IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 77/09
5152705

	BETWEEN	Eastern Bay Independent Industrial Workers Union First Applicant
	AND	Immo Beijerling Second Applicant
	AND	ABB Ltd First Respondent
	AND	Grant Gillard Second Respondent
	AND	Wu Khoo Third Respondent
Member of Authority:	James Wilson	
Representatives:	Lou Yukich for the applicants Richard McIlraith & Gillian Service for the 1st and 2nd respondents	
Oral submissions received:	9 March 2009 from the applicants and first respondent	
Determination:	10 March 2009	

DETERMINATION OF THE AUTHORITY

Oral Determination

[1] This determination confirms an oral determination given to the parties at 5.00 p.m. on 9 March 2009 and sets out the reasons for my decision not to issue a compliance order as requested by the Eastern Bay Independent Industrial Union of Workers (the Union/EBIIWU).

Application for compliance order

[2] In a statement of the problem lodged with the Authority on 19 February 2009 the Union sought, *with urgency*:

> *Under S137(1)(a)(i) of the Employment Relations Act 2000 the applicant/s seek the assistance of the Employment Relations Authority by way of an immediate order for compliance with the collective agreement clause 27 requirement for not less than two weeks dialogue followed by not less than two weeks consultation prior to the issue of not less than one month's notice of termination in the event that the employer does not otherwise decide.*

Although not specified in this part of the statement of the problem, the statement makes it clear that the Union is requesting a compliance order against the first respondent, ABB Ltd, as employer of a number of the Union's members employed by ABB at the Carter Holt Harvey Ltd Tasman mill in Kawerau.

[3] The statement of the problem also requested that the Authority impose penalties:

a. on ABB for alleged breaches of the collective employment agreement and for failing to comply with the duty of good faith in terms of section 4(1) of the Employment Relations Act 2000 (the Act).
b. On a manager of ABB Ltd, Mr Grant Gillard, the second respondent, for inciting etc a breach of the collective employment agreement.
c. On Mr Wu Khoo a manager with Carter Holt Harvey Ltd for inciting etc a breach of the collective employment agreement.

The Union also requested that the Authority award compensation for hurt and humiliation, in terms of section 123(1)(c)(i) of the Act for each of its members affected by the employer's actions in failing to observe the duty to discuss and consult prior to the issue termination notices. In addition the Union sought costs and incidentals.

Mediation

[4] Immediately on receiving the Union's application I convened a telephone conference with the Union's representative Mr Yukich, Ms Service for ABB Ltd and Mr Gillard, and Mr Towner for Mr Khoo and Carter Holt Harvey (CHH). At the conclusion of that conference I directed that ABB and the Union attempt to resolve their differences with urgent assistance of a Department of Labour mediator. I

understand mediation took place as directed and that the parties have continued to attempt to resolve their differences.. Regrettably, I am now advised, they have been unable to do so. As will be clear from the narrative set out below it is now necessary to determine whether or not a compliance order should be issued as requested by the Union.

Background

[5] ABB Ltd provides maintenance services at the Tasman pulp and paper mill operated by Carter Holt Harvey Ltd in Kawerau. On or about 5 February 2009 ABB were advised by CHH that the contract to provide the services was to be terminated at 7.00 am on 10 March 2009. On Monday, 9 February ABB convened a meeting of all its employees on the Tasman site. At this meeting Mr Gillard advised ABB's employees of the CHH decision and that he understood that the contract would be passing to Transfield Services Pulp and Paper Ltd (TSNZ). It is a little unclear as to how and when Mr Yukich became aware of this decision (he says that one of his members saw an announcement on an Australian website and advised him). There appears to be no dispute that Mr Yukich was subsequently advised by telephone by a representative of ABB on 10 February. Also on 10 February most (although it appears not all) of ABB's employees at the Tasman site received a letter from the ABB Tasman site manager advising them of the termination of the Carter Holt Harvey contract, and that:

> *This letter is to advise you of the termination of your employment on 10 March 2009 at 7.00 am <u>subject to no suitable redeployment options being agreed before that date.</u>*

[6] I have seen correspondence between the Union and the ABB Manager at the Tasman site, Mr Jansonious, including requests from the Union for consultation and further information in terms of the relevant collective agreement provisions. While much of this correspondence will be relevant in any subsequent investigation regarding whether or not ABB and its managers acted in good faith and/or breached the terms of the collective agreement, they are not directly relevant to the question of whether or not I should issue a compliance order as requested by the Union. I do note

however that on 27 February 2009, TSNZ wrote to most (if not all) of the Union's members offering them employment with TSNZ and stating:

> *This offer is in the same or similar capacity on similar terms and conditions of employment and will recognise your prior service with ABB Ltd.*

The collective agreement

[7] The collective employment agreement (CEA) contains the following relevant provisions.

> ***27 Redundancy***
> *Redundancy is a condition in which the employer has an employee, or employees, surplus to requirements because of the discontinuation of the whole or any part of the activities associated with the employer's operations resulting in a permanent reduction in the number of permanent employees (but does not include a technical redundancy arising from restructuring of the business).*
>
> ***Ineligibility for redundancy compensation:*** *an employee shall not be eligible for redundancy compensation if the employee:*
> - *Is employed on a casual, temporary or fixed term basis for less than 12 months.*
>
> ***Procedure and notice***
> *Where the employer identifies the need for redundancies, the matter shall be discussed over a period of not less than two weeks with the appropriate union/delegates.*
>
> *If agreement cannot be reached the employer shall make a final determination.*
>
> *If this involves redundancy, further discussions shall take place regarding the persons involved, which shall involve consideration of several options*

including voluntary redundancy, with the "last on, first off" process being the last resort.
These discussions shall be limited to a period of not less than two weeks.

Where the employer identifies the need for the restructuring of labour, the matter shall be discussed over a period of not less than two weeks with the appropriate union/delegates.

If agreement cannot be reached, the employer shall make the final determination.

The employer shall then notify in writing the employee or employees to be declared redundant.

This shall not preclude any redundant employee disputing this through any legal procedure.

One month's notice in writing shall be given to any employee whose employment with the employer is to be terminated by way of redundancy.

….
….
Criteria for selection of redundant employees:
…
Redundancy compensation
…
Technical Redundancy
27.2 Employee Protection Provisions
The purpose of this provision is to provide protection for the employment of affected employees if the employer's business is restructured and shall be construed to this end.
…
…
No redundancy compensation shall be paid to an employee if the employee's employment was terminated due to redundancy as a result of a restructure,

> *amalgamation, outsourcing or the sale or transfer of any part of the employer's business, if the new employer, the amalgamated company, or the person or entity acquiring the business offers the employee employment in the same or a similar capacity on similar terms and conditions of employment with recognition of prior service.*

The respective parties position's

[8] The Union argues that ABB have breached the terms of clause 27 of the CEA in that they have failed to follow the steps set out under the heading **procedure and notice.** The Union seeks an order that ABB be required to comply with the provisions of the collective agreement and commence consultation as set out in clause 27. The Union also requests that this compliance order require that:

> *Until such consultation and decision-making is concluded the respondent shall take no further steps to make or declare any ABB Tasman mill employee represented by the applicant's redundant or to terminate the employment of any such employee by reason of redundancy.*

[9] In support of their application the Union sites the Employment Court decision in *NZAEPMU and ors v. Carter Holt Harvey* AC 53/02, 30 August 2002, in which the Court ordered CHH *to take no further steps to contract out its Kinleith Mill maintenance functions ... and shall take no further steps to make or declare any Kinleith Mill maintenance employees ... redundant or to terminate the employment of any such employee by reason of redundancy.*

[10] The Union argues that there has been a clear breach of the CEA and the employer's duty to consult in good faith in terms of section 4 of the Act. They say that not to issue a compliance order under these circumstances would deny its members the opportunity for proper consultation and shorten the time in which they had opportunity to seek alternative employment (or redeployment).

[11] ABB on the other hand argues that it is not clear that there has been a breach of the collective agreement and point out that, in the words of the CEA, ABB neither *identified the need for redundancies* nor *identified the need for restructuring of*

labour. They point out that they were presented with a *fait accompli* by CHH and to follow the consultation steps set out in the collective would clearly have been a sham and to no effect. The company argues that in the *NZAEPMU v CHH* case cited by the Union, CHH were proposing that maintenance work currently done in-house would be contracted out. CHH therefore had complete control over the timing of that decision. In this case, they say, ABB have absolutely no warning of the decision to terminate the commercial contract or the timing of that termination.

[12] ABB also say that even if there was a breach of the CEA and/or their obligations to consult a good faith, any compliance order that the Authority issued would be of absolutely no effect. CHH's decision to terminate the commercial contract was made, apparently legally and within the terms of that contract, and is irreversible. They say that any requirement that they now consult with the Union and its members would simply cause further confusion. They point out that the members of the other union on-site (the EPMU) have all accepted TSNZ's offer of employment and that at least half of the EBIIWU members have unconditionally accepted TSNZ's offer. (I am advised that this acceptance, by the EBIIWU members, includes a formal statement to the new employer that they are accepting the offer under duress.)

[13] Finally ABB point out that the Union and its members are free to pursue claims against ABB seeking penalties for alleged breaches of the CEA and/or breaches of the duty of good faith, and, potentially, payment in lieu of notice and redundancy compensation and personal grievance claims and compensation for unjustified dismissal.

Legal considerations

[14] The Authority's power to order compliance is set out in section 137 of the Act. In the *United Food Workers v. Talley* [1992] 1 ERNZ 756 a full bench of the Labour Court set out in some detail the law applying to the issue of compliance orders. The Court said (at page 790):

> *The reason for that is made clear in their judgements. Compliance order is a discretionary remedy. In exercising its discretion the Court acts according to principle and not according to whim. It weighs in the balance all factors put*

before it. One of those factors is the prejudice which the applicant seeks to remedy in making the application. The prejudice alleged is frequently the very object of a compliance order application and the prejudice proved often determines the scope of the order that is made. Evidence about that therefore is always of highest relevance.

And;

When should compliance orders be made?

It is not enough to justify the making of compliance orders that there has been non-compliance or non-observance of an employment contract. Once that threshold has been crossed the Employment Tribunal has a discretion to make a compliance order or to refuse to make it or to postpone making it. That is what is meant when section 35 says "the Tribunal may". That does not mean, however, that the Tribunal has an uncontrolled discretion to do as it pleases on a particular day as between the particular parties. The exercise of discretion is subject to the supervision of the Court and the Court will not be satisfied with the manner of its exercise unless it has been carried out in accordance with the general principles governing the exercise of discretions generally and the specific principles which can be gleaned from relevant provisions in the Employment Contracts Act 1991 applying to the exercise of this particular statutory discretion.

First, as to the general principles, we think it is best to be remembered that what is required of judicial discretion is that the adjudicator seeks to do justice between the parties. It is a rule of statutory interpretation that where a discretion is conferred upon any judicial officer or public official it is to be regarded not as an absolute discretion but one that is conditioned by the requirement to do justice.

[15] In *NZ Electrical etc IUOW v. Remtron Lighting Ltd (in receivership) and ors* (1990) 1 NZILR, page 583, the Labour Court said

The third category of claim in the proceedings is for compliance. It follows that this must also be dismissed. In order to obtain a compliance order under s. 207 of the Labour Relations Act 1987 the Court must be satisfied that there has been a breach of an award. For the reasons extensively set out by me in this judgement I am not so satisfied. In addition, the remedy of a compliance

order is discretionary. As I discussed with Counsel during the hearing, even if it were established that any of the defendants had been in breach of an award or awards, the reality of the position now is that the first defendant company is in a hopeless financial state and is not trading so therefore does not employ any workers who might benefit by the imposition of a compliance order.

[16] It is clear that the Authority's power to order compliance in s137 of the Act closely mirrors that contained in earlier legislation. It is appropriate therefore to take account of cases which proceeded in terms of that earlier legislation and in particular to take account of the comments of the Court in *United Food Workers* (above) regarding when compliance orders should be made and the exercise of the Authority's discretion in that regard.

Discussion and determination

[17] I am not persuaded that the issuing of a compliance order, as requested by the Union, is appropriate in this instance. Firstly I am not convinced that ABB has breached the terms of the collective employment agreement. While there is at first blush a requirement for the employer to consult with the Union for defined periods, on further reading the wording does not specifically address the circumstances in which ABB found itself. To be perfectly clear: I do not find that ABB did not breach the collective agreement. Such a conclusion can only be reached after the testing of evidence from both sides and the opportunity to consider properly reasoned submissions. While I have seen some documentary evidence of what has occurred, and heard submission from the parties in this respect, I have been constrained by time limitations from hearing and properly testing sworn evidence. This opportunity will be provided by the Authority's subsequent investigation of the Unions application for penalties to be awarded against ABB.

[18] Even if I was satisfied that a breach of the CEA had occurred, I have come to the conclusion that it would not be appropriate to use my discretion to issue an order for compliance. Firstly to issue such an order would be pointless and in fact may serve to create more confusion both for the company and its employees. The parties have accepted that it is not within my jurisdiction to issue an order of compliance against Carter Holt Harvey. CHH have terminated the commercial contract with ABB and

have ordered a new contract to TSNZ. This transaction will proceed irrespective of any compliance order issued by the Authority against ABB. Secondly I can see no prejudice to the union members if I do not issue the compliance order sought by the union. The workers had been offered identical positions by TSNZ on what are purported to be identical terms and conditions of employment. Those workers who have accepted this offer have specifically notified TSNZ that the waiver contained in that offer (waiving their right to seek redundancy compensation from ABB) is objectionable and unconscionable and that they do not enter into the agreement freely.

[19] Finally I am conscious of the obligation, confirmed by the Court in *United Food Workers*, that my decision in this matter should *do justice to the parties.* Standing back and reviewing all of the arguments and the (untested) evidence I have available to me, I am convinced that the appropriate course is to decline the Union's application and not to issue a compliance order. There is no evidence at this point in my investigation to suggest that ABB had done anything other than make the best of a situation which is not of their making, to attempt to act in good faith and to do what is in the best interests of their employees. To issue a compliance order as sought by the Union would require ABB to undertake fruitless consultation at some cost. Such an order would provide no further protection, benefit or detriment to the employees concerned.

[20] For the reasons set out above, the Unions application for compliance order against ABB is declined.

The Union's other claims

[21] As outlined at the beginning of this determination the Union has brought a number of other claims to the Authority. My declining of the application for compliance does not affect those other applications in any way. The Authority Support Officer will contact the parties in the near future to arrange a telephone conference to discuss arrangements for the Authority's investigation of those matters. In the meantime the parties should take the opportunity to hold further discussions in an attempt to settle these matters. It may be that the parties would find the further involvement of a Labour Department mediator helpful.

Costs

[22] Costs in connection with the Unions application for compliance are reserved pending the final resolution or determination of other outstanding matters.

James Wilson
Member of the Employment Relations Authority