IN THE EMPLOYMENT COURT
AUCKLAND

AC 49/09
ARC 71/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NORSKE SKOG TASMAN LIMITED Plaintiff
AND	MANUFACTURING & CONSTRUCTION WORKERS UNION INC First Defendant
AND	BRIAN BOYLEN Second Defendant

Hearing:	28 May 2009 (Heard at Auckland) with additional written submissions filed on 8 and 15 June 2009
Court:	Chief Judge G L Colgan Judge B S Travis Judge A A Couch
Appearances:	Richard McIlraith and Kylie Dunn, Counsel for Plaintiff Kathryn Beck and Karen Jones, Counsel for Defendants
Judgment:	9 December 2009

JUDGMENTS OF THE FULL COURT

JUDGMENT OF CHIEF JUDGE GL COLGAN AND JUDGE BS TRAVIS

(Given by Chief Judge GL Colgan)

[1] This case concerns the requirement of the Employment Relations Act 2000 ("the Act") that every employment agreement must contain an employee protection provision ("EPP") to take effect if the employer restructures its business. The key issue is whether the employer can proceed with restructuring if no such provision has been agreed.

[2] In this case, the Authority determined (AA 306/08, 26 August 2008) that it was implicit in s69OJ that a restructuring could not proceed unless and until the employment agreements of the affected employees contained EPPs. On that basis, the Authority made a compliance order requiring the parties to *"negotiate until such time as they comply with s69OJ"* and restraining Norske Skog Tasman Limited ("Norske Skog") from implementing its proposed restructuring.

[3] Norske Skog challenged that determination and the matter proceeded before the Court by way of a hearing de novo. Because it involved novel and potentially difficult issues arising out of a part of the Act applying to the majority of employees in New Zealand, a full Court was convened.

Facts

[4] The parties helpfully provided the Court with an agreed statement of facts and an agreed bundle of relevant documents. Based on those materials, the essential facts are as follows.

[5] Norske Skog operates a paper mill in Kawerau. One of the operations at the mill is known as wood processing. Following contracting out of part of this operation in 2006, Norske Skog has employed seven employees in this area ("the affected employees"). The second defendant, Mr Boylen, is one of them.

[6] Those seven employees are all members of the Manufacturing & Construction Workers Union Inc ("the union") through its Pulp and Paper Council. From 1 September 2004, their work was covered by a collective agreement between the union and Norske Skog known as the SupplyCo collective agreement. That collective agreement expired on 28 February 2007. As bargaining for a collective

agreement to replace it commenced before it expired, however, the SupplyCo agreement continued in force after its expiration by operation of s53 of the Act.

[7] That bargaining began on 31 December 2006 and Norske Skog and the union have continued on and off to bargain for a new collective agreement covering the wood processing workers ever since. They have had mediation assistance on several occasions and, in 2008, took part in facilitated bargaining with a member of the Authority pursuant to ss50A and following. Despite that, the union and Norske Skog remain unable to conclude a new collective agreement.

[8] The SupplyCo collective agreement did not contain a discrete and explicit EPP. Bargaining for a new collective agreement has included bargaining for such a provision, but the terms of it have been one of the points of difference which have prevented a new collective agreement being concluded.

[9] Following earlier contracting out of parts of the wood processing operation, Norske Skog considered whether the remaining part of that operation might also be more efficiently operated by a contractor. In June 2008, Norske Skog initiated consultation with the union, Mr Boylen and other potentially affected employees about such a proposal. The union and its members declined to participate in the consultation process, saying that restructuring could not proceed until an EPP had been agreed.

[10] After receiving submissions from affected parties other than the union and the affected employees who are its members, Norske Skog issued a request for proposals for contracting out the remaining part of its wood processing operation. Tenders were received which confirmed that cost savings could be made by contracting out this work and Norske Skog wished to proceed with doing so.

[11] The union and Mr Boylen then issued these proceedings in the Authority seeking orders that the parties comply with the statutory requirement to agree an EPP and restraining Norske Skog from contracting out the wood processing work until such an agreement had been reached. Norske Skog agreed to put its plans for contracting out on hold until those proceedings were determined.

The Employment Relations Authority's determination

[12] The Authority found that the existing employment agreements did not satisfy the statutory requirement for an EPP. It concluded that the consultation obligations did not require agreement on the effects of changes and the existing provisions do not deal expressly with negotiations with a new employer. These deficiencies were not remedied by the company's redundancy policy.

[13] The Authority concluded that rather than deliberately omitting a sanction for non-compliance with s69OJ, Parliament overlooked inadvertently the consequences of non-compliance. At paragraph [85] the Authority concluded:

> *When Parliament has legislated that specific things must be included in employment agreements and that the purpose of that inclusion is to protect the interests of employees in a restructuring situation it is difficult to conclude that Parliament would have intended that a failure (and I accept that the failure is that of the parties to the negotiation) to negotiate the specified provisions would render the protection given by those provisions nugatory.*

[14] The Authority decided that the omission in 2006 of an equivalent of the former s69N(2)(c) was an inadvertent omission. It upheld the case of the union and the employees. The orders made by the Authority at paragraph [98] were:

> *The parties are to negotiate until such time as they comply with s69OJ. Until an EPP is agreed the respondent is not to implement its proposed restructuring.*

[15] The Authority did not make a single compliance order requiring the parties to negotiate to comply with s69OJ, subject to a condition under s138 that Norske Skog was not to restructure until the order had been complied with. Rather, we find the Authority made two compliance orders under s137. The first required negotiation and settlement of EPPs. The second prohibited implementation of the proposed restructuring. This second order was based on the Authority's conclusion that there is an implicit statutory requirement that an employer must not restructure unless and until all applicable employment agreements contain an EPP.

[16] The union and Norske Skog have continued to bargain for a collective agreement including an EPP, but without success. Norske Skog has not attempted to proceed with contracting out the remaining wood processing work.

Undertaking as to future conduct

[17] Norske Skog gave the Court and the defendants the following undertaking on 28 May 2009:

> *Should Norske Skog Tasman Limited (**"Norske Skog"**) contract out its Wood Processing area as part of the current process, it undertakes the following:*
>
> *(a) it will negotiate with the contractor regarding the effect of the contracting out on the PPWU members employed in its Wood Processing area (**"PPWU Wood Processing Employees"**);*
>
> *(b) it will involve both the PPWU and the PPWU Wood Processing Employees in those discussions;*
>
> *(c) such discussions will address:*
>
> *(i) whether the PPWU Wood Processing Employees will transfer to the contractor; and*
>
> *(ii) if so, on what terms and conditions of employment,*
>
> *with a view to as many as possible of the PPWU Wood Processing Employees transferring on the same terms and conditions;*
>
> *(d) if a PPWU Wood Processing Employee elects to accept employment with the contractor, but the role is on lesser terms and conditions, they will receive:*
>
> *(i) redundancy compensation in accordance with the Redundancy and Redeployment policy;*
>
> *(ii) should the contractor not offer the same salary, a one-off lump sum equivalent to the difference between the base salary offered by the contractor and 80% of the employee's current salary in a 12 month period; and*
>
> *(iii) should the contractor not offer superannuation at the same or greater than the entitlement provided by Norske Skog, Norske Skog will pay a one off lump sum equivalent to the difference between the two superannuation schemes for a 12 month period, to a superannuation scheme nominated by the employee;*
>
> *(e) it will discuss with the PPWU and the PPWU Wood Processing Employees what entitlements are available to the PPWU Wood*

Processing Employees if they do not transfer to the contractor. In particular, Norske Skog undertakes that the PPWU Wood Processing Employees may elect to either:

(i) be redeployed to any other available role within Norske Skog;

(ii) take voluntary redundancy; or

(iii) transfer to the redeployment pool set out at clause 18 of the Paper Mill collective agreement; and

(f) it will, in all other respects comply with its obligations under the Redundancy and Redeployment policy, including the extension of the offer of voluntary redundancies to other areas in the business to maximise redeployment opportunities.

Statutory provisions

[18] The Employment Relations Amendment Act (No 2) 2004 introduced Part 6A containing detailed provisions intended to promote continuity of employment for employees affected by restructuring. Those provisions were further amended in 2006, in part as a consequence of this Court's judgment in *Gibbs & Ors v Crest Commercial Cleaning Ltd*[1]. The employees to which this case relates, including Mr Boylen, are covered by Subpart 3 of Part 6A. The relevant provisions of that Subpart are as follows and, in particular, as underlined by us:

69OH Object of this subpart

The object of this subpart is to provide protection to employees to whom subpart 1 does not apply if, as a result of a restructuring, their work is to be performed by or on behalf of another person and, to this end, to require their employment agreements to contain employee protection provisions relating to negotiations between the employer and the other person about the transfer of affected employees to the other person.

69OI Interpretation

(1) In this subpart, unless the context otherwise requires,—

…

***"employee protection provision"** means a provision—*

(a) the purpose of which is to provide protection for the employment of employees affected by a restructuring; and

(b) that includes—

(i) a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and

[1] [2005] ERNZ 399

(ii) the matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and

(iii) the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer

69OJ Collective agreements and individual employment agreements must contain employee protection provision

Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.

Substantive issues

[19] The case for Norske Skog raises the following three issues:

(a) whether the existing terms of employment of the affected employees include an EPP;

(b) if not, whether it is implicit in the Act that restructuring cannot proceed unless and until there is an effective EPP;

(c) if so, whether a compliance order should be made requiring the parties to settle such a provision before restructuring can take place.

Preliminary jurisdictional issues

[20] Several additional jurisdictional issues arose during the course of argument and we allowed counsel to make timetabled written submissions to us on these. Although received after we heard submissions on the substantive issues, it is logical that we address them first in this judgment. In several different respects, the right to have the substantive questions decided depends upon contested jurisdiction.

Legislative gap filling and correction

[21] The substantive and preliminary jurisdictional issues in this both raise questions of legislative interpretation. In particular, the issue is what is to be done where the statute is completely silent on a matter that Parliament might have been expected to have addressed. Not unassociated with this is how to deal with an express provision in a statute that leads to an absurd and obviously unintended result or consequence.

[22] Whether the Court can interpret and apply a statute other than by the plain meaning of its words and phrases or in the absence of a provision or provisions, arises in two separate aspects of this case. The first is on a preliminary jurisdictional question. That is whether the Court is empowered to make a compliance order as the Employment Relations Authority did and as will be necessary if the defendants are to succeed as they did in the Authority. The second occasion on which the Court must consider these legal principles is on the substantive issue whether, unless and until the parties have an EPP, the employer may be restrained from restructuring its operations in a manner that will affect the employees.

[23] We deal in principle with this topic now. It is sometimes described as ellipsis but we will refer to it as "omission", and will refer back to the following reasoning later in the judgment.

[24] The leading judgment in this area in the United Kingdom is that of the House of Lords in *Inco Europe Ltd v First Choice Distribution*[2] followed in this country by the Court of Appeal in *Securities Commission v Midavia Rail Investments BVBA*[3] and recently approved by Tipping J in the Supreme Court in *McAlister v Air New Zealand Ltd* at paragraph [97][4]. A court may augment a statutory provision by implication where it is abundantly sure of three matters. First is the intended purpose of the statute or provision in question. Second, the Court must be sure that

[2] [2000] 1 WLR 586; [2000] 2 All ER 109
[3] [2005] 3 NZLR 433 (adopted in *Gibbs*)
[4] (2009) 8 HRNZ 801; (2009) 9 NZELC 93, 242

by inadvertence, the drafters and Parliament failed to give effect to that purpose in the provision in question. Third and finally, the Court should be sure of the substance of a provision Parliament would have made, although not necessarily the precise words it would have used, had the error or omission been noticed. As the judgment of Lord Nichols in *Inco* also notes at 592-593:

> *Sometimes, even when these conditions are met, the Court might find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. … The insertion must not be too big, or too much at variance with the language used by the Legislature. Or the subject matter may call for a strict interpretation of the statutory language as in penal legislation.*

[25] As this Court remarked in *Gibbs* at para [77], an enduring New Zealand case on this topic is the judgment of the Court of Appeal in *Northland Milk Vendors Assn Inc v Northern Milk Ltd*[5]. That was a case of new legislation that had not anticipated a very real problem which had not been expressly provided for and possibly not even foreseen by Parliament. Cooke P noted at pp537-538 of the Court of Appeal's judgment:

> *Whether or not the legislature has provided those aids, the Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended. … The present case is in our opinion another illustration of a hiatus which the Court can legitimately and should bridge.*

[26] In *Midavia* the Court of Appeal noted more recently at para [22], when dealing with a legislative omission:

> *This interpretation accords with common sense. There could be no possible reason why Parliament would have wanted to remove 'insider trading' proceedings from the commercial list when passing the Securities Markets Amendment Act 2002. There also could be no logical reason why the public issuers' claim (it brought) would be on the commercial list but not the same claim brought by the Securities Commission.*

[5] [1988] 1 NZLR 530; (1988) 7 NZAR 229

[27] A very important question in determining whether the Court should gap fill is to ascertain, to the extent this is possible, whether the omission is a case of inadvertent or deliberate omission.

[28] Although further analysis of the law is set out in much more detail in our judgment in *Gibbs*, we do not propose to reiterate it here but, rather, adopt and apply what we said in that case.

Preliminary issue 1: No power to order compliance

[29] First, Norske Skog submitted that this Court's powers to make compliance orders are limited to what is conferred on the Court by ss139 and 140 and do not extend to the powers expressly conferred on the Employment Relations Authority under ss137 and 138 of the Act. Accordingly, Norske Skog says that even if the defendants and the Authority are right that there is an implicit statutory prohibition on restructuring without an EPP and this is amenable to compliance order, it is not for the Court to make such an order.

[30] At first blush, it seems a remarkable proposition that an appellate court cannot make an order that it is satisfied the original tribunal ought to have made or, even more remarkably, cannot confirm on appeal the making of such an order. However, that is the apparent effect of the legislative change wrought by s61 of the Employment Relations Amendment Act (No 2) 2004. This added a new subs (2) to s183 dealing with decisions of the Court on challenges (appeals) to Authority determinations. Section 183 now reads:

> *(1) Where a party to a matter has elected under section 179 to have that matter heard by the Court, the Court must make its own decision on that matter and any relevant issues.*
>
> *(2) Once the Court has made a decision, the determination of the Authority on the matter is set aside and the decision of the Court on the matter stands in its place.*
>
> *(3) Despite subsection (2), a person may apply for review of the determination of the Authority under section 194.*

[31] The effect of subs (2) is that the Court's decision on a challenge sets aside the Authority's determination even if the Court is satisfied that the determination was correct. Regardless of the substance of the Court's decision, the determination of the Authority is set aside by operation of statute and the only effective decision is that of the Court.

[32] This leads to a serious problem in cases such as this, where the Court may not have the express statutory power to make either the order that the Authority made or an order that the Court considers the Authority ought to have made. As Mr McIlraith pointed out, such a situation arises arguably in relation to compliance orders. The Authority purported to make the compliance order in this case under s137 and/or s138 of the Act. The power to make compliance orders under these sections is confined to the Employment Relations Authority: s161. The Act provides the Court with exclusive power to make other, and considerably more limited, types of compliance orders under ss139 and 140 which have no relevance in the present case.

[33] Sections 187 (jurisdiction) and 188 (role in relation to jurisdiction) do not expressly empower the Court to make compliance orders except under s139. Nor does s190 which extends some of the powers of the Authority to the Court. Section 187(1)(a) provides the Court with express and exclusive jurisdiction to hear and determine elections under s179 relating to matters previously determined by the Authority. However, can it be said that it is necessarily implicit in this jurisdiction to hear and determine challenges that the Court has jurisdiction to make any order that the Authority might have made at first instance?

[34] The statute does give the Court express power to make some orders on challenges that the Authority made or did not make including, for example, under s6(5) determining the status of a person claiming to be an employee. This may, in turn, reinforce the argument that Parliament did not intend the Court to have other powers it has not addressed expressly.

[35] The implications of the legal position argued for by Norske Skog are logical but bizarre. A party against whom a compliance order under s137 is made by the

Employment Relations Authority would need only to bring and prosecute a challenge to the Authority's determination to both negate the effect of the order made by the Authority and to ensure that no further order could be made by the Authority or the Court even if the challenge were to be completely devoid of merit. Likewise, an unsuccessful applicant for a compliance order under s137 in the Authority would be unable to obtain more than a declaration that the Authority was wrong, irrespective of the merits of the case for a compliance order.

[36] A literal interpretation of other provisions of the Act produces similarly nonsensical results. An example is s128 which deals with the remedy of reimbursement. Subsection (1) of s128 declares that it applies where *"the Authority or the court"* determines that an employee has a personal grievance and has lost remuneration as a result. Subsections (2) and (3) then stipulate what *"the Authority"* must or may do in such circumstances. Subsection (1) clearly contemplates that the section will apply to matters before the Court yet a literal application of the words used in subsections (2) and (3) would give the Court no powers to exercise. The only sensible interpretation is that there has been an omission and that subsections (2) and (3) are intended to apply to the Court as well as to the Authority.

[37] We are sure that Parliament could not have intended such outcomes of literal interpretations. It follows that there must be an implied power for the Court to make such orders as it is satisfied the Authority ought to have made in proceedings brought by way of challenge. This has been described as a derivative jurisdiction or power[6].

[38] There are different routes to this conclusion. The first is the succinctly stated reasoning of the Court of Appeal in interpreting and applying New Zealand employment legislation in *Board of Trustees of Timaru Girls High School v Hobday*[7]. There was a challenge to the jurisdictional power of the Employment Court to make an order for interim reinstatement in the absence of an express statutory provision in the Employment Contracts Act 1991. The Court of Appeal

[6] See, for example, *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 446
[7] [1993] 2 ERNZ 146, 161

had no hesitation in determining the existence in practice of such a power, presumably by necessary implication, for the following reasons:

> … *It would be an extraordinary situation if something so fundamental as the preservation of an employee's position pending a personal grievance could not be achieved when the Employment Contracts Act provided for reinstatement. It could not have been the Legislature's intention to deny employees involved with the Act's grievance procedures protection of the status quo; to do so would be quite inconsistent with its emphasis on mediation and settlement.*

[39] The nature and purpose of the implied power held to exist in *Hobday* is analogous to the power contended for in this case to ensure that appropriate remedies can be applied.

[40] Next is the analytically more detailed route of statutory interpretation and curing of omissions as already referred to in paragraphs [21] to [28]. The intended purpose of this part of the Act is to establish an appellate structure, although not so named, by which parties may challenge determinations of the Authority and the Court can correct these if they are wrong. Sections 187, 188 and 194 all describe the Court's function in relation to a challenge as not only to "hear" the matter but also to "determine" it. "Determining" challenges or other proceedings suggests strongly that Parliament intended the Court to be able to grant effective and appropriate remedies. As already noted, we are not aware of any other appellate structure, especially in which hearings de novo are permitted, that precludes effectual remedies in some cases.

[41] We are confident that, when subs(2) was inserted into s183, Parliament did not intend to deprive the Court of jurisdiction to effectively discharge a major part of its role and that the omission of a provision confirming the jurisdiction of the Court can only have been inadvertent.

[42] Finally, we are sure of what Parliament would have enacted had it turned its attention to this irrationality. It would have provided that, on a challenge to a determination of the Employment Relations Authority, the Employment Court has the power to make such orders as it is satisfied the Authority ought to have made (in the case of a successful challenge) or confirming the orders the Authority made (in

the case of an unsuccessful challenge). That is particularly so because this is a provision dealing with the process of litigation and indeed access to justice. These are questions on which the Court is, if not uniquely qualified to express a confident view, then especially placed to do so. While we might be more cautious in reaching such a conclusion involving other elements of employment law, we have no such hesitation in this case. To do otherwise would render ineffectual Parliament's intentions for the resolution of employment relationship problems and allow for significant rights to be without remedies.

[43] For these reasons we conclude that the Court is empowered on a challenge to exercise the remedial powers attaching to the investigation and determination of the Authority.

[44] Despite this conclusion, we would nevertheless recommend legislative reconsideration of these and other like anomalies to which we now turn.

Preliminary issue 2: Prohibition against bargaining – related orders

[45] Next, Norske Skog submitted that neither the Court nor the Authority is or was entitled in law to consider the defendants' claims or to make a compliance order because this relates to bargaining and is thus prohibited by s161(2). That is a proviso to the Authority's *"exclusive jurisdiction"* section and says, materially, *"… the Authority does not have jurisdiction to make a determination about any matter relating to … bargaining; or … the fixing of new terms and conditions of employment."* The exceptions to this prohibition are the provisions under subs (1)(ca), (cb), (d), (da), and (f) relating respectively to facilitated bargaining, the fixing of terms and conditions of employment, unfair bargaining, and obligations of good faith in bargaining. These paragraphs, with these exceptions, are not in issue in this case. All except (f) arise rarely in litigation. The exception relating to enforcement of obligations of good faith in bargaining enables important rights and obligations set out in the Act to be dealt with and enforced in determinations. Although this case deals arguably with bargaining in the sense of whether parties should be compelled to negotiate and settle EPPs, these are not good faith issues in this particular case as that term is defined in ss4 and 32 of the Act.

[46] The submission for Norske Skog is that s161(2) precludes the Authority (and thereby the Court on this challenge) from making a compliance order requiring parties to agree on the inclusion of a provision in employment agreements. That is based on the simple ground of a plain meaning of the words of the Act. The subsection confirms that, with exceptions that are not applicable to this case, the Authority does not have jurisdiction to make a determination about any matter *"relating to bargaining"* or *"the fixing of new terms and conditions of employment"*.

[47] The phrase *"relating to bargaining"* is problematic in its apparent breadth. On Norske Skog's interpretation, the Authority purported to direct compliance with the statute by requiring the parties to settle new terms and conditions of employment. The process for doing so is *"bargaining"*. The word is defined in s5 of the Act although *"in relation to bargaining for a collective agreement"*. There is no logical reason to give it a different meaning in relation to bargaining for individual employment agreements or variations to these. Its statutory meaning is a broad one including *"all the interactions between the parties to the bargaining that relate to the bargaining"* and including *"negotiations that relate to the bargaining … and … communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining."* All these propositions have been confirmed by the Court of Appeal in *Canterbury Spinners Ltd v Vaughan*[8].

[48] We do not accept Norske Skog's contention that, broadly interpreted, s161(2) precluded the Authority (and would now preclude this Court) from considering the defendants' claims about compliance with s69OJ and/or making an order for compliance with it. That is for the following reasons.

[49] Section 161(2) was considered by the Court of Appeal, although not precisely on the point at issue in this case, in *Canterbury Spinners*. The following (with passages upon which we rely particularly underlined by us) are the observations of Blanchard J, who delivered the judgment of himself and Anderson J, and with whom Keith J did not disagree in his separate judgment:

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[8] [2002] 1 ERNZ 255; [2003] 1 NZLR 176 at para [40]

[41] We agree also with the Court that "bargaining" has its ordinary meaning in s 161(2) and that it is synonymous with "negotiating". The crucial question is, however, the end to which the bargaining or negotiating is directed. What we now say is subject, necessarily, to other provisions of the legislation such as ss 68 and 69 and the obligations of good faith, at common law and under the statute. With, then, that caveat, what s 161(2) prohibits the authority (or the Court if the matter comes before it in terms of the removal or challenge provisions – ss 178 and 179) from doing is being involved in the process of creating a new contractual term or terms – either when the parties are starting from scratch and constructing an entirely new agreement or when they are working towards supplementing or varying an existing contract. The authority may not become involved in the bargaining which precedes the formation or variation of a contract. It may not, for example, intervene in the negotiations and order a party to conduct itself, perhaps by making an offer, in a certain way. Nor may it act as arbiter and, where the bargaining does not lead the parties to agreement, settle for them the outstanding issues and thus complete the new term or terms for them.

[42] But that process of the parties bargaining for and endeavouring to settle new terms and conditions is quite different in its legal significance from the process of trying to reach a consensus over the meaning and effect of an existing contractual term (or terms) already binding upon the employer and employee. This latter process may involve an attempt to reach accord through negotiation on what the existing contract actually requires a party to do in order that the respective rights of the parties can be determined.

[43] Suppose, for instance, an employment contract were to contain a redundancy clause which said:

> *"The employer will pay the employee in the event of termination for redundancy a sum which is, in accordance with industry practice, reasonable in the circumstances, and will negotiate such sum with the employee."*

Undoubtedly, in accordance with ordinary principles of contract law, such a clause would create a present right in an affected employee to receive reasonable compensation, which could if necessary be fixed by the authority if there were to be a breakdown in negotiations between the parties (Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444). The authority could also, if it thought it appropriate, become involved in the procedure of bargaining (although in practice in such a straightforward case we imagine it would rarely do so). There might well be some uncertainty in the minds of the parties, when they first looked at the clause when a situation of redundancy arose, about the level of compensation which must be paid to the employee, but the clause would not be legally uncertain, that is, incapable because of its vagueness of being adjudicated upon. It would have contractual effect despite doubts about its operation. There might well be a process of bargaining as the parties strove to reach accord on the financial consequence of the clause, but that would not be "bargaining" of the kind contemplated by s 161(2), for it would be directed not towards fixing a new term or condition – creating a new contractual right and obligation respectively for employee and employer – but, rather, towards applying or operating (to use the words of s 161(1)(a)) an existing term or condition. In this latter process the authority is empowered to exercise jurisdiction at the behest of a party. In a particular case it may simply be a matter of

> *interpretation of a word or phrase or it may involve giving effect to the contractual intention by discerning what, by implication, the parties must have been intending. Some general guidance on the correct approach, and on the limitations upon it, is to be found in this Court's decision in Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd [2002] 2 NZLR 433 at paras [50] – [67].*
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> *[44] The proper question for the authority to ask itself, when considering whether the disputed provision brought before it is one upon which it is prohibited from giving a determination is whether, correctly interpreted, the provision already creates rights which are legally enforceable and, if so, what those rights are. Or is it merely an agreement to agree, or an agreement which directs a certain procedure but does not go so far as to indicate sufficiently an end result, so that, in either case, it is incapable of creating contractual rights? If so, any determination would in law create a new term or condition and the authority may not intervene.*

[50] While the issue in that case could be said on a broad interpretation of s161(2) to be related to bargaining, the Court of Appeal held it was in reality an issue about the interpretation, application or operation of a contractual clause and so was not prohibited by s161(2). In this case, by analogy, the real issue can be categorised as interpreting and applying a statutory provision that requires parties to agree to an EPP. So, although, on a broad construction of s161(2), that could be said to be a matter relating to bargaining, the true nature of the issue determines that the Authority was not precluded from examining it and nor should the Court be. Persons are required to comply with the law. If they do not, they may be compelled to do so. The statute is not overly prescriptive as to how s69OJ is to be complied with and the Authority and the Court can go no further than the statute mandates, which falls short of prescription of terms and conditions of employment. It does, however, set out what those terms and conditions must address, a matter to which we return. We conclude it cannot have been Parliament's intention to prohibit the Authority or the Court from requiring compliance with the statute in appropriate cases. Indeed, there is no other mechanism for doing so in any other court.

[51] The approach of the Court of Appeal in *Canterbury Spinners* was followed by this Court in *Asure NZ Ltd v NZPSA Inc*[9]. In that case the Employment Relations Authority determined that s161(2) precluded it from interpreting or applying a provision of an existing and operative agreement that was in dispute but about which

[9] [2005] ERNZ 747

the parties were also bargaining collectively. The Authority applied a literal interpretation of s161(2) and concluded that because the disputed clause was being bargained about, the Authority could not determine its meaning, albeit under a collective agreement the currency of which was extended statutorily. This Court noted:

> *[13] Read literally and in isolation, s 161(2) may apparently mean what the Authority found it to mean. The phrase "about any matter relating to" bargaining or the fixing of new terms and conditions of employment is very broad. At one level, it may include making a determination about anything that is associated with, or connected to, any matters that are the subject of bargaining or fixing of new terms and conditions of employment. But individual broad subsections must be read in the context of the whole of the enactment. Section 5 of the Interpretation Act 1999 so requires, as do longstanding fundamental tenets of statutory interpretation, no less in the field of employment law than in any other. The scheme and purpose of the Act must be considered and individual words and phrases interpreted in accordance with that.*
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> …
>
> *[20] On the one hand, the legislative intent of the Employment Relations Act 2000 and its 2004 amendments is to promote collective bargaining and reduce the need for judicial intervention (s 3(a)(iii) and (vi)). On the other, it is also to ensure that the role of the Authority and the Court, in resolving employment relationship problems, is to determine the rights and obligations of the parties rather than to fix terms and conditions of employment (s 101(d)). Further, it is to recognise that if problems in employment relationships are to be resolved promptly, expert problem-solving support, information and assistance need to be available at short notice to the parties to those relationships (s 143(c)). It also recognises that there will always be some cases that require judicial intervention at the lowest level by a specialist decision making body that is not inhibited by strict procedural requirements (s 143(f)), and that difficult issues of law will need to be determined by higher Courts (s 143(g)). Employment law recognises that parties may require and, if so, should receive, help in resolving their disputes.*
>
> …
>
> *[22] The plaintiff's interpretation of s 161(2) has, in my view, been strengthened by the 2004 amendments to that section. By expressly referring to the exceptions in subs (1)(ca), (cb) and (da) relating to facilitated bargaining and fixing of the terms of a collective agreement, Parliament has shown more clearly its previous intention that s 161(2) was meant to preclude the Authority or the Court from setting or fixing terms and conditions of employment in the place of parties to employment relationships doing so themselves. But what the existing or previous position may be has always been the legitimate scope of a dispute about the interpretation, operation or application of an employment agreement or contract. Interpreting, applying or operating current terms and conditions is not the same as determining or fixing what should be new terms and conditions, even if the subject matters are related in the broadest sense. It is the nature and consequence of what the Authority or the Court is asked to do, rather than the subject matter alone of the*

> *application, that is for close scrutiny, and will enable the Authority or the Court to determine whether what is asked of it offends against s 161(2) or not. Upon analysis, Asure's employment relationship problem did not infringe upon the prohibition established by s 161(2) and as Parliament intended should be the distinction in this important area of practice.*

[52] To adopt Norske Skog's very literal interpretation of s161(2) would be to ignore or contradict the approach taken by the Court of Appeal and this Court to interpreting the phrase *"relating to bargaining"* in the context of that section and we decline to do so. Such an approach would result in an absurd or obviously unintended result when viewed in the context of the Act.

[53] Seen in the context of the legislative scheme for bargaining and the regulation of employment relations generally, Parliament's purpose was to ensure that the Authority (and the Court) do not set terms and conditions of employment that should be bargained for. But that is not the same thing as not making orders that relate to bargaining in the sense, for example, of ensuring that the statutory scheme is complied with and even requiring that bargaining takes place as the Act directs. This distinction is confirmed in s101(d) setting out the object of Part 9 of the Act, that is for the institutions to determine rights and obligations rather than to fix terms and conditions of employment.

[54] As the authors of *Mazengarb's Employment Law* note in their commentary to the subsection (ERA 161.7):

> *Both subs (2) and the jurisdictional categories in subs (1)(d) were inserted into the ER Bill by the majority at Select Committee stage with little by way of explanation for the change. The insertion of subs (2) is widely assumed to have been part of the Government's efforts to allay concerns that the Authority might too readily exercise powers to cancel or vary employment agreements.*

[55] There is no other illuminating commentary in the texts.

[56] For these reasons the majority of us find against Norske Skog's argument that s161(2) prohibited the Authority from considering the defendants' claims and, subject to our other conclusions in this judgment, from issuing a compliance order. The dissent of Judge AA Couch on this issue is set out in his separate judgment.

Preliminary issue 3: No non-compliance proven?

[57] The third jurisdictional issue raised on behalf of Norske Skog was whether the second compliance order made by the Authority prohibiting Norske Skog from restructuring until an EPP had been agreed was in the nature of a quia timet injunction to restrain an anticipated breach of the statute rather than a statutory compliance order based on past non-compliance. As a subset of this argument, Norske Skog said that neither the Authority nor the Court could issue an injunction as opposed to a compliance order because it would have to be based on a cause of action for breach of statute which is a tort.

[58] We are satisfied that there is nothing in this point. The Authority was not purporting to exercise a common law jurisdiction in tort for breach of a statutory obligation. Although perhaps appearing to be in the form of a *quia timet* injunction, the Authority's order addressed compliance with the statute as s137 contemplates expressly in appropriate cases. Subject to the statutory requirement to establish a past breach, a compliance order is intended to do more than preserve the status quo and can reach forward to prevent future non-compliance. The common law rules relating to injunctions do not apply to compliance orders under the Act.

Role of the union

[59] This is a further preliminary issue affecting "standing", that is the right in law to bring, or otherwise to be a party to, the proceeding.

[60] As noted earlier, the collective agreement applicable to the affected employees expired on 28 February 2007. Pursuant to s53 of the Act, it continued in force for 12 months. The collective agreement then ceased to have any application as such and, pursuant to s61(2), the affected employees were employed under individual employment agreements based on the expired collective agreement.

[61] The significance of this is that the union is not a party to the individual employment agreements to which s69OJ now applies. The parties to those agreements are the affected employees and Norske Skog. It follows that the union

cannot have been in breach of s69OJ after March 2008 and ought not to have been the subject of the compliance order made by the Authority. Any order for compliance ought to have been imposed against the employer and the affected employees. While they could, of course, be represented by the union, that did not give the union the right to be a party.

[62] This conclusion also affects the union's entitlement to bring proceedings in its own name. In the course of the hearing, we raised with Ms Beck whether the union had any standing in the current proceeding before the Court. While properly acknowledging that the union had no standing in law, counsel emphasised the presence as a party of Mr Boylen whose standing cannot be doubted. That is so and, in that way at least, the issues are properly before the Court. We do not propose to now strike out the union as a party. As we indicated tentatively at the hearing, we consider the union to have been a person justly entitled to be represented and heard at the hearing in its own right even if not formally as a party.

What constitutes an EPP under s69OJ?

[63] We move now to the substantive issues in the case. Section 69OJ falls within Subpart 3 ("Other employees") of Part 6A ("Continuity of employment if employees' work affected by restructuring"). It provides that every collective agreement and every individual employment agreement must contain an EPP. This is defined in s69OI. A collective agreement or individual employment agreement must have a provision or provisions the purpose of which is to provide protection for the employment of employees affected by a restructuring.

[64] "*Restructuring*" is also defined in s69OI and there is no dispute that Norske Skog's proposals are for a "*restructuring*" as defined. There is equally no dispute that the employees in the wood processing operation are "*affected employees*" as that term is defined in s69OI(2).

[65] While the general purpose of an EPP is to provide protection for the employment of employees affected by a restructuring, s69OI(1)(b) requires that it specifically includes:

- a process that the employer must follow in negotiating with a new employer about the restructuring, to the extent that it relates to affected employees; and

- matters relating to the affected employees' employment that the employer will negotiate with the new employer including whether the affected employees would transfer to the new employer on the same terms and conditions of employment; and

- the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer.

The individual employment agreements based on expired collective agreement

[66] The following are the relevant provisions in the individual employment agreements of affected employees which are based on the expired Norske Skog Tasman SupplyCo CEA 1 September 2004 – 28 February 2007. Clause 10 (***"Consultation"***) provides:

> *10.1 During the term of this contract significant change in the Company's business operations may occur and the Company undertakes to consult in good faith with affected employees about the effects of such changes.*
>
> *10.2 The objective of this consultation will be to reach agreement on how any changes should be introduced. In the absence of agreement, the Company reserves the right to take the final decision on the introduction of changes and the Union reserves its right to represent any mattes resulting from such changes which it considers adversely affect the employment conditions of the Employees.*
>
> *10.3 Consultation will be used to:*
>
> - *Review and analyse options and proposals*
> - *Enhance the involvement of those individuals likely to be affected by proposed changes prior to a decision being made*
> - *Improve the level of communication within the business units*
>
> *The specific method and forum by which consultation will take place in each business unit will be specified in the appropriate domestic schedules.*

[67] Clause 32 (***"Redundancy"***) provides that the company's redundancy policy dated 31 August 2004 shall apply. We set this out below.

[68] Clause 35 (***"Contracting Out"***) provides simply:

> *The Company will not Contract Out any of the work covered by this Agreement prior to 28 February 2007 as per the CHH/NST/PPWU Mediation Settlement*

[69] As referred to above, the Norske Skog Redundancy and Redeployment Policy – 31 August 2004 which is incorporated expressly into the collective agreement provides materially:

> ***1. INTRODUCTION***
>
> …
>
> - *Consultation with the appropriate employees/Union.*
> - *Commitment to voluntary redundancy as a preferred mechanism of demanning.*
> - *Commitment to use of redeployment opportunities.*
> - *Commitment to developing processes that maximise voluntary redundancy and/or redeployment.*
>
> …
>
> - *Commitment to ensure that people who leave the Company do so with the right information and outplacement support.*
>
> …
>
> ***2. CONSULTATION***
>
> *In the event of any potential change process/restructuring which may impact on employees, the Company will consult with the appropriate employees/ Union(s). Consultation would include consideration by the Company of any alternative employment proposals submitted by the relevant Union/employees.*
>
> *The Company will ensure that at all stages through any change/restructuring process, including consultation, employees are offered appropriate change management and outplacement support services.*
>
> ***3. REDUNDANCY AND REDEPLOYMENT PROCESS***
>
> *After consultation …, if a decision is made by the Company to reduce the number of positions in a work area, the Company will approach demanning as follows. …*
>
> *3.1 The employees and Union(s) will be advised of the Company's decision.*

> *(a)* *If the redundancy of positions is as a result of asset closure or cessation of service, employees employed in positions identified by the Company as redundant will be advised that their positions are, or will become, redundant and clauses 3.2 – 3.13 will apply to those employees.*
>
> *(b)* *If the redundancy of positions is as a result of partial demanning of a workgroup, clauses 3.2 – 3.13 will apply to all employees in that workgroup.*
>
> …
>
> ***5. TECHNICAL REDUNDANCY***
>
> *Any employee whose position is redundant following the sale, transfer or amalgamation of all, or any part of the Company's business, shall not be entitled to receive redundancy compensation in the event that the purchaser, transferee or amalgamated Company offers the employee employment in the same or substantially similar position, and on the same or substantially similar terms and conditions of employment, including recognising the employee's service with the Company for all service related benefits and the employee accepts the position. In the event that the employee does not accept the position then redundancy compensation will be paid.*

Do the individual employment agreements contain an EPP?

[70] Norske Skog's case is, first, that its employment agreements with employees potentially affected by its proposed restructuring contain EPPs that meet the statutory requirements. We agree with Norske Skog's submission that it is the content rather than the form of an EPP that is important. Put another way, if taken together, the relevant provisions of the employment agreements can be said to contain the statutory constituents of an EPP, it does not matter that they are not in a discrete provision so labelled. That follows the reasoning in analogous cases such as *Service & Food Workers Union Inc v Vice-Chancellor of the University of Otago*[10].

[71] Norske Skog says that is so in this case. It points to a number of provisions of the individual agreements of the affected employees based on the expired collective agreement including:

- express obligations to consult about restructuring which include the contracting out of work;

[10] [2003] 2 ERNZ 156

- an absolute constraint upon the earliest time by which there can be a contracting out by the company;

- an obligation to comply with the employer's Redeployment and Redundancy policy including maximising voluntary redundancies and redeployments;

- obligations to discuss transfer of employees to the new employer;

- the payment of redundancy compensation; and

- offers of associated services to employees.

[72] Norske Skog says that, taken together, these provisions provide a real incentive for the company to transfer existing employees to a new employer, including by the exclusion of rights to redundancy compensation, in circumstances of technical redundancy.

[73] Next, Norske Skog points to its past custom and practice of negotiating with new operators to transfer employees on terms and conditions replicating, as closely as possible, those with the company. It emphasises having paid redundancy compensation when no offers of alternative similar employment have been made, and, as already set out, its commitment in its undertaking to the Court and the defendants that follows the statutory scheme.

[74] Track records in practice and promises for the future, even if laudable, are not what the statute requires although they may be relevant factors if and when it comes to considering whether a discretionary compliance order should be made in any particular case. What must be determined now is whether current employment agreements comply with the statutory requirements for an EPP.

[75] We conclude that neither the employment agreements, nor the Redundancy and Redeployment Policy that is incorporated expressly into them, meet the statutory requirements of an EPP in s69OJ of the Act. The statute deals with restructuring

and, in particular, with contracting out or other divesting of business functions that will continue to be performed, albeit by another entity than the employer. The employment agreements and the Redundancy and Redeployment Policy in particular deal principally with the consequences of reductions of available work from other causes. The only provision that can be said to address the statutory issues is that relating to "technical redundancy" in clause 5 of the policy. This simply disentitles employees to redundancy compensation if the purchaser or transferee of the business or part of the business offers employment in the same or a substantially similar position and on the same or substantially similar terms and conditions of employment.

[76] Rather than being an employee protection provision this is, in fact, an employer protection provision. It relieves the employer of the obligation to pay redundancy compensation in specified circumstances. It, and the other provisions of the policy and agreements, do not provide the protection required by the statute for employees affected by a restructuring.

[77] In particular, the current provisions do not set out a process that the employer must follow in negotiating with a new employer. Nor do they address the matters relating to the employment of affected employees that will be the subject of negotiations with the new employer, or the process to be followed at the time of a restructuring, or the process to be followed at the time of a restructuring in these circumstances.

[78] We find for the defendants on the first substantive question. The employment agreements do not contain an EPP as required by s69OJ.

The consequences of non-compliance with s69OJ

[79] The defendants' case that there must be an implied statutory prohibition upon restructuring in the absence of relevant EPPs, is essentially two-fold. In this analysis we refer to the former s69N of the Act as enacted in 2004 and repealed in 2006. This is an entirely different provision to the current s69N.

[80] The former s69N provided:

> ***69N When existing collective agreement or individual employment agreement must contain employee protection provision***
>
> *(1) Every collective agreement and every individual employment agreement in force immediately before the commencement of this section must be varied to include an employee protection provision to the extent that the agreement binds employees to whom this subpart applies*
>
> *(2) Subsection (1) must be complied with by the earliest of the following:*
>
> *(a) 12 months after the commencement of this section; or*
>
> *(b) when the collective agreement or individual employment agreement is next amended; or*
>
> *(c) if an employer's business is restructured, before the restructuring occurs.*

[81] First, the defendants say that former s69N, which dealt expressly with the consequences of an absence of EPPs, dictates that there should be such a provision read into the current statute and what that provision should be. Even if, however, the defendants' first premise is correct, their second would not assist these particular defendants because of the time limitation on former s69N that would have expired by now even if that section had been repeated by Parliament or is found by this Court to exist by necessary implication.

[82] Former s69N was in force from 1 December 2004 (pursuant to s30 of the Employment Relations Amendment Act (No 2) 2004) until 13 September 2006 by its repeal under the Employment Relations Amendment Act 2006. Former s69N dealt with EPPs for *"Other employees"* under former Subpart 2 of Part 6A. The requirements for an EPP under former s69L (***"Interpretation"***) were materially identical to those now affecting *"Other employees"* under new Subpart 3 in s69OJ set out earlier in this judgment. It follows that, since December 2004, there had been an obligation on parties to employment relationships to have EPPs and that both the obligation and the requirements of compliance with it were altered by the 2006 legislative alterations. What changed was the deletion of former s69N dealing expressly with the consequences of a failure to have an EPP.

[83] The second plank of the defendants' argument is based, by analogy, on the way the Court and Parliament dealt with s66 of the Act relating to fixed term employment agreements.

[84] The defendants rely upon the judgment of this Court and the Court of Appeal in *Norske Skog Tasman Ltd v Clarke*[11]. The Act was then silent about the consequence of non-compliance with s66 in its original form. It imposed requirements on an employer before an employment agreement could validly be for a fixed term. This Court, and a majority of the Court of Appeal, concluded that the consequence of a failure to comply with s66 was reversion to the well established default provision at common law. That position was that the employment agreement was one of indefinite duration, the termination of which by the employer might give rise to a personal grievance. Although s66 did not then provide expressly for a consequence of the failure to effectively create a fixed term agreement, there was no doubt that there remained an employment agreement between the parties which was of indefinite duration. Compliance with s66 was a precondition only to that agreement being for a fixed term.

[85] The defendants' initial argument that the Authority was correct to issue a compliance order prohibiting Norske Skog from restructuring until an EPP was in place, changed during the course of the hearing. The defendants acknowledged the difficulties of their primary argument for an implied statutory prohibition on restructuring. They submitted that they and Norske Skog were amenable to a compliance order under s137 requiring them to settle EPPs and that it would be appropriate to add as a condition under s138 the direction that there be no restructuring in the meantime.

[86] It strains the interpretation of the phrase "*may be made subject to such terms and conditions as the Authority thinks fit*" under s138(4)(a) to categorise a prohibition on restructuring as a term or condition of requiring parties to settle an EPP. It might have been more natural, for example, to reverse the directive and the condition so that Norske Skog was compelled not to restructure until there were EPPs, on condition that it was to settle EPPs before restructuring in compliance with them. Even that, however, sits uncomfortably with the requirement for the employer and the employees to comply with s69OJ.

[11] [2004] 1 ERNZ 127; [2004] 2 NZLR 323

[87] We set out the following submissions for Norske Skog because we largely accept them, at least except where noted. The company submits that the Act does not address the consequences of non-compliance with s69OJ. More particularly, Mr McIlraith emphasised that the legislation does not constrain an employer from restructuring its business in these circumstances. That is said to be because it was the responsibility of both parties to have negotiated an EPP and the consequence of the failure of that dual responsibility should not be visited upon only one party to the employment relationship, the employer.

[88] Next, the company says that the Court should not imply such a prohibition into Subpart 3. To do so will be to find that Parliament intended, but failed, to intervene to limit significantly an employer's right in law to operate its business. The company says that, although the express provisions of Subpart 3 are comprehensive, the absence of any consequential constraint must surely indicate that this was not an omission but, rather, a deliberate decision of the Legislature to confine the obligations of the parties to those it expressed.

[89] Mr McIlraith argued that the Court should take the same approach as it did in *Gibbs* in relation to the predecessor provisions in the legislation. In particular, Norske Skog says that, for the same reasons as in that case, the Court should not interpret the Act so as to add to, omit from, or substitute statutory wording. Counsel relied on the requirement for three clear prerequisites determined by the Court of Appeal in *Midavia* and already set out at paragraph [24] of this judgment.

[90] Mr McIlraith emphasised the object of Subpart 3 set out in s69OH: *"… to provide protection to employees … if, as a result of a restructuring, their work is to be performed by or on behalf of another person and, to this end, to require their employment agreements to contain employee protection provisions relating to negotiations between the employer and the other person about the transfer of affected employees to the other person."* Counsel emphasised that there is no suggestion in this object section that Subpart 3 was intended also to prohibit an employer from restructuring until an EPP was included in relevant employment agreements.

[91] Counsel for Norske Skog also emphasised the broad legal landscape of redundancy now well established in New Zealand. As long ago as the decision in *GN Hale & Sons Ltd v Wellington Caretakers IUOW*[12] the Court of Appeal emphasised what has been described as an employer's managerial prerogative to operate its business as it sees fit except to the extent of any restrictions to which it has agreed to be bound. That was followed more recently in *Simpsons Farms Ltd v Aberhart*[13] and Norske Skog says that there must be at least an initial presumption against implying obligations into employment relationships generally which fetter those managerial prerogatives, especially in circumstances of business restructurings.

[92] Mr McIlraith disagreed with the defendants that former s69M and s69N (in force from 1 December 2004 to 13 September 2006) assist in determining the purpose of s69OJ. Although categorising these two earlier sections as the predecessors to s69OJ, he submitted that neither constrained employers from any restructuring until an EPP was entered into. Former s69N provided a timeframe within which then existing employment agreements were to be amended. In a sense, former s69N was a transitional provision but, like s69OJ, former s69M and s69N, did not include any sanction for failure to comply.

[93] Further, counsel argued that even if former s69N might have assisted the Court in the manner contended for by the defendants, it was repealed and replaced with s69OJ with effect from 13 December 2006 and Parliament did not enact a matching provision, whether in s69OJ or otherwise.

[94] It is notable, as counsel submitted, that Parliament provided expressly for a review of Part 6A of the Act (including Subpart 3) to occur as soon as practicably after 13 December 2009, being the third anniversary of the commencement of the 2006 Amendment Act. As set out in s69OL, this review is to encompass questions including whether the operation of Part 6A of the Act meets the objectives identified in s69A and s69OH and, if not, whether any amendments to Part 6A are necessary or desirable to meet those objects. Counsel submitted that a clear statement in this judgment of the absence of a constraint upon restructuring will enable Parliament to

[12] [1990] 2 NZILR 1079, 1084; (1990) ERNZ Sel Cas 843; [1991] 1 NZLR 151
[13] [2006] ERNZ 825

consider appropriately whether such a provision should be included. The legislative review also militates against curial correction of omissions.

[95] Finally, counsel submitted that the obligation to ensure that an EPP is included in agreements is mutual. It is the responsibility of both employers and employees, whether individually or collectively. In the case of a collective agreement negotiated by a longstanding and experienced union on behalf of its members, as in this case, it cannot be said that the employer has taken advantage of ignorance or inexperience. The first defendant is a union aware of its rights and obligations in employment law and well able to insist upon compliance with these by employers in collective or other bargaining. It is unfortunate that neither party appears to have recognised the requirement to include an EPP in their collective agreement or, if it did, to insist upon compliance with the legislation. However, to restrain by compliance order Norske Skog's intended restructuring to which there is no other challenge in law, would be to shift entirely to Norske Skog responsibility for errors that are as much those of the union.

Decision

[96] We do not accept the defendants' categorisation of the orders made by the Authority as being a compliance order under s137 requiring the parties to settle an EPP on the condition that Norske Skog is not to restructure its operations until that is done. Nor is that a viable argument on a challenge even if the defendants reframe their claims as Ms Beck did in the course of argument.

[97] The nub of the case is the question whether, by compliance order, the employer should be constrained from addressing its intended restructuring until the parties settle an EPP. To achieve this, the defendants need to persuade the Court, as they did the Authority, that there is an implicit provision in Part 6A of the Act that has been breached.

[98] We do not accept the defendants' argument for an implied statutory sanction for non-compliance with s69OJ by analogy with the judgments in *Clarke*. Although it is correct in that earlier case that the statute was silent about the consequences of

non-compliance, there was a well established default position at common law which determined the consequences of a failure to satisfy the statutory prerequisites for a fixed term agreement. In these circumstances the employment agreement became, by default, one of indefinite duration. That Parliament subsequently legislated to this effect merely confirms its approval of the outcome of the case in practice but does not support the defendants' argument in this case.

[99] The position here is different. There is no default position, either statutory or at common law. If anything, it might be said that the default position is that the employer is entitled to restructure subject, of course, to other statutory and common law obligations but which do not include the necessary existence of an EPP. The judgments in *Clarke* do not assist the defendants.

[100] It is consistent with the intended purpose of Part 6A that EPPs should be in place to determine how employees are treated in restructurings and, logically, that such provisions should be settled before restructurings occur. However, this factor which favours the defendants is only the first of three elements of which the Court must be sure before implying the statutory provision sought by the defendants and found by the Authority.

[101] The second test is not met by the defendants. We are not persuaded that by inadvertence Parliament failed to give effect to the statutory purpose by the provisions it enacted. The failure to provide a sanction for non-compliance with s69OJ is equally consistent with deliberation as it is with inadvertence. By the time of the enactment of s69OJ and other new provisions in 2006, Part 6A had already been in force for almost 2 years. Former sections 69M and 69N had provided transitional arrangements intended to ensure that, by 2006 at the latest, all employment agreements would contain EPPs.

[102] In these circumstances it may have been presumed that there would be no need for further transitional provisions. Although we are sceptical about whether there was complete or even substantial compliance by employers, unions and employees with the 2004 legislation, there is no indication from the legislative background materials that Parliament was aware that there was only limited

compliance with Part 6A. In any event, parties to employment relationships had by then had 2 years to comply with the new law and it may well have been thought that those who had not should simply bear the natural consequences of non-compliance.

[103] The omission from the 2006 legislation of provisions similar to the former s69M and s69N is also a factor pointing away from inadvertent omission.

[104] For these reasons we cannot be abundantly sure that there was an inadvertent omission by the draftsman and Parliament that can and should be corrected now by the Court.

[105] Even if that were not so, the defendants have not persuaded us of the further essential element of implicit interpretation, the necessary certainty of the substance of the provision Parliament would have made had the error or omission been drawn to its attention. The defendants argue for an implied provision that would prohibit all restructurings pending the settlement of EPPs. Parliament did not, however, go this far in 2004 when, under the former s69N, it constrained employers from restructuring in the absence of EPPs but only for a maximum effective period of 12 months after enactment. We are not persuaded that Parliament would not have enacted a similar or identical provision if it had turned its attention to what was an omission in the 2006 draft legislation. Indeed, there are cogent arguments that a reiteration of former s69N would have been more likely than a more extensive and restrictive provision such as is now argued for by the defendants.

[106] So the second and third tests for rectification of omissions are not made out and Norske Skog's arguments on this most fundamental and important issue in the case must prevail. Although determined by a process of reasoning that is attractive and superficially logical, we conclude that the Authority's decision was wrong on this issue.

[107] Even if we had found for the defendants on the substantive issues, we would not have made a compliance order as the Authority did. That is because Norske Skog's undertaking set out at paragraph [17] of this judgment would have obviated the need for a compliance order in this case. The Court is reluctant to issue

compliance orders where it can be assured that a party will comply with the law once it is established authoritatively. This is such a case.

[108] Pursuant to s183(2), the determination of the Authority is set aside and this decision now stands in its place.

[109] It follows that, subject of course to rights of appeal and any interim orders that may attach to those, Norske Skog is now entitled to progress its intended and long-restrained restructuring. That should not be seen, however, as an ignominious defeat for the defendants. Norske Skog has given to the Court and the defendants what we would categorise as a very fair and even generous undertaking as to how it will conduct its restructuring. Indeed, if the undertaking were to be translated into the terms and conditions of an EPP agreed between the parties, we consider that it would fulfil more than adequately the statutory requirements for an EPP. The affected employees and the union in this case should feel protected more than adequately, even if not in terms to which they have agreed.

Costs

[110] This has been a true test case of new legislation and we are on record in other such cases as being generally disinclined to award costs in such cases. If, however, agreement on questions of costs cannot be reached between the parties and an order is sought, any application should be made by written memorandum within one month from the date of this judgment with the respondent to such an application having a similar period to reply.

GL Colgan
Chief Judge

Judgment signed at 4 pm on Wednesday 9 December 2009

JUDGMENT OF JUDGE AA COUCH

[111] I am in general agreement with the judgment given by the Chief Judge and Judge Travis, except for the issue of interpretation of s161(2) of the Employment Relations Act 2000. I am also in agreement with the outcome of the challenge they record in their judgment.

[112] The issue on which I differ from the majority of the Court is whether the orders made by the Authority were a determination about a "*matter relating to bargaining*" and therefore expressly excluded from the Authority's jurisdiction by s161(2) of the Act.

[113] Section 161(2) imposes two express limitations on the Authority's jurisdiction:

> *(2) Except as provided in subsection (1)(ca), (cb), (d), (da), and (f), the Authority does not have jurisdiction to make a determination about any matter relating to—*
> *(a) bargaining; or*
> *(b) the fixing of new terms and conditions of employment.*

[114] In its determination, the Authority concluded:

> *[98] The parties are to negotiate until such time as they comply with s69OJ. Until an EPP is agreed the respondent is not to implement its proposed restructuring.*

[115] Section 69OJ provides:

> ***69OJ Collective agreements and individual employment agreements must contain employee protection provision***
> *Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.*

[116] In light of s69OJ, the effect of the Authority's order was to require the parties to "*negotiate*" until their employment agreements contained an employment protection provision. That required either the negotiation of new employment agreements or of a variation to existing agreements.

[117] Whether this order was within the Authority's jurisdiction depends on whether negotiation of an employment agreement or a new term of an employment agreement are *"matters relating to bargaining"*.

[118] In *Canterbury Spinners Ltd v Vaughan*[14], the Court of Appeal considered the meaning of s161(2). It concluded in paragraph [40] that "bargaining" includes bargaining for an individual employment agreement and for an individual term of an employment agreement. In the opening sentence of paragraph [41], the Court confirmed that "bargaining" has its ordinary meaning in s161(2) and that it is synonymous with "negotiating".

[119] Applying that straightforward construction of s161(2), there is no doubt in my mind that the Authority's order that the parties "negotiate" a new term of an employment agreement was a determination relating to bargaining.

[120] This conclusion is reinforced by what the Court of Appeal went on to say in paragraph [41] of the decision in the *Canterbury Spinners* case:

> *[41] … The crucial question is, however, the end to which the bargaining or negotiating is directed. What we now say is subject, necessarily, to other provisions of the legislation such as ss 68 and 69 and the obligations of good faith, at common law and under the statute. With, then, that caveat, what s 161(2) prohibits the Authority (or the Court if the matter comes before it in terms of the removal or challenge provisions – ss 178 and 179) from doing is being involved in the process of creating a new contractual term or terms – either when the parties are starting from scratch and constructing an entirely new agreement or when they are working towards supplementing or varying an existing contract. The authority may not become involved in the bargaining which precedes the formation or variation of a contract.* (emphasis added)

[121] In this case, that is precisely the position the parties are in. They have no employee protection provision in their employment agreements. The negotiation they were ordered by the Authority to undertake was *"the bargaining which precedes the formation or variation of a contract"*. It inevitably follows that the Authority's determination was about a matter related to bargaining.

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[14] [2002] 1 ERNZ 255

[122] In their judgment, the Chief Judge and Judge Travis conclude that the Authority's determination was not related to bargaining because it was concerned with enforcement of a statutory obligation. With respect, I am unable to accept that logic. Because the order was made for the purpose of enforcing a statutory obligation does not mean it did not relate to bargaining. The two concepts are not mutually exclusive. I think it also overlooks the underlying point that compliance with the statutory obligation in question, s69OJ, can only be achieved through bargaining.

[123] The consequence of the conclusion I have reached is that the obligations imposed by s69OJ cannot be enforced by compliance order or, indeed, by any other process in the Authority or the Court. I agree with the majority that, as a matter of general principle, there ought to be a means to compel compliance with the law by those who refuse or fail to do so. In the absence of an express power of compulsion, that principle can be given effect in some cases by implication but a power to order compliance cannot be implied contrary to an express provision of a statute. That is the case here. If this result is unacceptable, then it is for Parliament to decide whether the Act should be amended and, if so, the form of that amendment.

[124] In my judgment, the Authority had no jurisdiction to make a compliance order directing the parties to bargain until they had complied with s69OJ and the challenge must succeed on that ground in addition to other grounds.

AA Couch
Judge

Signed at 4.15 pm on Wednesday 9 December 2009