IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA105/2022
[2022] NZCA 470

BETWEEN	IDEA SERVICES LTD Appellant
AND	ATTORNEY-GENERAL in respect of the Minister for Workplace Relations and Safety First Respondent
	ATTORNEY-GENERAL in respect of the Chief Executive of the Ministry of Business, Innovation and Employment Second Respondent
	E TŪ INCORPORATED Third Respondent

Hearing: 10 August 2022

Court: Courtney, Katz and Simon France JJ

Counsel: A S Butler and P A McBride for Appellant
K G Stephen and R I Thornley for First and Second Respondents
No appearance for Third Respondent

Judgment: 4 October 2022 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is allowed.

C A declaration is made that cl 8 of the Immediate Modification Order was invalid because it modified a statutory provision that did not fall within the scope of s 15 of the Epidemic Preparedness Act 2006.

D The first and second respondents must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Simon France J)

Introduction

[1] On 24 March 2020, in response to COVID-19, an epidemic notice was issued by the Prime Minister under s 5 of the Epidemic Preparedness Act 2006. These notices can only be for three months, but can be renewed. That is what has happened every three months since the initial notice.[1]

[2] Section 15(1) of the Epidemic Preparedness Act provides:

> **15 Immediate modification of statutory requirements and restrictions to enable compliance during epidemic**
>
> (1) *While an epidemic notice is in force*, the Governor-General may, by Order in Council made on the recommendation of the Minister of the Crown responsible for the administration of an enactment, modify any requirement or restriction imposed by the enactment.
>
> (Emphasis added.)

[3] A notice made under this provision is known as an Immediate Modification Order (IMO). On 16 April 2020, an IMO came into effect which amended aspects of the collective bargaining provisions of the Employment Relations Act 2000.[2] The IMO continued in force until, on 4 April 2022, a revocation order was made, effective 6 May 2022.[3]

[4] At issue in this proceeding is the lawfulness of the now revoked IMO. The appellant sought declarations that cl 8 of the IMO was invalid from the outset because the conditions necessary for it to be validly issued did not exist.[4]

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1 Epidemic Preparedness Act 2006, s 5(3)(a). The most recent notice is 12 September 2022, with an expiry date of 20 October 2022.

2 Epidemic Preparedness (Employment Relations Act 2000—Collective Bargaining) Immediate Modification Order 2020, cls 2 and 8.

3 Epidemic Preparedness (Employment Relations Act 2000—Collective Bargaining) Immediate Modification Order Revocation Order 2022, cls 2 and 3.

4 The appellant's statement of claim was directed only at cl 8 of the IMO which, as we later explain, was directed at s 53(3) of the Employment Relations Act 2000. Other provisions of that Act affected by different clauses of the IMO are not at issue here. For simplicity, when referring to the IMO we mean cl 8 of the IMO.

[5] With one exception the High Court disagreed. Isac J held the statutory conditions for the making of an IMO were met, but there was a flaw in its terms. The order contained no review requirement, and should have. A declaration to this effect was made, but otherwise relief was declined.[5] On appeal, the appellant renews its challenges to the lawfulness of the IMO, and alternatively to the limited relief granted by the High Court. It is submitted the flaw identified meant the IMO was invalid either from the outset or at the point in its life when a review should have occurred but had not.

The Employment Relations Act and the IMO

[6] Collective bargaining is governed by pt 5 of the Employment Relations Act. Relevant to the present litigation are those provisions which apply when there is already in place a collective agreement.

[7] Section 41(3) of the Employment Relations Act provides that the parties to the agreement may give notice to initiate bargaining for a new agreement, but may not do so until the existing agreement has only 60 days to run (if it is the union giving the notice) or 40 days (if it is the employer giving the notice). These timeframes obviously allow only a short period for negotiation before the current agreement expires. Section 53 addresses this. It is the provision then modified by the IMO. Section 53 provides:

> **53 Continuation of collective agreement after specified expiry date**
>
> (1) A collective agreement that would otherwise expire as provided in section 52(3) continues in force—
>
> (a) if subsection (2) is complied with; and
>
> (b) for the period specified in subsection (3).
>
> (2) This subsection is complied with if the union or the employer initiated collective bargaining before the collective agreement expired and for the purpose of replacing the collective agreement.
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> (3) The period is the period (not exceeding 12 months) during which bargaining continues for a collective agreement to replace the collective agreement that has expired.

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[5] *Idea Services Ltd v Attorney-General* [2022] NZHC 308 [Judgment under appeal] at [157].

[8] The IMO under challenge modified s 53(3) by providing that time did not run on the 12-month extension period while an epidemic notice was in force. This was thought to be necessary to prevent the expiry of collective agreements that were at that time being renegotiated: given the significant disruptions caused by COVID-19, negotiations may not have been completed before the end of the 12-month period.

The parties

[9] The appellant, Idea Services Ltd, is a disability service provider which employs 3,900 staff. About 2,800 of that cohort are members of the third respondent, E tū Inc, a registered union. An existing collective agreement between the parties was due to expire on 18 October 2020. The union initiated bargaining under s 42 of the Employment Relations Act on 9 September 2020.

[10] The parties have been engaged in bargaining since that time. However, a new bargain has not been agreed. The IMO, although now revoked, continues to have an impact. Under the unamended s 53(3) of the Employment Relations Act the existing agreement would have expired on 18 October 2021. However, because almost all the bargaining to date has occurred during the life of the IMO, the termination date for the existing agreement is now 6 May 2023.

[11] We are advised that, there being no new agreement, had the agreement expired in the normal way, the employees would have been on individual contracts on the same terms and conditions as under the agreement.[6] The relationship between Idea Services and E tū would be more affected, with the appellant having fewer obligations to the union, and the union having less rights of access and the like. Other obligations, such as the duty to bargain in good faith,[7] would remain unaffected.

[12] The Attorney-General is named as respondent on behalf of both the Minister for Workplace Relations and Safety, and the Chief Executive of the Ministry of Business, Innovation and Employment. As will be seen, these two office holders —

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[6] Employment Relations Act, s 61(2)(a).
[7] Sections 4(2)(b), 4(4)(a) and 32.

the Minister and the Chief Executive — each have a statutory function in relation to the making of an IMO.

Power to make IMO, and the challenges

[13] Section 15(1) of the Epidemic Preparedness Act has already been set out. The balance of the provision, as far as relevant to this proceeding, provides:

> (2) The Minister must not recommend the making of an order unless he or she—
>
> (a) has received from the chief executive of the department of State responsible for the administration of the enactment concerned a written recommendation stating that, in the chief executive's opinion,—
>
> (i) the effects of an epidemic of the quarantinable disease stated in the notice are, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with; and
>
> (ii) the modifications it makes go no further than is, or is likely to be, reasonably necessary in the circumstances; and
>
> (b) is himself or herself satisfied that—
>
> (i) the effects are, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with; and
>
> (ii) the modifications go no further than is, or is likely to be, reasonably necessary in the circumstances.
>
> …
>
> (5) A modification of a requirement or restriction—
>
> (a) may be absolute or subject to conditions; and
>
> (b) may be made—
>
> (i) by stating alternative means of complying with the requirement or restriction; or
>
> (ii) by substituting a discretionary power for the requirement or restriction.
>
> (6) Subsection (5) does not limit subsection (1).
>
> (7) An order under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

[14] The respective roles of the Chief Executive and the Minister, therefore, are to each form a view about the need for the modification. The specific requirements are that each person is of the opinion, or is satisfied, that:

(a) there is a "requirement" or "restriction" imposed by an enactment;

(b) it is impossible or impracticable to comply with the requirement or restriction;

(c) the impossibility/impracticability arises because of the effects of the epidemic; and

(d) the proposed modification goes no further than is reasonably necessary or is likely to be reasonably necessary.

[15] The challenges to the IMO maintained on appeal are fewer than those originally advanced.[8] They are now that the 12-month time frame contained in s 53(3) of the Employment Relations Act is neither a "requirement" nor a "restriction" within the meaning of s 15 of the Epidemic Preparedness Act, or if it is, it is not a requirement or restriction of the type that anyone needs to comply with. Further, the appellant says that it was not reasonably open to the Minister to be satisfied of the impossibility/impracticability of compliance, or to be satisfied that the modification did not go further than was reasonably necessary.

[16] As noted, the High Court concluded the IMO was flawed because it lacked a review provision. While the epidemic notice on which the IMO was dependent required a review of current circumstances every three months, it was held that the IMO needed to contain its own requirement to review its ongoing necessity.[9]

[17] The respondents do not challenge this conclusion in relation to the need for the IMO to have a review clause. The appellant submits the absence of a review clause

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8 In addition to the arguments Idea Services has continued with on appeal, it had also argued in the High Court that the IMO infringed, or unjustifiably limited, the right to freedom of association under the New Zealand Bill of Rights Act 1990.

9 Judgment under appeal, above n 5, at [143]–[147].

made the IMO invalid from the outset as going further than could reasonably be thought necessary since it was open-ended and did not require anyone to reconsider it. If wrong in that, it is submitted the IMO must have become invalid at the time it should have been reviewed and was not.

[18] Finally, there is an interpretation argument that, based on the wording of the IMO, the IMO was only ever a three-month provision.

Two relevant contexts

[19] Each party emphasises a particular feature that is said to provide important context concerning the Court's approach to the issues raised. The appellant focuses on the nature of the power being exercised; the respondents emphasise the extraordinary context that existed with the pandemic, and urge caution in relation to reviews with the benefit of hindsight.

The nature of the power

[20] Section 15 of the Epidemic Preparedness Act authorises the Executive to amend, by secondary legislation, an Act of Parliament. This type of provision is sometimes called a "Henry VIII clause" and is seen as raising constitutional concerns. The issue is set out in the *Legislation Guidelines* issued by the Legislation Design and Advisory Committee:[10]

> *Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power.*
>
> The nature of secondary legislation is that it generally takes effect *subject to* all primary legislation. It is possible, however, for secondary legislation to amend or override an Act. This requires that Parliament enact an empowering provision expressly authorising secondary legislation with that effect. Empowering provisions of this nature are sometimes called "Henry VIII clauses".
>
> By virtue of the fact that this type of empowering provision enables the Executive to override Acts of Parliament, these provisions create a risk of undermining the separation of powers. However, such clauses come in

[10] Legislation Design and Advisory Committee "*Legislation Guidelines*" (September 2021) at [15.1] (emphasis in original).

various types and, although each must be carefully considered, they do not all raise the same level of constitutional concern.

…

At the other end of the spectrum is an empowering provision that permits secondary legislation to override an Act in ways that affect its policy or, more significantly still, that amends *other* Acts. Examples include emergency powers created for post-earthquake responses or epidemics. These types of powers pose more risk, require strong justification, and need very careful designing of appropriate safeguards.

[21] Concerning how such provisions are to be approached by the Court, Mr Butler for the appellant cites a number of United Kingdom decisions which identify a rule of strict construction. As one example, referring to judgments in a Court of Appeal decision, Lord Keith of Kinkel observed:[11]

The judgments contain passages to the effect that a power to modify the provisions of a statute should be narrowly and strictly construed, and that view is indeed a correct one.

[22] Reference may also be made to the discussion of these clauses in Carter, McHerron and Malone where it is observed:[12]

… the courts strive to give them a restricted interpretation, preferring to regard Parliament as not having made any more complete surrender of its powers than must necessarily follow from the plain words used.

[23] The task of a court interpreting a statute is well settled, with the following passage from *Canterbury Regional Council v Independent Fisheries Ltd* capturing the position:[13]

[12] In interpreting the relevant provisions of the Act, we are to ascertain their meaning from their text and in light of their purpose. In determining the purpose we have regard to both the immediate and general legislative context, as well as the social, commercial and other objectives of the Act. We also

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11 *R v Secretary of State for Social Security, ex parte Britnell* [1991] 1 WLR 198 (HL) at 204 referring to *McKiernon v Secretary of State for Social Security* (1989) Times, 1 November (CA). Other cases containing similar comments which are noted include *Oakley Inc v Animal Ltd* [2005] EWCA Civ 1191, [2006] 2 WLR 294 at [16] — "where the power has been given to the Executive to amend primary legislation by regulation the courts will approach that power with some caution" and *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349 (HL) at 382 — "resolved by a restrictive approach".

12 Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at [12.2.5] (footnote omitted).

13 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 (footnotes omitted). See also *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

> recognise that the legislation should be interpreted in a realistic and practical way in order to make it work.

[24] That general approach identified, we accept that the nature of the empowering provision is a relevant factor in interpretation, and at a minimum tells against an expansive approach. If a genuine interpretation issue arises in relation to the scope of the power, the authorities suggest a strict construction is appropriate.

The pandemic

[25] The respondents emphasise the uncertain times that existed in March 2020 and have continued since. It is submitted that to the extent the Court is required to assess tests such as "likely to be reasonably necessary", it is important to avoid hindsight. It is noted in an appendix to the respondents' written submissions that up to December 2021 there had been 36 "Alert Level" changes either nationally or in a specific region.

[26] This submission is in part triggered by the appellant's emphasis on the fact that on 9 June 2020 New Zealand returned to Alert Level 1. That remained the case until Auckland went to Level 3, and the rest of the country went to Level 2, on 12 August 2020. It is submitted by the respondents that periods of lower restriction have not been lengthy and experience has shown the pathway the virus will take is not easy to predict.

[27] We accept this is also a relevant part of the context.

Issue one — a "requirement" or "restriction"

[28] It is necessary to begin with a conclusion reached by the High Court which influenced its approach to this issue, and with which we disagree. The Judge concluded:[14]

> [68] I accept the first and second respondents' submission that s 53(3) of the [Employment Relations Act] restricts the duration of the collective agreement extension, when bargaining has been initiated, to not more than 12 months. And given the statutory purpose of s 53 is to preserve a collective agreement for a defined period to enable negotiation of a new agreement, it amounts to a requirement to conclude those negotiations within 12 months.

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[14] Judgment under appeal, above n 5.

> [69] Section 53(3)'s effect is not, as IDEA Services submitted, merely directed to the status of a document. …

[29] We agree that if s 53 amounted to a requirement to conclude negotiations within 12 months, that would come within the meaning of s 15 of the Epidemic Preparedness Act. We do not consider, however, it is a correct interpretation of the Employment Relations Act.

[30] Section 4 of that Act contains an overriding obligation on parties to an employment relationship to deal with each other in good faith. The Act then details what that includes in various situations. The relevant provisions for collective bargaining are ss 32 and 33. Section 32(1) itemises steps that "at least" must be done by the parties. Section 33(1) then provides:

> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

[31] There is no time limit on s 33(1). The duty exists independently of whether there is an existing agreement. If difficulties arise in the bargaining, the Act provides a mechanism for referral of the bargaining to the Employment Relations Authority for facilitation.[15] An available ground for referral is that a party is responsible for sustained non-compliance with the duty to deal in good faith.[16] None of this is time-limited either.

[32] Section 53(3) extends the life of an existing agreement by up to 12 months in the circumstances noted. It does not require the parties to conclude an agreement. The text of s 33(1) has alternated between the current formulation of being required to reach agreement unless there is a genuine reason not to, and an alternative formula which says the duty of good faith does not require a concluded bargain.[17] Neither formula, however, is linked to the existence of the current agreement. There are consequences if the bargain is not concluded within the 12-month extension in that the

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15 Employment Relations Act, s 50B.

16 Section 50C(1)(a).

17 The alternative formula was the original statutory text, was replaced in 2004 by the current formula, was then reinserted in 2015 but replaced again by the current formula in 2019: see *Mazengarb's Employment Law* (loose leaf ed, LexisNexis) at [ERA33.3.1]–[ERA33.3.4].

current agreement will then expire, but there is no statutory requirement to avoid that. It follows that we do not agree the requirement identified by the High Court exists.

[33] The role of s 53(3) is clear. It extends the life of an existing agreement for a period of 12 months but no more. An issue may seem to be whether the end point of this extension (12 months) can properly be called a restriction either within the meaning of s 15 of the Epidemic Preparedness Act or otherwise. In our view, however, this does not matter because even if termed a restriction, it is not one with which compliance is required. It is merely identifying a fixed point in time. For it to have come within s 15, there must otherwise have been a requirement or restriction to which this fixed point in time related, and which was itself being amended by the IMO.

[34] This point is made in a paragraph of the judgment under appeal following that previously quoted:

> [70] Nor do I consider that the words "complied with" excluded s 53(3) of the Employment Relations Act from the remedial scope of s 15(1) as the applicant contended. It is clear that the effects of an epidemic may prevent the completion of collective bargaining for a new collective agreement, successful or not, within the extended 12-month period required under s 53(3). In that sense, the effects of an epidemic are, or are likely to be, such that the requirement to engage in good-faith bargaining during the relevant period is impossible or impracticable to comply (or comply fully) with.

[35] While the last sentence is no doubt correct, it is not the requirement to bargain in good faith that is being modified. Rather, the IMO modifies a different aspect of the process. It is an aspect that cannot be classed as being a requirement or restriction needing to be complied with. We also note that to the extent the Judge referred to an interpretation approach we do not agree with the label "remedial" for a Henry VIII provision such as s 15(1) of the Epidemic Preparedness Act.

[36] The respondents' focus was on whether s 53(3) of the Employment Relations Act contained a restriction, it being said that it was a restriction on the duration of the extension. We consider it doubtful that a time-limited extension can be termed a restriction. Section 53(3) is not in reality restricting any existing status, but rather is extending a document that otherwise expires. An expansive approach to the purpose of the legislation might lead a court to classify such time limit as a restriction, but such

an approach would pay little regard to the strict interpretation approach appropriate for such provisions.

[37] Clause 8, which is the clause of the IMO which modifies s 53(3), is headed:

> Requirement that collective agreement may not continue for period exceeding 12 months after expiry is modified.

It is, with respect, difficult to see this as a correct use of the term. The *Shorter Oxford English Dictionary*, in terms of relevant definitions of "requirement", refers to "the action of requiring something" and "something called for or demanded; a condition which must be complied with".[18] *Black's Law Dictionary* defines it as:[19]

> Something that must be done because of a law or rule; something legally imposed, called for or demanded…

Section 53(3) has none of these features. The wording of the heading of the clause suggests it is restricting a state that would otherwise exist, namely the existing agreement continuing, but that is not the case.

[38] Other clauses within this IMO do not present the same issue. For example, cl 4 modifies s 43 of the Act. Section 43 imposes a requirement on an employer to notify employees that a bargaining process has been initiated. The requirement is subject to timing obligations, and it is these that are modified. Likewise, s 51 of the Act requires the union to notify a ratification procedure at the outset by which it is then bound. Clause 7 of the IMO modifies that provision by allowing another procedure to be notified. The contrast is with s 53(3) which does not require anyone to do anything, nor restricts the capacity to do anything.

[39] The respondents' submissions address the "comply with" qualification of s 15 in a different context. They link it, as the section does, to impracticality and then focus on the evidence in the case that demonstrates the difficulties COVID-19 and its variants have caused for the bargaining process for unions. As noted, we consider the

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18 Lesley Brown (ed) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, 2002).
19 Brian A Garner (ed) *Black's Law Dictionary* (11th ed, Thomson Reuters, 2019) at 1561.

prior inquiry is whether it is a restriction for which compliance is needed to come within the terms of s 15(1).

[40] In our view, s 53(3) of the Employment Relations Act does not contain a requirement or restriction capable of being modified by an exercise of the power contained in s 15 of the Epidemic Preparedness Act.

Issue two — the duration of the IMO

[41] The appellant submits that the correct interpretation of the IMO is that it was only intended to last for the three-month period of the initial Epidemic Preparedness (COVID-19) Notice 2020 (COVID-19 Notice). We can briefly explain why this is not correct.

[42] Clause 8(1) of the IMO provides:

> **8 Requirement that collective agreement may not continue for period exceeding 12 months after expiry is modified**
>
> (1) This clause applies to a collective agreement if the period specified in section 53(3) of the Act expires—
>
> (a) while the Epidemic Notice is in force; or
>
> (b) within 3 months after the date on which the Epidemic Notice expires or is revoked.

[43] The term "the Epidemic Notice" in cl 8(1) is defined earlier in the IMO in cl 4(1). The provision identifies that the Epidemic Notice under which the IMO is made is the original COVID-19 Notice of 2020. All references in the IMO are to "the Epidemic Notice" as defined in cl 4(1).

[44] Turning to the original COVID-19 Notice, s 5 of the Epidemic Preparedness Act provides that the Prime Minister may, stated conditions having been complied with, "by notice" declare that a quarantinable disease is likely to disrupt, or continue to disrupt, essential government and business activity. Section 4 defines this s 5 declaration as an "epidemic notice".

[45] Section 7 deals with renewals of an epidemic notice and in its relevant parts provides:

> **7 Renewal and modification of epidemic notices**
>
> (1) With the agreement of the Minister of Health, the Prime Minister may, by notice given before an epidemic notice expires, renew that notice.
>
> (2) The Prime Minister must not give a notice under subsection (1)—
>
> (a) except on, and after considering, the written recommendation of the Director-General of Health; and
>
> (b) unless he or she is satisfied that the effects of the outbreak concerned are likely to continue to disrupt essential governmental and business activity in New Zealand (or the parts of New Zealand concerned) significantly.
>
> (3) If renewed under subsection (1), an epidemic notice expires on the earliest of the following:
>
> (a) the day 3 months after the commencement of the most recent notice renewing it;
>
> (b) a day stated in the most recent notice renewing it:
>
> (c) a day stated for the purpose by the Prime Minister by further notice.
>
> …

[46] The language of s 7 is that it is the original notice being renewed, not a new one being made. Section 7(1), for example, talks of renewing "that notice". The subsequent renewals that have occurred reflect this approach, terming themselves, for example:

> Epidemic Preparedness (COVID-19) Notice 2020 Renewal Notice 2022.

As a further illustration of the point, it can be noted that cl 3 of that renewal notice, which came into force on 17 March 2022, provides that:

> The Epidemic Preparedness (COVID-19) Notice 2020 is renewed.

[47] This terminology is consistent with the parent Act and reflects that the original COVID-19 Notice is the one still in force. Returning then to the IMO in issue in this case, cl 9 provided that the IMO was revoked immediately after the expiry of the three-month period that starts on the date "the Epidemic Notice" expires.

[48] It follows that the IMO existed unless itself revoked or until the original COVID-19 Notice expired or was revoked. We accordingly reject the proposition it had only a three-month life.

Issue three — other challenges

[49] The appellant challenged whether it was open to the Minister to be satisfied both that the requirement could not be practicably complied with, and that the IMO went no further than reasonably necessary. As regards these challenges, in the High Court the respondents had argued, and the Court agreed, that the subjective wording of s 15(2) meant all that was required was that the Minister be "satisfied". There was no scope for what was termed by the High Court a "merits based review" by a court.[20]

[50] After discussion with this Court, the respondents modified their position, accepting that it was not sustainable to contend the power in s 15 of the Epidemic Preparedness Act was largely beyond review just because it was expressed in subjective terms. Given this change in position, and given our earlier conclusion about the lack of power to make the IMO, it is not necessary to analyse the authorities in any depth. The point is, however, an important one so brief comment is appropriate.

[51] *Reade v Smith* is often cited as the New Zealand affirmation of the principle that casting a subordinate legislation power in subjective terms does not make it immune from subsequent scrutiny.[21] In *Reade* the power was expressed as arising when the Governor-General "thinks [regulations are] necessary" in order to secure the due administration of the relevant statutes. Turner J held the law was not, and never had been, that the opinion of the Governor-General conclusively governed the matter. The proposition to the contrary was "emphatically reject[ed]".[22]

[52] The texts note that of recent times the use of wholly subjective empowering provisions has declined or indeed is now "rare".[23] It is further noted that the courts

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20 Judgment under appeal, above n 5, at [97].

21 *Reade v Smith* [1959] NZLR 996 (SC). *Reade* is cited for the proposition in Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, 2018) at [3.12]; Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at [26.5.11]; and Carter, McHerron and Malone, above n 12, at [12.1.2].

22 *Reade v Smith*, above n 21, at 1002.

23 Carter, McHerron and Malone, above n 12, at [12.1.2(i)]; and more generally Joseph

will more readily defer to a decision-maker on questions of fact,[24] but we observe that recognising the statutory power affords the decision-maker a broad scope is a very different concept to not reviewing at all the exercise of the power.

[53] In the High Court, the Judge identified the assessment he would undertake if he had accepted the appellant's argument that the test, as set out in *Joseph on Constitutional and Administrative Law*, was whether the decision-maker could reasonably have formed the view, or in this case could reasonably have been satisfied. This type of review does not remove the decision-making power from where the legislature has placed it, but provides a check that there existed at the time of the decision a sufficient body of evidence to allow the decision-maker reasonably to be satisfied to the statutory standard. That test being met, the question of satisfaction is for the Minister. We see nothing in the wording or context of legislation to suggest it was intended to exclude any level of scrutiny of the decision. The position identified in *Reade* is settled law and clearer words would be needed than those used to displace it.

[54] Issues sometimes then arise as to the intensity with which a court should review the quality of the information available, and the appellant urges a "hard look" because of the nature of the provision. Given our earlier conclusion it is unnecessary to engage on this aspect.[25] The jurisprudence around Henry VIII clauses may support the approach contended for, but once it is concluded that the power is properly available, the statutory requirements in this case are factual evaluations to be made in an emergency context where the sands are shifting at pace. We are not generally attracted to the appellant's submission of a hard look at this aspect.

[55] The High Court Judge did consider, as an alternative to his preferred approach, whether it was reasonably open to the Minister to be satisfied. His conclusions on the point were:[26]

Constitutional and Administrative Law, above n 21, at [26.5.11].

24 *Joseph*, above n 21, at [26.5.11] and noted in Judgment under appeal, above n 5, at [96].

25 There is debate concerning whether the concept of intensity of review is a feature of New Zealand law — see, for example, *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116 at [39]–[47]. This paragraph is not a comment on the debate.

26 Judgment under appeal, above n 5.

> [95] But even if I am wrong in reaching that view, based on the evidence I am satisfied that at the time the Order was made there was sufficient information before the Minister to have concluded that compliance with s 53(3) was impossible or impracticable. The entire country had entered an unprecedented lockdown requiring all but essential workers to remain at home. The duration of the lockdown was unknown. In that context it was clearly impracticable, if not impossible, for collective bargaining to continue, given the requirements of mandate and ratification, and the obvious priorities of both businesses and unions dealing with the sudden and profound impacts of the pandemic and the public health response.

[56] We are in general agreement with this, but note there is a case to say that aspects of the material considered by the Minister were lacking. In the papers available to the Court there seems little focus on whether the other changes being made in the IMO would sufficiently alleviate the problem. Further, as discussed in the judgment under appeal,[27] the need for review against the statutory criteria seems to have been given scant regard both before its making, and after it.[28] Generally while the evidence now filed in the proceeding well explains the bargaining difficulties, the same depth of information is not readily to be seen in the disclosed briefing material.

[57] The appellant filed evidence that suggests around 70 per cent of collective agreements that were due to expire during the life of the IMO were in fact renegotiated despite COVID-19.[29] We agree this is relevant evidence, but it is very much after-the-event hindsight. It arguably goes more to the need for earlier review and reassessment of the IMO than undermining the initial decisions.

[58] Generally it is our assessment that the Judge's conclusion that it was reasonably open to the Minister to be satisfied compliance was impossible/impracticable has not been shown to be wrong, and that the Judge's focus on the importance of the lack of any review provision, and any review, was correct.

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27 Judgment under appeal, above n 5, at [141].

28 In one document prepared for the Minister in October 2021 (so shortly before the decision to revoke) an official noted the lack of ongoing utility of the IMO, and that most people were unaware it was still operating but were anyway meeting their obligations. Despite this, the advice was that no action was required.

29 Judgment under appeal, above n 5, at [76].

Relief

[59] This Court's finding that the IMO's purported modification of s 56(3) did not fall within the statutory power means different relief issues arise from those considered in the High Court. The IMO is invalid because there was no statutory power to make it. It purported to amend legislation and so engages fundamental issues.

[60] We are conscious that a declaration of invalidity will have impacts on cases such as the present where the existing agreement remains in force only because of the purported extension by the IMO. However, it will not impact on the terms and conditions of the individual worker. Further, and as we have explained, the obligation to negotiate in good faith continues regardless of whether the previous agreement is at an end.

[61] There are important constitutional issues at play. In *New Zealand Employers Federation Inc v National Union of Public Employees*, a union had been registered in advance of the legislation under which the registration purported to be done coming into force. This was held to be invalid. It was recognised by this Court that declaring it to be so:[30]

> … would immediately put the prematurely registered associations in a hopeless position and lead to considerable administrative confusion unless and until Parliament legislated.

[62] Nevertheless the declaration was made. Tipping J observed:

> [112] It may be thought a little old-fashioned to raise the difference between void and voidable decisions or actions. But here it is not a question of setting aside the Registrar's decision to register the union prematurely as if it were a voidable decision or action. His purported registration was not in law registration at all. Once that position is reached a conclusion to that effect is essentially a declaration anyway. Although an action which the actor had no power in law to undertake may have presumptive validity until adjudicated upon by the Court, there cannot logically be a conclusion that the actor had no power at all to do the act, yet the Court will simply treat the act as valid by not making a declaration. To take that approach is really positive validation in disguise, and for the reasons given by the President, with which I agree, there can be no question of validation here.

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30 *New Zealand Employers Federation Inc v National Union of Public Employees* [2002] 2 NZLR 54 (CA) at [51] per Richardson P.

[63] McGrath J added:

> [126] I am not insensitive to the complications a declaration by the Court may present, including those for respondents and others who have acted in good faith on the basis of governmental advice. These may be thought to require validating legislation but that is not for the Court to decide. Were the Court to refrain, however, from making a declaration, even though satisfied the Executive has trespassed into the functions of the legislature, it would be failing to discharge its own constitutional function and raise questions as to its independence (see *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA)). This in my view is the principal reason why a declaration must be made in the terms of the judgment prepared by the President.

[64] We have no doubt that a similar outcome is required here. It is important that a power to amend primary legislation by subordinate legislation is only exercised within its carefully defined scope. Where there is a purported exercise that goes beyond that scope, the court's role is to declare that to be so.

[65] In the High Court, in the context of relief, the Judge was influenced by the apparent delay of the appellant in filing the proceedings.[31] They were filed four days after the existing agreement would have expired but for the IMO. The effect was that, if the employer was correct, the union had conducted bargaining under a misapprehension as to the degree of protection offered by the existing agreement.

[66] When this was raised during oral argument on the appeal, the appellant sought leave to file evidence concerning when it became aware of the potential issue. The application was opposed, and was declined by the Court. Delay was an issue in the High Court and it is clear on the face of the judgment under appeal that the High Court saw it as relevant. It was in our view too late to seek at the oral hearing of the appeal leave to address the point by further evidence.

[67] As it happens, delay is not relevant given the conclusion reached by the Court. The IMO was always invalid and is so for all agreements it purported to apply to. It would not be a correct approach to refuse to make a declaration to that effect because of a case-specific issue. It would leave the status of other agreements unclear.

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31 Judgment under appeal, above n 5, at [154]–[156].

Conclusion

[68] Section 53(3) of the Employment Relations Act is not a requirement or restriction with which compliance is required within the meaning of s 15(1) of the Epidemic Preparedness Act. It follows that cl 8 of the IMO which purported to amend s 53(3) was invalid as being made without power. Consequently, the collective agreement between the appellant and the third respondent ended on 18 October 2021, that is 12 months after it was due to expire.

Result

[69] The application for leave to adduce further evidence is declined.

[70] The appeal is allowed.

[71] A declaration is made that cl 8 of the Immediate Modification Order was invalid because it modified a statutory provision that did not fall within the scope of s 15 of the Epidemic Preparedness Act 2006.

[72] The first and second respondents must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

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