Determination Number: AA 369/02
File Number: AEA 1242/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	NZ Amalgamated Engineering, Printing & Manufacturing Union Inc (Applicant)
AND	Carter Holt Harvey Limited (Respondent)
REPRESENTATIVES	Helen White for Applicant Christopher Toogood QC for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	23 December 2002
DATE OF DETERMINATION	31 December 2002

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By a statement signed on 7 December and received in the Employment Relations Authority on 9 December 2002, the New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc ("EPMU") has asked the Authority to resolve a problem about the way employees are being made redundant at the Kinleith Mill operated by Carter Holt Harvey Limited ("CHH"). On 9 December 2002 the employer began notifying 36 of the waged production workers employed at the Mill that they were to be made redundant. For most of those employees the periods of notice given to them will expire on or after 17 January 2003. In total there are presently about 300 waged production employees at the Mill.

[2] As requested by EPMU, the investigation of the problem by the Authority has been carried out as a matter of urgency. The same applies to the subsequent consideration given by the Authority to this determination and the issue of it to the parties. As the day-long investigation meeting held last week will be fresh in the minds of the parties and their representatives, I have aimed to condense this determination to the bare essentials necessary to enable the union (including its affected members) and the company to know what the determination is, how it affects them and why it has been made.

[3] EPMU states that its problem lies with the way CHH has gone about selecting the employees who have been declared redundant. The union complains that the employer has breached statutory obligations to deal in good faith which are found in s.4 of the Employment Relations Act 2000, and contractual obligations which are set out in material provisions of the individual employment agreements applicable to production workers at Kinleith Mill.

[4] CHH has provided a detailed response to the problem as presented by EPMU. The employer denies acting unlawfully at all in the way it has selected employees for redundancy. It says it has complied with the Act and the employment agreements and that the redundancies are able to be justified.

[5] On 21 August 2002 and other times the union told the employer it was premature for the company to be asking production employees to take part in any selection process. Instead EPMU wanted to bargain with CHH over the restructuring proposals themselves. The employer disagreed that bargaining was appropriate and continued with a programme of assessment of employees, as a basis of selection for redundancy. Although it offered the production employees the opportunity to participate, only 10 out of 300 employees took part in the assessment programme because of the stance of their union on bargaining. However EPMU does not seek any orders in relation to the conduct of the prolonged bargaining for a new collective agreement to cover production employees and others at the Mill.

[6] EPMU has made it clear from the outset in this case that its problem does not now lie with the restructuring of maintenance work at the Kinleith Mill or with the need for there to be redundancy among waged production employees generally at that Mill. There is no challenge to the genuineness of the employers decision to make 36 production employees redundant. As the orders sought by EPMU show, that is not where the problem lies. Neither are the orders aimed at the design or construction of the assessment method. I find from the evidence that the assessment method used by CHH to select at least 33 of those redundant employees is not challengeable. The evidence of Mr Dixon and Ms Sheard, the Sheffield consultants retained by the employer, convincingly supports the submission made by the company that the assessment method was thoroughly developed and objective. Also, the way that method was applied to any individual production employee has not been challenged. As further submitted by the company, the application of the assessment method has been rigorous. While most of the employees have not participated in their own assessment carried out so far, that is a choice they made after CHH had given them a reasonable opportunity to take part. To date therefore, in a situation of genuine redundancy, a fair selection process has been applied fairly.

[7] The contended employment relationship problem of EPMU and its members however is that the particular selection process used by CHH was chosen by it in breach of statutory and contractual rights of the union to be consulted by the employer, before any decision about a selection method was made. The union says it has been deprived of the opportunity to influence the employers choice of a selection process. The problem lies with the way in which individual production employees have been selected as surplus to the employment requirements of CHH. EPMU prefers voluntary redundancy, which under the employment agreement is expressly one of the options for selection required to be considered by CHH when consulting under the relevant provisions. Voluntary redundancy, to the extent it has so far been considered by CHH, proved capable of selecting some 12 employees in common with the 33 selected by assessment (a further three with medical conditions have been deemed redundant by mutual agreement). The parties have tried without success to cross-match the remaining 21. EPMU rightly complains that whether or not proper consultation will make any difference to the final determination of a selection method which CHH is able to make, the union and its affected members have a right to be consulted and are entitled not to have their agreement breached by the employer.

Orders sought by EPMU

[8] To resolve the problem, pursuant to s 137 of the Employment Relations Act the union seeks orders of compliance against the employer, having the following effect;

1. requiring CHH to meaningfully and in good faith consult with affected employees and their unions about the selection of persons to be declared redundant, and to do so within a period of not less than two days;

2. requiring CHH, in the event the company chooses a process of selection involving comparative assessments of employees, to give all production employees an opportunity to participate in the assessment process before making any final selection of the employees to be declared redundant;

3. requiring CHH, while the above orders are carried out, to revoke or treat as of no effect the notices of redundancy issued to waged production employees.

[9] In considering this employment relationship problem and the formal statements made about it by the parties, I have kept in mind the provisions of s 160(3) of the Act which enjoin the Authority to concentrate on resolving the problem however it may have been described by the parties. No personal grievance has yet been brought to the Authority in the name of any employee who has been given notice of termination by CHH for redundancy, but the likelihood that such claims will be raised is strong and therefore the Authority should, as far as possible, try to deal broadly with the problem and its causes to lessen the need for further judicial intervention at any level.

The statutory and contractual requirements for consultation

[10] In relation to statutory obligations, CHH has accepted that at material times it was required by s.4(4)(c) of the Employment Relations Act to consult in good faith. As observed recently by the Court of Appeal in *Carter Holt Harvey Ltd v National Distribution Union Inc.,* unreported, 25 September 2002, CA 22/02, "good faith connotes honesty, openness and absence of ulterior purpose or motivation" (at paragraph [55]).

[11] In relation to contractual obligations, I do not accept that when CHH agreed on 10 September 2002 to a request made by EPMU for "meaningful consultation" about the proposed restructuring of production positions, the company was not bound thereafter to comply with clauses 7 and 50 of the employment agreement when consulting. Although the Employment Court decision of 30 August 2002 had stopped short of making orders against CHH in relation to production at the Mill, that was because the Court held that the focus of the case before it had been on maintenance rather than production. But it does not follow that the consultation subsequently entered into voluntarily was free of any legal constraints as to the form and content of the discussions. Although CHH "volunteered" to consult it seems likely the company had carefully weighed up the chances that if it did not accede to the unions request for consultation there would be further orders sought, exposing the employer to a real risk that remedies would be granted on a similar basis to those given by the Court on 30 August. I regard it as implicit in the voluntary agreement to consult, that the provisions of the employment agreement at clauses 7 and 50 would be applicable – I note that the company readily confined itself to the 14 day consultation period under clause 50.4.1, and Mr King said in his letter of 10 September 2002 that the company would discuss whether options other than compulsory redundancies were appropriate. He echoed the language of clause 50.4.2 of the employment agreements which the company must have regarded itself as bound by.

[12] Clauses 7 and 50.4.2 required CHH to meaningfully consult over the selection method to be used for redundancy. Although the latter provision speaks of "discussion" rather than consultation, nothing seems to turn on this. The Court regarded the meaning of these expressions as the same in its wording of the second direction given at page 72 of the 30 August judgment. Further, at

para [155], the Court held that "meaningful consultation" is more than bare consultation, as it contemplates the parties getting closer to making final decisions or reaching agreement than more conventional consultation. It is also implicit from clause 50.4.2 that the consultative discussions are to be held with a view to reaching agreement, for it is when "agreement cannot be reached" that the employer is expressly able to finally decide upon a method of selection. The employer is then required to notify in writing the employees to be declared redundant, giving them at least one month's notice. In these respects the standard of consultation required in this case is a higher one than may be present in others.

[13] Other general principles that apply to consultation are set out in *Wellington International Airport v Air New Zealand Ltd* [1993] 1 NZLR 671, a decision of the Court of Appeal. They include a requirement for genuine effort to be made to accommodate the views of those being consulted, so that consultation is a reality and not a charade. Also, there is a requirement that the party obliged to consult, while entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. A further principle is that consulting involves a statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done.

Focus of investigation

[14] A major issue for determination in this case is whether CHH predetermined the method of selecting employees for redundancy. The words and actions of the employer, as an indication of its state of mind, are to be examined in the light of the statutory, contractual and other legal requirements for consultation mentioned above. There is also an issue as to whether CHH failed to allow the production employees an opportunity to participate in their assessment carried out by the employer. Further, there is an issue as to whether CHH mislead the union over the purposes of the assessment programme it had commenced. Another important issue arises clearly from the statement of problem and the evidence as to whether the employer, upon request from the union and before making any final selection of redundant employees, should have allowed the production employees who had been assessed an opportunity to learn the results of the assessment and to raise with the employer anything about the correctness or accuracy of those results as they applied to the individual. CHH offered access to only limited information and then only to those very few who had taken part in the assessment process. The union asked the employer to give employees the results of assessments and the opportunity for input into those before any final determination was made. This request was rejected on 3 December 2002 by the employer which then decided to use its assessment and selection process as the basis by which production employees would be selected for redundancy. The view of CHH is that the employees who have been declared redundant are able now, during the notice period or afterwards, to obtain the assessment data and use it if they wish as a basis for challenging their dismissals.

Consultation over selection process

[15] As indicated in the specific orders sought by the union, at the centre of this investigation is the phase of consultation, in which the options for methods of selecting those to be declared redundant were required to be discussed between EPMU and CHH. That phase, which was carried on from 9 October 2002, was covered by clause 50.4.2 of the employment agreement. The conduct of the employer during the earlier phase, the consultation over the need for redundancies carried on between 17 September and 1 October, is relevant, as is the conduct of CHH back to 10 September 2002. That was when it agreed to revisit consultation in respect of production employees while at the same time it was complying with the Court orders for consultation to take place in respect of the maintenance operations.

[16] I do not however consider that I should attach any great importance to the state of mind or attitude displayed by CHH towards consultation at any time prior to 10 September 2002, when the employer agreed to the request of EPMU for meaningful consultation to take place. EPMU has had opportunities to legally challenge CHH over the way it purported to consult in furtherance of the Day 1 and 2 announcements, in so far as those presentations affected production employees. While it is arguable that prior to 10 September the employer did not properly consult under clause 50 (sub-clauses 4.1 and 4.2) about redundancy in relation to production workers, in its judgment of 30 August the Employment Court made no orders against the company flowing from any proven failure of consultation with regard to production employees. The Court accepted that the emphasis of the EPMU challenge to the Authority determination had been on the contracting out of Mill maintenance, rather than on other work such as production which was also included in the restructuring announcements contained in the Day 1 and Day 2 packs. However the basis on which the orders were made by the Court in respect of a failure to properly consult may have equally applied to production as well as maintenance employees. That is the view of EPMU given by Mr Holmes. Mr Sweeney advised CHH that was the unions view of the Court's judgment, but for whatever reason the union did not return at that time to the Authority or the Court to seek orders. Instead on 10 September 2002 it gained the agreement of the employer to re-consult or further consult over the production employees.

[17] If EPMU had believed CHH had not earlier consulted properly it obviously thought the company was still capable of doing so after 10 September. Despite all that had taken place it must have thought that CHH was still able to apply an open mind when considering options other than assessment, such as voluntary redundancy, for the method of selection. In this respect the union as the severest critic of the employer was perhaps best placed to judge whether CHH could unwed itself from the comprehensive assessment method it had designed, developed and even implemented. In ordering it to do so the Court obviously thought that CHH could still consult properly after 30 August in relation to the Mill maintenance proposals. This was despite the advice given earlier to the Court by the company itself that its managers were not able to change their minds (at [294] of the judgment). In early August 2002 it was submitted to the Court, apparently by Mr Toogood QC and obviously reflecting his instructions from CHH, that the company managers were then less than open-minded (at [295]).

[18] Despite CHH telling the Court it could not unlock its mind in a related matter of consultation, the Court ordered it do so, saying that meaningful consultation in good faith requires "open-mindedness." As there seems to have been no further challenge to the subsequent actions of the company in relation to the maintenance consultation, it appears the company was successfully able to clear any mental block it had earlier formed. For its part EPMU was prepared to take CHH on trust that as at 10 September the company remained capable of consulting properly over the production employees and would do so. I have therefore looked to see what evidence there is after 10 September of a failure by CHH to properly consult under the statutory, contractual and other legal requirements as discussed above. Also relevant is anything the union may have only discovered after 10 September about earlier conduct of the company.

[19] Evidence suggesting a closed mind is that the company continued to have assessment data processed by the consultants and it received the results on 17 September. CHH had however been open about this on 10 September, when Mr King advised the union that it intended to complete its current process of assessing employees. He referred to the dual purpose of the assessment in benefiting the future development of remaining employees as well as providing a method of redundancy selection. The Day 2 pack had identified a use of the assessment process for the improvement of employees remaining in the restructured business. I am unable to regard this conduct as having corrupted the consultation that subsequently took place and there is no sign that the union took that view of it when Mr King forewarned EPMU that the process would continue for

a purpose transcending the restructuring proposals. I accept that while all work of any kind by anyone on the assessment programme was not halted after 10 September, as a matter of degree the further work did not entail entry into a major new phase of it, demonstrating pre-determination by the company to use the assessment method without giving consideration to other options put forward by the union. The consultants communicated results to the company on 17 September but these were not seen or studied by its negotiating team, members of which had yet to consult with EPMU from 2 October about redundancy selection methods. I consider that the additional work on the assessment programme as a method of selection for redundancy, was within the bounds of formulation of a working plan which, according to the *Wellington Airport* case (above), the party obliged to consult may have. The actions of the company in gathering and analysing data did not indicate that a final decision had been made to use the data for one the purposes earlier proposed.

[20] Both Mr Hastie and Mr Holmes complained that during the second phase of consultation beginning on 9 October 2002, the union asked for but did not receive certain information. The union wanted to understand how the Mill would operate in the future so that it could discuss the values applicable to the process of redundancy selection and the methods available to ensure skill retention. I do not find however there was any failure to provide relevant information in this respect. Mr Holmes in his response written on 9 October 2002 following the Sheffield presentation, asked the company to advise how it was going to run the Mill, what timeframes there were for a transition, and he sought other information. He said that once the union had an understanding of these matters it could discuss the values applicable to the process of redundancy selection and the methods available to ensure skill retention. Mr King responded to Mr Holmes in writing on 10 October 2002, stating or implying that during the first phase of consultation with regard to the need for restructuring, the company had provided a proposed organisational structure to meet the commercial needs of the business. Mr King pointed out that the consultation was now in the second phase, the subject of which was the implementation of the organisational model and in particular the methodology for selecting employees for redundancy. Mr King offered to provide a transition plan. The thrust of his response in this part seems to be that the parties had moved off the “if, whether and why” phase and were now on the “how” phase. The fact of redundancy he said had already been identified by both parties in their proposals. The requested transition plan was provided during the further consultation that took place on 14 October 2002. In proposals put forward on 16 October 2002 the union said that its ability to consult about the proposed changes had been impeded by the company’s failure to develop its plans beyond the conceptual stage. EPMU said that meaningful discussion had been curtailed by the lack of detail to the company’s plan, the development of which it said should not be deferred. EPMU said that it could not see how the company could meet requirements for safety if it had not identified what was to be done and how within the workplace. In several other respects throughout its document dated 16 October 2002 the union pointed to an absence of clear data from the employer about how the work was to be done.

[21] The company response given on 17 October 2002 was a detailed commentary refuting the claims of a lack of detailed information. I agree with the company that the information sought by the union had been available to it in the Day 1 and Day 2 packs and had been the subject of the first phase of consultation between 17 September and 1 October. I find there was no failure to meaningfully consult in this respect. The company remained insistent in later correspondence that it had debated with the unions at length over what should have been clear to EPMU, that the employer wanted to retain the highest possible concentration of employees whose knowledge, skills and personal attributes most closely fitted the requirements of the Mill in the future. This had been expressed as one of the objectives of the assessment programme. It was likely that voluntary redundancy would not be a practicable option because longer serving and therefore more experienced and skilled employees might tend to take advantage of the opportunity to leave. On 25 November 2002, the company advised that it had decided to select for redundancy solely on the

basis of the assessment process and results of that. It also advised that by the beginning of December redundancy notice letters would be prepared.

[22] The claim that CHH did not consult with an open mind in October 2002 must be considered in the light of a historical fact not able to be conveniently obliterated by the employer, that prior to 10 September 2002 the company had devised, developed and substantially implemented a method of assessment. It is not realistic to expect that when consulting after 10 September the company could forget all about that process, what its objectives had been in relation to the restructuring and what value that method might have been shown to have from the results obtained. Some degree of conditioning must be expected from the employer having experienced the events occurring before 10 September and the new round of consultation. For the above reasons I consider that the company did consult after that date in accordance with statutory and contractual obligations.

[23] CHH displayed a willingness to adopt the option of voluntary severance to the extent that some of the volunteers offered by the union were also identified for redundancy by the selection process. It may be that given time more volunteers would have emerged, and Mr Holmes and Mr Hastie now seem confident of that. The company was not compelled by any Court decision already given to consult over the need for production layoffs, and it was prepared to make redundant three employees who were otherwise medically unfit to work. Given the scale of restructuring, the need for that and the objectives of the company, it seems almost inevitable that a selection process like the one chosen by the company, and quite unlike the one offered by the union, would be adopted. Circumstances almost compelled the use of such a process if the restructuring was to be an effective exercise. In my view of the detailed evidence of the various meetings and communications between the parties, CHH did listen to proposals put forward by the union for an alternative means of selection but it was entitled to consider those against the ends was seeking to achieve in the restructuring. Voluntary redundancy ran counterproductive to the objects of the restructuring, in so far they included achieving a smarter business as well as one that was leaner. CHH was entitled to have a preferred method in mind, while remaining open to persuasion that a different method could be used. This was the likely reason why Ms Webster, after the meeting of 16 October, was left hopeful, although perhaps not expectant, that the company might not finally use the assessment process as a means of selecting employees for redundancy.

[24] The opportunity to participate in the assessment process was reasonably made available by the company but for its own reasons EPMU discouraged employees from taking that opportunity. As mentioned earlier there is no challenge against the integrity of the assessment process itself or the way it has been applied. Employees were free not to participate in it if they wished, however there is no basis for now giving those who did not take part a second opportunity. Rather than repeating the assessment process from the beginning the employer was entitled to revive it at the point the process had reached when consultation was completed. I consider that CHH did not try to mislead EPMU about the dual purposes of the assessment process. These had been clearly stated in the Day 2 pack at page 8 under the heading of Assessment. Mr King referred in his letter of 10 September to a primary purpose of the assessment, the future development of remaining employees. Mr Hastie told the Authority the union had had no problem with the company assessing people for training purposes if it wished. I am unable to find that because the employer had collected information it became locked into using that information, whether in a particular way or even at all. I therefore find no basis for making the orders sought by EPMU.

<u>Request on behalf of employees for results of assessments and an opportunity for input into those</u>

[25] Mr Holmes conceded that Mr King, as earlier claimed, had not tried to mislead the union about the extent to which employees were to be given an opportunity to challenge and influence their assessments once completed by the company and before any final decision was made about

redundancy. I find that only in a limited respect CHH offered that opportunity. This was in relation to the technical questionnaire which the company proposed, on 9 August 2000, would be completed by each employee and the employee's direct manager. At the same time, the company proposed to introduce a moderation process to resolve significant discrepancies found in the ratings given by any assessor. In relation to this questionnaire the company expressly reassured employees they would have an opportunity for input into the process before a decision was made. In the event most employees chose not to participate in the assessment process and therefore did not complete the questionnaire. The company saw no point in providing the opportunity for feedback to those who had not filled in the questionnaire.

[26] Mr Dickson and Ms Sheard gave evidence that the assessment process they had designed did not lend itself to seeking general feedback from the assessed employees. I took this evidence to mean that either the data cannot be made available in a form that is comprehensible or that the feedback could not usefully be taken account of. Either way, I consider that no good reason has been shown, or could be shown, why employees should not have crucial information about themselves while there remains a possibility that a response to that information might influence the ultimate decision of the employer. It may be that some of the assessments were likely to cause distress to some employees, but that should be ultimately the decision of the employees whether they wish to take that risk of putting themselves in that situation.

[27] In my view, the employer was obliged under the Employment Relations Act 2000 and under the employment agreement, to provide the information requested by the union on 3 December 2002 and to disclose the information before it was used as a basis for deciding to dismiss any employee. It is expressed to be an object of the Employment Relations Act 2000 to recognise that in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures. This object is set out in s101 (a) at the commencement of Part 9 of the Act, which deals with personal grievances, disputes and enforcement, including compliance under s 137. Before an employer commits to a decision that might give rise to claims for legal remedies, it should ensure that all information material to the decision making is made available to the employee together with an opportunity to provide input on it. That is consistent with treating employees as parties to an employment relationship rather than a contract, and treating them as individuals likely to have views and feelings and a natural wish to know what is happening and to be included as far as possible in life changing decisions. As was pointed out in submissions, s101 (a) of the Act and its requirements featured in the Employment Court and the Court of Appeal decisions in the *Coutts Cars Limited v Baguley* case.

[28] The provision of the employment agreement which, in the circumstances of this case, required the employer to provide the information requested by the union, is the general term of fair and reasonable treatment. It may seem unlikely that a significant factual mistake has been made in the assessment process or that any mistake will be detectable from the type of information to be provided, nevertheless where there are multiple redundancies in a large workforce, it seems to me employees are entitled to inspect for themselves data that is being used to make a decision about them. Two employees have apparently achieved the same overall score in their assessment. While one has been selected for redundancy, the other has not, the final decision being left to a manager or supervisor. A situation of this kind shows the reasons why an employee ought to be given the information and given an opportunity to respond to it, before the obviously fine line is drawn.

[29] While the position may have been different under previous legislation, I do not accept that under the Employment Relations Act 2000 a failure to supply information before a decision to dismiss has been made can be justified by the employee retaining the ability to later on challenge the decision. Obviously the employee takes on a greater burden once the dismissal has happened or notice of it is given. It also seems to me that the early provision of information is required as a

means of promoting mutual trust and confidence in all aspects of the employment relationship, and may also reduce the need for judicial intervention by way of personal grievance claims flowing to the Authority and the Court. Both these objects of the legislation are set out in s3 of the Act. I do not consider that there is anything unreal or artificial about the request for information and the opportunity for input in this case.

[30] I have considered all the evidence given about the union's request made for the assessment information to be supplied to employees. It was made by Mr Holmes to Mr McKay on Tuesday 3 December 2002 at a meeting. The request was confirmed in writing by Ms Hendra in a letter to Mr McKay dated 5 December 2002, in which she said the following;

> *Redundancy selection*
>
> *We advised you on Tuesday that the unions do not accept the redundancy selection process adopted by the company. We asked you to review the timetable for implementation of those selections and, as a fair employer, to give employees the results of assessments and the opportunity for input into those before any final determination is made. You were to get back to us in relation to that request. Please do so by return.*

[31] Although there was a reply to Ms Hendra's letter by CHH on the same date, it did not address the request at all. I have taken into account the fact that on an earlier occasion the union, as I accept, was opposed to the supply of the same information to employees. This was quite some time before 5 December, at the meeting of 16 October 2002, and the reluctance of the union to have this information given to employees was expressed in a qualified way by Ms Webster, who hoped that the information would not be used at all as a basis for selecting employees for redundancy. It is clear that the decision to dismiss any employees on the basis of the assessment process had not been made at the time the union obviously changed its mind and requested the information on 3 December. I have found no reason as to why a limited period could not have been allowed by the employer for the information to be supplied and for input to be received and considered. Ms Sheard said that before the 16 October meeting she had held no fixed view as to what information would be provided to employees following the assessment process. She said that after that meeting she decided on the basis of what Ms Webster had said, not to disclose detailed information to the waged production employees. I am unable to see what compelling reason there was for not providing this information. No doubt to do so would cause further delay and uncertainty in the process, which the company was entitled to view as undesirable given the great upheaval already caused by the restructuring and the legal proceedings in connection with it. However if for no other reason than to improve their understanding, the employees were entitled to greater knowledge of the decision making affecting them.

[32] I consider, therefore, that CHH was in breach of the Act and the employment agreement in failing to provide the information requested by the union on 3 December 2002, before the decision to dismiss had been made.

Determination

[33] I have found that CHH met its obligations under clause 50 of the employment agreement and under s 4 of the Employment Relations Act 2000, in that it did consult meaningfully and in good faith with EPMU over the method by which redundancies would be determined. I have found, however, that CHH was in breach of statutory and contractual obligations in failing to supply information when a request for that had been made by EPMU prior to decisions to dismiss for

redundancy being made. The question now is whether any orders are required from the Authority to resolve the employment relationship problem, and if so what those orders should be.

[34] Compliance is a discretionary remedy and I have considered reasons for and against granting an order. Against is the fact that EPMU made the request for information to be supplied to employees at the last minute, when it knew the employers intention was to implement redundancies by the end of November. Earlier it had requested the contrary, that employees not be supplied with the assessment results. Also, the likelihood is not strong that further consideration by the employer of any employee's objection to the assessment will result in a better outcome for that employee. The basis for saying so is not my knowledge of the individual assessments but of the process itself, how it was developed and applied with expertise and objectivity, as was evident from what Mr Gibson and Ms Sheard said. Although EPMU has not specifically sought compliance in relation to the supply of information, s.160 (3) of the Act requires the Authority to look broadly at the employment relationship problem and how it should be resolved, rather than at the particular orders that have been sought. In favour of an order must be the object of the Act that access to information is more important than formal procedures. Also in favour is the possibility that a legal brake applied at this time to the employer's actions may prevent multiple grievances arising out of the dismissals which, in their resolution, will probably require an examination of the assessments in any event.

Mediation

[35] I conclude however that the information has been requested too late, after too much delay, and that in the circumstances it would be unjust to disrupt the notice periods while the information is made available and any response is considered before the redundancy of any employee is confirmed or withdrawn. The alternative remedy of a personal grievance is available. However so that further claims may be avoided as far as possible I will direct the parties to mediation. Too make it clear, this is only in respect of the supply of the assessment results to employees as requested by the union on 3 and 5 December 2002. The parties are to attempt in good faith to make arrangements that will enable employees to receive that information as soon as possible and respond to it if they wish, and that will require CHH to consider the response before confirming or withdrawing the notice of redundancy. It is open to the parties to agree that the notice period now running can be suspended while this is done, depending on the immediately availability of any employees to receive and consider the personal information. The direction to mediation is made under s.159(1)(c) of the Act and is to be complied with immediately, subject to the availability of a mediator which is a matter for the parties to ascertain.

Directions - costs

[36] Further directions may be sought from the Authority at any time. Costs are reserved. If either party wishes to apply that shall be in writing filed and served before the end of January 2003.

A Dumbleton
Member of Employment Relations Authority