

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 369/09
5279740

BETWEEN ELECTRICAL
 UNION INCORPORATED
 First Applicant

AND PAUL CROFT & ORS
 Second Applicants

AND TRANSFIELD SERVICES
 (NEW ZEALAND) LIMITED

Member of Authority: K J Anderson

Representatives: L Yukich, Advocate for Applicants
 G Service, Counsel for Respondent

Investigation Meeting: 28 September 2009 at Hamilton

Supplementary
submissions received: 9 October 2009

Determination: 20 October 2009

DETERMINATION OF THE AUTHORITY

Preliminary Matters

(a) Consolidation

- [1] The applicants made two applications. They were received by the Authority on 7th and 9th September 2009 respectively. It was requested that urgency should be accorded to both matters pursuant to clause 17 of the Second Schedule to the Employment Relations Act 2000. Given the circumstances, the subject matter (consultation and pending redundancies) and the pending possible loss of employment, urgency has been accorded.
- [2] At the investigation meeting on 28th September 2009, it was accepted that both applications should be consolidated and heard together.

(b) The Parties

- [3] It was submitted for the cited respondents that there was no basis for Mr Ross Lockwood to be named as a party to the proceedings. There was no evidence or tangible submission forthcoming from the applicant parties as to why Mr Lockwood should be a cited party to the proceedings. I accept that there is no basis for him to be named as a party; his name is struck out and he is discharged as a party accordingly.
- [4] While it is accepted that the Electrical Union Incorporated (“the Union”) is the first applicant to the proceedings, the respondent has raised the fact that Paul Croft is the only person whom has been named in regard to the citation of the second applicants. Mr Yukich has provided a union membership list which names 48 people (including Mr Croft) whom, he submits, are the second applicants to the proceedings. This list is attached as Appendix One to this determination. There was no objection raised by the respondent that these employees should be the applicant parties. In the absence of evidence to the contrary, I have taken it that the Union is authorised to act on behalf of the 48 named employees in regard to their status as the second applicants to the proceedings.

The Claims

- [5] The presentation of the claims is somewhat confusing but in summary, the applicants seek:
- (a) An “immediate order” that the employer, Transfield Services (New Zealand) Limited (“Transfield”) comply with s.4 of the Employment Relations Act 2000;
 - (b) An interim order that the employer [Transfield] desist in the implementation of restructuring until meaningful consultation with the Union [first applicant] and its members [the second applicants] has concluded and until the Employment Court has addressed the substantive matter.
 - (c) An order that the employer provide the union and its members with all relevant information prior to the commencement of consultation.
 - (d) An order removing the above matters to the Employment Court.

The Response

- [6] (a) Transfield says that it is not in breach of its obligations of good faith to the applicants and that it has undertaken consultation in accordance with its obligations.
- (b) In regard to the provision of relevant information, Transfield says that all relevant information has been provided to the employees.
- (c) Transfield says that it is not appropriate for the Authority to make an interim order preventing the company from proceeding with the planned restructure until consultation is concluded, as sought by the applicants.

Evidence

- [7] The Authority heard evidence for the applicants from Mr Paul Croft, Telecommunications Technician, and received written statements from Mr Brian Houston, Mr Manu Barton and Mr David Derby, all Telecommunications Technicians. For the respondent, the Authority heard from Mr Rod Bryant, Area Manager Telecommunications, Ms Carole Moodie, Manager Employee Relations, and Mr Ross Lockwood, Executive General Manager, Telecommunications. Both parties provided supporting documents and submissions.

Background

- [8] Transfield provides telecommunications services from several locations in New Zealand. The evidence of Mr Lockwood is that Transfield was successful in achieving a new contract to perform telecommunications services for Telecom (Chorus). The contract with Chorus was finalised by the end of June 2009 and following a subsequent finalisation of work flows, a review of Transfield's telecommunications division took place in June/July. The outcome being that a number of positions within the company were likely to be affected. In early August 2009 Transfield compiled a proposal to put to its employees.
- [9] Via a text message on 17th August, Transfield requested that all Waikato telecommunications employees attend a "Transformation Presentation" meeting at the Te Rapa Racecourse the next day. At the meeting on 18th August, Mr Bryant, Area Manager Telecommunications, presented a restructure proposal to the employees.¹

¹ Mr Paul Croft, a delegate for the Electrical Union, recorded the substance of the proceedings and produced a written transcript of the substance of the meeting to the Authority.

The presentation took the form of a power point slide show with Mr Bryant explaining the background to the changes which the company was proposing. The third slide of the presentation imparted the message that: **“This presentation outlines the details of the proposal relating to Waikato patch employees and the effects of this proposal.”** The slides showed among other things, the current and proposed structure for the Waikato operation. A further slide conveyed that: “This presentation represents the commencement of the consultation process.” And that:

“Consultation is scheduled to end 5pm Wednesday 26th August 2009

The consultation process provides all employees with an opportunity to commit and/or submit alternative proposals

Feedback will be formally reviewed and considered by a senior management group

Alternative proposals will be reviewed on the basis of feasibility and the extent to which they will assist in the achievement of a sustainable business model.”

A further slide provided a timetable for consultation and review with the outcome of the consultation process being advised by 4th September 2009.

[10] The nub of Mr Bryant’s presentation was that Transfield envisaged the reduction of 150 roles nationally with 40 positions being lost from the Waikato branch being; 5 field managers, 3 designers and 32 field staff.

[11] The evidence of Mr Bryant is that following the presentation, he indicated that a question and answer session would be held. At this point, Mr Croft stood and advised that he had been instructed to leave the meeting if it is deemed to be consultation. Mr Bryant says that he advised Mr Croft that he was free to leave the meeting and he did so, along with other members of the Electrical Union. Mr Bryant says that he was surprised by this as he felt it was important that everyone participated and understood what was proposed.

[12] The written evidence of Mr Croft is that he informed Mr Bryant that; “as the format of the meeting was clearly a consultation event we required our union to be directly involved and that EU members would not be participating in isolation from their union.” Having heard from Mr Croft, I very much doubt if he was this verbose.² The further evidence of Mr Croft is that the Electrical Union members left the meeting and went back to work in

² I did not find the evidence of Mr Croft to be totally credible and his memory was selective. He also acknowledged that the content of his statement of evidence was 50% his contribution and 50% contributed by Mr Yukich.

anticipation of Transfield contacting the union to discuss a timetable for consultation over the restructuring proposal. Mr Croft also said that the advocate for the Electrical Union, Mr Yukich, had advised; "*probably the week before*" that union members should leave the meeting if consultation was being discussed and that he (Mr Croft) had informed members that this would happen, sometime before the meeting.

- [13] The meeting continued in the absence of members of the Electrical Union. At its conclusion, Mr Bryant handed out to the remaining employees, a *NOTICE TO EMPLOYEES* dated 18th August 2009, which apparently applied to all Transfield employees throughout the country, along with a local *Supplementary Information – Waikato* document, and a *FEEDBACK FORM – RESTRUCTURE PROPOSAL*. The latter document gave employees the opportunity to suggest alternatives to the restructure of the business, suggest alternatives to the creation or removal of roles, and any other general feedback or comments. The evidence of Mr Bryant is that he put copies of these documents in the employee's pigeon holes, at the reception area and in the smoko room. The Union has raised some doubts as to whether some employees, including Mr Croft, would have received these documents as they are based at workplaces other than Hamilton, but Mr Bryant says that the respective field managers would have taken these documents to their workplaces also.
- [14] The next day (19th August) Mr Manu Barton and Mr Brian Houston, both members of the Electrical Union, went to Mr Bryant's office. Mr Houston had not been at the meeting the day before. Mr Barton did attend but had left with other members of the Union. There is some conflict between the evidence of the three men as to what was said on the 19th August but it is clear that Mr Bryant asked Mr Barton to leave due to Mr Bryant being of the view that Mr Barton was; "setting me up in order to accuse me of bullying him." Mr Bryant says that there had been previous accusations that he had bullied Union members. I reach no conclusions as to what appears to have been a minor tete-a-tete on the day and which has little or no relevance to the issues which the Authority has been asked to determine.
- [15] From 20th August to 26th August, Transfield received 104 feedback forms from employees who gave a variety of suggested alternatives and other feedback on the proposed restructure. It is unclear if any of the members of the Union provided any feedback as some of the feedback forms have no name included.

- [16] There is no evidence of any contact between the Union and Transfield, about the restructuring, until 1st September 2009 when Mr Yukich, the Advocate/Secretary of the Union wrote to Mr Lockwood:

“Subject: Inquiry as to Restructuring

Dear Sir,

The Electrical Union Inc. represent [sic] employees of Transfield Services Limited and are led to believe that Transfield Services are currently considering a restructure of its business which may result in redundancies of our members.

We have not received advice from Transfield Services Limited that restructuring is under consideration. Can you please confirm whether or not restructuring with potential redundancies for the Union’s members is under consideration by Transfield Services Limited. In the event that restructuring is under consideration we would draw your attention to the employer [sic] duty to consult in accordance with S4 Employment Relations Act 2000 and for that purpose but prior to the commencement of consultation to provide all relevant information.”

An extract from s.4 of the Employment Relations Act 2000 is included. The letter was directed to Mr Lockwood despite the fact that Mr Yukich had been informed on several occasions that all contact regarding industrial matters was to be with Ms Moodie, the Manager of Employee Relations.

- [17] Given the evidence of Mr Croft that he had spoken to Mr Yukich possibly within 24 hours of the meeting on 18th August, and that Mr Croft recorded the proceedings, which one could reasonably assume Mr Yukich would be made aware of, it is most odd that Mr Yukich failed to make any contact with Transfield about the restructuring for two full weeks. This is even more intriguing when on 21st August 2009, Mr Yukich emailed Mr Lockwood in regard to other matters pertaining to bullying, and industrial action (entirely unrelated to the restructuring), which had been decided by secret ballot at a meeting on 20th August.

- [18] On 2nd September 2009, Ms Moodie responded to Mr Yukich. The salient content of the letter is:

“I confirm that Transfield Services is proposing a restructure of its Telecommunications business. This proposed restructure affects a number of EU members and I confirm that there may be redundancies as a result of the restructure should it go ahead.

Staff (including EU members) were invited to attend a meeting on 18 August at which the proposed restructure was detailed in a presentation. Employees were given a written notice of

the proposal as well as a supplementary document both of which provided information about the proposed restructure.

EU members and Delegates attended this meeting and feedback from all affected employees on the proposal was sought.

I apologise for not forwarding the documents provided to staff at the consultation meeting on 18 August to you. I had requested a copy of this information to forward to you [sic] as a courtesy and it is an oversight that I did not do so. A copy of this information is enclosed.

If you wish to discuss the restructure with me, please call me tomorrow at any time. Please be aware that the outcome of the consultation process will be announced on Friday 04 September.

I am also happy to arrange a conference call on an urgent basis between you and Ross Lockwood to go over what was discussed at the consultation meeting on 18 August. If this is of interest to you, please let me know."

[19] Rather than make contact with Ms Moodie as he had been informed to do by Mr Lockwood previously, and most recently, in an email dated 21st August 2009³, Mr Yukich wrote again to him on 3rd September via a letter attached to an email sent at 10:36p.m. that evening. The letter is lengthy but in essence Mr Yukich informed that the Union required a "Stay of Proceedings" largely on the grounds that Transfield had allegedly failed to consult on several fronts. The Union was seeking an undertaking from Transfield that the restructuring would not be implemented in respect of the Union's members until such time as they and the Union; "have been fully and meaningfully consulted over the restructuring proposal." And: "In the absence of such undertaking prior to 1600 Monday 7 September 2009 Transfield Services will leave the Electrical Union Inc. reluctantly with little alternative but to seek Employment Court assistance with urgency by way of an interim order for stay i.e. injunctive relief and a subsequent order for compliance with the employer duty of good faith in accordance with S4 Employment Relations Act 2000." Costs and penalties were also mentioned.

[20] The letter from Mr Yukich then went on to seek information regarding the proposed restructure. In summary (and paraphrased), the Union sought:

- (a) The date that Transfield first gave consideration to a restructuring proposal;
- (b) The overheads and presentation pack used at the meeting on 18th August;
- (c) The "operational initiatives" referred to in the August 18 2009 notice;
- (d) The object of the proposed restructuring;

³ In this email Mr Lockwood informed Mr Yukich that he must deal directly with Ms Moodie or requests will be ignored. Mr Lockwood stated that this would be the last correspondence on this subject.

- (e) Which field technician positions are affected;
- (f) How many of the Union's members are affected by the restructuring proposal;
- (g) Which positions appear not to be included in the proposal;
- (h) Will Transfield give favourable consideration to proposals from the Union to avoid involuntary redundancy;
- (i) Whether permanent employees will be afforded preference for continued employment over temporary, part time or casual employees;
- (j) Will Transfield afford any redundant Union members a preferential right for future employment;
- (k) Will there be retraining opportunities;
- (l) Will job share opportunities be afforded;
- (m) Will favourable consideration be given to "casualisation" as an alternative to involuntary redundancy;
- (n) Will favourable consideration be given to reduced working weeks;
- (o) Details of redeployment;
- (p) Compliance with the principles of the Treaty of Waitangi.

[21] The Union sought a prompt response to the issues raised and proposed a meeting at a mutually convenient time to; "finalise arrangements for disclosure of any relevant information that you might consider of significance or identified by the Union in the interim and agree a period in which the Union and its members will be afforded an opportunity to consider same and to prepare verbal and written counter proposals."

[22] Notwithstanding the pre-emptive threat of legal action against the company, on the surface, most of the information sought appears to be a reasonable request by the Union on behalf of its members, some of whom could be facing the loss of their employment. However, the next day (4th September), at 7:50a.m, Mr Yukich sent an extraordinary email to Mr Lockwood:

"The Electrical Union Inc. will be conducting a meeting/s of its members to advise progress in bargaining and to advise position in consultation over proposed restructure under S20/21 Employment Relations Act 2000 at 1300 hours today.

As well further to our earlier letter, and in the event that relevant information for the purpose of consultation is not forthcoming in a prompt and timely manner or in subsequent application in discovery please be advised that we will be applying for an Anton Piller order from the High Court, do not attempt to destroy any of the relevant information or documents including emails exchanged between Transfield Services, Chorus and Telecom."

As Transfield employees had been informed the day before that a further informative meeting would be held regarding the next steps in the restructuring process, it appears that the Union intentionally orchestrated a separate meeting of its members for the same time.

[23] Mr Lockwood forwarded this letter to Ms Moodie who responded by email later that day. She informed Mr Yukich of the meeting with Transfield employees that day and that: "Employees have been instructed to attend and in order for them to be informed of the outcome it is in their interest to do so." Ms Moodie also conveyed to Mr Yukich: : "... we are happy for you to meet with your members at the conclusion of the Company's scheduled meeting to discuss the "*consultation over the proposed restructure.*" We do not consider the meeting to be a meeting held under s20 (I refer you to my previous communications on this matter) however we are prepared to pay employees who attend your meeting a maximum of one hour ordinary pay to the extent that they would otherwise be working for the company during the meeting.

Please be aware that should your members disobey the company's instruction to attend the company meeting their time will be unpaid."

[24] At 1:00p.m. the majority of Transfield employees attended a meeting for the purpose of hearing from the management about the feedback received following the meeting on 18th August. Also discussed were changes to the original proposal and presentation of a comprehensive proposed selection process and selection criteria for the respective roles. Some members of the Electrical Union did not attend this meeting as the Union went ahead with its own meeting in the car park of the hotel where the Transfield convened meeting was taking place at the same time. There is no evidence as to which of the Union's members attended the respective meetings.

[25] Later on 4th September, Ms Moodie wrote again to Mr Yukich. The germane content is:

"Employees were advised at today's consultation meeting that the proposal previously outlined in consultation is being adopted. The Company also responded to feedback it had received from employees regarding the restructure.

I am surprised at your reference to injunctive relief in your letter and an Anton Piller order in your email. Today's announcement at 1.00pm is part of the ongoing redundancy consultation process that all employees (including EU members) have been invited and encouraged to participate in. Transfield Services has consulted and is still in consultation with its employees.

As was explained to employees in the meeting today at 1.00pm, the next phase of consultation is in relation to the selection criteria. A copy of the presentation and the Proposed Selection Criteria are provided for your information.

It is in the best interests of our employees to participate in the consultation process. It is disappointing to learn that some employees belonging to the EU did not attend today's meeting."

[26] In tandem with the meeting on 4th September, Transfield employees received a letter of the same date.⁴ The purpose of the letter was to: "...provide additional details following on from the consultation process where the Company further reviewed the current state of the business in light of the feedback that was submitted."

The letter informs that:

"After considering the feedback, it has been decided that the structure proposed to you on the 18 [sic] August 2009 shall proceed. Therefore the following changes are confirmed – ”.

Summarised; the confirmed changes are:

- A flat, streamline structure focussed on client needs;
- Centralisation of administration;
- Staged formation of the Operations Hub;
- A national reduction of 155 current roles;
- The establishment of 17 additional Team leader roles; and
- The establishment of 6 Quality / Mentor roles.
- A reduction in the number of Field Managers, Designers and Field Staff.

[27] The letter informs that before the selection process can begin for the remaining roles and the newly established roles, there will be a further consultation process for the selection criteria. When this process is complete, employees will be notified of the timeline for the selection phase. Information about this is provided in a separate document. "Consultation on the selection criteria starts on September 4th and finishes at 5pm on Wednesday September 9th." If employees require further clarification they are invited to speak directly to Mr Ian Webb, General Manger Operational Performance or contact the Transfield Services support line on a 0800 number.

Provided with the letter is a *Consultation -- Frequently Asked Questions* document.

[28] On 6th September, Mr Yukich wrote to Mr Lockwood twice, asking for particular information some of which was clearly commercially sensitive and confidential. Mr

⁴ The Authority viewed the letter to Mr Croft.

Yukich wrote again to Mr Lockwood again on 12th and 13th September. There is no evidence of any response for Transfield but given that proceedings were commenced in the Authority on 7th September with a further application on 9th September, this is may not be surprising.

[29] The parties attended mediation on 24th September 2009.

The Application for Removal to the Employment Court

[30] Pursuant to s.178 of the Act, the applicants seek an order removing the matter/s to the Employment Court on two grounds:

- (i) That an important question of law is likely to arise other than incidentally, being; whether the definition of redundancy contained in the employment agreement permits the employer to terminate [the employment of] individual employees on [the] ground of redundancy when the position filled by that employee is not superfluous.
- (ii) That the jurisdiction of the Authority does not extend to the granting of interim orders of the injunctive nature sought by the applicants.

(i) The definition of redundancy in the employment agreement

[31] Firstly, the status of the relevant employment agreement requires examination. It is the *Transfield Services (New Zealand) Limited Telecommunication Services Collective Agreement 2008-2009* ("cea"). It expired on 30th June 2009. As provided at clause 1, there are two parties to the agreement: Transfield Services (New Zealand) Limited – Telecommunication Services business unit; and New Zealand Engineering, Printing & Manufacturing Union Inc ("EPMU"). In regard to coverage, at clause 2 it is provided that the agreement shall apply to all field staff who are members of the EPMU and who are engaged to work for Transfield. Currently, there is no collective agreement between Transfield and the Electrical Union and/or its members.

[32] The Authority has been told that the majority of the second applicants were formerly members of the EPMU. Therefore, in accordance with s.61(2) of the Act, these employees are now employed under an individual employment agreement based on the expired Transfield/EPMU collective agreement. As I understand it, the applicant

parties whom were not previously members of the EPMU are also employed under individual employment agreements based on the expired collective document.

[33] I do not understand it to be disputed that clause 46 of the expired cea should apply as a term of the individual employment agreements of the employees concerned. This clause provides (at 46.1) the definition that:

“Redundancy means a situation where an Employee’s employment is terminated by the Company, the termination being attributable, wholly or mainly to the fact that the position filled by the Employee is, or will become superfluous to the requirements of the Company in accordance with the Employment Relations Act 2000”

[34] It is difficult to see how an important point of law is likely to arise, incidentally or otherwise, from any rational interpretation of this clause. At the time of the investigation meeting there has been no evidence provided to the Authority that Transfield intends to terminate the employment of any employee where the position held by that employee is not superfluous. But even if this were to be the case, an affected employee may have grounds for raising a personal grievance, perhaps based on unfair selection criteria. But, even then, conditional on the circumstances which might prevail, it is unlikely that this would qualify as an important question of law which would warrant the Authority removing the matter to the Court. I find that the application to remove the matter of the definition of redundancy in the employment agreement, and its applicability to what is currently a hypothetical scenario, is erroneous. I decline to remove the matter to the Court on this ground.

(ii) **That the jurisdiction of the Authority does not extend to the granting of interim orders of the injunctive nature sought by the applicants**

[35] Pursuant to s.161 of the Act, the Authority has: “exclusive jurisdiction to make determinations about employment relationship problems generally” including (and relevant to this case):

“(f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case.”

[36] Furthermore, pursuant to s.137 of the Act, the Authority has the power to order compliance where any person has not observed or complied with-

- “(a) any provision of -
 - (i) any employment agreement; or
 - (ii) Parts 1, 3 to 6, 6A (except subpart 2), 6B, 7, and 9;”

And further, at s.137(2), it is provided that:

“Where this section applies, the Authority may, in addition to any other power it may exercise, by order, require, 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.”

[37] Relevant to the issues raised in this case is Part 1 of the Act. It includes s.4, the good faith provisions. It does not require a pedantic legal analysis to conclude what is now well established. That is, that the Authority does have the jurisdiction to grant interim orders of the nature sought by the applicant. It does so regularly, as the parties to this dispute are recently aware.⁵

[38] But in any event, the ground being advanced for removing matters to the Court is not one of the established criteria for removing a matter to the Court as provided by s.178 of the Act, or other legal precedent. It is simply a matter of jurisdiction. I determine that the Authority does have jurisdiction to issue interim orders of an injunctive nature as sought by the applicants.

Was there a breach of the duty of good faith between the second applicants (the employees) and Transfield?

[39] The applicants rely on s.4(1)A,(c),(i) and (ii) of the Act but paragraph (b) has relevance also:

“[(1A) The duty of good faith in subsection (1) –

- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse affect on the continuation of

⁵ *Electrical Union Incorporated and Paul Croft & Ors v Transfield Services (New Zealand) Limited* AA 360/09, A Dumbleton, Member, 12 October 2009.

employment or 1 or more of his or her employees to provide to the employees affected-

- (i) access to information, relevant to the continuation of the employee's employment, about the decision; and
- (ii) an opportunity to comment on the information to their employer before the decision is made."

[40] Relevant too is subsection (1B):

"Subsection (1A(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.

[41] Also relevant is subsection (4)(c), (d) and (e):

"(4) The duty of good faith in subsection (1) applies to the following matters:

- (c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:
- (d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:
- (e) making employees redundant:

[42] All of the above provisions rely on the existence of an employment relationship and the duty of good faith emanates from subsection (1):

"The parties to an employment relationship specified in subsection (2) –

- (a) must deal with each other in good faith; and
- (b) without limiting (a), must not whether directly or indirectly, do anything-
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.

[43] The employment relationships are defined at subsection (1C (2) and relevant to this case is:

- "(a) an employer [Transfield] and an employee employed by the employer [the second applicants]:
- (b) a union [the Electrical Union] and an employer [Transfield]."

[44] The second applicants firstly say that there has been a breach of the duty of good faith because Transfield failed to comply with clause 8 of the expired cea. This provides a **“STATEMENT OF OBJECTIVES”**:

“The parties agree that this Agreement will be implemented in the spirit of good faith. The parties joint objectives include:

- (i) To develop and maintain the prosperity and success of the Company and its Employees.
- (ii) To promote and maintain mutual trust and co-operation between the Company and its Employees.
- (iii) To improve the work environment through job design and training.
- (iv) To develop more effective communication and consultation between Management, the Union and Employees.
- (v) To improve the productivity and efficiency of the Company by the most effective use of new and existing technology.

[45] The second applicants also say that Transfield failed to comply with clause 9 of the cea; **“CONSULTATION / COMMUNICATION:**

9.1 The Company, Employees and the Union acknowledge that consultative arrangements should be encouraged in the workplace.”

[46] All references to the Union, as set out above, is to the EPMU and not the Electrical Union. Given the provisions of s.61(2) and the findings in *Talley v United Food and Chemical Workers Union of New Zealand* [1993] 2 ERNZ 360, it would seem that a sensible and practicable approach would reasonably see the above provisions, with the exception of any reference to the Union, carried over to the individual employment arrangements.

[47] Having had regard to the above provisions and the evidence presented to the Authority, I do not find any evidence of a breach of any of the above conditions on the part of Transfield. On the contrary, I conclude that the Company:

- (a) By restructuring, is most probably seeking to develop and maintain the prosperity and success of the Company (clause 8 (i));
- (b) Attempted, as far as was possible, given the withdrawal from the process by the second applicants, to promote and maintain trust and co-operation between the Company and its employees (clause 8 (ii));

- (c) Attempted effective communication between Management and Employees (clause 8 (iii) but was thwarted in this attempt by the failure of the second applicants to fully engage in the communication process; and
- (d) Attempted to encourage consultative arrangements in the workplace (clause 9.1) but this was frustrated by the withdrawal of the second applicants from the consultative process, beginning on 18th August, as manifested by the walkout from the first consultative meeting and their orchestrated absence from the meeting on 4th September 2009.

[48] Turning to the provisions of s.4 of the Act (above), rather than Transfield being in breach of the relevant provisions, I find it was the second applicants, whom by their unwise actions:

- (a) Failed to be responsive and communicative towards the employer (subsection (1A) (b); and
- (b) Failed to avail themselves of access to readily available information relevant to the continuation of their employment subsection (1A (c)(i); and
- (b) Failed to avail themselves of the opportunity to comment on the information provided by their employer before decisions were made (subsection (1A (c)(ii).

[49] Given that there was a concerted, but in my view, misguided, withdrawal by the second applicants from the consultative process implemented by Transfield, and that the thrust of the above provisions place an onus on the employer, as the possessor of relevant information, I am disinclined to conclude that the second applicants committed any breach of these provisions of the Act. Nonetheless, the duty of good faith applies equally to employers and employees. If a party seeks a determination that another party has not acted in good faith, they should come with clean hands. But even without the actions of the second applicants, I find that there is no evident basis for the assertion by them that Transfield is in breach of any of the good faith provisions of s.4 of the Act.

Was there a breach of the duty of good faith between the first applicant (the Electrical Union) and Transfield?

[50] The Union relies on the judgment of the Employment Court in *NZEPMU v Carter Holt Harvey Ltd* [2002] 1ERNZ 597. In this case, the Court found that the employer

breached s.4 of the Act. It found that the relevant provisions of the expired cea governed the employer's consultation obligations with its employees and the application of s4 to its statutory obligations of consultation with the Union. While the issues involved in the CHH case were more complex than those in this case, and the findings of the Court reflected this, it seems to me that the fundamental difference between the circumstances which existed pertaining to the CHH case and those pertaining to the Transfield situation, is that the obligation of CHH to consult with the Union arose from the expired cea which required the employer to; "meaningfully consult with the affected employees and their unions." CHH insisted upon consultation with its employees individually about its plans for restructuring and excluded the unions from consultation on behalf of its members.

[51] As mentioned earlier, any reference in the expired Transfield cea to "the Union" was to the EPMU not the Electrical Union ("EU") and the latter has no status under the expired cea or any other agreement at the moment. Following *Talley*, it seems sensible and practical that clause 9 of the cea carries over to the individual employment agreements and I suggest that it would then be a provision that: "The Company and Employees acknowledge that consultative arrangements should be encouraged in the workplace." As I have concluded earlier in this determination, Transfield did consult with its employees about the restructuring. So, where does the obligation of Transfield to consult with the EU and the associated duty of good faith arise from? I believe the answer to this question is that the duty of good faith arises from subsection (1C) (4)(c) which provides that a duty of good faith applies to consultation between an employer and its employees, "including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business." [Underlining added]. However, there is no provision in the Act nor in any arrangement with the Union or its members, as to the timing of any consultation, that is, when any consultation should begin with employees and/or their union.

[52] The Union says it should have been consulted by Transfield as far back as May 2009. In support of this contention it points to the question and answer document provided to employees by the Company and the answer to question 7.⁶ The question is:

"Why/how have you chosen the structure proposed for each area?"

⁶ Document 12 of the respondent's bundle.

A. We've carefully studied and modelled the resources and rosters required for the new contract going forward. There has been significant discussion with the Senior Management team of Telco and the proposed structures meet the new contract environment and were an integral part of the tender for the new contract."

[53] It appears to be the argument of the Union that Transfield was in possession of sufficient information when it tendered for the new contract (the Union says this was in May) to initiate consultation with the Union. But the uncontroverted evidence of Mr Lockwood is that the new contract was not signed until the 30th of June 2009 and there was no certainty as to whether a contract would eventuate at all. The further evidence of Mr Lockwood is that following a review of its Telecommunications division in June/July, Transfield compiled a proposal in early August and this was put to employees via the beginning of the consultation process on 18th August 2009. The evidence of Mr Lockwood was credible and in the absence of any evidence to the contrary, is accepted. Apart from the fact that there is no evidence of the employees seeking to have the Union involved earlier than 18th August, I find there is nothing to support the Union's proposition that it should have been consulted earlier.

[54] The Union advances a further argument that when it received the information that was made available to employees on 18th August, from Ms Moodie on 3rd September; it was given as a "courtesy" and not pursuant to the duty of good faith. The members of the Union had expressed a desire for the Union, i.e. Mr Yukich as their advocate, to be involved in any consultation, albeit this was communicated in a very rudimentary manner by Mr Croft, before leading the union members out of the meeting on 18th August. The explanation from Ms Moodie as to the "oversight" and the delay in providing this information to Mr Yukich, was less than convincing. On the other hand, Mr Yukich did not seem to believe that there was any hurry to become involved with representing the members of the Union as two full weeks elapsed before he saw fit to seek any information from the Company. Mr Yukich says that it is for the Company to initiate the consultation with the Union but there is no sound basis for this assertion. Given that Mr Yukich had most probably been briefed by the union delegate, Mr Croft, within 24 hours of the meeting on 18th August, it would have been a simple matter for him to have contacted Mr Lockwood, as he has shown a propensity to do on many other occasions. Even when Ms Moodie extended an invitation (2nd September) to Mr Yukich to call her at any time the next day, in addition to offering to arrange an

urgent conference call with Mr Lockwood, Mr Yukich showed no inclination to take up this offer. Rather, he emailed Mr Lockwood at 10:36p.m. on the evening of 3rd of September with a less than subtle threat of litigation if the Company failed to give the undertaking demanded, by 4:00p.m, 7th September (which happened to be the day when proceedings were commenced with the Employment Relations Authority).

[55] Putting aside for a moment the threat of legal action, the information that Mr Yukich was seeking appeared to be entirely reasonable. That is, if it wasn't then for the fact that, having made the request on 3rd September, at 10:36p.m., the very next morning at 7:50a.m, Mr Yukich sent another email to Mr Lockwood threatening further legal action in the form of an application for discovery and a High Court action for an Anton Piller order. I find that these combined threats of legal proceedings were hardly the actions of a Union that was seeking to be "meaningfully consulted" as indicated in the letter of 3rd September 2009.

[56] While it seems that the consultation process was within a rather short time frame and I accept that Transfield could have taken steps to involve the Union in the consultation process on or about 18th August, or certainly shortly thereafter, when the members of the Union had expressed their wish to have the Union involved, I do not accept that the failure to do so goes to being a breach of s.4 (1C)(4)(c) of the Act or any other provision of s.4.

[57] Furthermore, I find that the unprovoked threats of legal action by Mr Yukich, on behalf of the Union, were hardly the actions of an organisation that wished to consult in any meaningful manner. While I cannot be certain, it appears that the Union had little intention of ever engaging in a meaningful process of consultation, unless it was entirely on its terms, and the indications are it was more intent on pursuing legal action against the Company as its first preference. Overall, I find that the actions of the Union were not conducive to a good faith employment relationship as contemplated by s.4 of the Employment Relations Act.

New Evidence

[58] There is one final matter pertaining to consultation with the EU which requires examination. On 29th September 2009, the Union provided new evidence to the

Authority in the form of a letter dated 23 September 2009. The letter is from Ms Moodie to Mr Greg Lloyd, General Counsel for the EPMU. It refers to a meeting which took place on 1 September 2009 between Transfield management and representatives of the EPMU. I understand that the EU raises the existence and content of this letter as evidence of inconsistency between the degree of consultation accorded to the EPMU as compared with the EU and that this shows a lack of good faith on the part of Transfield. Given the content of this letter and its possible relevance to the issue of consultation, in a subsequent conference call, I indicated to the parties that I would admit this evidence but required submissions from them as to the weight which should be accorded to it. Ms Service also indicated that the attendance of Mr Lockwood and other senior management of Transfield at the meeting on 1st September, was largely in regard to some other issues which had arisen between Transfield and the EPMU. Submissions were duly provided by Ms Service and Mr Yukich, along with a supplementary statement of evidence from Mr Lockwood.

[59] The Union submits (as written) that the letter of 23rd September: “demonstrates the availability of financial performance information that goes to justification for the restructure of the business with the failure of the employer in providing that information or access to it, to its employees and their Union and is clearly a breach of the employer duty at s4, was deliberate and is sustained and is intended to undermine the Union.” The Union also makes further submissions but these relate either to matters which were heard at the investigation meeting with submissions being taken then, or to events post-investigation meeting which are outside the remit of the Authority as it pertains to the applications before it.

[60] Transfield submits that the new evidence is neither relevant nor significant. It says that the letter does not reflect preferential treatment of the EPMU over the EU regarding consultation. Transfield says that the meeting on 1 September was convened at the request of the EPMU and that no comparable request was received from the EU. It says that the discussions on 1st September centred on the general basis for the proposed restructure, which was outlined to the Waikato employees on 18th August, and other matters of no relevance to the Waikato employees, being a dispute regarding Christchurch Despatch employees, which is no longer a live issue.

[61] The evidence of Mr Lockwood is that the EPMU had requested financial information and a copy of the commercial arrangement between Telecom and Transfield and that the agenda of the Union was more about obtaining information which could be used in a separate campaign involving Telecom and Visionstream. It eventuated that Transfield allowed only the EPMU accountant, in the company of Transfield accountants, to view certain non-confidential financial information. Mr Lockwood says that this information did not pertain specifically to the proposed restructure and was scheduled to be publicly released a few weeks later as part of its financial disclosure requirements to the Companies Office.

[62] Having considered all the circumstances applying to the new evidence, while I accept that the EPMU were involved in a degree of consultation, including access to Transfield Executive Managers, which did not occur for the EU, this access was initiated by the EPMU, albeit according to Mr Lockwood, the EPMU may have had an ulterior motive. In the event, the additional consultation appears to have made no difference to the outcome and the proposals of the Company went ahead substantially as had been previously scheduled, despite a request from the EPMU to delay the schedule.

[63] While I find that the relationship between Transfield and the EPMU appears to be more responsive and communicative than that between Transfield and the EU, I do not find that this amounts to any lack of good faith on the part of the Company going to a breach of any of the provisions of s.4 of the Act. Rather, it may simply reflect a different approach by the two unions in regard to being involved in consultation in a meaningful way, consistent with the objectives of the Act.

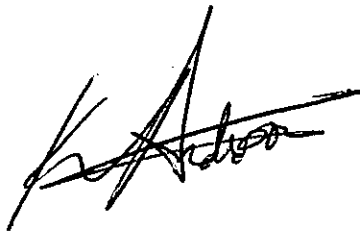
Determination

- [64] 1. For the reasons given above (paragraphs 34 and 37), I find it is not appropriate that the matters before the Authority be removed to the Employment Court. I decline to make the order sought.
2. I find that there is no evidence that the Respondent has not complied with any of the provisions of the Second Applicant's individual employment agreements pertaining to consultation or redundancy.

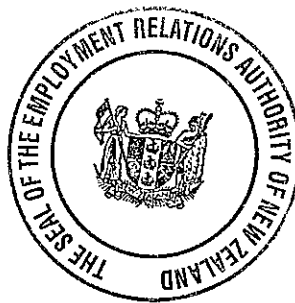
3. I find that there is no evidence that the Respondent has not complied with any of the good faith provisions of section 4 of the Employment Relations Act 2000 pertaining to the employment relationship between the Company and its employees.
4. I find that there is no evidence that the Respondent has not complied with any of the good faith provisions of section 4 of the Employment Relations Act 2000 pertaining the relationship between the Company and the Electrical Union.
4. Given the above findings I decline to make the orders sought by the Applicants.

Costs

[65] The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicants have a further 14 days to file and serve submissions.



K J Anderson
Member of the Employment Relations Authority



12/12/12

APPENDIX ONE

**ELECTRICAL WORKERS UNION (EU)
MEMBERSHIP LIST AS AT 29/06/09
TRANSFIELD SERVICES (NEW ZEALAND) LIMITED - TELECOMMUNICATION SERVICES BUSINESS GROUP HAMILTON**

Ind	Group	Location	Emp No	Last Name	First Name(s)	Start Date	Position	Hourly Rate	Union	Date Joined EU	Comments
	TELECO	Hamilton Branch		All	Liakat	1/10/2007	Cable Restoration Technician		EU	12/05/2009	
	TELECO	Hamilton Branch		Bacani	Arlene				EU		
	TELECO	Hamilton Branch	1246862	Barton	Manu Jai	1/03/2006	OP Communications Tech (MF)		EU	18/05/2009	
	TELECO	Hamilton Branch		Basagre	Gregorio	7/01/2008	Cable Restoration Technician		EU	25/05/2009	
	TELECO	Hamilton Branch		Baylis	Nigel James	28/04/2008	Telecommunications Technician		EU	12/05/2009	
	TELECO	Hamilton Branch	1234909	Cherstut	Keith Thomas	1/05/2005	Cable Restoration Technician		EU	9/06/2009	
	TELECO	Hamilton Branch		Crampton	Michael Fredric	17/03/2008	Trainee Technician		EU	5/06/2009	
	TELECO	Hamilton Branch		Dallas	James Izatt	8/10/1998	Cable Restoration Technician		EU	30/12/2000	Delegate
	TELECO	Hamilton Branch		DeGuzman	Nelson	8/10/2007	Cable Restoration Technician		EU	5/12/2000	
	TELECO	Hamilton Branch		Derby	Dave						
	TELECO	Hamilton Branch		Douglas	Neil Lloyd	20/05/1998	Cable Restoration Technician		EU	6/12/2000	
	TELECO	Hamilton Branch		Esposito	Ramon Rosquetla	4/04/2008	Cable Restoration Technician		EU	15/05/2009	
	TELECO	Hamilton Branch		George	Mervyn Terence	20/06/2005	Cable Restoration Technician		EU	8/06/2009	
	TELECO	Hamilton Branch		Hanham	Desmond Neville	1/05/2005	Residential Restoration Tech		EU	8/12/2000	
	TELECO	Hamilton Branch		Harutuku	Pepepe	19/01/2009	Provisioning Technician (MF)		EU	16/06/2009	
	TELECO	Hamilton Branch		Hedel	Kei Tepinhi	16/01/2006	Built-Cable Copper Network Tec		EU	3/06/2009	
	TELECO	Hamilton Branch	1234693	Hodge	Adrian Neville	1/05/2005	Cable Restoration Technician		EU	27/05/2009	
	TELECO	Hamilton Branch	752122	Hohata	Tama						
	TELECO	Hamilton Branch	762312	Houston	Brian	3/04/2000	Cellular & Radio Trans Tech		EU	25/05/2009	
	TELECO	Hamilton Branch		Kemp	Malcolm Robert	1/05/2005	Cable Restoration Technician		EU	10/12/2000	
	TELECO	Hamilton Branch		Kerr-Bell	Nicholas Robin						
	TELECO	Hamilton Branch		Lang	Paul Matthew	25/03/1998	Cable Restoration Technician		EU	11/12/2000	
	TELECO	Hamilton Branch	908529	Lee	Graeme Cecil	23/01/2006	Cable Restoration Technician		EU	12/12/2000	
	TELECO	Hamilton Branch		Macewen	Daniel John Alexander	12/11/2001	Cable Restoration Technician		EU	9/05/2009	
	TELECO	Hamilton Branch		Marinez	Celso T Ejada	23/10/2007	Proactive Technician		EU	15/05/2009	
	TELECO	Hamilton Branch		Mcguire	Michael David	14/02/2005	IP Communications Technician		EU	13/12/2000	
	TELECO	Hamilton Branch		Morris	Wayne Mohi						
	TELECO	Hamilton Branch		Murtagh	Barry Melville	1/05/2005	Provisioning Technician (MF)		EU	15/12/2000	
	TELECO	Hamilton Branch		Naidu	Munesh Murthi	17/09/2007	Cable Restoration Technician		EU	8/06/2009	
	TELECO	Hamilton Branch		Narara	Saitosi	9/04/2007	Cable Restoration Technician		EU	17/12/2000	
	TELECO	Hamilton Branch		Ordonio	Cornelio						
	TELECO	Hamilton Branch	1195524	Potter	Staron Joyce	25/02/2008	Trainee Technician		EU	27/05/2009	
	TELECO	Hamilton Branch		Price	Grant Norman	22/03/2004	Pressurisation Tech		EU	9/06/2009	
	TELECO	Hamilton Branch		Quaramoto	Amena						
	TELECO	Hamilton Branch		Robinson	Baden John	1/05/2005	Pressurisation Tech		EU	3/06/2009	
	TELECO	Hamilton Branch		Ross	Michael Colin	22/01/2007	Trainee Technician		EU	19/12/2000	
	TELECO	Hamilton Branch		Sinclair	Mark Kevin	22/02/2006	Cable Restoration Technician		EU	20/02/2000	Delegate
	TELECO	Hamilton Branch		Stinson	Thomas						
	TELECO	Hamilton Branch	1234861	Taylor	Barry Lee	1/05/2005	Residential Restoration Tech		EU	8/06/2009	
	TELECO	Hamilton Branch	496907	Te Amoanga	Rihaa	1/08/1995	Build-Cable Copper Network Tec		EU	9/06/2009	
	TELECO	Hamilton Branch	1301016	Thomson	Matthew John	9/03/2009	Trainee Technician		EU	20/05/2009	
	TELECO	Hamilton Branch	1302115	Turner	Bradren Robert	6/04/2009	Trainee Technician		EU	4/06/2009	Apprentice-no fee
	TELECO	Hamilton Branch		Van Syp	Steven David	13/07/1998	Proactive Technician		EU	26/05/2009	
	TELECO	Hamilton Branch		Waleley	Paul David	24/05/2007	Cable Restoration Technician		EU	22/12/2000	Delegate
	TELECO	Hamilton Branch	128752	Walton	Karl Joseph	25/02/2008	Business Provisioning Tech		EU	23/12/2000	
	TELECO	Hamilton Branch	687156	Wells	Grant Vallinhe	1/07/1999	Build-Cable Copper Network Tec		EU	16/06/2009	