IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 306/08
5130186

	BETWEEN	PULP & PAPER INDUSTRY COUNCIL OF THE MANUFACTURING AND CONSTRUCTION WORKERS' UNION First Applicant
		BRIAN BOYLEN Second Applicant
	AND	NORSKE SKOG TASMAN LIMITED Respondent

Member of Authority:	Dzintra King
Representatives:	Kathryn Beck, Counsel for Applicants Richard McIlraith, Counsel for Respondent
Investigation Meeting:	11 August 2008
Determination:	26 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants, the Pulp and Paper Industry Council of the Manufacturing and Construction Workers' Union ("the PPWU") and Mr Brian Boylen, ask that the respondent, Norske Skog Tasman Ltd ("Norske Skog") be ordered to comply with the provisions of s.69OJ of the Employment Relations Act 2000; and that the respondent be prevented from implementing any restructuring until such time as an employment protection provision ("EPP") is contained in any employment agreement that binds the affected employees.

[2] The respondent opposes the making of any orders.

Background

[3] The parties have produced an agreed statement of facts.

[4] Norske Skog operates a paper mill in Kawerau. The first applicant, the PPWU, is a registered union representing employees in the pulp and paper industry. It represents approximately 190 employees of Norske Skog. The second applicant, Mr Boylen, is employed by Norske Skog and is a PPWU member.

Wood processing

[5] As part of its papermaking operations, Norske Skog runs a wood processing area. In early 2006, Norske Skog announced a proposal to contract out part of its wood processing function. The issue and implications of not having an agreed EPP were raised by the PPWU with Norske Skog as a barrier to the contracting out. Without prejudice to either party's position on the need for an agreed EPP, following consultation with the PPWU and mediation between the parties, that particular contracting out occurred by agreement with effect from 31 July 2006.

[6] Since 31 July 2006 seven operational employees have been employed in the wood processing area, all of whom are members of the PPWU.

Employment agreement

[7] Norske Skog and the PPWU were parties to a collective employment agreement covering the work performed by the PPWU wood processing employees, the Supply Co CEA. The term of the Supply Co CEA was from 1 September 2004 to 28 February 2007. The PPWU wood processing employees are now employed on individual employment agreements on the same terms as the expired Supply Co CEA.

[8] The PPWU initiated bargaining on 31 December 2006 for a new collective agreement covering the Supply Co employees, including the PPWU wood processing employees. Bargaining for this new collective agreement has been taking place since January 2007. The parties have met many times and attended numerous days of mediation. During bargaining, extensive discussions have taken place regarding the form of an EPP to be included in a new collective agreement. The parties are yet to reach agreement on this issue.

[9] During 18 months of bargaining, the parties have reached agreement on two collective agreements in other areas of the mill: Order Fulfilment and Paper Machines. Both new collective agreements contain an EPP.

[10] The PPWU's view is that the circumstances of the employees and the issues affecting those two work areas are different from those in Supply Co.

Consultation on Norske Skog's proposal to issue an RFP

[11] Prior to the commencement of the formal consultation process, Norske Skog informally raised the possibility of contracting out of wood processing with the PPWU. The company asked to meet with the Union. It prepared an information pack for a consultation meeting to be held with the PPWU and PPWU wood processing employees on 11 or 12 June.

[12] The company was told that neither the Union nor the wood processing employees would participate in the consultation process.

[13] Norske Skog sent its consultation packs both to the Union and to the employees. This set out Norske Skog's proposal to issue an RFP in relation to wood processing. After the packs had been sent out, Swarbrick Beck MacKinnon, the PPWU's solicitors, wrote to Russell McVeagh, Norske Skog's solicitors, stating that consultation regarding any contracting out of wood processing was premature as the Supply Co CEA did not contain an EPP. Consequently Norske Skog could not meet its legal obligations under the collective agreement or its obligations of good faith in any consultation process and the parties should focus on bargaining for an EPP.

[14] Russell McVeagh replied saying that Norske Skog had an obligation under the Employment Relations Act 2000 and employment agreements to consult regarding proposed changes in the area and that the company remained willing to bargain about an EPP. However, it considered that consultation was a separate process from bargaining for a new collective agreement.

[15] Norske Skog was originally to make a decision whether to contract out wood processing and, if so, which contractor to engage by 7 August. Norske Skog has agreed to delay this decision until such time as the Authority issues its determination in this matter.

The Position of the Applicants

[16] I have set out the parties' submissions in some detail as I have found them to be very helpful.

[17] The applicants say that s.69OJ means that an EPP is required to be included in the parties' employment agreement prior to the employer undertaking the restructure. To find otherwise would have the effect of the employees being denied the right to protection which the statute expressly confers on them.

[18] The stated purpose of Part 6A Subpart 3 – Other employees, is to provide protection to employees where their work is to be affected as a result of their employer restructuring the business. Section 69OJ reads:

> *Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.*

[19] The applicants say that that section and its wording must mean something and non-compliance must have a consequence. They say that the consequence must be a compliance order that requires that the applicable employment agreements contain an EPP before the respondent can undertake or implement its proposed restructure.

<u>The law – Part 6A Subpart 3 ss.69OH-69OJ</u>

[20] Subpart 3 of Part 6A of the Act provides protection for affected employees where their work has been contracted out. Section 69OH states:

> *The object of this subpart is to provide protection to employees to whom subpart 1 does not apply if, as a result of restructuring, their work is to be performed by or on behalf of another person and, to this end, to require the employment agreements to contain employee protection provisions relating to negotiations between the employer and the other person about the transfer of affected employees to the other person.*

[21] The legislation specifically defines the meaning of an EPP, the purpose of it and further prescribes what that provision is to contain. Section 69OI reads:

> ***employee protection provision means a provision*** –
>
> *(a) the purpose of which is to provide protection for the employment of employees affected by a restructuring; and*
>
> *(b) that includes –*

> *(i)* *the process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and*
>
> *(ii)* *the matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and*
>
> *(iii)* *the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer.*

[22] Section 69OJ reads:

> ***Collective agreements and individual employment agreements must contain employee protection provision.***
>
> *Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.*

[23] The applicants say that the intention of the legislation is clear. It is to ensure that an employee is afforded the protection of an EPP where the employer elects to restructure the business.

[24] While the Act does not set out the consequences of failing to comply with s.69OJ, the applicants submit that it is clear that the intention of Parliament was to ensure an employer could not restructure its business without the affected employees having the protection afforded by the Act. Implementing restructuring without an EPP is not a situation that can be rectified or addressed by damages after the fact. The purpose of an EPP is to at least potentially put boundaries around the bargain that an employer is able to reach with any third party.

[25] An EPP is a fundamental first step in any restructuring process. Accordingly, without it, an employer is simply not in a position to know what its obligations are let alone comply with them. It would therefore be nonsense for an employer to be able to restructure its business without having a provision in the appropriate employment agreement which complies with s.69OJ. That would cut right across the purpose of Subpart 3.

[26] Section 69OJ cannot be meaningless. It must mean that an employee must have the protection of an EPP. That protection is meaningless unless it is in place before restructuring.

[27] Section 5(1) Interpretation Act 1999 reads:

> *The meaning of an enactment must be ascertained from its text and in the light of its purpose.*

This clearly sets out the purposive approach to statutory interpretation.

[28] Ms Beck referred me to *Gibbs v. Crest Commercial Cleaning Ltd* [2005] 1 ERNZ 399 at 419:

> *Where Parliament's intention is clearly expressed in statutory words, the Court must give effect to this intention and to the legislative scheme so expressed. If the statute is apparently ambiguous or deficient, the Court may have recourse to the background material relied on by the proponents of the legislation and by Parliament to attempt to discern what may have been its intention.*

[29] Ms Beck says the failure of the legislation to deal with the consequence of the failure to comply with s.69OJ is clearly an omission within the statutory provisions. What the Authority can do about the omission depends on whether the omission is intentional or an ellipsis. See Burrows, Statute Law in New Zealand 3rd ed, Wellington, LexisNexis 2003.

[30] If the omission is an ellipsis, then the Authority must adopt an interpretation of the legislation that gives the words a sensible meaning. If the omission is intentional, then the Authority cannot fill the gap.

[31] The applicants submit that the omission of the legislature to address the consequence of non-compliance with s.69OJ is an ellipsis. An ellipsis is considered in *Gibbs v. Crest* at p.420:

> *That is where Parliament has simply and inadvertently omitted to include words or phrases to cover the circumstances.*

[32] In Statute Law at p.110 Burrows says:

> *Incomplete expression*
>
> *Ellipsis is a common feature of communication. Speakers and writers often do not trouble to express every detail of what they wish to say, simply because they can assume that the recipients of the*

> *communications will take such details for granted. All communications assume a degree of common context and background knowledge among the recipients.*

[33] Ms Beck submitted that in determining a matter of ellipsis, it was helpful to consider two areas:

(a) The previous wording of the comparable provision within the statute prior to s.69OJ being introduced; and

(b) The consequences of assuming such an omission was intentional.

Previous wording of comparable provision: s.69N

[34] This helps to understand more clearly the implications of the purpose of these statutory provisions. In considering the previous wording of the relevant section, it is clear that Parliament intended that before an employer could implement a restructure the relevant employment agreements had to contain a compliant EPP. At that time, the legislation explicitly required that an EPP be inserted either by December 2005 or, where the employer was proposing a restructure, prior to that restructure commencing.

[35] Section 69N reads:

> ***When existing collective agreement or individual employment agreement must contain employee protection provision***
>
> *(1) Every collective employment agreement and every individual employment agreement in force immediately before the commencement of this section must be varied to include an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.*
>
> *(2) Subsection (1) must be complied with by the earliest of the following:*
>
> *(a) 12 months after the commencement of this section; or*
>
> *(b) when the collective agreement or individual employment agreement is next amended; or*
>
> *(c) if an employer's business is restructured, before the restructuring occurs.*

[36] That legislation allowed a 12 months grace period, at the end of which all employment agreements were to contain an EPP and specifically identified that where an employer intended to carry out a restructuring within the 12 month grace period, then the EPP had to be included prior to that restructuring occurring. That is no longer expressly stated. However, the change of wording does not indicate a change

of intention or purpose. It was simply no longer necessary to retain the original wording in the place of the grace period being removed from the section and the requirement that all agreements, no matter what the circumstances, were to contain an EPP. The purpose of both the previous and the current Subpart is the same, that is, to provide protection to employees where their employment was affected by a restructure. For that purpose to be effective, that protection needs to be in place before restructuring.

Deliberate omission

[37] The applicants question what effect would a deliberate omission have on the efficacy of the legislation? The wording of s.69OJ is definite. Compliance is mandatory. All employment agreements must contain an EPP. To infer that silence regarding the consequences of non-compliance was deliberate would in turn mean inferring that Parliament intended there to be no consequence for non-compliance with s.69OJ. That would mean that the section itself would be of no effect. That is nonsensical.

[38] It is unrealistic to ascribe to the legislature an intention that a failure to comply with s.69OJ should be of no importance. The section includes the word "*must"*. See *Norske Skog Tasman Ltd v. Clarke* [2004] 1 ERNZ 127.

[39] The approach of the Authority should be to adopt the meaning that is sensible and reflects commonsense propositions. In *Frucor Beverages Ltd v. Rio Beverages Ltd* [2001] 2 NZLR 604, followed in *Gibbs*, the Court said:

> *The Courts should strive to arrive at a meaning which gives effect to* [Parliament's] *intention. The principles of interpretation which assist the Courts in that exercise are well established. They reflect commonsense propositions and should, therefore, be applied sensibly. Thus, it would be less than sensible to assume that Parliament intended to legislate in a manner which is absurd. Indeed, it would be uncharitable, if not presumptuous for the Courts to approach the task of interpreting Parliament's legislation on any other basis. Thus, the Courts have come to give the concept of "absurdity" a wide meaning, using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.*

[40] To find that Parliament intended that there be no consequence for non-compliance goes against commonsense.

Intentional or unintentional?

[41] When deciding between the two options available, that is whether the omission was intentional and therefore s.69OJ is meaningless, or that the omission was an ellipsis and therefore unintentional, the Authority must adopt the option that gives the legislation a sensible interpretation.

[42] The only sensible interpretation is that the omission was an ellipsis and as a consequence the Authority is required to fill the gap in order for the Act to work as Parliament must have intended.

[43] Section 69OJ requires strict compliance and that means there must be a meaningful consequence of non-compliance. The sensible interpretation must be that an employer cannot undertake a restructure without first ensuring s.69OJ has been complied with.

[44] The applicants say the protection afforded by the inclusion in an agreement of an EPP cannot be met in any other way. It cannot be met by good faith, implied terms and/or consultation. If it could, s.69OJ would not be necessary.

[45] The respondent says that the employees are protected by other contractual provisions but the applicants say that the redundancy and redeployment policy does not suffice. The applicants say that that only covers what the respondent's obligations will be once restructuring is actually occurring and after any deal has been done with the third party. It does not afford protection of employment, there is no guarantee of transfer or redeployment, s.69OI(1)(a); and it does not cover what and how the respondent has to negotiate with any third party in the first place, s.69OI(1)(b)(i)-(ii). The contractual provisions on consultation and change also fail to deal with these fundamental components of an EPP.

[46] None of the contractual provisions provide the employees with any certainty of the ongoing employment with the third party or the respondent or the terms and conditions that may be offered in the event a third party does wish to retain an employee.

The respondent's submissions

[47] The respondent says that the employment agreements do contain an EPP. In the alternative, it says that the Act is silent on the consequences of a failure to have an EPP in an employment agreement. That failure lies at the feet of both parties and cannot have been intended to lead to a sanction as stark as a prohibition on any action falling within the definition of restructuring under s.69OH of the Act. Finally, as an alternative to both those arguments, the respondent submits that no compliance order should be made.

[48] To comply with s.69OI, an employment agreement need not contain a clause for an employee protection provision. It will be sufficient if the agreement as a whole contains the requirement of an EPP. See *Service & Food Workers' Union Inc v. Vice-Chancellor of the University of Otago* [2003] 2 ERNZ 156. The parties are agreed on this proposition. I also accept that proposition.

[49] Clauses 10 and 38 of the Supply Co CEA provide an obligation to consult about proposed changes. There is also an obligation not to contract out wood processing prior to 28 February 2007 at clause 35 of the Supply Co CEA. At clause 32 there is an obligation to comply with the redeployment and redundancy policy in any redundancy situation.

[50] The Supply Co CEA was concluded after the Act was amended to include a requirement to agree an EPP. Norske Skog and the PPWU therefore both had an obligation to include an EPP in the Supply Co CEA. This was not a new obligation which had only arisen in the context of bargaining for a new collective employment agreement. The respondent says that the parties must be taken to have intended to comply with the statutory obligations. Notably clause 39 of the Supply Co CEA states that:

> *The parties to this Collective Employment Agreement certify that the terms and conditions of employment contained in this Collective Employment Agreement (Base Document and Domestic Schedules) are in full and final settlement of all matters pertaining to employment of persons covered by this agreement. No further claim shall be made in respect of the terms and conditions of employment during the term of the Agreement, other than in accordance with the procedure detailed in this Agreement.*

[51] This clause cannot override the statutory requirement to have an EPP.

[52] Clause 35 is of particular significance. It prohibits the contracting out of work covered by the CEA prior to 28 February 2007. Inclusion of an EPP in the Supply Co CEA which provided specific detail as to what Norske Skog could negotiate with a new employer in a restructuring situation was simply not necessary. Clause 35 offered a much greater level of protection.

[53] I note again that there was nonetheless a legislative requirement to have an EPP.

[54] Mr McIlraith said that all elements of Norske Skog's EPP were not in writing in the same document. That was analogous to a failure to include any other required component of an employment agreement in that agreement. For example, the requirement under s.65(2)(a)(ii) that an individual employment agreement includes a description of the work to be performed by employees. If the agreement does not contain a job description that in breach of the section and might require the assistance of did not mean that the parties had not agreed to one. It simply meant that the written agreement did not record the whole relationship and while the parties were technically the Authority to determine the substance of their obligations.

Effect of non-compliance

[55] The Act does not address the consequences of no EPP being included in an employment agreement. There is no provision that states that an employer is unable to restructure its business without an EPP. One can surmise this is because both parties must accept responsibility for a failure to agree. There is no case law which comments on this issue.

[56] Without there being an express provision in the Act setting out the consequences, the PPWU and Mr Boylen must argue that it is implied that an employer must not be able to restructure. This effectively requires the Authority to read additional words into ss.60OH-69OK. Norske Skog does not accept that that is a legitimate interpretation.

[57] In *Gibbs v. Crest* (supra), the Employment Court was asked to consider the scope of the definition of restructuring as it applied to vulnerable employees. A Full Court held that the employees concerned were not caught by the express words of the definition and went on to consider whether it should read words into the section so

that it would apply. Mr MacIlraith said that was analogous to what the applicants were asking the Authority to do with regard to Subpart 3.

[58] In that decision, the Court referred to the House of Lords decision in *Inco Europe Ltd v. First Choice Distribution* [2000] 2 All ER 109 (followed by the New Zealand Court of Appeal in *Securities Commission v. Midavia Rail Investments BVBA* [2005] 3 NZLR 433 which held:

> *This power is confined to plain cases of drafting mistakes. The Courts are ever mindful that the constitutional role in this field is interpretative. They must abstain from any course which may have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the Courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the Courts must be abundantly sure of three matters:*
>
> *(1) The intended purpose of the statute or provision in question;*
>
> *(2) That by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and*
>
> *(3) The substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.*
>
> *The third of these provisions is of crucial importance otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation.*

[59] In *Gibbs v Crest* (supra), the Court considered whether the failure to include subsequent contracting in the definition of restructuring was a deliberate act or accidental omission by Parliament. It held that while earlier versions of the amendment Bill suggested an intention to include subsequent contracting, it was not sufficiently certain if Parliament's intention to justify intervention as set out in *Inco* (supra). The Full Court summarised the legal position as follows at para.[151]:

> *Drawing together all the essential principles of these judgments and articles, we conclude, first, that the words used in s.69B do not cover plainly the circumstances of the applicant. Next, therefore, it is legitimate to inquire whether the absence, if any of a legislative provision covering the applicant's position was an omission or oversight by Parliament or whether it may have been deliberate. If we are satisfied that any omission was by legislative oversight (a Northland Milk Vendor's situation), then the law allows us to fill such a gap if we are sufficient certain that this is what Parliament would have done had it not suffered from this ellipsis. By contrast, however, if we are unable to have that degree of certainty and still consider that Parliament may have acted deliberately rather than inadvertently, the case law on statutory interpretation does not permit us to substitute what would be in effect our own legislation.*

[60] The Court determined that subsequent contracting was not covered by the definition of restructuring as it applied to vulnerable employees. The Act has subsequently been amended to ensure that it now does.

[61] Mr McIlraith then went through the three limbs of the *Inco* test. First, the intended purpose of the provision. The words of the provision are to be given their natural and ordinary meaning in light of the express purpose of the legislation. The object of the Subpart of the Act dealing with EPPs is set out at s.69OH. The object is the protection of employees. That is absolutely critical. It is not necessary to imply the power to grant a compliance order sought by the applicants to give effect to those objects. There is no suggestion in the objects section that Subpart 3 was intended to prohibit an employer from restructuring until an EPP was included in an employment agreement. Nor is there any suggestion that this outcome was contemplated by Parliament at any stage. There can be no credible argument that providing such a sanction was the clear intention of Parliament.

[62] Mr McIlraith submitted that there must be a presumption against implying obligations into the Act or into employment relationships generally which fetter the managerial prerogative of an employer. That would clearly be the case if the Authority implied a requirement that an EPP must be in place before a restructuring could occur.

[63] There is no suggestion that failure to include the express power to prevent restructuring was omitted from ss.69OH-69OJ by inadvertence. This is not a situation where a word or two is missing. In order to have the effect alleged by the applicants, Parliament would have had to inadvertently omit an entire section from the Act and such a section would confer a substantial power on employees and unions. The Authority should be hesitant to imply such an onerous provision.

[64] Thirdly, the substance of the provision omitted is abundantly clear. The third limb of the test is that it should be abundantly clear what is to be read into the statutory provision to fill the gap. What is to be used to fill the gap, if there is one, is far from clear. In *Service & Food Workers' Union v. Vice-Chancellor of the University of Otago* at p.167, the Full Court of the Employment Court recognised that the question of non-compliance with s.54(3)(a)(ii) was "*a very difficult question*". The same must be said in relation to non-compliance of Subpart 3.

[65] Even if it were the case that Parliament intended to include a sanction for failing to agree an EPP, and its failure not to do so was an oversight, what did Parliament intend that sanction to be? There is no guidance in Hansard, the Select Committee reports or various versions of the Amendment Bill in relation to either the December 2004 or December 2006 amendments to the Act. There is no basis to suggest that a compliance order of the type sought in this case to fill that gap. Why not a penalty for a breach of good faith? Why not nothing?

[66] Section 137(2) of the Act provides:

> *Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction or requirement.*

[67] A compliance order is a discretionary remedy. If the Authority were to determine that it did have the power to grant the compliance order sought by the applicants, the respondent says that a compliance order is a discretionary measure. It would not be enough for the applicants to establish non-compliance or non-observance with the Act. They must also persuade the Authority to exercise its discretion to make a compliance order.

[68] Mr McIlraith said that the practical effect of a compliance order in the form sought by the applicants would not be simply to require the parties to settle a collective employment agreement containing an EPP. In effect, it would require Norske Skog to agree to the EPP proposed by the PPWU before restructuring could occur. The Authority should not allow its processes to be used in that way.

[69] The purpose of an obligation to include an EPP is to provide protection for employees in a restructuring situation. In that situation, the compliance order is simply not necessary to achieve the purpose.

[70] Norske Skog has comprehensive contractual obligations to the PPWU and the PPWU wood processing employees in a restructuring situation. That is best demonstrated by past practice. In August 2004, the number of employees had decreased from 41 to 7. That level of manning had been achieved without a single

involuntary redundancy. On every occasion, employees in all 34 redundant positions had either:

(a) Been redeployed to another role within Norske Skog; or

(b) Elected to take voluntary redundancy; or

(c) Accepted employment with the new employer.

[71] Where employees had accepted a role on lesser terms and conditions, they had been paid redundancy compensation and had certain terms and conditions of employment, for example superannuation, guaranteed for a certain period of time.

[72] If the proposed contracting were to go ahead, Norske Skog had stated that it intended to negotiate with the new employer to ensure that as many of the employees as possible are able to transfer. For those employees who are not offered roles, the redundancy and redundancy policy would apply. In accordance with that, redeployment and voluntary redundancy would be the priority.

[73] Mr McIlraith submitted that in considering whether to exercise a discretion to make a compliance order, the Authority should carefully consider that this is a situation of mutual obligation. The requirement to have an EPP lies with both parties. A failure to agree must also lie at the feet of both parties. Yet the compliance order sought by the applicants would impose an extreme sanction on Norske Skog, a prohibition on restructuring until an EPP was agreed. That would conversely provide a significant benefit to the applicants, the opportunity to prevent any contracting out until Norske Skog agreed to an EPP. Such a result would not be dealing with this matter in equity and good faith.

[74] Mr McIlraith said any failure to include an EPP is the responsibility of both Norske Skog and the PPWU. To assert that Parliament intended such a failure to prevent contracting out would be to imply a draconian remedy into the Act. It is inconceivable that such a consequence would not have been dealt with expressly. It is noticeable that the applicants have significant protection in the contracting out that is contemplated by Norske Skog.

Decision

[75] I have looked at the existing employment agreement and its provisions do not satisfy the statutory requirements. The consultation provisions require consultation but not agreement about the effects of changes. This does not expressly deal with negotiations with a new employer. Neither does the redundancy policy.

[76] I am therefore going to consider whether there was a deliberate omission, or an ellipsis; and, if the latter, what the content of the ellipsis has to be.

[77] The Milk Act 1988 made no provision for home deliveries in the interim between the coming into force of the Act and the establishment of the NZ Milk Authority, which was to lay down standards for home delivery. In *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 at 537 the Court of Appeal said there were cases where, in the preparation of new legislation, a very real problem had not been expressly provided for and possibly not even foreseen. In such cases, the responsibility falling on the Courts was to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act. The Courts could in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended.

[78] Cooke P said:

> *The responsibility falling on the Courts as a result is to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act – that is to say, the spirit of the Act. In doing so we have to bear in mind that freedoms such as that of the owner of a business to conduct the business as he sees fit are not to be restricted unless it clearly appears that this must have been the intention of the legislature. Obviously therefore a great deal turns on the need for the Courts to appreciate and give weight to the underlying ideas and scheme of the Act.*
>
> *It can be helpful, even crucial, to have statements of general principle or purpose in the Act itself: see New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 as to the State-Owned Enterprises Act 1986 and Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc [1988] 1 NZLR 78 as to the Water and Soil Conservation Amendment Act 1981. As will be seen, the present case as to the Milk Act 1988 is one in which we have found the long title is of some help. Whether or not the legislature has provided those aids, the Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended. See Goodman Fielder Ltd v Commerce Commission*

> *[1987] 2 NZLR 10 as to the Commerce Act 1986, a case which illustrates both aspects of that proposition. The present case is in our opinion another illustration of a hiatus which the Court can legitimately and should bridge. In that respect, although the subject-matter is quite different, it is similar to a case concerning the Labour Relations Act 1987 in which judgment has just been given. New Zealand Labourers' Union v Fletcher Challenge Ltd [1988] 1 NZLR 520.*

[79] The purpose of the legislation is to ensure that employees whose employment is to affected by a restructuring will be protected. To that end s69OI (1) (a) and (b) specify matters which must be provided for and included in an employment agreement.

[80] I have also considered s3 which sets out the objects of the Act. The object is to *"build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship."* Two of the specific criteria are:

> *a. by recognising that employment relationships must be built not only on the implied obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and*
>
> *b. by acknowledging the inherent inequality of power in employment relationships.*

[81] The restructuring provisions, which provide protection for employees, provide a legislative basis for that protection and must also be an acknowledgement of the inherent inequality of power in employment relationships.

[82] Mr McIlraith has argued that to prevent a restructuring taking place would be a draconian, punitive, an interference with managerial prerogative and provide a significant benefit to the union.

[83] The legislation does place limits on managerial prerogative. It does that not only by stating in the Objects Section that good faith is more than an implied duty but also by, for example, requiring employers to have certain things in employment agreements. It prohibits employers from dismissing people in an unfair manner.

[84] Whether or not the union is able to negotiate the employment protection provisions it wants into the employment agreement will depend on the surrounding circumstances, one of which may well be the effect of this determination. It is clear that Parliament wanted – indeed required – that workers have such provisions. Negotiations are always a matter of balancing strengths and weaknesses, desires and needs.

[85] When Parliament has legislated that specific things must be included in employment agreements and that the purpose of that inclusion is to protect the interests of employees in a restructuring situation it is difficult to conclude that Parliament would have intended that a failure (and I accept that the failure is that of the parties to the negotiation) to negotiate the specified provisions would render the protection given by those provisions nugatory.

[86] In reaching this conclusion I have taken into account the preceding legislation which provided that employment agreements had to contain an EPP, that a timeframe for the inclusion of an EPP was specified and that a restructuring could not take place until such a provision was placed in the employment agreement. Parliament had already considered and legislated for the "punitive and draconian" measure now being contested by the respondent.

[87] When I consider the underlying ideas and scheme of the Act I reach the conclusion that the omission of the equivalent of s 69N (2) (c) was an accidental omission.

[88] In *Frucor* (supra) the majority of the Court of Appeal held that a purposive approach was needed to determine whether the wording of s34 of the Evidence Amendment Act (No 2) 1980 should be read in a manner which provided privilege both to patent attorneys and their clients. Looking at a variety of factors the Court concluded that Parliament's intention had been to confer a statutory privilege on patent attorneys and their clients. A literal reading would have deprived the section of that meaning.

[89] At p.111 of Statute Law Burrows says that sometimes incompleteness goes beyond the degree to which general language needs to be *"read down"* in conformity with context and purpose. He notes that questions may arise which require answers but no such express provision has been made by the legislation. This is the situation

in this case. He goes on to say that often a vacuum cannot be filled by the Court but that that there is a growing tendency for the Courts to attempt answers to such questions "*if the scheme of the Act as a whole evinces a clear parliamentary intent that the question was to be answered in a particular way*".

[90] At 211 Burrows says that "*reading in*" words to give effect to implications of the express words of a provision one is not really adding to the section but drawing out what is already implied in it. He states that "*ellipsis is a common infirmity of expression: it consists of not spelling out the precise limits of one's proposition, but leaving those limits to be inferred from context and purpose*".

[91] The mischief rule accords with modern purposive interpretation. The mischief the provision was designed to rectify was the vulnerability of employees ina restructuring situation. The remedy was to require an EPP in employment agreements. If a prohibition on restructuring is not read in then the remedy (the protection) is ineffectual.

[92] While the instant case is not about what meaning is to be attached to words the general principle that Parliament cannot have intended to pass legislation that would render its intention absurd or meaningless.

[93] If I look at the criteria in *Inco* I am satisfied that they can all be met:

- The intended purpose of the provision is to provide protection to employees in a restructuring situation by requiring there to be an EPP in the employment agreement.

- If there is no ability to prevent a restructuring until such time as an EPP is negotiated then effect cannot be given to the provision in question.

- The substance of the provision Parliament would have made had the error in the Bill been noticed could only have been to place a prohibition on restructuring in the absence of an EPP.

[94] I have considered what Mr McIlraith has said about other consequences. He has mooted the possibility of a penalty for breach of good faith or nothing. It cannot have been intended that there be no consequences. That would make a mockery of the provision. A remedy such as a penalty would not address the problem nor would

it facilitate the purpose of the statutory provision. Furthermore, on whom would the penalty be imposed given that the provision needs to negotiated?

[95] Given the framework of the Act, its philosophy and the history the ineluctable conclusion must be that the only remedy which could have been intended and was intended is the one sought by the applicants.

[96] Section 137(1) gives the Authority the power to order compliance where any person has not observed or complied with Parts 1, 3-7 or 9 of this Act. Section 137(3) provides that the Authority must specify a time limit within which the order is to be obeyed.

[97] The applicants have asked that the respondent be ordered to comply with s69OJ. The obligation is on both parties to comply with that section.

[98] The parties are to negotiate until such time as they comply with s69OJ. Until an EPP is agreed the respondent is not to implement its proposed restructuring.

Costs

[99] Costs were reserved.

[100] The parties should endeavour to resolve the issue of costs. If they unable to do so the applicants should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicants' memorandum.

Dzintra King
Member of the Employment Relations Authority