or otherwise; and

ii) Clause 24 is entirely in accordance with the objects of the Act; and

iii) Despite certain statutory tensions existing, s 9(2) clarifies that there may be differentiating employment conditions amongst employees and since 2004 this has been emphatically reinforced by s 9(3).

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33 At [63].
34 At [65].
35 *Pact Group (A Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc*, above note 30. Footnotes omitted.

[47] Mr Pollak submitted that, through cl 24, Golden Bay had "curtailed its general freedom to appoint by a perceived benefit in terms of flexibility, productivity, and up skilling of its existing employees engaged in its manufacturing process." Elaborating orally on this written submission, Mr Pollak explained that there are two unions looking after the interests of their respective members and through collective bargaining the employer (Golden Bay) had come to different arrangements with each. To illustrate this point, Mr Pollak referred the Court to cl 31 of the current EMPU collective employment agreement which provides (relevantly):

> **31 Job security and Contractor Management**
>
> 31.1 Job Security
>
> The intent of this clause is to address the concern of employees regarding the use of contractors and to provide for continuity of employment even if some contracting out does occur. It is also intended to enable the Company to make sensible use of contractors with the aim of maintaining the viability of the business.
>
> 31.2 Undertaking not to terminate employment due to contracting out
>
> Subject to the limitations contained within this clause, the Company undertakes not to terminate the employment of any employee as a result of redundancy where that redundancy has arisen as a consequence of the contracting out of work that was traditionally performed by GBC employees.
>
> …

[48] Mr Pollak submitted that while members of the EMPU did not have the guaranteed career pathway entitlement provided for in cl 24 of the (AWUNZ) Union's collective agreement they did have the guarantee of employment provided for in cl 31 of their collective which, in turn, was an entitlement not available to (AWUNZ) union members.

[49] In response to the claims made by Mr Pollak, Ms Muir submitted:

> 86. It is accepted that clause 31 is different to the terms and conditions of the AWUNZ CEA and provides a benefit not available to AWUNZ employees. However, this benefit does not set out a priority at the expense of employees who are not EPMU members and its operation does not impact on them to their disadvantage.

Discussion

[50] The first issue is whether cl 24 of the collective agreement confers on members of the Union a preference by reason of union membership, in contravention of s 9 of the Act. There was no dispute that under cl 24 employees who are within coverage under the collective agreement receive first preference on vacancies. Ms White's principal submission, however, was that the "reason" or "cause" for this preference was not union membership but rather the fact that the rights or benefits of the clause had been secured "as a result of genuine, robust and lawful bargaining" and s 9 had "never been intended to prohibit this."

[51] Ms Muir submitted that cl 24 clearly conferred a preference on members of the Union when it came to opportunities for training, promotion or transfer. Counsel went on to state:

> 65. The only reason for the preference is <u>because</u> employees are members of AWUNZ. AWUNZ members clearly obtain a preference and an advantage by being considered first for job vacancies.

[52] In reference to the historical position, Ms Muir submitted:

> 60. The 1997 CEA further supports that the objective intention of the clause is to give preference to AWUNZ members because, at that time, the CEA was between the plaintiff, defendant and "*all persons named in the first schedule attached"*. Clause 25 (now 24) provided *"The vacancy will first be opened to applications from permanent GBC employees* ***who are party to the GBC/AWU Process workers collective employment contract***". The wording was changed to the current wording after the introduction of the Employment Relations Act 2000. However, the original clause and its operation in practice since … make it plain that this was about union membership and not coverage as the plaintiff now claims.

[53] The difficulty with that proposition, however, is that the Court is being invited to conclude that back in 1997 Golden Bay deliberately flouted the prohibition on preference provision in s 7 of the ECA by granting a preference for no apparent reason other than union membership. At that time, s 7 expressly prohibited any contractual provision conferring preference on any person by reason of union membership.

[54] The other difficulty with Golden Bay's submission that the original clause in the 1997 CEC was "about union membership and not coverage" is that under the ECA employee parties to a collective contract were not required to be members of a union and it cannot, therefore, be inferred that the introduction of the original clause had anything to do with union membership. This is the issue touched upon by this Court in *Pact*.[36] It is only since the passing of the Act in 2000 that it has been necessary for an employee to be a member of the relevant union to have coverage under a collective agreement.

[55] Ms Muir noted that upon the introduction of the Act in 2000 the wording of cl 25 (now 24) was changed and the changes are noted above in this judgment.[37] If the preference granted under the clause in question had been conferred solely because of union membership, as Golden Bay now claims, then it would have been clear that such a provision continued to remain unlawful under the new s 9 and that would have been another timely opportunity for Golden Bay to get it right and negotiate for the clause to be deleted or appropriately amended but that was not done.

[56] The alternative, and more appealing, approach to cl 24, which does not involve attributing any unlawful action to Golden Bay, is that advanced by the Union and the interveners; namely, that it was all about coverage and opportunities for career advancement rather than union membership. That approach is consistent with the evidence of Mr Bianchi, who was the only witness actually involved in the negotiations of the 1997 collective employment contract. In reference to cl 24 (then 25) Mr Bianchi said:

> The Defendant originally proposed that because of what became known as "*the career pathway*" it was viewed as very positive by the Defendant for many years and saved them significant financial resources. It was linked to other initiatives, which were designed to involve the Union which was seen as positive. It built the relationship between the employees and the management and it helped productivity. Union involvement in selection was a way of keeping the process fair.

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[36] At [45].

[37] At para [13] above.

> Together with other agreed terms like those that created a stable income and the opportunities clause 24 provided for career development were very much valued by the employees.

[57] Even if, contrary to our finding, it could be said that the preference was conferred because of union membership, we consider that cl 24 is also protected by virtue of s 9(3) of the Act which specifically permits a term or condition in a collective agreement that is intended to recognise the benefits of such an agreement and the benefits arising out of a collective relationship.

[58] Subsection (3) was inserted in the Act as from 1 December 2004 by s 8 of the Employment Relations Amendment Act (No 2) 2004. In *Taylor Preston* Judge Shaw, after making reference to *ABB Limited*, stated that, "Parliament added s 9(3) in 2004 to follow and statutorily confirm the effect of the *NUPE* judgment."[38] While that assumption is, perhaps, understandable, given that the *NUPE* judgment was dated 8 October 2004, it is not an accurate statement of the position. The Authority investigation in *NUPE* was carried out on 6 May 2004 and in its determination dated 8 June 2004, the Authority made reference in these terms to the amendment which would become s 9(3) of the Act.[39]

> [44] In that regard, I was referred to the wording of a proposed amendment to section 9 of the Act:
>
> *To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits–*
>
> *(a) of a collective agreement;*
>
> *(b) arising out of the relationship on which a collective agreement is based.*
>
> [45] The suggestion is that the existence of that proposal means that making a payment such as the PfQ dividend is currently an unlawful preference. Mr Aitkin gave evidence that the proposed amendment was initiated by him (and possibly others) because of doubt generated by political comments by opposition Members of Parliament rather than any belief within the State Services Commission that the practice is currently unlawful. The explanatory note accompanying the Bill says that "the proposal *confirms and clarifies* existing practice and other material surrounding the Bill supports the view expressed by Mr Aiken."

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38 *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd*, above note 22 at [45].

39 *Asure New Zealand Ltd v National Union of Public Employees*, CA67/04, 8 June 2004.

[59] Earlier in its determination, the Authority referred to Mr Aitken as the manager of the State Services Commission strategic employment relations team.[40]

[60] In its report on the Employment Relations Law Reform Bill, dated 22 July 2004, the Department of Labour referred to the various submissions received on the proposed amendment to s 9 but recommended no change to the draft subsection 3.[41] The Department made the following comments on the draft clause:[42]

> The policy intent of the Bill is to encourage and promote collective bargaining and to ensure that negotiations on benefits arising out of collective employment relationships are allowed. This clause clarifies existing law. There is no contradiction between this clause and the prohibition on preference.
>
> Any union has the ability to initiate a claim for such a provision and employers must consider such claims in good faith.

[61] Research has revealed that over 17,000 submissions were made in relation to the 2004 Employment Relations Bill, however, cl 8 (which introduced the new subs 9(3)) remained unchanged in its passage through the House of Representatives, including the Select Committee. The commentary in the report from the Employment and Accident Insurance Legislation Committee stated:[43]

> Freedom of association (Part three: clauses 8 to 12)
>
> A number of submitters commented generally on the freedom of association provisions in the [B]ill. Where employees and unions commented, they were generally positive about the voluntary unionism and freedom of association provisions. Any comments by employers were generally negative. Much of the comment was related to support or otherwise of unionism. Some submitters supported the provisions as bringing New Zealand law more into line with ILO conventions.
>
> The committee, by majority, is not recommending any amendments to Part 3.

[62] It appears to us that consistently with the objects of the Act, in particular the object to build productive employment relations by promoting collective bargaining,[44] s 9(3) recognises that unions and employers are free to negotiate and

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40 *Asure New Zealand Ltd v National Union of Public Employees*, above n 38, at [10].
41 Department of Labour, *Employment Relations Law Reform Bill*, (ER/DOL/5) at 25-26.
42 At 26.
43 Employment and Accident Insurance Legislation Committee, *Employment Relations Bill and Related Petitions*, (13 September 2004) at 7.
44 At para [28] above.

agree upon terms and conditions in a collective agreement which might otherwise infringe upon the prohibition on preference provisions in s 9(1). Subject to any specific provisions in the Act and the requirements of good faith, the legislature has been content to allow parties to have virtually a free hand when it comes negotiating the terms and conditions of a collective agreement.

[63] Section 9(3) is unusual in that it requires the Court, as part of the interpretation exercise in determining whether a provision in a collective agreement infringes the prohibition on preference, to have regard to what the term or condition was intended to recognise. If the intention was to recognise the benefits of a collective agreement or the benefits arising out of the relationship on which a collective agreement is based then no preference is conferred which breaches s 9.

[64] Mr Bianchi gave convincing unchallenged evidence that the clause in question was first introduced at the initiative of Golden Bay to provide a guaranteed career pathway for union members which would, in turn, enhance productivity. The clause was part of a series of changes to employment conditions at its site which included the up-skilling of employees so as to ensure a flexible workforce. The ultimate objective was to achieve an enhanced financial performance for the company. Mr Bianchi told the Court how Golden Bay management took him and others to Victoria, Australia, to view similar reforms in the workplace which had been carried out at the Alcoa aluminium plant. Mr Bianchi said that both the Union and Golden Bay were able to learn from the Alcoa experience. He explained how initiatives taken by Golden Bay involving the Union were “seen as positive" and, in turn, the closer relationship established between the company and the Union increased productivity. As Mr Bianchi expressed it, "the opportunities clause 24 provided for career development was very much valued by the employees."

[65] There was no other reliable evidence directed at the issue of what cl 25 (now 24) was intended to recognise. As noted above,[45] Mr Gellatly was not involved in the negotiations resulting in the introduction of cl 25 and, although he was able to say that the clause was not a factor in the introduction of the stable income plan, he did not disagree with a proposition put to him by the Court that the provisions of

[45] At para [19] above.

cl 25 appeared to be consistent with other elements of the Company's guaranteed career incentive scheme which the Court was informed of. For the record, therefore, we accept Mr Bianchi's evidence and find on the facts that the preference in question was not conferred because of union membership.

[66] It appears to us that cl 25 (now 24) formed an important part of the guaranteed career pathway agreement Golden Bay reached at the time with the Union. It was a provision which recognised benefits which, in reality, could only be achieved through a collective agreement and the relationship based upon such an agreement. To that extent, it is typical of the type of provision intended to be protected by s 9(3) of the Act.

[67] By way of analogy, cl 24, which provides a guaranteed career pathway entitlement to Union members, can be positively compared with cl 31 of the EMPU collective employment agreement,[46] which would appear, from what we were told, to provide job security to EMPU members. In both cases the relevant terms and conditions were intended to recognise benefits that in practice could only be achieved through collective agreements and the relationship arising out of such agreements.

[68] In so holding, the Court should not be seen to be condoning in any way the specific provisions of cl 24.6 of the collective agreement which provide that an employee who has completed pre-training and is selected for a vacancy is obliged to take up the relevant job if they are required to do so by the Company. Although it was not argued before us, such a provision would appear to infringe against the common law doctrine of servitude. In this case, however, the Union has not taken any exception to the provision and has indicated that it is prepared to continue recognising that its members' obligations under this sub-clause are part of the package agreed to when cl 24 was originally introduced.

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[46] At para [47] above.

Conclusions

[69] For the above reasons, the Union succeeds in its challenge and this judgment now stands in place of the Authority's determination of 31 March 2015.

[70] We reserve the question of costs. If that issue cannot be resolved directly between the parties then the plaintiff may file submissions within 28 days from delivery of this judgment and the defendant will have a further 28 days in which to file submissions in response. In accordance with the usual practice in this jurisdiction, the interveners should bear their own costs.

For the full Court
A D Ford
Judge

Judgment signed at 12.20 pm on 1 February 2016