

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 197/09
5159160

BETWEEN

N Z STEEL LTD
Applicant

AND

NZ AMALGAMATED
ENGINEERING PRINTING &
MANUFACTURING UNION
INC
Respondent

Member of Authority: James Wilson

Representatives: Philip Skelton for the applicant
Anne-Marie McNally for the respondent

Investigation Meeting: 2 & 3 June 2009 in Auckland

Submissions received: From both Counsel on the 3 June 2009

Determination: 22 June 2009

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] In a statement of the problem filed on 17 April 2009 NZ Steel sought a determination from the Authority that:

(a) NZ Steel is lawfully entitled to require 22 of its trade maintenance employees covered by the (applicable) collective agreement to revert to day work (provided that the appropriate notice is given to such employees and/or compensation payments are made in accordance with the payments schedules set out in..... the collective agreement.

(b) The decision to require some of its trade shift employees to revert to day work is not a breach of the manning level agreement for the central maintenance group.

(c) NZ Steel has not breached consultation obligations in the collective agreement or under the Employment Relations Act in relation to this decision.

(d) In the event there has been a breach, NZ Steel seeks a determination as to the steps that it must undertake in order to be able to more fully implement its plan.

[2] In a memorandum filed with the statement of problem, NZ Steel requested that the Authority give urgency to this matter as the Company wished to be in a position to give notice to the affected employees 4 weeks before the proposed implementation date of 25 May 2009 (i. e. the Company wished to notify the 22 affected employees on 27 April 2009)

[3] By agreement the parties arranged urgent mediation but were unable to resolve the issues between themselves. In the meantime, as previously indicated, on 27 April NZ Steel formally advised 22 of its shift maintenance employees that they would be reverting to Monday to Friday day duties with effect from 25 May 2009. On 8 May 2009 the Amalgamated Engineering Printing and Manufacturing Union (the Union) filed an application for an interim injunction seeking to prevent N Z Steel from requiring the 22 affected employees to cease working 12 hour shifts on 25 May 2009.

[4] Following further discussion the parties agreed an interim arrangement on the understanding that the Authority would consider the substantive issues as soon as practicable. In terms of the interim arrangement the Union withdrew its application for interim injunction and the Authority held an investigation meeting on 2 and 3 June to hear evidence and submissions from the respective parties.

The issues for determination

[5] Mr Skelton, for NZ Steel, in his submissions summarises the issues for determination under three headings; the substantive issue, the procedural issue and, if applicable, remedies. Under those headings he poses the following questions:

Issue 1 (the substantive issue)

Does N Z Steel have the contractual right, pursuant to clause 2.6.3 of the Collective Agreement, to require shift trades employees to revert to day work?

Issue 2 (procedural issue)

Has NZ Steel followed proper process in exercising its contractual power under clause 2.6.3? Sub-issues that arise include:

(a) what procedure (if any) must NZ Steel follow when exercising its rights under clause 2.6.3:

(i) The procedure specified in clause 2. itself; or

(ii)..... the consultation procedure set out in clause 9.4.2 of the collective agreement?

(iii) What is the effect (if any) of the statutory section 4 (of the Employment Relations Act) good-faith duties and/or the implied duty of fair and reasonable treatment?

Issue 3 (remedies)

if, which is denied, NZ Steel has not followed proper procedure, what remedies can and should the Authority award to remedy that breach of procedure?

[6] In her submissions for the Union, Ms McNally sets out the issues slightly differently. Ms McNally says:

The issues in this case are:

1.1 Does the Company need to consult with the union when reviewing manning arrangements for the Central Maintenance Group (CMG) shift trades employees?

1.2 If so, when: in particular is this limited to consultation about the details of implementation of a decision already made, or was it needed sooner?

1.3 what the collective agreement requires:

(a) clause 9 consultation

(b) clause 2.6.3 transfer to days

(c) clause 8.5 changed interpretation

(d) clause 2.5 - 12 hour shifts

(e) 12 hour shift variations

(f) clause 1, hours of work

1.4 How does section 4 of the Act apply?

1.4.1 Remedies:

(i) What is available and what is appropriate?

(ii) Was effective notice given to the 22 employees?

(iii) What is the effect of the interim agreement?

The events leading to this dispute

[7] While there is some disagreement between the parties regarding exactly what was said at some of the meetings held over the past few months, much of the factual background is agreed and is set out below.

[8] In early March 2009 NZ Steel's Senior Management Team (SMT) requested one of its senior managers, Mr Wayne Staff to head up a team of managers to determine whether the business could achieve cost savings in the way it undertook maintenance work at the Glenbrook steel site. This group recommended to the SMT that the number of 24 hour shift trades employees be reduced and that 22 employees revert to day work on a Monday to Friday basis. This recommendation was formally been accepted by the SMT on 20 March 2009

[9] On 12 March 2009 a joint union delegate/management representative group (known as the Strategic Coordinating Team or SCT) met. At that meeting the company representatives advised the union delegates that the Company was undertaking a review of trade shift operations. The union delegates at that meeting say that they believed that this advice would be followed by some form of consultation before any decisions were made.

[10] On 25 March 2009 company representatives met with senior union delegates and advised that the Company had decided to reduce the number of 24-hour shift trades employees from 46 to 24 with effect from 25 May 2009. Although there is some difference of opinion about the exact exchange which took place at that meeting it is agreed that the Company indicated that it had already made a decision and were seeking Union and employee input only on the implementation of the proposed changes. At the same time as this meeting with union delegates was taking place the

Company convened a meeting of other affected managers to advise them of the changes.

[11] Over the next few days the Union challenged the Company's failure to consult and on 17 April the Company filed a statement of the problem as set out in paragraph 1 above. On 27 April 2009 the company gave notice to 22 employees of transfer from 12 hour 7 day shifts to 8 hour days, Monday to Friday. On 8 May 2009 the Union applied for an interim injunction to stop the employees from being transferred.

[12] On 14 May 2009 parties reached an interim arrangement which provided that the 22 shift employees would move to a 12 hour 7 day shift pattern working days only i.e. 7 am to 7 pm, with effect from 25 May 2009.

The collective agreement

[13] The applicable collective agreement (CA) is effective from 1 June 2008 to 31 May 2011 and contains a number of relevant clauses. In particular:

1. Hours of work

The tables below outline the ordinary hours, start/finish times, meal intervals and rest intervals for employees on days, day rosters and shifts. Any changes to established hours of work shall be as per clause 1.3 (Variation of Hours)

1.1 Hours of Work: Table

Day employees

Ordinary hours

- *not exceed 40 hours*
- *per week (37.5 for clerical workers)*
- *not more than eight per day (7.5 for clerical employees)*
- *five days per week, Monday to Friday*

Start/Finish times

- *between 7:30 am and 5 pm*
- *or between 6 am and 6 pm (engineers)*

Day roster employees***Ordinary hours***

- *not exceed 40 hours*
- *not more than 8 hours per day*
- *on each of any five of the seven days of the week*
- *Saturday or Sunday to be paid penal rates.*

Shift Employees***Ordinary hours***

- *Not more than five shifts of eight consecutive hours in any week without payment of overtime.*

Start/finish times

- *Day shift not to commence before 7 am. For shift definitions refer to definitions page.*

1.2 Rest Intervals Table

...

1.3 Variation of Hours

Any of the hours of work provisions provided for elsewhere in this section of the CA may be varied as to all or a section of the employees by agreement between the two parties.

- *Any such agreement shall specify the application of time related entitlements.*
- *The agreement shall be reduced to writing and signed by management representatives and the Secretary of the appropriate union or its authorised agent.*
- *In the event that agreement cannot be reached between the parties, then be established hours of work shall prevail.*

2.5. 12 Hour Shifts/Salarisation Basic Principles

The parties may develop local 12 hour shift/Salarisation agreements. When doing so, the following principles shall be incorporated within each agreement (clauses 2.5.1 to 2.5.20 set out various principles which should be incorporated into any 12 hour shift/salarisation agreements)

[14] All of the employees who the company wishes to reassign from *shift employees* to *day employees* work a 12 hour shift pattern. This arrangement is covered by one or other of two variations to the Collective Agreement:: either the *CMG rolling and coating shift maintenance, 12 hour shifts, standard weekly wage trial, variation* or the *CMG primary shift maintenance 12 hour shifts and standard weekly wage variation*. While neither of these variations are formally signed the parties accept that they have been given effect by their operation. The parties agree that these documents are agreed *variations* to the collective agreement (in terms of clause 1.3). Both also agree that these *variations* do not contain a *salarisation* provision but rather provide for a *standard weekly wage*. Both variations contain a clause stating:

Entitlements

It is agreed the under mentioned clauses contained within the CA will be interpreted in such a way that they reflect the operation of a 12 hour shift roster.

[15] Returning again to the relevant clauses of the collective agreement:

2.6 Change of Shift Roster (except as detailed 2.6.2)

2.6.1 Period of Notice and Pay

A minimum period of notice for changes to the posted roster will be four weeks unless otherwise agreed by the parties. They shall not preclude changes between the roster groups described below

- ...
- ...

2.6.2 Reverting to Days (less than two weeks)

...

2.6.3 Reverting to Days (more than two weeks)

Where shift employees are required to revert to day work for a period exceeding two weeks such employees shall revert to the day work provisions described in clause 1.1 Hours of Work: Table.

...

2.8 Reduction in Roster Pattern

2.8.1 *Where a plant reduces a shift operation from a seven-day continuous roster to 15 shifts or less per week and the notice period is less than 10 weeks, those employees affected by the change shall be paid a compensation payment of 13 1/4 hours per week at the employees basic hourly rate in accordance with the following schedule;*

...

...

2.8.2 *Where an individual employee is required to move from a 7 day continuous roster to 15 shifts or less and the notice period is less than 10 weeks, the employees affected by the change shall be paid a compensation payment of 13 1/4 hours per week at the employees basic hourly rate in accordance with the above schedule. This payment shall not apply if the employee affected was temporarily assigned to a seven-day continuous roster for a predetermined set period.*

2.8.3...

2.8.4 ...

2.8.5...

2.8.6 *Individuals may be required to change rosters, as defined in 2.8.2 at less than four weeks notice. If less than four weeks notice is given the individual will receive payment equivalent to 10 weeks less the amount of notice given e.g. nine weeks payment for one week's notice.*

[16] The parties disagree as to the applicability of the following CA clauses.

8.5 Settlement of Disputes

Where an employee (or any number of employees) has a dispute with management about the interpretation and application or operation of this collective agreement (or any of its supplementary documents) the matter will be dealt with in accordance with the provisions of the code conduct.

Where either party interprets the agreement in a manner different from existing custom and practice, and as a result wished to implement changes to existing custom and practice, no such changes may be implemented until either:

- *agreement is reached on the changes; or*
- *the matter is determined through the Employment Relations Authority or resolved as follows:*
- *during the term of this agreement, the union may refer up to 6 matters to a nominated panel of mediators who will have the authority to make a final and binding decision if the parties are unable to reach agreement. Participation in this process will exclude legal (lawyers) representation.*

9. Consultation and participation

9.1 Definitions

"Consultation" means to seek information or advice from; and to talk with and listen to each other's objectives, opinions and ideas. (It is accepted that negotiation may follow consultation).

"Participation" means to share in by common action and to provide employees with opportunities to participate in the decision making process by providing access to information and opportunities for input.

9.2 Intent

The parties to this CA are fully committed to continually improve employee relations. This will require an effective consultation and participation structure to be established and maintained prior to changes being made. It is recognised that employees security and welfare requires a joint cooperative approach. The smooth introduction of a change in the area of new production improvements or work methods, processes, equipment, technology and training can only be achieved by consultation and participation.

9.3 Commitment

The parties commit themselves to a constructive approach taking into account each other's point of view, and the need to consult efficiently so that the business continues to respond to the pressures to make continuous improvement in a timely manner. Where consensus cannot be achieved in a timely manner, the parties will notify each other and reserve their respective rights. This will ensure:

- *employees have an opportunity to participate in decisions by contributing information and input.*
- *full use is made of employees experience and ideas on the efficient running of New Zealand Steel;*
- *the parties have the opportunity to meet and understand each others' views and objectives.*

9.4 Code for Restructuring

9.4.1 The parties recognise that changes in business requirements will continue to occur and may result in the need to restructure areas such as processes, work methods and services.

9.4.2 Where the need for restructuring has been identified, the appropriate Union Delegate(s) and employees will participate with Management, in the:

- *Formative stage*
- *Investigation of options and gathering the necessary information*
- *Development of a restructuring plan*
- *The communication of the recommended plan*
- *implementation of the plan*

9.4.3 In developing the restructuring plan, all relevant information, and options, will be taken into consideration.

Statutory good faith provisions

[17] Also of relevance are the provisions of the Employment Relations Act (the Act) in respect to good faith. The obligations of the parties to an employment relationship to deal with each other in good faith are set out in section 4 of the Act:

4 Parties to employment relationship to deal with each other in good faith

(1) *The parties to an employment relationship specified in subsection (2) --*

- (a) must deal with each other in good faith; and*
- (b) without limiting paragraph (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.*

(1A) *The duty of good faith in subsection (1) --*

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and*
- (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 effect on the continuation of employment of one or more of his or her employees to provide to the employees affected --*
 - (i) access to information, relevant to continuation of the employees' employment, about the decision; and*
 - (ii) an opportunity to comment on the information to their employer before the decision is made.*

And at section 4(4):

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

(a)...

...

(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)...

The submissions

[18] Both Counsel had provided me with extensive, helpful, submissions supporting their client's positions. In the interest of brevity I will not set out the submissions in anything other than summary form. I can assure the parties that I have read and considered these submissions carefully.

New Zealand Steel's submissions

[19] Mr Skelton, for NZ Steel, says that an employment agreement must be interpreted in accordance with its plain meaning having regard to the words the parties have used. He submits that clause 2.6.3 of the CA creates a right for New Zealand Steel to require employees to revert to day work and a corresponding obligation on the employees to so revert. He argues that clause 2.6.3 is not subject to employee agreement and the only restraint on New Zealand Steel of exercising its contractual right is clause 2.8 i.e. the payment of compensation if less than 10 weeks notice is given.

[20] Mr Skelton says that the reference, in clause 1.3 to requiring agreement to vary *any of the hours of work provisions provided for elsewhere in this section of the CA* is a reference to the hours of work table at clause 1.1 of the collective agreement and not the reassignment of employees from one *hours of work* group to another. He says that there is nothing in the 12 hour shift variations which imposes any obligation on the Company to obtain the employees agreement when requiring them to become day employees in terms of clause 2.6.3.

[21] In Mr Skelton's submission clause 8.5 of the CA does not apply because the Company is not interpreting clause 2.6.3 in any manner *different from existing custom and practice*. He says that the supposed examples quoted by the Union (restructuring that took place in 1995, 2002/3 and 2007) are not relevant because on each of those occasions the purposes of the changes was, at least in part, to reduce the number of employees. In the present case New Zealand Steel does not want to declare any redundancies. In any event, Mr Skelton points out, the Company has postponed the implementation of this decision (by way of the interim agreement) pending the outcome of the Authority's investigation.

[22] Turning to clause 9.4 of the CA Mr Skelton says that in this instance the company is not undertaking a restructuring and therefore the restructuring code provided for in clause 9.4, has no application.

[23] Mr Skelton argues that section 4(1A)(c) of the Act does not apply because the employer was not proposing to make a decision that was likely to have an adverse effect *on the continuity of employment of one or more of these employees*. He accepts however that section 4(4) (c) and (d) do have application and says that NZ Steel did not breach its duty of good faith by misleading or deceiving anyone. He suggests that in fact it would have been misleading and deceitful for New Zealand Steel to have consulted with the Union in the pretence that no final decision had yet been made. He says that NZ Steel was open and honest with its employees that it had decided to transfer 22 employees to day work and it did openly and honestly consult with the employees concerned over the implications of that decision and how it was to be implemented.

[24] In respect to remedies Mr Skelton suggests that, if the Authority determines that New Zealand Steel has not properly discharged its consultation obligations then, by way of remedies:

- the Authority could order compliance but suggests that as the parties have already attended one and a half days of mediation any direction to further mediation should with a short time frame.
- The Union has not sought a penalty and, he submits, this is not a case where a penalty is appropriate as there is no evidence that New Zealand Steel set out to deliberately breach its obligations.

- While the Authority has the power to award damages it would need to be satisfied that there was more than a speculative chance that the outcome would have been different had the parties engaged in full consultation. He submits that no quantifiable loss flows from the alleged breach.

The Union's submissions

[25] The Union's principal submissions is that the collective agreement and section 4 of the Act impose an obligation on New Zealand Steel to consult with the Union and the affected employees before making the decision to transfer employees from shift work to day work. In particular Ms McNally points to clauses 9.1, 9.2 and 9.3 of the CA as having a broad application. She says that it is inconsistent with the commitments in those clauses for the Company to restrict consultation to the implementation of their decision. In any event, Ms McNally says, the changes the Company wants to implement amount to *restructuring* in terms of clause 9.4 of the CA and the Company is therefore required to operate in terms of the *code for restructuring* as outlined in that clause. She says that in similar circumstances in 2003 and 2007 the Company acknowledged that what they were doing was restructuring and followed the process set out in clause 9.4 (including offering voluntary redundancy to affected employees).

[26] The Union disagrees with the Company's suggestion that clause 2.6.3 of the CA overtakes clause 9.4 making it unnecessary to consult before transferring shift employees to day work. Ms McNally argues that nothing in the wording of clause 2.6.3 or clause 9 requires them to be mutually exclusive.

[27] Ms McNally suggests that this is not simply the application of clause 2.6.3 as the Company asserts. She argues that while the Company says that clause 2.8 sets out the Company's obligations it has not addressed clause 2.8.7 which affirms that the compensation payable under clause 2.8 *shall not preclude management from providing 10 or more weeks notice*.

[28] The Union argues that clause 8.5 was amended during the collective agreement negotiations in 2005. They say that as a *quid pro quo* for agreeing to a three-year term for that CA the Company offered to insert the second paragraph in clause 8.5 to provide some comfort to union members that, should the Company wish to vary its interpretation of the CA, there would be a process in place to address any arising dispute. In particular Ms McNally says that the Company has on similar previous occasions (2003 and 2007) invoked the restructuring provisions set out in clause 9.4 of the CA. The Company is now saying that clause 9.4 does not apply and Union says this is an interpretation of the CA *differing from existing custom and practice*.

[29] Ms McNally says that section 4 of the Act (the good faith provisions) seeks to promote good employment relationships. She cites the Court of Appeal's comments in **CHH v. NDU [2002] 1 ERNZ 239 (CA)**, that good-faith connotes *honesty and openness*. She suggests that the Company's actions between 4 and 20 March 2009 were less than open and in effect mislead the Union about what was happening. She argues that this was short of the good-faith requirement of the Act.

[30] In respect to remedies, Ms McNally says that the Union is not seeking penalties or damages but rather a requirement that the company consult with the Union and its members *about whether the trade shifts employees should come off shift, and if so, how many and when, and secondly should the answers reached be in the affirmative, to review those selections*. Ms McNally submits that it is sustainable and appropriate to maintain the interim agreement while such consultation occurs.

Discussion

[31] For simplicity I will discuss the issues for determination in the order and under the headings proposed in Mr Skelton's submissions for the applicant.

Does N Z Steel have seen contractual right to require shift trades employees to revert to day work?

[32] I agree with Mr Skelton's submission that the collective agreement must be interpreted in accordance with its plain meaning. In accordance with that plain meaning, clause 2.6.3 of the CA does give the Company the right to require shift employees to revert to day work. The fact the collective agreement provides for a period of notice and a scale of compensation were that notice is not given, reinforces that view. I also agree that the reference to requiring agreement to any variation of hours of work provisions can only be read to mean variation to the hours of work table is set out in clause 1.1. The introduction of a 12 hour shift roster is clearly an agreed variation in terms of that provision. These variations do not impose any restrictions on the ability of the employer to reassign employees in terms of clause 2.6.3. The 12 shift variations simply agree that *shift employees* will work 12 hour shifts rather than the 8 hour shifts as provided for in clause 1.1. Both variations explicitly state that *other than the variations specified... the CA prevails* and both indicate that, along with other clauses, clause 2.6 will be *interpreted in such a way that they will reflect the operation of a 12 hour shift roster*.

[33] As discussed with the parties at the investigation meeting I have considered whether the employees affected by the Company's decision can be said to have suffered a reduction in their terms and conditions of employment. There is no dispute that the employees concerned, when they revert from shift work to day work, as a result of no longer receiving penal payments for weekend work will receive as much as 30% reduction in their take home pay. Of relevance in this regard is the Labour Court decision in **NZ Nurses Union v. Exceler Properties Ltd [1989] 3 NZILR, 299**, where the Court said;

It was part of the union's argument that the penal payments previously received by these two nurses, were relied upon by these nurses as necessary income. We reject any argument based on this submission. A balanced approach is needed to penalty payments. They can be advantageous to workers who work unsociable hours, but by nature they are intended to encourage an employer to employ workers within the award ordinary time hours.

[34] While this decision was issued when society's attitude to weekend work was somewhat different, the rates paid to the affected workers at NZ Steel are very similar to those that would have been paid in the late 1980s. I have been unable to find any later judgements which address this issue. I conclude that the payment of penal rates is linked to the specific weekend hours worked. The employees concerned have neither a direct or implied right to continue to work those hours or, as a consequence, to receive the penalty payments those hours attract.

[35] I agree with Mr Skelton's argument that clause 8.5 does not apply in the current circumstances. The changes proposed by NZ Steel in 2003 and 2007 were different in substance than its current proposal. In each of the previous occasions part of the Company's objective was to reduce the total number of maintenance staff employed. In this instance they have explicitly said that the objective is not to reduce the number of employees except by natural attrition. In any event as Mr Skelton has pointed out NZ Steel has in effect reverted to the process required by 8.5 by seeking the Authority's confirmation of its interpretation of clause 2.6.3.

Has NZ Steel followed a proper procedure?

[36] I have found that clause 2.6.3 of the CA does give New Zealand Steel **the right to require shift employees to revert to day work. However as discussed below this right is not unfettered.**

[37] Turning firstly to clause 9.4 of the CA, I find that the changes proposed by NZ Steel do not amount to a *restructuring*. The work to be carried out by the employees who revert to day work is substantially the same as that they would have been performing as shift employees. Their terms and conditions of employment including base salary, holiday entitlements etc will still be governed by the collective agreement. As set out in paragraph 31 above, the reduction in take home pay brought about by the change in their days and hours of work is not a reduction in their conditions of employment. There are two implications of this finding. Firstly as there is no restructuring there is no obligation on the employer to follow the *code for restructuring* as set out in clause 9.4. Secondly there can be no entitlement for the affected employees to be made redundant or to receive redundancy compensation. Clause 24 of the CA defines redundancy as:

...a condition in which the company has labour surplus to requirements because of the closing down of the whole or any part of the operations, or a change in plant methods, materials, products, restructuring, or like causes, requiring a reduction in the number of employees, which cannot be accommodated by attrition or redeployment to a position which is agreed to be substantially similar by the parties.

The Company is adamant. They do not propose to reduce the number of employees in the central maintenance group other than by attrition.

[38] However, the fact that there is no restructuring does not absolve the Company from undertaking a proper consultation process with the Union and the affected employees. In this regard I accept the Unions proposition that clause 9 of the collective agreement imposes an obligation on the parties to consult. Specifically clause 9.2 commits the parties to *establish an effective consultation and participation structure ... prior to changes being made* and recognises that *the smooth introduction of change..... can only be achieved by consultation and participation*. At clause 9.3. the parties for have *committed themselves to a consultative approach*. As with any other aspect of the collective agreement the words agreed by the parties in clause 9 must be read in accordance with their plain meaning. The plain meaning of these words can only be that New Zealand Steel made a commitment to consult with the Union *prior to changes being made*.

[39] In addition to the commitment it into entered into in terms of clause 9 of the CA, the Company is also required, in terms of section 4 of the Employment Relations Act to deal with the Union and its members in good faith - particularly in respect to *a proposal that might impact on the employer's employees* (section 4(4)(d)). NZ Steel's proposal will impact at least on employees who are required to revert to day work.. Where an employer undertakes, in terms of a collective agreement, to consult with its employees regarding the introduction of changes that will affect those employees, good faith requires that they honour that commitment.

[40] Mr Skelton suggests that as the Company has the contractual right to require employees to move from shift work to day work, and the Company had already decided that they would, it would be deceptive and misleading to undertake a consultation process when the decision had already been made. With respect, this argument assumes the false premise that NZ Steel had no option but to proceed with these changes in the form in which the Company has proposed.. This is clearly not the case. NZ Steel did have options. It could for example have decided, after consultation

- not to make any changes at all; or
- that fewer, or more, employees revert to days; or
- that the changes will take effect but from a later date; or
- that the shift arrangement as set out in the interim agreement was a viable long term alternative.

With absolutely no knowledge of the day-to-day operational requirements I am not in a position to offer any opinion as to the viability or acceptability of any of the above options. Those I have listed are simply to demonstrate that the Company did have options. I have no doubt whatsoever that the employees concerned, with the knowledge of operational requirements would themselves be able to generate a number of alternate proposals for the Company to consider.

[41] Mr Skelton in his submissions has cited the Court of Appeal in *Auckland City Council v. NZPSA* [2003] 2 ERNZ 386 to support his proposition that good faith does not require mandatory consultation before a decision is made in every case. In particular he refers to the Courts statement at paragraph 24:

There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate, and where appropriate, consult in the sense of imparting information when they can still realistically influence outcomes and argument with an open mind. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind. Similarly the issue in question may affect the nature and timing of the provision of information and consultation. Redundancy of particular positions presents a different issue than does the formulation of business plans.

[42] I have reread the *Auckland City Council* case and do not consider that the Court of Appeal's comments provide a basis for NZ Steel not to consult with the Union in the circumstances in which it found itself. I accept the Company's evidence that the current global recession has dramatically affected its profit margins and it has no option but to review all of its operations as quickly as possible to ensure that it is as efficient as possible. The initial review was carried out rapidly and identified savings to be made by reconfiguring the central maintenance group. However there is no indication that consultation with the Union and its members would have unduly delayed the decision making process. I can see nothing in the *exigencies of (NZ Steel's) particular business operations* that would preclude proper, and speedy, consultation.

Summary of findings

[43] Before turning my attention to the appropriate remedies to order in this case the following summaries the findings set out above:

- (1) New Zealand Steel does have the contractual right pursuant to clause 2.6.3 of the collective agreement to require its shift trade employees to revert to day work.
- (2) The reassignment of employees as proposed by NZ Steel is not a variation to the hours of work clause, requiring the agreement of the Union, as set out in clause 1.1 of the CA.
- (3) The previously agreed 12 hour shift variations are variations to the hours of work in terms of clause 1.1 but these variations do not impose any restrictions on the ability of NZ Steel to reassign employees in terms of clause 2.6.3.
- (4) The reassignment of employees as proposed by NZ Steel is not *an interpretation of collective agreement differing from existing custom and practice* and clause 8.5 of the CA does not apply.
- (5) The changes proposed by New Zealand Steel do not amount to a restructuring and the Company is not therefore required to follow the *code for restructuring* as set out in clause 9.4.
- (6) The employees reassigned from shift work to day work are not redundant and are not entitled to redundancy compensation.

However

(7) New Zealand Steel are obligated in terms of clause 9.1, 9.2 and 9.3 of the collective agreement, and in terms of the duty of good faith set out in section 4 of the Employment Relations Act, to carry out a proper consultation process with the Union and the effected employees before making the decision to reconfigure the staffing structure of the central maintenance group.

Remedies

[44] Appropriately the Union is seeking neither penalties or damages. They are seeking an order that the Company consult with the Union and its members about whether the trade shift employees should revert to day work and if so how many and when. Should the outcome of this consultation be that employees should be reassigned and they are seeking further consultation regarding the staff to be reassigned.

[45] The Company have suggested that any consultation ordered by the Authority should be confined to a relatively short time frame. The Company points out that the parties have already attended mediation and held separate discussions in an attempt to resolve their differences. The Company argues that its financial position is such that it must move as quickly as possible to implement a decision they say must be put into effect urgently to address the economic circumstances the Company faces. I accept that the Company has been adversely affected by the international economic downturn and any consultation process should be kept to an absolute minimum.

[46] The Company took only two weeks, in early March, to review the economic and operational information and reach the conclusion that the changes they were proposing were necessary and achievable. This information is no doubt still available to be reviewed as part of a new consultation process. There should be little or no delay therefore in the parties meeting, jointly reviewing the situation and the Company considering any alternative proposals which may be put forward by the Union. In the meantime I understand that the interim arrangements are working satisfactorily and can be continued while the consultation process is completed.

Orders of the Authority

[47] NZ Steel is ordered to immediately commence a consultation process, as envisaged by section 4 of the Employment Relations Act and clause 9.1 of the collective agreement, regarding the configuration of the staffing levels of the central maintenance group. This consultation process is to be completed within 28 days of the date of this determination and is to include both what changes, if any, should be made to the staffing configuration of the CMG and how those changes are to be implemented.

[48] In recognition of the discussions which have already occurred and the urgency with which the Company is required to implement cost savings, the parties are further ordered to apply all necessary resources to ensure that the consultation process is carried out expeditiously.

[49] Unless an alternative arrangement is agreed between the Company and the Union during this consultation process, at the completion of the 28 day consultation period the Company will be entitled to give 4 weeks notice to individual shift employees that they will be required to revert to day work.

[50] Should employees be reassigned from shift work to day work at the completion of the 28 day consultation period, the period of notice shall be deemed to have commenced from the date of this determination i.e. those employees shall be entitled, terms of clause 2.8.1, to only a further two weeks compensation.

[51] For the avoidance of doubt, employees required to move from shift work to day work in terms of clause 2.6.3 of the collective agreement are not redundant and are not entitled to redundancy compensation.

[52] Unless otherwise agreed between the parties, the interim arrangements agreed between the parties on 14 May 2009 shall continue during the consultation period outlined above.

Costs

[53] Costs are reserved. The nature of this case suggests that costs should lie where they fall. Should either party, however, seek costs they should file and serve submissions within 28 days of the date of this determination.

James Wilson

Member of the Employment Relations Authority