Employment Court of New Zealand

Lye v ISO Limited [2021] NZEmpC 120 (5 August 2021)

Last Updated: 12 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2021] NZEmpC 120
EMPC 491/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GEORGE LYE Plaintiff
AND	ISO LIMITED Defendant

Hearing:	1 July 2021 (Heard at Tauranga)
Appearances:	SR Mitchell and J Lynch, counsel for plaintiff K Ashcroft and JN Steele, counsel for defendant
Judgment:	5 August 2021

JUDGMENT (NO 2) OF JUDGE K G SMITH

[1] George Lye is seeking a compliance order against his employer, ISO Ltd, because the individual employment agreement between them contains an availability provision that does not comply with pt 6 of the Employment Relations Act 2000 (the Act). ISO is opposed to any order being made.

[2] There has been a protracted history to this proceeding which only needs to be briefly summarised.

[3] In November 2018 Mr Lye was one of several stevedores who applied to the Employment Relations Authority for a determination that their individual employment

agreements with ISO contained availability provisions that did not comply with ss 67D and 67G of the Act.1

[4] The Authority held that the employment agreements did not satisfy the requirements of s 67D(2) of the Act.2 It determined that an availability provision may only be included in an employment agreement if it specifies agreed hours of work, including guaranteed hours of work, and relates to a period where an employee is required to be available in addition to those guaranteed hours of work.3

[5] The Authority decided that the employment agreements did not specify the days of the week, start and finish times, or any flexibility in those arrangements.4 The employment agreements actually stated that the employees had no set entitlement for particular days, shifts or hours of work unless otherwise agreed. The closest the agreements came to specifying guaranteed hours was in the remuneration clause which stated an amount to be paid for each four-week period. The Authority was not satisfied that was sufficient.5 It followed that the agreements were non-complying and the Authority declared as much. The Authority was not asked to make any further orders.

[6] The same issue returned to the Authority a year later, in November 2019.6 That proceeding was lodged by Mr Seymour, one of Mr Lye's colleagues who had participated in the Authority's investigation a year earlier. This time a compliance order was sought.

[7] The application was for an order as follows:7

...requiring ISO to comply with ss 67D to 67F inclusive of the Act by entering into an employment agreement that either does not contain an availability provision or that complies by:

(a) Containing agreed hours of work at specific times that employees work each week; and

1. *Maritime Union of New Zealand Ltd v ISO Ltd* [2018] NZERA Auckland 368 (Member Campbell) at [5].

2 At [39].

3 At [35].

4 At [38].

5 At [37]; and see Employment Relations Act 2000, s 67D(2).

6 *Maritime Union of New Zealand Inc v ISO Ltd* [2019] NZERA 704 (Member Campbell).

7 At [55].

(b) That provides for reasonable compensation to the employee for making themselves available for work outside those times.

[8] The Authority investigated two issues:8

(a) Whether compliance orders should be made in respect of the 2018 determination.
(b) Whether ISO had or continued to breach ss 67D—67F of the Act and, if so, if compliance orders should be made.

[9] The Authority referred to, and considered, its decision of the previous year. It recorded that the individual employment agreements did not specify hours of work but referred to the 24-hour, seven day a week, nature of ISO's operations. It observed that there were no guaranteed hours of work in the terms and conditions of employment, although an agreement had been reached about a retainer, specified as a guaranteed payment.

[10] At the time the employment agreement was entered into the retainer amounted to a payment equivalent to 120 hours within a four-week period. There had, however, been no subsequent adjustment to take into account that there was an effective reduction in the hours covered by the payment each time a pay rise was negotiated.

[11] ISO's argument, that it could rely on the payment of the retainer to set guaranteed hours of work within the meaning of s 67D, was rejected.9 A conclusion was reached that the terms and conditions of the employment agreement did not include hours of work as was required for a complying availability provision.10

[12] Ultimately the Authority concluded that nothing had changed between 2018 and 2019. The employment agreement it was asked to consider contained a non-

8. At [9]; the Authority also dealt with an issue about whether Maritime Union of New Zealand Inc had standing to be a party that is not material to this decision.

9 Section 67D(2)(a).

10 By s 67C of the Act.

complying availability provision and was unenforceable, because it did not specify agreed hours of work and did not include guaranteed hours.11

[13] The Authority rejected ISO's submission that the application invited a compliance order related to bargaining and was, therefore, contrary to s 161(2) of the Act.12 While the Authority knew collective bargaining was underway during its investigation, it was not satisfied that the effect of the application was inconsistent with that section. It concluded that the orders sought were related to the bargaining but fell short of asking to have new terms and conditions of employment fixed.13

[14] However, the application for a compliance order was declined. The Authority accepted ISO's response that it had not

applied the terms of the employment agreement requiring the employee's availability. Mr Seymour was allowed to accept or reject work on a weekly basis without justifying his decision.14 That conclusion meant the Authority had heard the same issues debated twice and reached the same conclusion about the employment agreement both times.

[15] The 2019 determination was challenged. By the time the matter was heard Mr Seymour was no longer employed by ISO. Mr Lye, who was one of the original applicants in 2018, and remains employed by ISO, stepped into his shoes.15

[16] Amended pleadings were filed with Mr Lye challenging the whole of the 2019 determination. As well as seeking a compliance order, he claimed relief requiring ISO to be compelled to comply with the availability provisions in ss 67D and 67E of the Act by means of agreed rostering.16

11 At [41].

12 At [57]-[58].

13 At [41]; and see *Asure New Zealand Ltd v New Zealand Public Service Assoc (No 1)* [2005] NZEmpC 116; [2005] ERNZ 747 (EmpC) at [19]; and *Canterbury Spinners Ltd v Vaughan* [2002] NZCA 284; [2003] 1 NZLR 176, [2002] 1 ERNZ 255 (CA).

14 *Maritime Union of New Zealand Inc*, above n 6, at [43].

15 His successful application to be added as a party is recorded in *Maritime Union of New Zealand Inc v ISO Ltd* [2020] NZEmpC 49.

16 See paragraph [57] following.

[17] A judgment about Mr Lye's challenge was issued on 17 December 2020.17 Three issues were identified in that decision:

(a) Did the employment agreement between Mr Lye and ISO comply with s 67D or the balance of pt 6 of the Act.
(b) If it did not comply, are ISO's changed work practices material.
(c) If the agreement does not comply and the changed work practices are not material, should a compliance order be made?

[18] I held that the employment agreement was non-complying. First, because that was the outcome of the 2018 determination to which Mr Lye was a party and it had not been challenged. In the absence of a successful challenge the Authority's conclusions about Mr Lye's employment agreement could not be disputed. To entertain ISO's argument that the employment agreement did, in fact, comply with the Act would have been to allow an impermissible collateral attack on the determination. I also agreed with the determination.

[19] Second, ISO's argument that it had materially changed work practices was rejected. I held that the Act had been breached and the breach was ongoing.18 A submission by Ms Ashcroft, counsel for ISO, that there was no risk of further non- compliance or non-observance with the Act was rejected.19 A finding was made that ISO had consistently resisted efforts to amend, or replace, the employment agreement despite being on notice from November 2018 that it contained a non-complying availability provision. Nevertheless, the company persisted with its practices, to obtain flexibility by its method of allocating work for a competitive advantage. The changes made to ISO's practices did not alter the fact that, under the terms and conditions of the agreement, Mr Lye was required to make himself available for work without any certainty that he would be offered any and without compensation for that availability.

17 *Lye v ISO Ltd* [2020] NZEmpC 231, [2020] ERNZ 551.

18 At [41].

19 At [42].

[20] A compliance order was not made at that time, however, because ISO and Mr Lye's union, Maritime Union of New Zealand Inc (MUNZ), were and are bargaining for a collective agreement.

[21] It was common ground that, if MUNZ and ISO had succeeded in reaching agreement, the resulting collective agreement would have covered the work performed by Mr Lye and, consequently, resolved this proceeding. The proceeding was adjourned to provide an opportunity for the bargaining to continue.20

[22] Unfortunately, no agreement was reached. ISO and MUNZ have not entered into a collective agreement and there have been no separate negotiations to address the deficiencies in the individual employment agreement between the company and Mr Lye. MUNZ and ISO have reached a stalemate. While several reasonably minor matters are outstanding between them the sticking point is the availability provision proposed by ISO.

The resumed proceeding

[23] This proceeding resumed on 1 July 2021 to consider whether a compliance order can be made and/or should be made. Mr Lye gave updating evidence to the effect that there has been no change in the agreement he has with ISO, or the way he

works. He said, and I accept, that the work continues to be organised in the same manner as before.

[24] The position reached between MUNZ and ISO was described by Craig Harrison, the national secretary of the union, and Dean Carter, ISO's General Manager Human Resources.

[25] Correspondence between the union and the company was exchanged after the last hearing and before the judgment was issued. In September last year MUNZ wrote to ISO stating a view that it would be inappropriate for the union to enter into a collective agreement without advising the company that it considered the issues raised in the hearing would be likely to impact on any agreement relating to availability.

20 At [49].

[26] ISO replied to the union, by letter dated 16 October 2020, raising as matters for consideration its view about the proposed pay rate and a reference to a CPI adjustment in a draft collective agreement. Matters progressed sufficiently that, a few days later on 20 October, the union withdrew the proceeding it had lodged in the Authority.

[27] On 28 October 2020, Mr Carter proposed to MUNZ that there should be a meeting the following week to sign the collective agreement and the terms of settlement provided in September. There was no reply. Mr Carter wrote again on 5 November 2020 proposing that the term of any collective agreement should be shortened to 12 months.

[28] In January 2021, MUNZ proposed including a clause in the collective agreement dealing with availability. The union advised the company that to be a lawful availability provision it would need to contain some guaranteed hours, defined hours of work that the employee knows will be required to be worked, any further hours that may be allocated and provide reasonable compensation. ISO was invited to propose how to remedy the situation in light of the decision issued in December 2020.

[29] MUNZ and ISO met on 3 February 2021. At this meeting the union offered two options to settle the availability issue that was still at large. They were:

(a) Option 1:
    (i) Two guaranteed days off per seven days.
    (ii) Three guaranteed days and start and finish times published on the Friday before.
    (iii) Two days where the stevedore was available, with compensatory payment of $130.
(b) Option 2:

(i) Three guaranteed days off per week.
    (ii) Four guaranteed twelve hour start and finish times.
    (iii) No payment for availability.
    (iv) The individual employee could make themselves available within an Hours of Work Policy, to work further days.

[30] MUNZ and ISO met again on 12 February 2021. Before this meeting Mr Carter informed the union, by email, that its two options had been reviewed. The union was advised that the company agreed that setting fixed days off was possible. ISO disagreed with the union that the Act required them to be fixed and considered the union's options to be impractical. The company was, however, keen to explore an option, previously presented, which allowed for a day off to be fixed while providing for guaranteed hours.

[31] The company's consistent view in the February meetings was that its proposed collective agreement contained a complying availability provision. That was because it regarded the proposal as providing for a guaranteed number of hours in a fortnight.

[32] Thereafter bargaining stalled. Since February 2021 there have been no meetings or correspondence to attempt to get over this impasse.

The proposed collective agreement

[33] The collective agreement ISO proposed to MUNZ is comprehensive. The coverage clause proposed means the agreement would apply to all of ISO's employees who are members of MUNZ at the Port of Tauranga irrespective of their job descriptions. That includes Mr Lye.

[34] The proposed availability provision is in clause 11. The clause recognises that ISO works all day every day by referring to its operation as "continuous 24/7" dependent on client needs and that the hours of work depend on "these factors".

[35] Clause 11.2 provides that employees will be assigned work based on the continuous 24/7 operational requirement, which could involve varying start or finish times and varying days of the week. Late notification of a start or finish is provided to occur from "time-to-time". Clause 11.3 provides that acceptance of work with less than six hours' notice will be considered voluntary. The clause provides that, in such a case, the employee is to receive a phone call rather than an

“ETXT”.

[36] A roster system was proposed. In clause 11.4 final confirmation of allocation for “non-rostered Employees” can be made on the job, by text, or by telephone in accordance with the following times:

> (a) By 11 am on the day prior to any requirement to work a morning shift the next day that starts before 6 am.
> (b) By 4 pm on the day prior to any requirement to work a morning shift the next day that starts at 6 am or later.
> (c) By 4 pm on the day prior to any requirement to work an evening shift the next day.
> (d) By 4 pm on Friday for any requirement to work the morning or evening shift on Saturday and Sunday with the exception of any shift that starts before 6 am Saturday. In relation to the shift on a Saturday confirmation is required by 11 am on Friday and with Sunday day shift allocations being required by 4 pm on the proceeding Friday.

[37] The proposed agreement provided that “as far as practical” where orders can be confirmed earlier than 4 pm employees would be notified by text message that they were “released”. This part of the proposed agreement provided that employees’ start times would not be altered other than to “accommodate our client needs”. It goes on to provide that changes can be made on the actual day of work, by text or other suitable means, and deals with cancellation, postponement or alteration of a shift.

[38] Finally, the proposed agreement specifies that skills, competencies, availability and performance will determine work allocation in conjunction with:

> (a) rostered employees being available to meet the requirements in their roster; and
> (b) non-rostered permanent employees achieving the minimum guaranteed per pay fortnight.

[39] Mr Carter was questioned about whether the proposed collective agreement, put forward by ISO, meant that non-rostered employees could expect an irregular work pattern based around shipping requirements. He agreed.

[40] The proposed collective agreement involves an 80-hour minimum each fortnight. Mr Carter was asked if a non-rostered employee was still required to be available to meet that 80-hour minimum and, if that person did not take allocated work, the 80 hours would reduce. He agreed.

[41] A proposition was put to Mr Carter that ISO has, under the proposed agreement, the ability to ask or require that 80 hours to be worked at any time “24/7”. He agreed.

[42] Mr Carter was asked if that meant there is no time when Mr Lye knows he will be working. He agreed.

[43] Mr Carter was asked if Mr Lye looked ahead into next week, or the next fortnight, there was no time when he knows he will be rostered to work or any set hours of work within the agreement. He agreed.

[44] Mr Carter was asked that, if Mr Lye sought time off under the proposed agreement, the company had the ability to withhold permission if that was necessary for operational reasons. He agreed.

[45] Mr Carter was asked if under the proposed agreement Mr Lye could be subjected to varying start times for work and days of the week and could have four hours’ notice of a shift cancellation. He agreed.

[46] Mr Carter was asked if Mr Lye could arrive at work with an expectation of a 12-hour shift, be required to finish early after four hours work and be paid only for four hours. He agreed.

[47] As to the work pattern this proposed agreement would allow, the proposition put to Mr Carter was that Mr Lye would be guaranteed an offer of 80 hours work per fortnight but that could mean most of those hours might be worked in one week with very few in the following week. He agreed.

[48] It was put to Mr Carter that the proposed work pattern was “very much” what Mr Lye was employed on under the terms and conditions of the existing individual employment agreement. He agreed.

[49] Mr Carter accepted that there would be very little difference, so far as availability and when Mr Lye was to work, between the terms of his individual employment agreement and the proposed collective agreement.

[50] Mr Carter was asked if he considered that the type of work arrangement in the draft agreement complied with the availability provisions of the Act. Mr Carter said that it did.

[51] The proposed collective agreement was sent to the union before the Court’s decision was issued in December 2020. ISO’s position has not changed subsequently.

[52] While collective bargaining has taken place there have been no separate discussions about the individual employment agreement between ISO and Mr Lye. The company declined to discuss a proposal by the union to vary that agreement. It did

so on the basis that any change needed to await the conclusion of a collective agreement.

The issues

[53] There are two remaining issues: does the Court have the power to make a compliance order and, if it does, should one be made?

Can a compliance order be made?

[54] Mr Mitchell, counsel for Mr Lye, submitted that the current position is untenable. Mr Lye is continuing to work under the terms of an individual employment agreement that requires availability but which has been held several times to contain an unlawful availability provision.

[55] ISO has refused to budge from the position it took nearly three years ago even though that has been shown to be flawed. It is still seeking to have the benefit of an employment agreement with Mr Lye (and potentially to implement a collective agreement replicating it) providing the company with the most flexibility possible for its continued 24/7 operation. In return, Mr Mitchell's argument was that it is providing little in the way of certainty or compensation for the commitment Mr Lye is expected to make.

[56] Aside from not shifting on the individual employment agreement, the criticism levelled at ISO was that the proposed collective agreement it offered MUNZ did not remedy the identified deficiencies. The agreement with Mr Lye (and presumably his fellow stevedores) still makes him available to work "24/7" but does not provide for agreed hours of work, guaranteed hours, or compensation for that flexibility. I agree with Mr Mitchell's submission that the individual employment agreement continues to be non-complying and the provisions in the proposed collective agreement do not satisfy s 67D.

[57] Turning to the orders sought, they were pleaded as:

13. The making of a Compliance Order requiring the Defendant to comply with the availability provisions of the Act contained in Sections 67D and 67E by:
    13.1. Rostering the Plaintiff only at times that are both agreed and guaranteed and;

13.2. Rostering any additional hours only if agreed;

...

[58] To explain the claimed remedy, Mr Mitchell described a compliance order as flexible and able to respond to the problems identified by Mr Lye. Three decisions were mentioned where the Court had made orders that were said to illustrate the flexibility provided by the power to order compliance.21

[59] Mr Mitchell acknowledged that those cases did not involve situations like this case or relief of the type now sought. The value of them lay, he said, in showing how a compliance order can be creatively used.

[60] Supplementing that submission, Mr Mitchell sought assistance from s 187(1)(g) of the Act, providing the Court with jurisdiction to make a compliance order. He did not explain how that section might assist where what was sought is derived from a challenge to the Authority's decision and s 137 of the Act. However, Mr Lye's case was put forward on the basis that a compliance order could be made using what was referred to as the Court's derivative jurisdiction.22

[61] On Mr Mitchell's analysis, the relief sought does not infringe the prohibition in the Act from making a compliance order that relates to bargaining or fixing terms and conditions of employment.23 His submission was that the order sought required ISO to make an offer for a complying employment agreement. It was, therefore, consistent with the Act's requirements where an availability provision is to be included in an agreement.

[62] The other remedies available to Mr Lye were said not to be particularly helpful to address the problems he faces especially given the inequality of bargaining power

21 *Allen Chambers Ltd v Pelabon* [2019] NZEmpC 45, [2019] ERNZ 64; *Northern Clerical IUOW v Lawrence Publishing Co of NZ Ltd* (1990 ERNZ Sel Cas 667 (LC); and *Murfitt v CentrePort Ltd* EMPC Wellington WC/99, 16 December 1999.

22 Relying on *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342 (EmpC).

23 Section 161(2) provides that 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, except as otherwise provided; see ss 161(1)(ca), (cb), (d), (da), (f) and (qd).

between him and ISO.24 He can refuse an offer of work made in breach of the Act, but that was described as not much of a remedy because the system used by ISO would mean, in declining work, he loses pay.25 Mr Lye can raise a personal grievance with ISO as he had done.26 Mr Mitchell pointed out, however, that the personal grievance procedure does not provide anything other than the potential for compensation for past wrongs and does not address correcting ongoing behaviour. If ISO does not change, Mr Lye will face the prospect of having to raise more personal grievance claims, but that alone will not alter his work situation or result in an agreement that provides complying availability provisions.

[63] Mr Mitchell discounted the effectiveness of relying on the union to apply to the Authority for facilitated bargaining.27 His view was that facilitation was not designed to ensure the parties have a compliant agreement because the mechanism is not designed to determine the legality of the respective bargaining positions, which is the real issue here. Rather, he said, facilitation was useful in circumstances where the dispute was about the terms of the agreement.

[64] Ms Ashcroft summarised ISO's response as:

(a) There is no legal basis to grant the remedies sought by Mr Lye and his claim should be dismissed as frivolous and/or vexatious.28
(b) If the claim was not dismissed:
(i) There are no grounds for compliance orders as sought, because to grant them would be to set individual terms and conditions of employment, which the Court is not empowered to do.
(ii) The "sanctity" of bargaining is recognised by the Act and it is left to the parties. The Act provides mechanisms for resolving

24 Recognised in s 3(a)(ii).

25 See s 67E.

26 Section 103(1)(h)–(i).

27 See s 50A and following.

28 Schedule 3 cl 15 to the Act.

issues that arise during bargaining and a compliance order is not one of them.

(iii) If MUNZ has difficulties with the state of the collective bargaining, it has options available under the Act.

(iv) This case is not one appropriate for a compliance order, given that collective bargaining is underway.

(v) Mr Lye is using other mechanisms open to him under the Act by declining hours and pursuing a personal grievance.

(vi) The differing views about what is required by guaranteed hours, which is the sticking point in the collective bargaining, was not determined in this case and the requested order is not a mechanism to resolve that impasse. Mr Lye's claim did not put that matter in issue and it would be inappropriate to use this case to provide guidance on the subject.

[65] Supplementing those submissions, Ms Ashcroft argued that ISO could not satisfy a compliance order regarding the individual employment agreement between Mr Lye and ISO. Making an order as sought would involve, she said, forcing ISO to deal directly with him but that was not possible where there is ongoing bargaining between the company and union. The effect of such an order would result in a different breach, namely of s 32(1)(d)(ii) of the Act. The section prohibits direct or indirect bargaining with a represented party unless agreement is otherwise reached.

[66] Ms Ashcroft acknowledged that the employment agreement between Mr Lye and ISO is outdated and has no minimum hours of work in it at all; that is, that the individual agreement is non-complying. However, she said that the subject was something that needed to be resolved by bargaining not through compulsion. That led her to submit that how it is resolved is for the parties not the Court. A compliance order was said to be the wrong mechanism because the most it could do was deal with existing terms or conditions of employment but it could not set new ones, which would

be the outcome if the remedy sought by Mr Lye was granted. Underpinning Ms Ashcroft's submission was that the power to order compliance is constrained by the jurisdictional limitation in s 161(2).29

[67] ISO's argument that the proceeding was frivolous and/or vexatious was because ss 67D and 67E do not require it to specify how hours of work are allocated in an individual employment agreement. ISO maintained it was being burdened with having to defend claims lacking merit that had "morphed" since the proceeding began in the Authority. Mr Lye's claim was criticised as being for an improper purpose; to further MUNZ's agenda in bargaining when it is not a party to this proceeding.

[68] I do not accept Ms Ashcroft's submissions that Mr Lye's claim is frivolous or vexatious. The employment agreement is non-complying and availability is still being required. Attempting to correct those problems cannot be dismissed in that way. I also do not accept Ms Ashcroft's arguments that a compliance order cannot be made for the following reasons.

[69] The Authority was asked to exercise the powers in s 137 of the Act to compel ISO to comply with ss 67D to 67F both of which are in pt 6 of the Act.30 The relevant section is s 137(1)(a)(ii) that reads:

> (1) This section applies where any person has not observed or complied with—
> (a) any provision of—
>
> ...
>
> (ii) Parts 1, 3 to 6, 6AB, 6A (except subpart 2), 6B, 6C, 6D, 7, and 9; or
>
> ...

[70] Section 137(1) applies where any person has not observed or complied with any provision of pt 6, which deals with an individual employee's terms and conditions

29 The relevant power is in s 137(1)(a)(ii).

30 See paragraph [7] above.

of employment. The object of pt 6 is to specify the rules for determining the terms and conditions of an employee's employment.31

[71] Part 6 includes ss 67C–67G inclusive, which deal with availability provisions. When those sections were introduced into the Act, they were to address what were colloquially called zero-hour contracts but were not confined to them. In *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* this Court observed that s 67D(2) only allows employers to include availability provisions in an employment agreement if that agreement specifies agreed hours of work and includes guaranteed hours.32 To obtain the flexibility in working arrangements anticipated by an availability provision an employer must guarantee some work.

[72] Under s 137(2) the Authority (and the Court on a subsequent challenge) has a discretion to make a compliance order once the grounds for one have been established.33 The purpose of such an order is to prevent further non-observance or non-compliance with the provision, order, determination, direction or requirement. The power is broad, expressed as to be able to require a party to do any specified thing or to cease any specified activity.

[73] Where pt 6 has been breached it follows that s 137(2) confers a power to compel compliance with the relevant provision; in this case s 67D. That is not the end of this analysis, however, because ISO's response to Mr Lye's claim relies heavily on s 161(2) limiting that power. That section reads:

> (2) Except as provided in subsection (1)(ca), (cb), (d), (da), (f), and (qd), 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.

31 Section 60(a).

32. *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2019] NZEmpC 47, [2019] ERNZ 78 at [22].

33 See *Norske Skog*, above n 22.

[74] The two-pronged defence discussed by Ms Ashcroft can be summarised as s 161(2) operating to prevent an order of the kind pleaded being made. That was because the orders sought would require bargaining about the employment agreement, therefore engaging s 161(2)(a) and the relief asked for amounts to the fixing of new terms and conditions of employment contrary to s 161(2)(b).

[75] Ms Ashcroft sees s 161(2) as carving out of the Authority's powers to order compliance under s 137(1)(a)(ii) matters relating to bargaining and fixing new terms and conditions. The result of ISO's submissions, if accepted, is that Mr Lye is left only with the self-help remedies previously mentioned, and the agreement he has with ISO remains in its present form while he remains available to work as required.

[76] I consider s 161(2) does not constrain the exercise of the power to order compliance as Ms Ashcroft argued.

[77] In *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union* a full Court considered the ability to make compliance orders where the collective employment agreement at the centre of the dispute did not comply with s 69OJ of

the Act.34

[78] In that case the Authority had made two compliance orders. The first order required the parties to "negotiate until such time as they comply with s 69OJ".35 The second had the effect of restraining Norske Skog from implementing a proposed restructuring until the collective agreement complied with s 69OJ.

[79] The case discussed what is meant by the expression "related to bargaining" in s 161(2).36 The Court referred to the definition of bargaining in s 5, which deals with collective bargaining. It saw no reason to differentiate between bargaining for a collective agreement and bargaining for an individual employment agreement or variation of one. The statutory definition of bargaining is broad. It includes "all the

34. Section 69OJ is a statutory requirement for every individual employment agreement and collective agreement to contain an employee protection provision.

35 *Norske Skog*, above n 22, at [2].

36 At [45]–[56].

interactions between the parties to the bargaining that relate to the bargaining", including negotiations, communications or correspondence that relates to the bargaining.37 As defined it is immaterial whether the communication or correspondence is before, during, or after the negotiations.

[80] The Court in *Norske Skog* rejected a contention for the company that s 161(2) precluded considering claims about compliance with s 69OJ, despite the potential difficulty presented by the breadth of the definition of bargaining,

[81] In reaching its conclusion the Court drew heavily on the Court of Appeal's decision in *Canterbury Spinners Ltd v Vaughan*.38 In that case the Court of Appeal dealt with whether the Authority had jurisdiction to determine the amount of redundancy compensation payable under a clause in an individual employment agreement. Under that clause the employer was required to negotiate and make an offer of the redundancy compensation to be paid to employees to be made redundant.

[82] The Court of Appeal agreed with the Employment Court that "bargaining" as used in s 161(2) has its ordinary meaning.39 It is synonymous with "negotiating". However, the Court of Appeal said that the crucial question was the end to which the bargaining or negotiating was directed. It was satisfied that s 161(2) prohibited the Authority from being involved in the process of creating a new contractual term; 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 one.

[83] The Court of Appeal held that the Authority may not become involved in the bargaining which precedes the formation or variation of a contract. An example given by the Court was that it could not intervene in the negotiations and order a party to conduct itself, perhaps by making an offer, in a certain way. It could not act as an arbiter and, where the bargaining does not lead the parties to an agreement, settle for them the outstanding issues and thus complete the new term or terms for them.40

37 At [47].

38 *Canterbury Spinners*, above n 13.

39 At [39]-[47].

40. At [41]. The situation is different where the Authority is engaged in facilitated bargaining now recognised by s 161(1)(ca).

[84] However, a distinction was drawn between bargaining for new terms and conditions and the process of trying to reach a consensus over the meaning and effect of an existing contractual term. The debate was, therefore, whether the clause under consideration involved a new term or was giving effect to an existing one.

[85] In the Court of Appeal's view, the proper question to ask was whether, correctly interpreted, the provision already created rights that were legally enforceable and, if so, what they were. That did not mean the Authority could, by strained interpretation, expand its jurisdiction and circumvent the limitations imposed by s 161(2).

[86] Drawing on *Canterbury Spinners* the majority in the full Court in *Norske Skog* concluded that the reference in s 161(2), about being "related to bargaining" was, in reality, about the interpretation, application or operation of a contractual clause. The Court held: 41

...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 [employment protection provision]. 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.

[87] The Court observed:42

[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

41 *Norske Skog*, above n 22, at [50].

42 The decision on this aspect of *Norske Skog* was a majority one with Couch J dissenting.

determine rights and obligations rather than to fix terms and conditions of employment.

[88] I agree with those conclusions. In *Norske Skog*, a compliance order was possible, even where the parties were bargaining, if what was contemplated was compliance with a mandatory requirement of the Act. Orders were not made in that case because the statutory obligation to have a complying collective agreement fell on both parties.

[89] The outcome in *Norske Skog* is consistent with the scheme and purpose of s 137(1)(a)(ii), which creates the power to order compliance where there has been a failure to comply with pt 6. It would be a discordant outcome if, in the face of a clear breach of s 137(1)(a)(ii), no power was available to remedy the situation merely because an order to comply could be construed as relating to bargaining or, coincidently, the parties had started bargaining. Parliament cannot have intended to confer a power to order compliance with the Act and simultaneously hamstring the exercise of that power despite the existence of a breach. It is difficult to imagine a circumstance in which correcting an ongoing breach of pt 6 would not involve, for example, having to take some remedial action that could be construed as relating to bargaining or fixing new terms and conditions of employment.

[90] It follows that I consider a compliance order can be made and do not accept ISO's contention that Mr Lye is confined to the remedies discussed earlier, or that they are sufficient in this case.43 Mr Mitchell's response to this submission was compelling. The ability to refuse work, and to lodge a personal grievance, does not provide a complete or adequate remedy where the offending behaviour continues. Refusing work involves Mr Lye penalising himself in lost income. Making repetitive claims for personal grievances is not a satisfactory response either. The personal grievance will be heard, and Mr Lye might be successful, in which case compensation may be awarded to him. If he succeeds the Authority might make a recommendation under s 123(1)(ca). That, alone, will not necessarily change ISO's behaviour or the employment agreement it has with Mr Lye.

43 See paragraph [62] above.

[91] I do not accept Ms Ashcroft's submission that ISO cannot satisfy a compliance order because that would involve a different breach; because the company would not be able to satisfy s 32(1)(d)(ii) of the Act. The section is about preventing the relationship between the represented party and a representative from being undermined. It is not about preventing proposals being made via an agent known to be acting. ISO knows the union is Mr Lye's agent. A representation made to the union on his behalf, either proposing an alteration to the individual employment agreement it has with him, or a collective agreement that would cover his work, would not infringe s 32(1)(d)(ii).

Should an order be made and, if so, in what terms?

[92] I am satisfied that a compliance order is able to be made, but the next issue is if one should be made and, if so, what it should look like. Section 137(2) allows a compliance order to be made which either requires something to be done or that a specified activity cease.

[93] The relief sought by Mr Lye faces two problems. The first of them is that, in seeking rostering, it extends further than requiring compliance with the Act (or to cease offending activity) and amounts to a direction that ISO must bargain and to do so in a particular way. The pleading is, therefore, inconsistent with s 161(2) in that it both relates to bargaining in an impermissible way and would result in the imposition of new terms and conditions of employment because any resulting agreement would shift dramatically from what the parties presently have.

[94] The second difficulty is that, like *Norske Skog*, the relief presupposes that responsibility for correcting the non-complying provision rests exclusively with ISO. It follows that Ms Ashcroft's criticism of the pleading is well founded.

Making an order requiring ISO to comply with the Act, by proposing the rostering system referred to in the pleading, goes further than ss 137 and 161(2) allow and strays into the realms of the impermissible responses referred to in *Canterbury Spinners*.

[95] Mr Mitchell acknowledged difficulties with the pleading. Initially he was satisfied with the possibility that a compliance order might have the effect of doing no

more than requiring compliance with the Act where an availability provision is to be included. However, as the submissions developed, his view was that restricting the order in that way would be insufficient but he did not propose alternative wording.

[96] As already mentioned, I am not satisfied an order can be made in the terms proposed in Mr Lye's second amended statement of claim. That does not mean, however, that no order should be made, especially where the challenge to the determination was reasonably broad and the issues have been fully explored. In those circumstances, it is possible to contemplate an order expressed in a way which would prohibit making an offer that breaches pt 6 but falls short of purporting to compel an offer to be made.

[97] I have concluded that the parties should be provided with an opportunity to propose the form of an order that might be contemplated if one is to be granted other than as pleaded.

[98] Mr Lye is to file a memorandum containing a proposed draft order no later than 4 pm on Monday 23 August 2021. ISO may file a memorandum in response no later than 4 pm on Monday 6 September 2021.

K G Smith Judge

Judgment signed at 3.15 pm on 5 August 2021
