IN THE EMPLOYMENT COURT
AUCKLAND

AC 39/06
ARC 18/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	EPIC PACKAGING LTD Plaintiff
AND	NEW ZEALAND AMALGAMATED ENGINEERING, PRINTING & MANUFACTURING UNION INC Defendant

Hearing: 15 May 2006
(Heard at Auckland)

Court: Chief Judge GL Colgan
Judge CM Shaw
Judge AA Couch

Appearances: Tim Cleary and Parvez Akbar, Counsel for Plaintiff
Helen White, Counsel for Defendant
Peter Cranney, Counsel for New Zealand Council for Trade Unions Inc as Intervener by leave

Judgment: 21 July 2006

Judgment of Full Court

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[1] This case addresses the novel and important question how unions can persuade employers to join existing collective employment agreements as subsequent parties. In particular, it decides whether the statutory bargaining process, which includes access to strike action, can be invoked for this purpose.

[2] Some of the employees of Epic Packaging Limited ("EPL") are members of the New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc ("the union"). The union wants EPL to become a subsequent party to an existing

multi-employer multi-union collective agreement called the Plastics Industry Collective Agreement (1 September 2003 to 31 August 2005) ("the Plastics agreement").

[3] The union issued EPL with a notice under s42 of the Employment Relations Act 2000 purporting to initiate bargaining for an agreement that EPL become a party to the Plastics agreement. EPL resisted joining the agreement. It takes the view that the notice initiating bargaining is invalid and that it cannot be required to enter the statutory bargaining process for that purpose.

[4] The union's position is that, by giving notice initiating bargaining under s42, it can compel EPL to engage in bargaining. The implications of this are that the union could then use strike action to coerce EPL to agree and, in the event of a breakdown in negotiations, the parties could be subject to facilitated bargaining or be bound by terms and conditions of an agreement "fixed" by the Employment Relations Authority.

[5] Because of these implications, the issues are important, both for the parties and for employers and unions generally. For this reason, the New Zealand Council of Trade Unions Inc (NZCTU) and Business New Zealand Inc were offered an opportunity to be represented and heard in the proceeding as interveners. NZCTU took that opportunity. Business New Zealand considered that its interests would be sufficiently represented by counsel for the plaintiff and was content to informally support the plaintiff's case.

[6] The central issue for the Court is whether it is open to the union to initiate bargaining for an agreement that EPL become a subsequent party to the Plastics agreement by giving notice under s42 of the Employment Relations Act 2000. In answering this question it is also necessary to determine the meaning of key terminology used in the Act including "bargaining", "collective bargaining" and "collective agreement".

The Employment Relations Authority's determination

[7] The questions we have to decide in this case are essentially the same as those presented to the Authority although we believe we have had the benefit of more detailed argument. The Authority found in favour of the union's position but we do

not propose to summarise the Authority's determination[1]. This challenge has been by hearing de novo and we must reach our own decision in the matter: s183(1) Employment Relations Act 2000.

The Relevant Facts

[8] We were provided with an agreed statement of facts. EPL manufactures plastic packaging. About 20 percent of its employees are members of the union. All EPL's employees are engaged currently on individual employment agreements.

[9] The union was, at all material times, a party to the Plastics agreement. This was a multi-union multi-employer collective agreement negotiated between two unions and a number of employers in what was described as *"the Plastics Industry"*. The employer parties to the agreement are seven original parties and numerous subsequent parties who have since joined the collective agreement although we were not told by what process. EPL was not a party to this agreement.

[10] The relevant clauses of the Plastics agreement can be summarised as follows:

- The *"Intent of the Agreement"* includes that one of its objectives is *"Allowing for flexibility for enterprises to depart from specified provisions through the operation of enabling clauses."*
- It makes provision for employers to become subsequent parties:

  Employers in the Plastics Industry who subsequently agree to be come (sic) *parties by way of the Additional Employer Variation (Clause 2.1) below shall be recorded on a master list compiled by the NZAEPMU. The Plastics New Zealand Inc Industrial Working Party shall be advised of additions to this list, on a not less than quarterly basis. For the purposes of this subclause and 1.3 below, the Plastics Industry is defined as companies whose primary purpose is the manufacture of plastics products, the supply of services to those manufacturers or the recycling of plastic products. No company party to this agreement prior to 1 September 2005 shall be excluded from being a party by virtue of this subclause.*

- The coverage clause includes employees whose work is specifically described in the agreement and who are *"employed by an employer in the Plastics Industry who is a party to this Agreement, and who are, or become, members of a union party to this Agreement"*.
- Clause 2.1, headed "Subsequent Employer Variation", provides:

  The parties agree that this Agreement may be varied from time to time by the NZAEPMU, without requiring the agreement of any other party, to

[1] *Epic Packaging Ltd v New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc* unreported, Y Oldfield, 8 February 2006, AA 25/06.

include further employers in the Plastics Industry who agree to become parties.

2.1.1 Under section 56A of the Employment Relations Act 2000 as amended, there is a requirement on such subsequent employer parties to this Agreement to notify all existing parties of their intention to be covered. This requirement shall be fulfilled by way of a standard letter by the union parties to this Agreement.

- Clause 2.2 provides a general power of variation of the agreement by agreement between the employer and union parties whose members are affected by the variation.

- A number of the agreement's provisions affecting either employer specific or employee specific terms and conditions of employment are left for settlement on a case by case basis between the union and each employer. These include clause 13 (hours of work), clause 15 (overtime), clause 16 (meals/rest periods/wash up), clause 17 (meal allowances), clause 18 (call backs), and clause 19 (shifts).

[11] As noted above, clause 2.1 of the Plastics agreement permits the union to vary it unilaterally to include another specified employer party. Any subsequent or other variations require negotiation with, and the agreement of, other parties to the agreement including, in particular, the other employer parties.

[12] In April 2005, the union purported to give notice to EPL of its intention to bargain for a collective employment agreement pursuant to s42 of the Employment Relations Act 2000. The stated intention of the bargaining was to obtain EPL's agreement to become a subsequent party to the Plastics agreement by virtue of clause 2.1. EPL contested the notice and the union's right in law to initiate collective bargaining for this purpose in this way. It did not recognise the initiation of bargaining notice as valid and refused to commence bargaining with the defendant pursuant to ss32 to 50 of the Act about becoming a subsequent party to the Plastics agreement.

[13] In the course of these proceedings, the 2003-2005 Plastics agreement expired. It was subsequently re-negotiated and renewed for a further two year period from 1 September 2005 to 31 August 2007. Although the union had the opportunity to nominate EPL as an employer party to the collective bargaining for that replacement multi-employer multi-union collective agreement, it chose not to do so.

[14] We assume that the union took this course in reliance on its argument that EPL can be persuaded, through the statutory bargaining process, to agree to be a subsequent party to the agreement. There is no question that, if the union had nominated EPL as an employer party to the bargaining for the renewal of the Plastics agreement, it could have exercised the legislation's coercive measures (including strike action) to persuade EPL to become an original employer party and to agree to the union's proposed terms and conditions.

[15] EPL is not opposed to bargaining collectively with the union. It accepts that if it were given notice initiating bargaining for a single-union single-employer collective agreement or even perhaps a multi-union single-employer collective agreement, it would have to engage in that process. However, it does not wish to be party to a multi-employer collective agreement with competitor employers and/or other unions.

[16] The relevant parts of the notice given by the union to EPL are:

INITIATION OF BARGAINING FOR COLLECTIVE AGREEMENT

Employment Relations Act 2000, Section 42

To: *Epic Packaging Limited*

The NZ Amalgamated Engineering Printing and Manufacturing Union hereby initiates bargaining for a collective agreement.

1. *The intended parties to the collective agreement are:*

   Union party: *NZ Amalgamated Engineering Printing and Manufacturing Union.*

   Employer party: *Epic Packaging Limited*

2. ***Coverage:*** *The Union is seeking by way of this bargaining to have the named employer agree to become a subsequent party to the Plastics Industry Collective Agreement (2005 to 2007). This is possible through the following provision of that Agreement.*

   2.1 Subsequent Employer Variation: *The parties agree that this Agreement may be varied from time to time by the **NZAEPMU**, without requiring the agreement of any other party, to include further employers in the Plastics Industry who agree to become parties.*

The coverage clause for that agreement is:

Coverage: This Agreement shall cover employees whose work is described in clause 51 of this Agreement and who are employed by an employer in the Plastics Industry and is a party to this Agreement and who are or become members of the Union.

New employees engaged in work described in clause 51 of this

> *Collective Agreement, will, pursuant to section 62 of the Employment Relations Act 2000, be employed on the terms and conditions of this Agreement for the first 30 days of their employment. Nothing shall prevent mutual agreement to terms and conditions that are not inconsistent with this Agreement.*
>
> *If there is anything about this notice which you believe is contrary to the requirements of the Act, or which otherwise would make the initiation of bargaining ineffective, please advise the union promptly. Failure to do so will be regarded as acceptance that bargaining has been properly initiated by this notice.*

The Statutory Provisions

[17] This case is essentially about interpreting the relevant provisions of the Employment Relations Act 2000. These are found principally in Part 5 of the Act*: "Collective bargaining"*.

Collective bargaining

[18] Although not a phrase explicitly defined in the Act, it is clear from the way in which the term "*collective bargaining*" is used (including in the definition of "bargaining" in s5) that it means bargaining for a collective agreement.

Bargaining

[19] In this context, the words "*bargain*" or "*bargaining*" do not mean simply negotiating, as all persons are entitled to do, about the nature and process of an agreement or other arrangement that one proposes be entered into with the other. "*Bargaining*" in the context of the Employment Relations Act 2000 is a term of art and, where it is used in the expression "*collective bargaining*", it means the process referred to in ss40 to 50 under the subheading "*Bargaining*".

[20] Section 41 defines when such "*bargaining*" may be initiated. If there is no applicable collective agreement between the parties, either an employer or a union may initiate bargaining with the other at any time. If there is an applicable collective agreement in force, bargaining may not be initiated until the start of a defined period prior to the expiry of the agreement. The length of that period is between 40 days and 120 days depending on the nature of the collective agreement and which party is seeking to initiate bargaining.

[21] Section 42 provides the mechanism for initiating the bargaining process. It provides:

> ***42. How bargaining initiated***

> *(1) A union or employer initiates bargaining for a collective agreement by giving to the intended party or parties to the agreement a notice that complies with subsection (2).*
>
> *(2) A notice complies with this subsection if—*
>
> *(a) it is in writing and signed by the union or the employer giving the notice or its duly authorised representative; and*
>
> *(b) it identifies each of the intended parties to the collective agreement; and*
>
> *(c) it identifies the intended coverage of the collective agreement.*

[22] Such *"bargaining"* includes both compulsory and coercive elements. Parties to lawfully initiated bargaining can compel each other to participate in certain processes against their will. Parties to such statutorily sanctioned *"bargaining"* can take strike or lockout action in support of the bargaining to persuade or coerce each other to agree to a particular outcome. Engagement in statutory bargaining requires compliance with a number of minimum good faith obligations contained in the legislation. If bargaining is unavailing, the statutory process can include recourse to so-called facilitated bargaining under ss50A to 50I of the Act. Finally, in circumstances of serious and sustained breaches of good faith in relation to collective bargaining, s50J empowers the Employment Relations Authority to fix terms and conditions of employment in settlement of the bargaining.

[23] If parties are entitled to *"bargain"* in the sense just described in respect of seeking to include others as subsequent parties to current multi-party collective agreements, the legislation substantially alters what would otherwise be the common law rights and obligations of the parties relating to the negotiation and settlement of contracts.

Collective agreement

[24] *"Collective agreement"* is defined in s5 the Employment Relations Act 2000 as being an *"agreement"* that is binding on one or more unions and one or more employers and two or more employees. The word *"agreement"* on its own is not explicitly defined and its meaning must be taken from its context. It is not an abbreviation or synonym for *"employment agreement"* which is defined in s5 as meaning *"a contract of service"* including *"an employee's terms and conditions of employment in … a collective agreement; or a collective agreement together with any additional terms and conditions of employment …"*.

[25] Section 54, although not defining a collective agreement, assists in identifying

whether any particular agreement is a collective agreement. It must be in writing and signed by each union and employer that is party to it. It must contain:

- a coverage clause;
- a plain language explanation of the services available for the resolution of employment relationship problems;
- a clause providing how the employment can be varied;
- the date on which the agreement expires or the event on the occurrence of which the agreement is to expire.

[26] Agreements generally, and employment agreements in particular, that do not include these requirements are not enforceable as "collective agreements" under the Act.

[27] Although the Employment Relations Act 2000 provides for a statutory process of bargaining for a collective agreement, it is equally open to unions and employers to reach collective agreements without invoking that process. Many collective agreements are reached willingly and in a spirit of co-operation, especially where they renew and amend an existing collective agreement between the same parties. It is the form and content of an agreement which makes it a collective agreement for the purposes of the Act, not the process by which the agreement was reached.

Section 56A

[28] Section 56A was added to the principal Act with effect from 1 December 2004.[2] It provides how employers and unions may become subsequent parties to an existing collective agreement:

[2] Section 17 of the Employment Relations Amendment Act (No 2) 2004.

56A Application of collective agreement to subsequent parties

(1) An employer who is not a party to a collective agreement may become a party to the collective agreement if—

(a) the agreement provides for an employer to become a party to the agreement after it has been signed by the original parties to the agreement; and

(b) the work of some or all of the employer's employees comes within the coverage clause in the agreement; and

(c) the employees referred to in paragraph (b) are not bound by another collective agreement in respect of their work for the employer; and

(d) the employer notifies all the parties to the agreement in accordance with subsection (5) that the employer proposes to become a party to the agreement.

(2) On the day after the day on which all parties to the collective agreement have been notified in accordance with sub- section (5),—

(a) the employer becomes a party to the collective agreement; and

(b) the collective agreement also binds and is enforceable by—

(i) the employer:

(ii) employees—

(A) who are employed by the employer; and

(B) who are or become members of a union that is a party to the agreement; and

(C) whose work comes within the coverage clause in the agreement.

(3) A union that is not a party to a collective agreement may become a party to the collective agreement if—

(a) the agreement provides for a union to become a party to the agreement after it has been signed by the original parties to the agreement; and

(b) the union has members doing work that comes within the coverage clause of the collective agreement; and

(c) as a result of a secret ballot of those members, a majority of them who are entitled to vote and do vote are in favour of the union becoming a party to the collective agreement; and

(d) the union notifies all the parties to the collective agreement in accordance with subsection (5) that the union proposes to become a party to the agreement.

(4) On the day after the day on which all parties to the collective agreement have been notified in accordance with sub- section (5),—

(a) the union becomes a party to the collective agreement; and

(b) the collective agreement also binds and is enforceable by—

(i) the union:

(ii) employees—

(A) who are employed by an employer that is a party to the agreement; and

(B) who are or become members of the union; and

(C) whose work comes within the coverage clause in the agreement.

(5) For the purposes of this section, a party to a collective agreement is notified—

(a) when the notice is given to the party; or

(b) if the notice is posted to the party, on the 7th day after the day on which the notice is posted.

(6) For the purposes of subsection (1)(b) and (c), employees includes persons whom the employer might employ in the future.

[29] Subsections (1) and (2) of s56A set out the requirements for an employer to

become a subsequent party to an existing collective agreement. Subsections (3) and (4) address the corresponding requirements for unions. The requirements are not identical. In the case of a union, subs (3)(c) requires that there be a secret ballot of the union's members.

[30] It is apparent from s56A(1) and (2) that an employer may become a party to an existing collective agreement without there being a process of bargaining initiated by a s42 notice. This is consistent with the observation we have made earlier that it is open to employers and unions to enter into collective agreements which are recognised under the Act either through the statutory bargaining process or independent of it.

[31] What this confirms is that the issue in this case is not whether the statutory bargaining process must be used to enable an employer to become a subsequent party to an existing collective agreement. Clearly, it does not. Rather, the issue is whether it is open to a party to a collective agreement to invoke the statutory bargaining process, including the coercive options available under it, to persuade another person to become a subsequent party to that collective agreement.

The Act Interpreted

[32] It is not immediately clear from the words of the Act whether the bargaining process triggered by a s42 notice is intended to be applicable to the s56A joinder process. We must therefore apply the established processes for statutory interpretation to ascertain its meaning. The starting point must be s5 of the Interpretation Act 1999 which requires us to have regard to the legislation's purpose.

[33] In determining that purpose, the object sections of the Act are important. The first object in s3 is *"to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship"*. This is to be achieved both *"by promoting collective bargaining"* and *"by protecting the integrity of individual choice"*.

[34] Employment relationships, as defined in s4(2), can include those between multiple unions and multiple employers.

[35] The two objects of promoting collective bargaining and protecting individual choice are arguably in tension, if not in conflict. Promoting collectivity of bargaining inevitably impinges on the integrity of individual choice which is to be

protected. So interpretation of relevant parts of the statute cannot promote collective bargaining at all costs. Equally, it cannot protect the integrity of individual choice above all else. In interpreting the Act, regard is to be had to both of these objects but as a means to the ultimate end of building productive employment relationships.

[36] Part 5 of the Act, which deals with collective bargaining, has its own objects set out in s31. Relevant objects include to promote orderly collective bargaining and to ensure that employees confirm proposed collective bargaining for a multi-party collective agreement. As judgments of the full Court[3] have confirmed, both before and after the 2004 amendments, while the purpose of the Act is to promote collective bargaining, Parliament did not state a preference for any particular sort of collective bargaining over another. In particular, it did not mandate multi-party collective bargaining in preference to single-party collective bargaining or require that multi-employer collective bargaining was to be preferred over single-employer collective bargaining. Nor was there to be any statutory preference for the outcomes of such bargaining, such as that multi-employer collective agreements might be preferred to others.

[37] So the interpretation of the sections in issue must accommodate and balance these express objectives of the Act.

[38] We also have regard to s6 of the New Zealand Bill of Rights Act 1990. This provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning shall be preferred to any other meaning. Among the rights and freedoms is the right to freedom of association in s17. That right is to be enjoyed by corporate persons such as the plaintiff as well as by animate persons: see s29 of that Act. Freedom of association is at issue in the case because the plaintiff does not wish to associate with other employers as another party to a collective employment agreement. This Court has recognised the application of s6 to interpretation of the Employment Relations Act 2000 in *Gibbs v Crest Commercial Cleaning Ltd* [2005] 1 ERNZ 399.

[39] A further guide is that the second broad object of the Employment Relations Act 2000, contained in s3(b), is *"to promote observance in New Zealand of the*

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[3] *Toll New Zealand Consolidated Ltd v Rail & Maritime Union Inc* [2004] 1 ERNZ 392 and *Association of University Staff Inc v Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224

principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively."

[40] Article 4 of Convention 98 provides:

> *Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

[41] New Zealand ratified ILO Convention 98 on 9 June 2003 but has not ratified Convention 87. Although ratification emphasises the need to act in conformity, it is not required to give effect to the object of the Act expressed in s3(b). We note also New Zealand's longstanding membership and active participation in the business of the International Labour Organisation which make it proper for us to have regard to Convention 87 as well as Convention 98. As Mr Cleary for EPL pointed out, however, what is addressed by the object in s3(b) of the Act is the promotion of the observance of the underlying principles of the conventions, rather than adherence to the words themselves or to the way in which they have been interpreted by the ILO's Freedom of Association Committee. Convention 87 is less relevant to the questions at issue in this case than Convention 98.

[42] We accept Mr Cleary's submissions that the underlying principle of Article 4 of Convention 98 is the promotion of machinery for the *"voluntary negotiation"* of collective agreements between employers' and workers' organisations. The convention makes no mention of multi-party collective agreements, let alone multi-employer collective agreements or mechanisms for subsequently joining them.

[43] Other international human rights instruments are also relevant. These include the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both United Nations covenants. Although human rights by their very nature affect and benefit human beings and not inanimate corporations, many employers for whom Parliament legislated are animate natural persons entitled to the benefits of these rights and freedoms. So, international human rights considerations cannot be excluded in the interpretation of legislation simply because some employer parties are not natural persons.

[44] Article 20 of the Universal Declaration of Human Rights provides not only that

everyone has the right to freedom of peaceful assembly and association, but also its corollary, that no-one can be compelled to belong to an association. "Association" is a broad concept not confined to bodies such as societies or clubs. It includes a wide range of interaction and commonality of interest or activity. In our view, it includes the interaction and common interest inherent in the negotiation, settlement and operation of a contractual regime governing employment relationships such as a collective agreement.

[45] Similarly, Article 1 of the International Covenant on Civil and Political Rights records the agreement of the General Assembly that all persons have the right of self-determination including pursuit of their economic development. Article 22 provides that everyone shall have the freedom of association with others (including the right to form and join trade unions for the protection of interests) and that no restrictions may be placed upon the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety or other momentous considerations. Although New Zealand entered a reservation in respect of Article 22, this was *"as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article."*

[46] Applying the guides to statutory interpretation and relevant parts of the international instruments we have referred to, it is clear that the provisions of the Employment Relations Act 2000 at issue in this case should, to the extent it is not inconsistent with any clear legislative intention, be interpreted consistently with an employer's freedom to choose not to associate with other employers and/or unions. Put another way, the legislation should not be interpreted to impinge upon the freedom not to associate, unless a contrary parliamentary intention can be discerned.

[47] Because of the uncertainty of the meaning of the Act and the need to reconcile the conflicting objectives of promoting collective bargaining and protecting individual choice, it is appropriate to consider the law making process to determine what Parliament intended to be the law affecting the questions raised by this case. That begins with the legal environment in which the enactment was made.

Statutory Interpretation – Legislative Background

[48] Although joinder of subsequent parties to collective instruments has a long history in New Zealand industrial law, we have confined our examination to the relevant provisions under the Industrial Relations Act 1973 and subsequent legislation. Under that Act, the key documents setting terms of employment were collective agreements registered, and awards made, by the Arbitration Court. While those documents arose out of negotiations conducted between unions and groups of employers, they applied equally to all unions, employers and employees who were within their coverage, whether or not they had been engaged in the negotiations. Thus, many employers in particular became subsequent parties to collective agreements and awards. There was no choice and no process was required. It occurred automatically by operation of law.

[49] The Industrial Relations Act 1973 also provided for the negotiation and registration of what were known as voluntary settlements and composite agreements. These were documents quite similar to collective agreements under the current legislation. During the currency of a voluntary settlement or a composite agreement, any other employer or union engaged in the same industry could become a party with the agreement in writing of the existing parties. Although provided for in the statute, this process effectively mirrored the common law principle that the parties to an agreement may vary it by agreement.

[50] The 1973 legislation therefore provided for subsequent parties, either by operation of law or on an entirely voluntary basis, depending upon the type of collective instrument.

[51] The Industrial Relations Act 1973 permitted strikes during voluntary negotiations for a collective agreement but prohibited them once the statutory conciliation process had been invoked. The Act did not deal with strikes to compel an employer to become a subsequent party to a voluntary settlement or a composite agreement but it appears that such action was probably proscribed by the Commerce Act 1975.

[52] The Industrial Relations Act 1973 was succeeded by the Labour Relations Act 1987. This maintained a very similar system of awards and voluntary settlements which created subsequent parties by operation of law. It also allowed for what were

known as enterprise agreements and composite agreements. By its nature, an enterprise agreement involved a single employer and there could be no issue of subsequent employer parties. The Act made no provision for subsequent union parties. The addition of parties to a composite agreement was subject to the agreement of all parties to it and of the Arbitration Commission.

[53] Under the Labour Relations Act 1987, strike and lockouts were expressly declared to be lawful in some circumstances and unlawful in others. There were, however, some circumstances not covered by either provision. A strike in support of a claim for an employer to become a subsequent party to a composite agreement was arguably one of those circumstances but, given the requirement for the approval of the Arbitration Commission to the joinder of parties, such action would have been pointless and the question of whether it would have been lawful does not appear to have ever arisen.

[54] The Labour Relations Act 1987 was replaced by the Employment Contracts Act 1991. Consistent with the philosophy of that legislation, no express provision was made by Parliament for joining subsequent parties to collective employment contracts. As it was expressly provided that the parties to a collective contract could, at any time while it remained in force, agree in writing to the variation of any or all of its provisions, however, that would have allowed the addition of subsequent parties by agreement of all concerned.

[55] Section 63 of the Employment Contracts Act 1991 contained an express prohibition upon strikes "*concerned with the issue of whether a collective employment contract will bind more than one employer*". This clearly prevented industrial action in support of a claim that an employer become a subsequent party to a collective contract.

[56] As originally enacted, the Employment Relations Act 2000 was silent on the issue of subsequent party joinder but Parliament did not re-enact the previous prohibition on strike action in support of multi-employer agreements.

[57] We were not told, and are therefore unaware of, what practices may have prevailed following the enactment of the Employment Relations Act 2000 for the joinder of subsequent parties to multi-party employment agreements. In particular, it is unclear whether the coercive provisions of the legislation's collective bargaining

regime may have been employed to persuade employers to become subsequent parties and whether any such practice was the cause of concern.

[58] The legislative history and lack of evidence of any controversial issue under the legislation as originally enacted makes it difficult to ascertain why Parliament enacted s56A as and when it did. We have therefore examined documentation relating to the passage of the legislation through the parliamentary process.

[59] The Employment Relations Amendment Act (No 2) 2004 appears to have had its genesis in a ministerial document known as *Review of the Employment Relations Act: Overview of Proposals for Legislative Fine Tuning* dated 31 March 2003 which was submitted to the Cabinet Economic Development Committee. It stated at paragraph 13 and in Appendix 2, paragraph 77:

> **Facilitating access to Concluded Settlements**
>
> *13 agree that the Act be amended to provide for the voluntary joinder of union and employer parties to existing collective employment agreements, where the parties to the original collective agreement had negotiated an enabling provision in the agreement to allow this to occur;*
>
> *…*
>
> ***Promoting Collective Bargaining by Facilitating Access to Concluded Settlements***
>
> *… The decision to seek joinder to an existing collective would be solely by the mutual agreement of the employer and union concerned – i.e. there would be no citing in. Where the employer did not agree, no joinder would be possible.*

[60] In her speech upon the introduction of the Bill, the Minister of Labour referred to this provision stating:

> *The Bill will also facilitate the settlement of multi-employer and multi-union collective agreements. Other unions and employers will be able to easily join in* [sic] *existing collective agreement where the original agreement allows that to occur and all parties agree.* [11 December 2003]

[61] What became s56A was introduced as clause 18 of the Employment Relations Law Reform Bill 2003 (No 92-1). The explanatory note to the Bill as a whole includes the following as part of the general policy statement and overview:

> *… the Act acknowledges the inherent inequality of power in employment relationships, and seeks to balance the interests of employers and employees through the promotion of unions and collective bargaining … . The operation of the Act since 2000 has … revealed a number of areas where it can be strengthened so that it can better achieve Government's employment relations policy objectives.*

[62] The Bill's explanatory note summarises relevant specific provisions as ensuring:

> *the effective promotion and encouragement of collective bargaining and settlement. The Bill seeks to reduce practical and behavioural barriers to*

collective bargaining through providing appropriate incentives for collective bargaining, as well as provisions to discourage and penalise the deliberate undermining and avoidance of collective bargaining.

[63] In the explanatory notes' summary of key elements affecting the promotion of collective bargaining, it is stated:

> *The promotion and encouragement of collective bargaining is a key object of the Act. However, practical incentives for the parties to bargain and settle collective agreements can very, whilst unions face administrative barriers in organising employees collectively, particularly in multi-party bargaining. …*
>
> *… Other provisions to promote collective bargaining include making it a requirement of multi-party collective bargaining that the relevant unions and employers (or their representatives) meet at least once after bargaining has been initiated to work out the bargaining arrangements. Failure to do so will be a breach of good faith.*
> *…*
> ***The Bill also allows subsequent union and employer parties to join existing collective agreements, where the parties to the original agreement have negotiated an enabling provision to allow this to occur***.
> [Emphasis added]

[64] The Bill's explanatory note set out a clause by clause analysis that, in relation to clauses 14 and 18, stated:

> Clause 14 *inserts a* new section 48A *in the principal Act relating to the first meeting of multi-party bargaining for a collective agreement. The new section imposes an obligation on each party to the bargaining to attend, at least, the first meeting to the bargaining.*
> …
> Clause 18 *inserts a* new section 56A *in the principal Act. The new section specifies when and how an employer or union who are not original parties to a collective agreement can become parties.*

[65] Commentary by the Transport and Industrial Relations Committee in its report to the House addressing clauses 14 and 18 noted at p7:

> *While clause 14 intended to promote effective and efficient bargaining for multi-union and multi-employer collective agreements, the majority has carefully considered the issues raised by submitters and recommends the deletion of this clause. The majority considers that clause 14 has contributed to a perception that employers will be compelled to enter into a multi-party collective agreement. In addition, it could potentially detract from the existing good faith obligations in section 32 of the principal Act (which include entering into a bargaining arrangement and to meet form time to time for the purposes of bargaining). These obligations apply to bargaining for MECAs, as well as bargaining for single-employer collective agreements.*

[66] Addressing clause 18, the committee advised the House in its report:

> *… the majority considers that clause 18, proposed new section 56A, specifying how and when an employer or a union (not original parties to the collective agreement) may become party to a collective agreement subject to certain criteria, enables willing employers and unions to join pre-existing collective agreements.*

[67] The Department of Labour's report on the Employment Relations Law Reform Bill, ER/DOL/5A, dated 22 July 2004 noted that submissions opposing the clauses considered variously that they would compel employers to enter into multi-employer collective agreements, that they could enable strikes in support of subsequent party clauses, that they would mark a return to national awards, and that the proposed provisions were ambiguous and uncertain. The department's comments on the clause were as follows:

> *The aim of this clause is to provide a clear process for employers and unions to become parties to existing collective agreements if they wish to do so.*

[68] Clause 14 did not survive to be enacted at all. The Department of Labour did not recommend to the committee that clause 18 be changed. Clause 18 was enacted as s56A without amendment in the legislative process.

The Parties' Positions

[69] EPL's case is based on three broad propositions. First, it says that s56A establishes an entirely voluntary and standalone mechanism for employers and unions to become parties to a current collective agreement. Second, its case is that bargaining for subsequent joinder of parties to an existing collective agreement is not within the scope of the bargaining regime established by ss31 to 50 of the Employment Relations Act 2000 and inconsistent with the scheme of the Act as a whole. Finally, EPL says that allowing the statutory bargaining process to be used to coerce an employer to become a subsequent party to an existing collective agreement would be inconsistent with the common law principle of freedom of contract and would infringe an employer's right to freedom of association. It says that each of these broad planks of its case is linked by a common theme that there can be no "bargaining" for an agreement already formed by other parties.

[70] In essence, the union's case is that there is no express statutory prohibition upon bargaining for the inclusion of a subsequent party in a collective agreement and, because it is not prohibited, it ought to be permitted. It says the scheme of the legislation is not only to allow, but to encourage, collective bargaining for joinder to a current collective agreement.

[71] Ms White for the union focused significantly in oral submissions upon what she categorised as a two stage strategy by the union. The first stage is to bargain for an agreement that the employer becomes a subsequent party to the Plastics

agreement and, once that has occurred, the second stage is for that employer and the union to negotiate variations to the terms of the agreement specific to that employer. Ms White submitted that the union should be entitled to use the statutory bargaining process in the first stage of that process. This categorisation of the process was necessary to meet the fundamental argument that unless and until an employer is a party to the Plastics agreement, it cannot negotiate for its variation as the union accepts it should be able to do.

[72] The NZCTU accepts that, at the heart of the case, is the proper interpretation of s56A in the context of the Act as a whole. It supports the union's position that, once the three qualifying and one procedural requirement contained in that section are met, the statute should be interpreted and applied so as to permit the statutory bargaining process to be used to achieve joinder of a subsequent party.

Decision

[73] The Employment Relations Act does not provide explicitly that its statutory bargaining regime applies to the joinder of subsequent parties to an existing collective agreement or to the new s56A process in particular. In these circumstances it is necessary to discern the intent of the legislation on this question by recourse to conventional aids to statutory interpretation.

[74] There is an inevitable tension in the Act between the objects of promoting collective bargaining and preserving individual freedom of choice. The resolution of that tension lies in our conclusion that what the legislation promotes is collective bargaining, and implicitly collective agreements, generally but not any more particularised form of collective bargaining or any particular types of collective agreement, including multi-employer collective agreements. This is consistent with the conclusions reached by this Court previously[4], both before and after the passage of the 2004 amendment Act.

[75] The object of the legislation to promote collective bargaining is strongly supported by the statutory bargaining process initiated by notice under s42. This permits the parties to have recourse to coercive tactics to achieve a collective agreement. Beyond that, recognition of the object of protecting the integrity of individual choice requires an interpretation that favours the exclusion of coercion or

[4] The *Toll* and *AUS* judgments: see paragraph [36]

compulsion as a means of obtaining agreement of parties to join in particular forms of collective agreements, including existing multi-employer agreements.

[76] It is fundamental that the collective bargaining referred to in the object section of the Act is bargaining for a collective agreement as that concept is described and embodied in the Act. Such an agreement must contain or otherwise fix terms of employment. It must also have the form and content required by s54. It follows that the bargaining process under the Act must be directed at concluding such an agreement. What the union seeks to achieve by its notice in this case is not the creation of such an agreement. The Plastics agreement has already been bargained for and concluded.

[77] The Act specifically provides in s41 that, once an "applicable" collective agreement has been settled, the statutory bargaining process cannot be invoked to bargain for it again until a precise time close to its expiry. In our view, this restriction on fresh bargaining for an agreement which has been concluded reflects an important object of Part 5 of the Act set out in s31(d) which is *"to promote orderly collective bargaining"*. To allow the statutory bargaining process to be invoked again with respect to a collective agreement which has already been concluded as such would, in our view, be contrary to that object.

[78] Looked at overall, the scheme of Part 5 of the Act points to the statutory bargaining process initiated by a notice under s42 being confined to bargaining for collective agreements yet to be settled. The collective bargaining provisions of the Act are inconsistent with negotiations relating to the variation of an agreement that has already been formed and is in operation. It is a strong principle that, other than by willing agreement, the terms of a current agreement cannot be varied. We therefore conclude that coercive bargaining is not available to procure a variation to an existing agreement.

[79] That conclusion is reinforced by the application of s6 of the New Zealand Bill of Rights Act and by a consideration of the principles contained in the various international covenants and other instruments discussed. The conclusion is also consistent with the legislative history of s56A we have outlined. The use of words and phrases such as *"voluntary"*, *"mutual agreement"*, *"willing employers"* and *"if they wish to do so"*, confirm this. This language is inconsistent with any intention to

permit coercive measures to be used to procure the joinder of subsequent parties. We are satisfied that the passage through the parliamentary process of the clause that became s56A was on the basis that it would not be subject to coercive bargaining procedures. This view is reinforced by the select committee's removal of clause 14 of the Bill on grounds that it might be seen to compel employers to agree to multi-employer collective agreements. Parliament, at the second and third readings of the Bill, accepted that deletion.

[80] We conclude that, by enacting s56A, Parliament intended to expressly permit parties to agree upon the joinder of a subsequent party to a current collective agreement but did not intend to permit the statutory bargaining process initiated by a s42 notice to be used to coerce an unwilling party. It follows that the notice given by the union in this case is ineffective and does not bind the plaintiff to the statutory bargaining process. If the union wishes to persuade EPL against its will to become a party to the Plastics agreement, it will have to wait for the statutory period approaching the expiry of the collective agreement to initiate bargaining with EPL as an original party to a replacement agreement.

[81] The foregoing reasoning and decision based on statutory interpretation disposes of the case. Out of deference to the comprehensive arguments advanced by the defendant and the intervener, however, we address these.

[82] Ms White submitted that, through the two step process initiated by the union, all potential issues between the union and EPL will be available for negotiation if statutory bargaining is permitted. We disagree. Key elements such as the identities of the other party to the agreement, its coverage clause and its expiry date will not be open for negotiation between these parties. They have been settled and agreed to previously by other employer parties to the Plastics agreement and, without the consent of all other parties, cannot be altered.

[83] We also find against the union's argument that, by initiating bargaining for an agreement that an employer will become a subsequent party to an existing collective agreement, it is seeking to conclude an agreement that is binding on the union, that employer, and the employees of that employer who are members of the union and within the coverage clause of the Plastics agreement. Such an arrangement will not amount to a *"collective agreement"* as defined in s5 and incorporating the

requirements of s54, and the bargaining would therefore not be for a collective agreement. Ms White, for the union, conceded in the course of argument that this submission was based on a narrow reading of the Act.

[84] In light of our earlier findings about the nature of a statutory collective agreement, we conclude that this argument overlooks the essential nature of a collective agreement under the Act which is to establish the terms and conditions of employment of employees. This is clearly reflected in the definition of "*employment agreement*" in s5 which "*… includes an employee's terms and conditions of employment in … a collective agreement …*".

[85] Contrary to the union's position, s42 itself contains an indication that Parliament did not intend that notices initiating bargaining would apply to subsequent party joinder situations. Subsection (1) provides that the union or employer initiating bargaining is to give "*to the intended* ***party or parties to the agreement*** *a notice that complies with subsection (2)*" [emphasis added]. It is significant that Parliament did not use the phrase "*party or parties to the bargaining*". Not only in this case did the union not identify the other numerous employer parties to the Plastics agreement, but there would have been little reason to do so, given that they have all agreed to the subsequent party joinder by new employer parties without reference to them. That is to be compared to the s56A(1)(d) requirement that an employer who was not a party to the collective agreement may become so by, among other things, notifying all the parties to the agreement to which the employer proposes becoming a party.

[86] Section 42(2)(b) and (c) is more consistent with bargaining for a new collective agreement than with bargaining for joinder to an existing collective agreement. That is because, in the latter case, the other parties to the collective agreement are known, as is the intended coverage of that agreement.

[87] Collective bargaining must be directed at concluding a collective agreement. The collective bargaining must be for a collective agreement, not merely for an agreement to agree to join an existing collective agreement.

[88] Ms White for the union argued that Epic's "*willingness*" to be joined as a party to the Plastics agreement must be judged in the context of collective bargaining in the sense that employers and unions have traditionally agreed, and still frequently

agree, to collective arrangements under such pressures as are generated by strikes and lockouts. So, counsel submitted, although such an outcome may not be a party's preferred position, an employer agreeing to the terms of a collective agreement under the pressure exerted by strike action against it can nevertheless be said to have been *"willing"*.

[89] We do not agree. When Parliament used the word *"may"* in s56A(1) and elsewhere in that section, it did not intend such an outcome to be produced by coercion or, in particular, by the consequences of strike action. Such would have been unwilling consent (as opposed to the *"willing"* agreement) referred to at all relevant stages of the legislative process. Unwilling agreement is an accurate description of the basis upon which parties settle employment arrangements after application of such coercive tactics as strikes and lockouts.

[90] If Parliament had intended that lawful, coercive means such as strikes and lockouts could bring about a joinder under s56A, it would have made that clear as it did elsewhere in the legislation addressing circumstances in which strikes and lockouts weapons can be used lawfully.

[91] Ms White for the union submitted that, once an employer is persuaded to become a subsequent party to the Plastics agreement, it is open to the parties to negotiate variations to the Plastics agreement that will apply only to the new employer party and its employees. While that is what is provided in clause 2.2 of the Plastics agreement, it does not extend to all aspects of the agreement. For example, s54 of the Employment Relations Act requires each collective agreement to have a single coverage clause and a single expiry date. There would, therefore, be no scope for these key provisions of the collective agreement to be varied and thus, although important to it, there would be no scope for EPL to negotiate about them.

[92] In addressing this issue, Mr Cranney for the NZCTU submitted that it is open to the parties to trade such non-negotiable terms off against changes to others which are negotiable. That does not deal satisfactorily with the issue in our view. If any otherwise lawful terms are not negotiable, it inevitably detracts from the essential nature of bargaining. In bargaining for a new collective agreement, such terms as the identities of other parties, the expiry date and coverage could be the subject of bargaining. It is the concluded nature of the Plastics agreement that excludes them

from the bargaining process: to reach a different agreement about such terms between these immediate parties would necessarily constitute a breach of the agreement with others.

[93] Mr Cranney argued that s56A cannot be interpreted literally because to do so would enable an employer to become a subsequent party to an existing collective agreement without the consent of its employees and to thereby alter unilaterally their terms of employment. So, counsel argued, it must be implicit in s56A that an employer can only exercise its rights under the section as a result of bargaining initiated by notice under s42.

[94] We disagree. The plain meaning of the words of s56A conveys a sensible and coherent meaning without the need to imply anything into the section. In these circumstances that meaning should be given effect. In any event, it is not novel in the Act that terms of employment are imposed by operational law. One example is s63 relating to the terms of employment of a new employee who is not a member of the union. Another is that a determination of the Employment Relations Authority under s50J fixes the terms and conditions of employment without agreement of either the employer or employees. In any event, while s56A is clear in its terms, the question here is whether that mechanism can be the object of coercion by strikes.

[95] Next, Mr Cranney submitted that once bargaining is initiated under s42, parties are entitled to discuss any outcome they wish provided they do so in good faith. Counsel submitted that this includes a commitment by the employer to become a subsequent party to the existing collective agreement.

[96] While this proposition is correct, it does not follow that the act of validly initiating bargaining makes every subsequent topic of discussion a valid part of the collective bargaining process established by the Act and potentially subject to the coercive measures available in such bargaining. As we have already noted, collective bargaining must be directed at concluding a collective agreement.

Summary Of Decision

[97] For the foregoing reasons, we find for the plaintiff that the s42 notice was invalid. The union is not entitled to invoke the statutory bargaining process to persuade EPL to become a subsequent employer party to the current Plastics agreement. The Employment Relations Authority's determination to the contrary is

wrong and must be set aside.

[98] Neither party sought costs and we agree that this has been a true test case that would not warrant an award in any event.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 9 am on Friday 21 July 2006

Solicitors: