

Determination Number: WA 27/06

File Number: WEA 131/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	NZ Amalgamated Engineering, Printing and Manufacturing Union Inc (first applicant)
AND	Colin Blackler & Daryl Moyes (second applicants)
AND	Carter Holt Harvey Limited (respondent)
REPRESENTATIVES	Tony Wilton for the applicants Peter Kiely for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS RECEIVED	17 August, 1 & 11 September 2005 and 31 January & 9 February 2006
DATE OF DETERMINATION	17 February 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In a preliminary determination dated 14 November 2005 (WA 175/05) I found in favour of the applicants' claim that Colin Blackler and Daryl Moyes enjoyed standing to bring their grievances against the Company.
2. In light of that finding, and consistent with ss 114 (5) of the Act, the parties were directed to undertake further mediation in an attempt to settle the problem on their own terms: the parties' advise they have attempted to do so but have been unsuccessful.
3. What now falls to be determined is the applicants' claim that the Company breached the terms of the collective employment agreement (CEA) which gave Mr Blackler and Mr Moyes – having been made redundant – re-employment preference.
4. At issue is the meaning of the following clause:

11. *Work(ers) whose employment has been terminated due to redundancy shall, within 12 months, **where practicable and all things being equal**, be given **preference** for re-employment.*

(emphasis added, clause 11, Printpac-UEB Redundancy Agreement, as incorporated into the parties' CEA)

Background

5. As is made clear in WA 175/05, the key facts are largely agreed. They are:
6. Following consultation with the Union, the second applicants were made redundant by the Company at its Levin plant in August 2004. Both were members of the Union. At that time Mr Blackler had 16 years service with the Company. Mr Moyes' service totalled 33 years. The genuineness of their selection for redundancy was not challenged, nor was the redundancy process.

7. Shortly after the redundancies the Company was required to recruit staff. It engaged an outside agency to conduct the recruitment process on its behalf.
8. In early November 2004, and in response to the respondent's moves to recruit more staff, the Union approached the Company to discuss the position of employees recently made redundant and the application of clause 11. No agreement was reached by them as to the meaning of the preferential re-employment clause.
9. The second applicants sought re-employment. Applicants for the vacant positions were required by the Company's recruitment agent to complete various reasoning tests, and to undergo drug and alcohol testing and criminal record checks. The agency then made its appointment recommendations to the Company.
10. By letter dated 23 December 2004 the Company advised Mr Blackler and Mr Moyes that they had not been successful in obtaining re-employment.
11. Some time later the applicants commenced legal action against the Company. The remedies originally sought by the applicants were a penalty, an order that the Company employ the second applicants, compensation for humiliation, etc and loss of benefits, and costs. During the investigation Mr Blacker withdrew his claim for re-employment.

Investigation Outcome

12. During the Authority's investigation it became clear that, when the Company became aware of their attempts to obtain re-employment and prior to Mr Blackler and Mr Moyes undertaking the various tests and checks required of them, the respondent forwarded to its recruitment agent references in respect of both men (refer to the Company's document 17 and the letter of 19 December 2005 from counsel for the respondent, Mr Peter Kiely, to the applicant's counsel, Mr Tony Wilton). The references stated that neither man was to be re-employed.
13. At paragraph 32 of my preliminary determination, I urged the parties to have regard to the following:

- a. *Mr Blackler no longer seeks employment with the Company. That is probably an appropriate election in light of an admission he made during his interview for re-employment. However, should his personal grievance succeed, an issue of contributory fault may arise in which case it would have to be considered in respect of his ongoing substantive claims.*

- b. *The Company made a similarly frank admission, on this instance during the Authority's investigation. It was in respect of document 17 in the respondent's bundle, which is described as a reference check. The Company advised that a similar document had been produced in respect of the other second applicant. It was not tabled in the Authority's investigation and will need to be – along with an opportunity for the parties to comment – before a substantive determination can be arrived at. The Company agreed that the reference checks were a clear signal to the agency undertaking its recruitment exercise that it was not to recommend the re-employment of the second applicants. In the event of my having to do so, that admission will need to be tested in the context of the meaning of the words "workers whose employment has been terminated due to redundancy shall, within 12 months, **where practicable and all things being equal**, be given preference for re-employment", as set out at clause 11 of the CEA (emphasis added). In interpreting what those words mean, by application to the facts of this case, issues requiring determination include the parties' mutual good faith obligations and whether the Company's advice amounted to an unjustifiable disadvantage.*

Applicants' Argument

14. The applicants take issue with the Company's approach and say that the words "*all things being equal*" must be given some meaning. They do not accept that their effect is that Mr Blackler and Mr Moyes will be given preference only if they are better candidates or, at the very least, are equal to outside applicants.

15. The meaning of "*preference*" is prior favour or choice (Shorter Oxford English Dictionary), i.e. it involves a starting advantage. The Company's position is that of reducing preference to an illusion. The parties cannot have intended that when they undertook to minimise the "*serious consequences that the loss of permanent employment can have on individual employees*" (clause 1 of the Redundancy Agreement).

16. The sensible and effective view of "*all things being equal*" is that taken by the Employment Court in *Fletcher Development & Construction Limited v NZ Labourers'*

Union [1991] 1 ERNZ 259, where previously redundant workers are equal to the task and it is “*practicable*” then re-employment preference must be given to those workers.

17. The Company, in breach of its obligations under the preference clause, sought out and engaged workers it thought would be better performers than Mr Blackler and Mr Moyes. The evidence was clear: at least two of the people engaged were put to work in positions and on tasks previously undertaken by the second applicants before they were made redundant.
18. The failure to appoint amounts to an unjustifiable action. So also was the selection process initiated by the Company: that process was neither “*fair*” (p 14 of the bundle, Company letter of 10 November 2004 to Mr Blackler) nor did it give “*transparency*” (par 4.9 of the witness statement from the Company’s facility manager), as claimed by the respondent. Instead, and without disclosing at the time its communication to the applicants, the Company subverted that process by instructing its agent not to recommend either Mr Blackler or Mr Moyes. At the investigation the Company accepted its communication amounted to a “*signal*” (Company’s oral evidence) not to re-employ Mr Blackler. The communication relating to Mr Moyes was an identical signal. In respect of the selection process, the Company failed to provide the second applicants with a level playing field. Instead, out of sight, it undermined their applications.
19. A penalty for a breach of agreement is sought so as to send a clear signal to parties to employment agreements of their obligations to adhere fully to the terms of those agreements.
20. Mr Blackler no longer seeks re-employment with the Company. It is accepted that the Authority may no longer have jurisdiction to order his re-employment. That being the case the Company’s actions have permanently deprived him of rights he enjoyed under the redundancy agreement and this should be reflected by way of compensation. Significant compensation for humiliation, etc should be awarded to the second applicants in any event, as a consequence of the damage done to them by the Company’s failure to re-appoint them, the subsequent disclosure of the reference checks and as a result of the respondent’s cynical and manipulative behaviour in respect of the selection process. The second applicants should also

enjoy compensation for significant loss of chance, from February 2005 when they reasonably could have expected to be re-employed by the Company. Mr Blackler is on significantly reduced income: Mr Moyes has been unable to find new employment.

21. There can be no issue of contributory fault in respect of Mr Blackler as his admission was not linked evidentially to any safety issue nor had the Company clearly adopted a consistent policy in respect of his admission. More importantly, regardless of his admission the Company had already determined not to re-employ Mr Blackler.

Respondent's Position

22. The Company takes issue with the applicants' view of the relevant provision in the redundancy agreement (clause 11), that it creates a preference for re-employment of redundant former employees in circumstances where those former employees are "*suitably qualified*" and it is "*practicable*" to re-employ them.
23. Amongst other submissions, and apart from *obiter* comments in *Fletcher* (above), the Company says its actions were consistent with the interpretation of the words "*all things being equal*" as set out in a number of Employment Court cases.
24. Even aside from these authorities the applicant's argument is unattractive as it asks the Authority to ignore the clearly expressed intention of the parties at the time the redundancy agreement was finalised. Clause 11 provides for preference "*where practicable and all things being equal*" (emphasis added). Just because a person is suitably qualified and appointment is practicable does not mean "*all things being equal*"; the phrase is "*very widely encompassing*" and can include considerations such as efficiency and productivity: *Tune v Babcock New Zealand Limited* [1998] 3 ERNZ 594.
25. The words "*all things being equal*" add a "*significant qualification*" to any preference for re-employment: *Priest v Fletcher Challenge Steel Ltd* [1999] 2 ERNZ 395, p 423.
26. The Company' recruitment agent sought references for all the candidates for the vacant positions, not just Mr Blackler and Mr Moyes. The Company prepared their reference check for Mr Blackler at the request of the recruitment agent, after it had

received his application for one of the vacant positions. Requesting references from previous employers is standard practice in such cases: for both of the second applicants the Company was their previous employer.

27. Mr Blackler disputed the content of the reference prepared by the Company about him. However, the Authority has written records that corroborate, as examples, much of the reference's content: p 19 – 22 of the respondent's bundle. No issue has been taken with the content of Mr Moyes' reference. The references take the form of questions and answers. The Company was nothing but truthful in answering the questions.
28. The issue remains unresolved in New Zealand as to whether there is any liability to an employee or a future employer in respect of a negligently prepared reference. Once the request for references was made, the Company was required to prepare them carefully. Provided the references contained only fact or honest opinion, no claim of disadvantage can follow.
29. In any event the effect of the references was negligible. The recruitment agent's reports refer only to the results of its own testing and statements made during its interviews. It is speculative and misleading to say there was any form of direct causal link between the references and the recruitment agent's recommendations against appointment.
30. Penalties are only available where there has been a wilful or deliberate breach of the applicable agreement: *Ruapehu District Council v Northern Local Government Officers Union*, unreported, 16 November 1992, Castle J, WEC 54/92. If there has been a breach in this case, which is not accepted, there is no evidence to suggest that breach was wilful or deliberate.
31. If any award is to be made for compensation it should be minor. The applicants are to be compensated only for the failure to re-appoint and not for their positions being made redundant: *Coutts Cars Ltd v Baguley* [2001] ERNZ 660 (CA).
32. The references fall within the definition of "evaluative material" for the purposes of s. 29 (1) (b) Privacy Act 1993: the second applicants had no automatic right to the

references. Had the applicants not commenced this proceeding it is unlikely they would ever have seen the references.

33. The correct approach to loss of chance is set out in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA). While reaffirming the right to claim compensation for loss of future earnings, the Court of Appeal emphasised the need for restraint and proven or confidently predictable future loss of earnings. Evidence is required of an intention to remain in the Company's employment while taking into account the vicissitudes of life. Calculation of future loss would be on the basis of new terms and conditions and not what the second applicants previously enjoyed. In the absence of relevant evidence an award under this heading is not appropriate.
34. Mr Blackler's admission was clearly a factor in the Company's decision not to re-employ him (refer to p 27 of the respondent's bundle). The Company does not agree that its policy in this area is inconsistent.

Discussion and Findings

35. I do not accept the Company's argument that other candidates were more suitable for the available positions than the second applicants and therefore Mr Blackler and Mr Moyes legitimately fell outside of the re-employment preference. I reach that conclusion because all things were not equal for the second applicants, the Company having determined in advance of its selection process not to re-employ them. As a result, Mr Blackler and Mr Moyes stood no prospect of re-employment, regardless of the calibre of other applicants and the recommendations of the respondent's employment agent. I reach this conclusion after having regard to the following:
36. The parties to this problem were, at the time, under an obligation *to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship*", specifically by *"recognising that employment relationships must be built on good faith behaviour"* ss. 3 (a) (i) of the Act.

37. The Company also agreed to recognise “*the serious consequences that the loss of permanent employment can have on the individual (employee)*”: clause 1, of the parties’ “Intent of the (Redundancy) Agreement”.
38. Consistent with that recognition, the Company further agreed to give preference to the re-employment of redundant workers, within 12-months, “*where practicable and all things being equal*”.
39. Finally, the Company assured one of the second applicants, Mr Blackler, that it had decided to employ people through an agent so as to ensure a “*fair*” process and to help it,

*“... in employing the right people with the appropriate skills and work history to complement our business. **Again I encourage you to contact** (the agent) **and forward your application to them**”*

(emphasis added, Company letter dated 10 November 2004, p 14 of the respondent’s bundle).

40. Shortly thereafter, and by communications dated 14 December 2004, the Company advised the agent that it would not re-employ Mr Blackler nor Mr Moyes.
41. In respect of the second applicants, the (re-)selection process amounted to a sham. There was nothing “*fair*” about it, for Mr Blackler or Mr Moyes. While the Company “*again*” encouraged Mr Blackler to forward his application it shortly thereafter advised the recruitment agent he would not be re-employed.
42. The Company clearly never intended to re-employ the second applicants, or even to permit them to fairly compete for re-employment. The reasons for its decision are set out in the second respondents’ reference check. They relate to performance matters, including strengths and weaknesses, competency, attendance, illness and attitude.
43. Is the Company entitled to rely on its own reference checks to block the re-employment of redundant staff? Being under a statutory obligation to promote mutual trust and confidence in all aspects of the employment relationship and, in this

instance, having contracted to recognise the serious consequences of the loss of permanent employment and to give re-employment preference to redundant staff, I do not accept it is. This is because the Company had accepted Mr Blackler and Mr Moyes, and the quality of their work and performance, respectively for 16 and 33 years: it was therefore not open to the Company to deny re-employment in respect of performance matters which properly – if genuinely held – should have been resolved during the time the second applicants worked for the Company. These are matters that should have been dealt with at the time and not held, in reserve, to deny legitimate re-employment aspirations and entitlements.

44. Preference has a meaning: in this instance I find it should be applied literally, i.e. “1 *a greater liking for one alternative over another or others. >a thing preferred. > favour shown to one person over another or others. 2 Law a prior right ...*” (Concise Oxford Dictionary, 10th Ed.). Having contracted to provide preference to Mr Blackler and Mr Moyes, the Company was obliged to deliver the same.
45. I am satisfied that the Company’s actions are in breach of its contracted undertaking, to recognise the serious consequence of the loss of permanent employment and to give preference to redundant employees.
46. I am also satisfied that the Company has not acted in good faith.

Remedies

47. Mr Blackler no longer seeks re-employment. Because of the adverse nature of Mr Blackler’s admission to the recruitment agency and the Company’s entirely appropriate health and safety practice, it is unlikely that I would have granted this remedy: s. 124 of the Act anticipated. That is because his admission would have been legitimate grounds for the Company to deny him re-employment, notwithstanding the effect of clause 11. It follows he has no claim to recover lost benefits.
48. Having accepted Mr Moyes’ employment for 33 years, and in the absence of any contributory fault considerations, I can see no reason to deny his claim for re-employment: s. 137 of the Act applied. It is appropriate that the implementation of

this remedy be delayed for two weeks to allow the parties to meet and reach agreement on an induction programme for Mr Moyes' return and the date of when that, and thereby his return to the workforce, will get underway. In any event I expect Mr Moyes to be returned to the workforce no later than 8-weeks from the date of this determination.

49. It follows that Mr Moyes is entitled to recover all of the benefits he has lost as a result of the Company's breach of clause 11 in respect of him, from the date of when he should have been re-employed: s. 123 (b) of the Act applied. In the event of the parties being unable to reach agreement on the detail of those benefits and the date from when they are to be calculated, leave is reserved for this matter to be returned to the Authority for determination.
50. After close consideration I decline the application for a penalty on the Company: this is because I am satisfied the overall determination will best address the parties' employment relationship problem and that, while the Company acted deliberately, the evidence falls short of establishing its behaviour was wilful and the remedies awarded the second applicants fix the problem: s. 134 of the Act applied.
51. Having regard to the evident humiliation, etc experienced by the second applicants, not least by the disclosure during the investigation of the reference checks, and bearing in mind the remedies awarded to Mr Moyes, I am satisfied that compensation of \$8,000 is appropriate to meet the legitimate claims of the second applicants: s. 123 (c) (i) of the Act applied.

Determination

52. I find in favour of the applicants' claims that the respondent, Carter Holt Harvey Limited, acted in breach of its obligations to Mr Colin Blackler and Mr Daryl Moyes and thereby unjustifiably disadvantaged them. I therefore direct the respondent to:
 - a. So as to comply with clause 11 and for the reasons set out above, re-employ Mr Moyes no later than 8 (eight) weeks from the date of this determination.

- b. Reimburse Mr Moyes the loss of benefits he would have enjoyed from the date of when he should have been re-employed, and
- c. Pay compensation for humiliation, etc to Colin Blackler and Daryl Moyes of \$8,000 (eight thousand) dollars each.

Costs

53. At the request of the parties costs are reserved.

Denis Asher

Member of Employment Relations Authority