IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 159/10
5319750

	BETWEEN	SERVICE & FOOD WORKERS' UNION NGA RINGA TOTA INC Applicant
	AND	OCS LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Peter Cranney, counsel for Applicant Paul McBride, counsel for Respondent
Investigation Meeting:	1,4,5,6 & 7 October 2010 (by telephone conference and memoranda)
Determination:	8 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The matter before the Authority is an application made under s 69O of the Employment Relations Act 2000. The Service & Food Workers' Union Nga Ringa Tota Inc (SFWU) has applied to have the Authority investigate bargaining for redundancy entitlements that has taken place between SFWU and OCS Limited (OCS), and also to have the Authority determine the redundancy entitlements of a number of OCS employees.

[2] Bargaining occurred after OCS proposed in August 2010 to make redundant up to 50 cleaners employed by the company in its cleaning contracting business at three Massey University sites. The cleaners were given notice that their employment would end on 8 October 2010, although a recent extension has put the date back a week to 15 October.

[3] As well as the s 69O application, an application for interim reinstatement of the cleaners was intimated but has not been made.

[4] After hearing from counsel Mr Cranney for SFWU, the cleaners' union, and Mr McBride for OCS the immediate issues for the Authority to decide are whether to order removal of the union's s 69O application to the Employment Court, whether to refer a question of law to the Court for its opinion, or whether to stay the investigation of bargaining until the Court of Appeal has given judgment on two particular appeals now before it.

[5] If leave to appeal is given by the Court of Appeal its judgment will consider and answer questions of law concerning the same parties which are central to the matter before the Authority. The Court's answer may determine whether the Authority can embark at all on a s 69O investigation in the circumstances of this case. It may also decide the scope of any determination of redundancy entitlements the Authority is able to make.

[6] The reasons for the redundancies of the OCS cleaners are to do with their transfer from a previous employer, which in their particular occupation is a situation covered by Part 6A of the Employment Relations Act. Part 6A provides for the continuity of employment where employees' work is affected by restructuring. The object of Part 6A is expressed to be the provision of protection for specified categories of employees, and also the provision to them of a right to bargain for redundancy entitlements.

[7] OCS and SFWU were unable to reach agreement after bargaining over the redundancy entitlements of the cleaners during September. Following the breakdown of bargaining SFWU invoked s 69O of the Act, seeking to have the Authority investigate the bargaining and, if necessary, determine the cleaners' redundancy entitlements.

[8] The response of OCS is that the Authority should not commence any investigation or make any determination under s 69O until the Court of Appeal has given judgment on the appeal and cross appeal filed with that court by OCS and SFWU.

[9] The appeals are from the decision of the Employment Court given on 31 August 2010 in *Service & Food Workers' Union Nga Ringa Tota Inc v. OCS Ltd*

[2010] NZEMPC 113. On the facts and law before it, the Court held that the circumstances needed under Part 6 of the Act were present so as to require OCS to bargain with SFWU and try to reach agreement on redundancy entitlements for the cleaners. The Court also gave a decision as to the scope of the phrase "redundancy entitlements," as used in s 69N of the Act.

[10] In concluding the Court's judgment, Chief Judge Colgan confirmed at [73] the right of SFWU on behalf of the cleaners employed by OCS to bargain for "redundancy entitlements" under s 69N of the Act. The Court also confirmed the cleaner's ability to have the Authority under s 69O investigate the bargaining and determine, if necessary, the redundancy entitlements if agreement could not be reached.

[11] After the parties had bargained as directed by the Court without reaching agreement on redundancy entitlements, OCS applied to the Court of Appeal for leave to appeal against the Employment Court decision. Leave was sought in particular to appeal against the Court's interpretation of s 69N in relation to "redundancy entitlements," including the Court's conclusion as to whether the cleaners employment agreement provided for those entitlements or expressly excluded them.

[12] A few days later SFWU applied for leave to cross-appeal against the Employment Court's decision. The union's appeal was expressed to be against a part of the decision in which the Court concluded the cleaners were not entitled to "monetary redundancy compensation."

[13] The appeals raise a question as to the application of s 69N of the Act, which sets out the circumstances required to be present before employees are entitled under the Act to redundancy entitlements from their employer. OCS contends that the required circumstances are not present in this case and that therefore the Authority should not embark upon an investigation of the bargaining with a view to determining redundancy entitlements. There also remains a question as to the meaning of "redundancy entitlements," where that phrase is used in s 69N and s 69O.

[14] Under s 69N employees are not "entitled" to redundancy entitlements and may not bargain for those, if the employment agreement provides for some redundancy entitlements and in addition expressly excludes others.

[15] In this regard the OCS cleaners' collective employment agreement provides;

> ***25.2*** *The parties to this employment agreement agree that no claims for redundancy payments will be made as a result of loss of employment due to downsizing of client contract or loss of client contract.*

[16] The Court held that there had been a downsizing of an OCS client contract and that clause 25.2 therefore applied to the cleaners' redundancy situation. At [41] and [42] of the judgment the Court interpreted clause 25.2 of the employment agreement to mean that it did not "provide" for redundancy entitlements but it did "expressly exclude" those entitlements. As one of the two alternative situations under s 69N(1)(c) giving an entitlement to redundancy entitlements was present, the Court held the cleaners could bargain for redundancy entitlements and could apply to the Authority under s 69O if necessary.

[17] The Court's decision about this is expressly the subject of OCS' appeal. The right of the cleaners through SFWU to enter into bargaining is therefore a question of law that may eventually be answered by the Court of Appeal to either confirm or deny that right.

[18] If it is confirmed the cleaners have that right there is a further question as to the scope of the "redundancy entitlements" they may bargain for. That question is whether monetary redundancy compensation is included. The Employment Court held at [55] to [58] of its judgment that the entitlement does not extend to monetary redundancy compensation. That conclusion is a subject of the appeal by SFWU and the answer will also have a direct bearing on any investigation and determination by the Authority under s 69O.

[19] The Authority has jurisdiction to investigate bargaining and to determine redundancy entitlements, provided the circumstances expressed in s 69N of the Act are present. There is a real issue as to whether those circumstances, insofar as they include matters of law, are present in this case. OCS has a persuasive argument that until those questions of law have been finally decided the Authority should not proceed with the s 69O application, in case a determination by it is vitiated as a result of a subsequent Court of Appeal decision.

[20] In applying for removal of the s 69O application from the Authority to the Employment Court, SFWU through counsel Mr Cranney has emphasised the urgency of the s 69O matter arising because of the notice of termination given to the cleaners, which will take effect in just a few days' time on 15 October.

[21] Removal is sought by SFWU on each of the four grounds provided by s 178 of the Employment Relations Act. The first is that important questions of law are likely to arise other than incidentally in the matter of the application under s 69O before the Authority. Those questions include the meaning of the phrase "redundancy entitlements" where used in s 69N of the Act, and whether the claims put forward by SFWU were for redundancy entitlements.

[22] The second ground of the removal application is that the matter is of such a nature and of such urgency that it should be removed. In relation to this ground reference is made to the pending dismissal of the cleaners employed by OCS and to the nature of the dispute as being serious and ongoing as well as occurring in a major educational institution, which is an indirect reference to the element of public interest under s 178(2)(b). The third ground relied on is that the Court already has proceedings before it about the same issues involving the same parties, and the fourth ground is that in all the circumstances the matter should be removed in the opinion of the Authority.

[23] The availability of referral by the Authority of a question of law for the opinion of the Court under s 177 was also raised. Although OCS is opposed to the removal of the matter before the Authority to the Employment Court, it will abide the decision of the Authority as to whether a question of law for the Court's opinion should be referred.

[24] It seems to me that at this time and before there has been any decision on either of the two appeals before the Court of Appeal, the important questions of law identified in the removal application are likely to be determined by the Employment Court, if removed there, with the same answers that have already been given by it to those questions. To the extent that they are questions of law likely to arise in the matter before the Authority, those questions have been answered by the Employment Court whose answers must be taken as authoritative until the Court of Appeal either confirms they are correct or gives different answers.

[25] As to the ground that the matter is of such a nature and of such urgency that it is in the public interest for it to be removed immediately to the Court, again there is a practical difficulty in that although the Authority could immediately respond to the urgency of the matter by starting to investigate the bargaining, it would be doing so against the possibility that a Court of Appeal decision might subsequently hold in the

circumstances that the cleaners have no right to bargain for redundancy entitlements and no ability to invoke s 69O.

[26] As to the ground that the Court already has before it proceedings which are between the same parties and involve the same or similar issues, that is only true to the limited extent that in deciding the proceedings under WRC 22/10 with its 31 August judgment, leave was reserved by the Employment Court for the parties to apply for further directions, including directions to mediation. The Authority has not been advised of any substantive proceedings still to be decided.

Determination

[27] Removal of part of the matter before the Authority is ordered under s 178(2)(d) of the Act. After considering submissions made by Mr Cranney and Mr McBride, the Authority is of the opinion that the Employment Court should if it can determine the part of the matter before the Authority that requires a final decision as to the interpretation of the relevant provisions in Part 6A of the Employment Relations Act.

[28] That part to be removed is able to be separated from the part requiring an investigation of bargaining and determination of redundancy entitlements by the Authority. That latter part, in essence a factual inquiry and exercise of an arbitral function, can be adjourned or deferred by the Authority until the final decision on the removed part has been given. The arguments for OCS in opposition to removal may yet be persuasive in the Employment Court for a stay of determination of the part matter removed.

[29] To the question at para 10 of Mr McBride's submissions of 7 October - what is the Authority not removing? – the answer is the Authority's role as the investigator of bargaining and determiner of redundancy entitlements. Whether that role is exercisable in the circumstances and to what extent, are questions for the Employment Court or Court of Appeal to answer with finality.

[30] I decline to refer a question of law to the Employment Court under s 177, as it seems the Court of Appeal ultimately will be the court that answers any such question appropriate to the circumstances of this case.

[31] The Authority accepts the urgency of the cleaners' pending redundancies and removes part of the matter before it to allow SFWU an opportunity to advance the case towards a final decision on the questions of law. When that has been achieved, if the union's right of access to s 69O has been confirmed the Authority will immediately make necessary arrangements to investigate with urgency the bargaining and to determine with urgency the redundancy entitlements of the cleaners. This can commence within days of confirmation.

[32] Following a final determination by the Employment Court or Court of Appeal, SFWU is to confirm to the Authority that it wishes to proceed with an investigation of bargaining and a determination of redundancy entitlements by the Authority. The application by SFWU under s 69O will stand adjourned in the meantime.

[33] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority