Determination Number: AA 122/07
File Number: 5082335

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	NZ Amalgamated Engineering, Printing & manufacturing Union Inc First Applicant
	Paul Clarkin Second Applicant
	Phillip Stowers Third Applicant
AND	Carter Holt Harvey Limited Respondent
REPRESENTATIVES	Anne-Marie McInally Counsel for Applicants
	Rob Towner Counsel for Respondent
MEMBER OF AUTHORITY	Dzintra King
INVESTIGATION MEETING	19 April 2007
DATE OF DETERMINATION	26 April 2007

DETERMINATION OF THE AUTHORITY

The applicants contend that the respondent has breached the employment agreements of the second and third applicants by failing to comply with the requirement to accord priority for re-employment after they were made redundant in December 2002.

The applicant seeks:

- An order directing the respondent to comply with the second and third applicants' right to be given priority for re-employment, including the provision of appropriate training where needed.

- That the respondent's behaviour was in breach of s4 (1) (a) being a breach of the obligation to deal with the applicants in good faith pursuant to s4 (4) (bb) being "any matter arising under or in relation to an individual employment agreement while the agreement is in force."

- A determination that the breach of s4 was deliberate serious and sustained.

- A penalty under s4A (a) in relation to the breaches of the employment agreements and the Act.

The Contractual Provision

Clause 50.7 of the Carter Holt Harvey Pulp & Paper Kinleith Mill Collective Employment Agreement 2000 – 2001 provides:

Re-Employment of Redundant Employees

50.7.1 The employer is sympathetic to the situation of an employee made redundant on a compulsory basis. The employer also accepts that there is a distinction to be drawn between an employee who has voluntarily taken redundancy and one who was made redundant on a compulsory basis.

50.7.2 Therefore previous employees who were made redundant on a compulsory basis shall be given priority over other applicants for appointment to any Kinleith Mill vacancies for which their skills and experience are suitable. Where more than one person on the register is suitable, priority for re-employment shall be determined by the length of previous service with the employer.

50.7.3 The employer acknowledges its obligation to provide training as is necessary to aid affected employees where deficiencies are identified as an impediment to re-employment under this provision.

50.7.4 For the purposes of managing this provision, a register shall be kept listing each employee made redundant on a compulsory basis, together with details of positions held and contact details. The Human Resources manager and the Chairman of the Kinleith Site Delegates Committee shall share responsibility for keeping the register up to date and for its administration.

50.7.5 Employees whose names are recorded in the register shall be responsible for advising the employer and the appropriate site union of any changes to their contact details

This collective agreement ("the 2001 collective agreement") had effect from 8 October 1999 to 31 March 2001.

Redundancies

In December 2002 Mr Stowers and Mr Clarkin were made compulsorily redundant from the Kinleith Mill. Both men were at that time on individual employment agreements based on the 2001 collective agreement.

When the redundancies took place both men held the position of Stacker Drivers. However, both had held a variety of positions during their employment with Carte Holt Harvey. Mr Stowers had been an employee for thirty five years and Mr Clarkin for twenty five years.

Since the redundancy in 2002 Mr Stowers has been employed on a temporary basis in what the Union contends is the same role he held in 2002. The temporary employment was in July and August 2003 for a few days on each occasion. He then worked from 24 May 2004 to 30 June 2004 and 29 March 2005 to 26 June 2005. In September 2005 he worked from 11 September 2005 until 7 March 2006 to cover for an employee on maternity leave. There was a further period of employment from May 2006 till until August 28 2006 and in August 29 he resumed the role and has been in it since on a temporary basis.

The Union contends that when the position was advertised internally in October 2006 both the second and third applicants were capable of undertaking the work. Both men applied for the position but the respondent appointed another person who did not have a contractual claim to priority for appointment. That person subsequently resigned as a result of a disciplinary inquiry.

When Mr Stowers applied the Workplace Team considered his application but considered he did not have the skills. The Team was then intending to advertise externally but one of the union representatives said that preference had to be given to persons on the redundant persons' register. As agreement could not be reached the decision fell to be made by Mr Whyte. Mr

Whyte said he would move to advertise externally because the parties had agreed to a 12 month cap on preference for those made redundant in 2002. Mr Couling told him the Union would consider an injunction.

At the time of the redundancies there were two separate but sequential operations at the dry end of No 2 Pulp Dryer: a pulp manufacturing operation and a loadout operation. The respondent says that the restructuring brought these two roles together so that the functions performed by the applicants now comprise less than a third of the skills necessary to perform the present role of Dry End Operator for the No 2 Pulp Mill. According to the respondent, the present position requires an employee with a greater range of skills, a manufacturing background, computer skills and there is an educational/knowledge requirement.

Subsequent Collective Agreements

On 28 March 2001 the Union initiated bargaining for a new collective agreement. This new agreement ("the 2003 agreement") was ultimately ratified and took effect from 28 May 2003. From that time the re-employment preference clause was modified so that the preference was over external applicants rather than over other applicants and the retraining obligation was removed. Whyte, the Operations manager for the Kin Leith, said that the removal of the obligation to provide re-training to facilitate re-employment was clearly intended to apply retrospectively to persons such Messrs Stowers and Clarkin despite the fact that they were never employed under the 2003 collective agreement.

A further collective agreement was negotiated in 2005 ("the 2005 agreement"). This took effect from 28 May 2005 and in that agreement the preference for re-employment was limited to a twelve month period. The agreement did not say that the twelve month would run from the end of 2002 when the last redundancies had occurred.

The second and third applicants were not covered by the bargaining for the 2003 and 2005 agreements, having been made redundant in December 2002 at which time they were on individual employment agreements based on the 2001 collective

Issues in Contention

The stance of the applicants is that they should be considered for re-employment on the basis of the re-employment clauses in the 2001 agreement. The respondent, however, argues that the 2003 and 2005 agreements modified their priority for re-employment by restricting the right to a twelve month period and removing the priority over existing employees.

The applicants say that the crux of the issue is whether rights created under an individual employment agreement can be forfeited by a subsequent collective agreement to which the holders of those rights were not party; and whether personal entitlements 'crystallise' upon the event of redundancy so far as the redundant employee is concerned; and, if so, can the entitlements be removed retrospectively by a subsequent collective employment agreement to which the redundant former employee is not a party.

I agree with the applicants that these questions are the crux of the dispute and I do not accept the respondent's submission that they are irrelevant.

The Arguments

Mr Towner maintained that the Messrs Sowers and Clarkin could not have any greater rights than employees employed under subsequent collective employment agreements which modified the re-employment clauses in place at the time of the redundancies. This argument is not correct. A person on an individual employment agreement deriving from an expired collective can most certainly have superior entitlements to people who chose to be on a subsequent collective. If employee Y on an individual employment agreement based on expired collective A has an entitlement, for example, to long service leave and the long service leave provision has been removed in later collective B (to which employee Y was not a party,

did not authorise the union to negotiate on his or her behalf and did not/could not participate in the ratification process) then employee Y's entitlement to the long service leave subsists until such time as she or he agrees to vary it.

Mr Towner told me that it was implicit in the re-employment clause that it could be altered; and that subsequent negotiations in fact showed that it had been altered. Messrs Clarkin and Stowers were therefore bound by the future changes. Mr Towner said not all variations required employee consent. He cited as examples clauses permitting the employer to vary duties or hours of work. Such clauses make express provision for variation without the employee's consent and I agree with Ms McInally that the argument mounted by Mr Towner would not begin to satisfy the tests for the implication of terms.

Mr Towner maintained the clause regarding re-employment of redundant employees in the 2005 collective agreement was, on the ordinary natural meaning of the words used, intended to apply to employees previously made redundant, including those made redundant in 2002 and 2003. He said those ex-employees were not insulated against the effect of the variation because they were employed on individual employment agreements at the time of their redundancies.

The problem with that proposition is that it fails to provide any mechanism, other than the contention that all clauses in employment agreements can implicitly be varied in the future, to explain how it is that persons with rights that subsisted after their employment terminated can be said to have had those rights legally removed without their consent.

The respondent submitted that at the time of making an appointment to the vacancy there were no names of employees on the redundancy register who were entitled to be given priority for re-appointment. Mr Clarkin was considered for the vacancy as an external applicant, without priority, but it was decided that his skills and experience were not suitable. The respondent argues that it is not a case of contractual entitlement but simply a situation of Messrs Stowers and Clarkin not being entitled to any priority.

That argument is tautologous because they would only not be entitled to priority if there were no contractual entitlement.

A major difficulty for the respondent is that in order to succeed it has to show that the clauses in the 2003 and 2005 collective agreements can have retrospective application.

It makes no sense for a provision restricting the preference period to a period of twelve months to apply to redundancies that took place two and a half years earlier when, even adopting the employer's position, that restriction would not have taken effect until the 2005 collective agreement came into force, which was 28 May 2005. In other words, the temporally unlimited re-employment rights would have subsisted from December 2002 to the end of May 2005.

Generally, statutes are not of retrospective application. Maxwell on Interpretation of Statutes sets out that the basic premise is that the legislature does not intend what is unjust and therefore the interpretation leaning is against giving statutes retrospective operation. While employment agreements are not statutes there would have to be either an express provision regarding a retrospective application or a necessary implication. There is no express provision and as I have already noted with regard to the time restriction, such retrospectivity would make no sense.

Managerial Prerogative and Contracts

In Grant v Superstrike Bowling Centres Ltd [1991] ERNZ 727 Finnigan J made reference to NZ PSA v Electricorp [1991] 2 ERNZ 365 in which there was reference to the Court of Appeal judgment in Hale:

> [Hale] is, of course, an important judgment in the area in which it has relevance – that is – redundancy as a justification for a dismissal otherwise unmerited. But the various observations about the employer's right to manage are not available as a general pretext for avoiding legal obligations voluntarily entered into but which it is no longer convenient to fulfil.

Unfortunately, the respondent seems to have found that the obligations created under the 2001 collective agreement were no longer convenient. It quite legitimately negotiated changes to those obligations in subsequent collectives. What was not, however, legitimate, was the attempt to impose those variations upon Messrs Stowers and Clarkin.

Performance/Lack of Skill Issues

I was disturbed by the respondent's attempt to deny re-employment to people who had been made compulsorily redundant (dismissed without any fault on their part) and who had both been longstanding employees with no performance issues or any criticism of their skills and abilities during their employment.

This attempt to devalue employees whose contractual entitlements the company now finds it inconvenient to honour because it believes it can employ better people is unacceptable particularly given that the respondent has already been taken to task on this very issue in NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd, unrep, WA 27/06 WEA131/05 17 Feb 2006 Asher. In that case at para 43 the Authority held:

> …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.

Although there are differences between this case and the one referred to, in both instances the respondent has attempted to use performance criteria as a rationale to defeat a preferential post redundancy employment clause. I accept Ms McInally's argument that how the second and third applicants compared with their colleagues in 2002 is of no relevance and it may well be that there are people who may be better suited to the role. However, what the respondent has contractually bound itself to do is to identify areas of deficiency, to provide training and to prefer an employee who was compulsorily made redundant over other applicants. Such applicants have to be given precedence and are to be preferred over other applicants

Disagreement Regarding Application

It is clear that there is a history of disagreements between the union and the employer over the application of the 2003 and 2005 re-employment clauses.

In December 2004 Mr Mike Sweeney, the EPMU's Northern Regional Operations Director wrote to Mr Ian Whyte, the Manager, Engineering and Maintenance, saying that there had been "a slackening of commitment by the company to re-engage those who were previously made redundant." In January 2005 Mr Whyte replied:

> Where an applicant is registered on the redundant employee register and meets the set criteria, he/she will be given preference in selection over other applicants.
> ….
> The company had received no complaints from ex-employees regarding this process, but as a matter of course I will remind our area management of their obligations regarding this process.

In 26 October 2005 the union wrote complaining about the practice of preferring a worker who had never worked at Kinleith over long serving employees who had been made redundant. Mr Sweeney noted:

> I have highlighted 50.7.3 [2001 collective] as this creates an obligation on the company to provide training so that employees whose skill and experience are not "suitable" can overcome that impediment to re-employment. This is an important aspect of the employment agreement that has not been implemented in recent months.

Mr Sweeney said that of the issue was not resolved the union would be compelled to refer the matter to the Authority.

On 14 November 2006 Mr Raymond Wheeler, the District Organiser, wrote to Ms Debbie Piggott, the Human Resources Manager, saying: "Even if the parties at the recent negotiations had intended to limit the rights of those employees made redundant in 2002 it is our view it is not legally achievable."

Clearly, the parties were not of one mind as to the proper application of the re-employment provisions.

On 19 December Ms McInally wrote to Ms Piggott saying that the preference issue had to be resolved before anything could happen regarding the appointment of a permanent employee and that the Union intended to put the matter before the Authority. She asked whether CHH would agree to a joint application and to confirm that no permanent appointment would be made before the dispute was resolved.

Ms Piggott replied saying that the company intended to continue to apply the provisions of the new collective. On 21 December Mr Whyte wrote:

> The company notes your intention to make an application to the Authority on this matter but declines your offer of a joint application. We disagree that your intention to apply to the Authority should give cause to cease any appointments at Kinleith in the meantime. This would unnecessarily impact upon the running of our business. The Kinleith CA sets in place a process for appointments into CA positions and we see no reason why this should be interrupted.

At that stage Mr Stowers was employed in the role on a temporary basis. Ms McInally stated that he would be prepared to continue to do so until the dispute was resolved so there was no need to make a permanent appointment at that stage. She also said "If your client makes a permanent appointment before the dispute is heard and determined, we will seek the imposition of a penalty against the company". The company refused to provide an undertaking.

Breach of Good Faith and Penalty

The forgoing history is relevant to the remedies sought. The applicants say that Carter Holt Harvey acting wilfully by appointing someone other than the second and third applicants to a vacant position after being notified of the claim for compliance and that the attempt to do so was only thwarted because of a deficiency on the part of the appointee.

The respondent was able to operate its business within that period as Mr Stowers was in the position on a temporary basis. It would have been wise not to proceed with the making of a permanent appointment when the issue was clearly in dispute and the Union had indicated its intention to proceed to the Authority and had asked the respondent to consider a joint application.

Section 4 (1A) provides that the duty of good faith includes a requirement that the parties should be "active and constructive in maintaining an employment relationship". To proceed

with making a permanent appointment in circumstances where the rights of the parties were at issue was not conducive to maintaining a good employment relationship with any of the applicants.

There has been a breach of the duty of good faith.

I accept that the employer did have a genuine, albeit erroneous, view that its position on the application of the re-employment clauses was correct. I do not accept that the failure was intended to undermine an individual employment agreement or the employment relationship although it was certainly foolish and not constructive. It was deliberate in the sense that it was volitional. It was also a serious breach. What has saved the respondent from having a penalty awarded is its last minute agreement to leave the reappointment issue in abeyance until the matter was legally determined coupled with the genuinely held view of the correctness of its position.

Breach of Employment Agreement

The respondent has breached the employment agreements of Messrs Stowers and Clarkin by failing to give them priority and by failing to give training to overcome any skill deficit as required by clause 50.2 of the 2001 collective agreement which became part of the individual employment agreements of the two applicants.

The respondent is to comply with the provisions of clause 50.2.

Costs

Costs are reserved. If the parties are unable to resolve this issue the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority