IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 282/10
5291281

BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INC First Applicant	
AND	JAMES MOENGAROA, KEVIN OHLSON, DAVE MOKOMOKO, GLENN TAIT Second Applicants	
AND	CARTER HOLT HARVEY LIMITED Respondent	

Member of Authority: Dzintra King

Representatives: Kathryn Beck, Karen Jones Counsel for Applicants

Peter Kiely, Daniel Erickson, Counsel for Respondent

Investigation Meeting: 26 and 27 April 2010

Determination: 14 June 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The second applicants, who are members of the first applicant, the Eastern Bay Independent Industrial Workers' Union Inc ("the Union") allege that:

- they have been unjustifiably dismissed by the respondent, Carter Holt Harvey Limited ("CHH" or "the company"), on the grounds of redundancy on 7 January 2010;

- the respondent has breached an agreement to resume bargaining on an employment protection provision ("EPP") and to hold the restructuring in abeyance upon receiving an Employment Court decision;

- the respondent has breached the express and implied terms of the employment agreement with the second applicants;

- the second applicants have been unjustifiably disadvantaged by being suspended, not being permitted to work and not being give proper notice of termination;

- the respondent has breached its obligations of good faith to the first and second applicants.

[2] The second applicants seek compensation pursuant to s123 (1) (c) (i) in the sum of $15,000 each, reimbursement of any wages or money lost as a result of the personal grievances pursuant to s123 (1) (b); and any loss of benefit pursuant to s23 (1) (c) (ii).

[3] They seek an order that the respondent pay damages for any earnings lost as a result of the breach and any other losses suffered; and an order that compensation of $15,000 be paid to each for the second applicants.

[4] For breach of the employment agreement – dismissing the applicants without consulting them properly as to the effect of the redundancy, failing to look genuinely at alternatives to dismissal, failing to negotiate with the new employer, failing to allow them to work out the notice period, failing to give notice of dismissal, failing to notify the employee organisation prior to the issuing of redundancy notices – they seek an order compensating them for damages arising from the breach; and a penalty pursuant to s134 (1) to be paid to each of the employees in accordance with s136 (2).

[5] Payment of $15,000 each for unjustified disadvantage pursuant to s123 (1) (c) (i) is also sought.

[6] They seek a declaration that the respondent breached its obligation of good faith; and a penalty pursuant to s4A to be paid to the first applicant.

[7] They seek a declaration that the respondent failed to comply with Part 6A;

[8] They also seek:

a. an order the respondent reimburse the second applicants for any wages or money lost by them as a result of the grievances pursuant to s123 (1) (b) in a sum to be quantified;

b. an order that the second applicants be paid compensation pursuant to s123 (1) (c) (i) of $15,000 each;

c. an order that that the second applicants be paid for any loss of benefit pursuant to s123 (1) (c) (ii).

[9] The respondent says that the second applicants have been justifiably dismissed.

[10] The respondent says that there was no breach of the December agreement; and that even if there had been it would have made no difference to the termination of their employment, which was a result of a genuine commercial decision to outsource their work to Checkmate Precision Cutting Tools Limited ("Checkmate").

[11] If they were unjustifiably dismissed remedies should be modest and limited to compensation for hurt and humiliation.

Background

[12] The second applicants all worked as saw doctors at the respondent's sawmill in Kawerau, which is operated by the respondent as part of its Wood Products division. They were covered by the Kawerau Mill Site Collective Agreement (Trades) ("the 2005 CEA") which expired on 20 July 2008.

[13] At the time of the termination of their employment the second applicants were all long serving employees with employment ranging from 13 years and 7 months to 22 years and 5 months.

[14] From 2006 onwards CHH partially outsourced its saw doctor function to an external company, Checkmate. Saw doctor functions were performed by both Checkmate and the second applicants. This was the "hybrid" arrangement.

[15] In mid to late 2008 the company became concerned that the structure of saw servicing at Kawerau was not effective. It considered that improvements in the way saw doctoring was provided needed to be made.

[16] On 22 May 2008 the Union initiated bargaining on behalf of the second applicants for a collective agreement. The respondent's advocate was Mr Ken Mackenzie, who is employed by Rank Group Limited, the owner of CHH.

[17] On 25 August 2008 a bargaining process agreement was settled, the parties exchanged claims and commenced bargaining.

[18] In November 2008 the company advised Mr Lou Yukich, the Union's advocate, that it was considering a restructure which would affect the work carried out by the second applicants.

[19] Mr Mackenzie advised that given the restructure there was little point in continuing the bargaining as the restructure could result in the termination of the saw doctors' employment.

Consultation

[20] On 2 December 2008 the company started a consultation process regarding the possibility of fully outsourcing the saw doctor functions.

[21] A Consultative Committee was established in accordance with the second applicants' employment agreements, which were based on the 2005 CEA. A consultation package was tabled.

[22] There were four meetings of the Consultative Committee between January and March 2009. The Union and second applicants presented a number of counter proposals.

[23] On 2 February 2009 Mr Arnold Federink, the Operations' Manager, and Ms Julie-Anne Eggermont, the CHH National Human Resources Manager, met with Mr Yukich and went through the proposals that had been considered by the Consultative Committee. Ms Eggermont gave Mr Yukich a document which showed the varying requirements in terms of saw doctor staffing under the different proposals. The document and the issue of cost saving were discussed.

[24] The final meeting of the Consultative Committee took place in March 2009. Mr Yukich was told that the company had decided to outsource. However, implementation of the decision was delayed while the parties waited for the decision of the Court regarding the status of the EPP.

[25] Mr Yukich deposed that while the restructure was discussed there were no discussions regarding implementation or any issues arising out of the restructure. I find that Mr Yukich's recollection is correct.

December 2008 and February 2009 Agreements

[26] On 2 December 2008 Mr Yukich wrote to Mr Mackenzie regarding the proposed restructure. He asked that the progressing of the restructure be put on hold until an EPP had been agreed.

[27] On 5 December 2008 the second applicants commenced strike action.

[28] Mr Yukich emailed Mr Mackenzie saying that the Union required an answer to its letter and particularly the matter of an adjournment of the restructuring until an EPP had been concluded. If that was received he would recommend a return to work. Later that morning Mr Yukich emailed again saying he thought the workers would return to work "*within two hours of my receiving an undertaking on restructuring of saw doctors being set aside until we have either reached an understanding on the impact of restructuring on the sawdoctors and or agreed an EPP.*"

[29] Mr McKenzie replied saying:

> *This note is to confirm that the restructuring will be put in abeyance until the question of a valid epp cl exists or not….. has been resolved.*
>
> *You and to discuss next steps re getting this resolved in an expeditious (sic) way*
>
> *Pse conf that the day shift sawdoctor is on his way to work*

[30] Mr Yukich and Mr Mackenzie agreed that the second applicants would cease their strike action; the respondent would not progress the restructure beyond initial consultation until the issue of whether there was a valid EPP or not had been determined; and the parties would apply to the Employment Relations Authority for such a determination. The second applicants returned to work.

[31] On 9 February 2009 the applicants issued proceedings in the Employment Relations Authority (which were removed to the Employment Court) claiming that:

- The 2005 CEA had not been properly ratified;

- The second applicants' terms and conditions were set out in a previous collective agreement;
- That previous collective agreement did not contain an EPP that complied with Part 6A of the Employment Relations Act 2000.

[32] In February 2009 the Union approached the company to confirm that it would not proceed with the restructure until the Court had issued a decision. The company confirmed that it would comply with the assurance given on 8 December and agreed a course of action once the Court decision had been issued.

[33] On 10 February Mr Mackenzie confirmed that:

> *You have my assurance that post the decision re a current EPP cl or not, should it be held that there is not such a current cl then we* ***will meet you within seven days to negotiate such a CL*** *and also deal with any other concerns that you have.*
>
> *If it is held that there is such a cl in existence then any other issues can be dealt with through the consult process*

[34] In March 2009 the company decided to proceed with fully outsourcing the saw doctor functions. This decision was communicated to the first applicant at the final meeting of the Consultative Committee. The company undertook to delay implementing the decision until the dispute between the parties regarding the applicable terms and conditions had been resolved by the Employment Court.

[35] During the hearing before the Employment Court the Union raised a further claim: if the Court were to find that the 2005 CEA had been properly ratified the EPP in that CEA did not comply with Part 6A. That matter was dealt with in further proceedings.

[36] The Court's decision of 27 May 2009 (AC22/09) confirmed that the 2005 CEA had been properly ratified and governed the second applicants' employment.

[37] On 15 June 2009 Mr Daniel Erickson wrote to Mr Yukich saying that while CHH had completed its consultation process it had postponed the proposed outsourcing pending the outcome of the Court action.

The Court's Decision on the EPP

[38] On 9 December 2009 the Court issued its decision (AC 22A/09) and found that the existing EPP was not compliant with the Act. The Court held at paras 21-22:

> *That was the issue at the heart of the Norske Skog case. For the reasons the Full Court determined in that judgment, I find the absence of EPPs does not prevent the employer from restructuring, although that may be subject to other statutory and contractual obligations and/or to whatever concessions the employer may be prepared to make, as exemplified in the Norske Skog case.*
>
> *In spite of what I have concluded is the absence of compliance with s 69OJ, the Full Court's judgment in Norske Skog confirms that there are no express sanctions as sought by the plaintiffs for non-compliance in cases such as this and these are not to be implied by the Court. In these circumstances, whilst the employer must comply with Part 5 of the expired collective, such as it is, it cannot in law be restrained from continuing its restructuring on the grounds that there is no EPP in effect that is compliant with s 69OJ.*

10 December 2009

[39] It appears that the second applicants were not made aware of this decision until some time the following day. Mr Moengaroa, the Union delegate, appears to have had access to a copy. At 2.36pm on 10 December, following on from an earlier email about the taking of strike action regarding, amongst other things, the resumption of bargaining and the negotiation of a compliant EPP, he emailed the other second applicants and Mr Yukich, regarding the decision. The email stated:

> *You may be aware that Saw Doctors had challenged the Employee Protection Provision in the expired Collective on the basis that the EPP did not comply with the requirements of the Employment relations Act 2000. The Employment Court has now ruled in favour of the Saw Doctors. That is, the EPP in the expired collective (and incidentally all Kawerau Collectives derived there from) does not comply with the Act.*
>
> *In light of the strike action the support of all Unions at the CHH Kawerau site is requested. To this end, the saw and associated equipment normally serviced by the saw doctors is blacklisted.*

[40] It emerged in evidence that this email sent under Mr Moengaroa's name, was in fact written and sent by Mr Stan Austin, a friend and advisor of Mr Moengaroa's.

[41] Mr Yukich was on leave at the time that this was taking place.

[42] On the morning of 10 December Ms Eggermont was driving from Auckland to Rotorua to attend to an unrelated matter. She had a telephone conference with Mr Chris White and Mr Federink. They spoke about the Employment Court decision which Ms Eggermont had not read at that stage. She read it upon arrival in Rotorua. During the phone conference it was decided to proceed with implementing the restructuring.

[43] Mr Federink instructed Mr Brett Vincent, the sawmill manager, to contact the saw doctors and tell them about a meeting at 4pm but not to tell them what the meeting was about. If they asked they were to be told that they would find out when they got there.

[44] At 4.05pm on 10 December Messrs Tait and Mokomoko were called to a meeting by Mr Vincent.

[45] Mr Moengaroa saw missed calls from Mr Vincent on his phone and texted in response. Mr Vincent sent him a text asking him to attend a meeting but did not provide any further information. Mr Ohlson said he was too drunk to attend. Both these people were on rostered days off.

[46] Messrs Tait and Mokomoko asked that a Union representative be present but Mr Vincent said he had been unable to get hold of the other saw doctors. It seems that the company was aware that Mr Yukich was on leave and consequently made no attempt to contact him, although the CEA required that the Union be informed prior to redundancy notification being given to the members.

Dismissal Meeting

[47] The meeting commenced at 4.25pm. Present were Mr Federink, Ms Eggermont, Ms Kay Mead, Mr Vincent and the new mill manager, Mr Paul Threw. Mr Federink said the company had looked at five options and decided that option three, the contracting out option, was the best one for the company. Messrs Tait and

Mokomoko asked on more than one occasion that a Union representative be present. That request was refused. To place the best light on this from the company's perspective, it is possible that Mr Federink thought Messrs Tait and Mokomoko were asking for a Union representative to be present because they wanted to continue with the consultation regarding restructuring, which the company regarded as having been completed, which it had been. However, Mr Federink was well aware that the purpose of the meeting was to tell the employees who were present that they were to be made redundant; and Ms Eggermont, as the Human Resources Manager, should have ensured that they were represented, and that the Union was notified prior to the notice being given.

[48] Messrs Tait and Mokomoko were then given an Outcome Communication package, which had been prepared a few months beforehand and had relevant dates appended. This confirmed that the company was contracting out the saw doctors' work, that the saw doctors were to be made redundant effective 16 December and that that they were not required to return to work. Messrs Tait and Mokomoko did not open the packages.

[49] After another request for Union representation was made at 4.55 the company agreed to adjourn the meeting to allow Messrs Tait and Mokomoko to ring the Union. They both left the meeting to make calls.

[50] Mr Tait spoke to Mr Moengaroa and Mr Mokomoko tried to contact Mr Yukich. Mr Moengaroa advised that the meeting should not proceed any further.

[51] Mr Tait returned to the meeting and Mr Mokomoko continued to try to get hold of Mr Yukich.

[52] Mr Tait advised that the delegate had said that the meeting was to be adjourned so that advice and representation could be obtained.

[53] Mr Tait said he was then advised by Mr Federink that the saw doctors were locked out, that their swipe cards would be deactivated and that their services were no longer required. Mr Tait and Mr Mokomoko were told to leave the premises immediately. Mr Tait was told to remove his personal belongings from the locker room. Mr Tait was told that if they did not take the packages they would be sent to them.

[54] It was agreed that the reference to a lock out was an unfortunate choice of phrase. What was being referred to was not a lock out in the industrial action sense but a lock out in the sense that they were to leave the building and be prevented from returning as their employment had been terminated.

[55] There was no discussion about whether the employees wished to work out the notice period. Ms Eggermont said it was company practice not to permit employees to continue working in such circumstances as there was a health and safety risk. The employment agreement does not permit the employer to determine that employees will not work their notice periods. Rather, clause 5.2.1 clearly implies that they would work out the notice period. This clause provides that employees who take up alternative outside employment within the notice period do not need to work it but that no payment in lieu shall be made for the unexpired period of the notice.

[56] While I accept that the employees had had a shock and that they worked with saws there were other options available to deal with that situation. The employees' consent to leave for the day could have been sought. The company's concerns could have been discussed. They were not told they were not being allowed to work out their notice for purported health and safety reasons.

[57] At 4.59pm the company emailed Mr Yukich a copy of the Outcome Communication package and confirmed that the company was proceeding with the contracting out. The 2005 CEA provides at clause 5.2.1, which deals with redundancy, that prior to the issuing of redundancy notices to affected employees the company would notify the Union.

[58] Mr Mokomoko had been about to commence his shift. Checkmate employees came on site at 5pm and started working in the positions filled by the second applicants. Instructions for them to work had been given earlier that day.

[59] The Outcome Communications packages were couriered to the second applicants. That was how the other applicants were notified of the termination of their employment.

[60] Mr Moengaroa managed to contact Mr Yukich at 6pm that evening. Mr Yukich had not checked his emails.

[61] It should be noted that the Union held a different view of the import of the Court's decision from that of the company. The Union's position was that it had an agreement which constituted a contractual obligation or a concession and that therefore the Company could not restructure because it had agreed to meet and negotiate within seven days of a finding that the EPP was not compliant. At 1.31am Mr Yukich emailed saying the Union did not share the company's view regarding the outcome of the Court's decision and that to proceed with the restructuring would be an act of bad faith on the company's part.

[62] On 10 December 2009 an email was sent to Wood Products managers by Human Resources informing them that the saw doctor positions had been disestablished and requesting a freeze on external hiring. This was to give the second applicants an opportunity to apply for positions within the whole of Wood Products.

Subsequent Events

[63] On 13 December Mr Yukich emailed the company asking it to attend mediation to discuss the EPP in light of the Court decision. There was no response. The rationale for not responding was that the communication should have been with the company's solicitors. It was unfortunate that the matter was not mediated at that stage.

[64] On Monday 14 December the saw doctors resolved to end the strike action and return to work.

[65] On the Monday morning Mr Moengaroa tried to access the worksite but his swipe card had been deactivated. Messrs Pomare and Ohlson had also tried to access the work place as had Mr Tait.

[66] Mr Moengaroa asked to speak to Mr Vincent, who was the contact person. Mr Vincent advised him to speak to Mr Federink. Mr Moengaroa waited for some time then left.

[67] The Outcome Communications package referred to individual letters of redundancy and separate written confirmation of the company's decision being sent to the employees. No such communication arrived. It appears that the company prepared the letters in Auckland but they were inadvertently not sent out.

[68] There is a reference to "end date" on the redundancy calculations included in the pack: that was 7 January 2010.

[69] On 17 December the company sent a letter to Mr Moengaroa asking him to attend a disciplinary meeting. This had to do with the company's view that he had misrepresented the outcome of the Employment Court decision and had therefore engaged in misleading and deceptive behaviour in breach of the statutory duty of good faith. The company's preliminary view was that he had incited unlawful industrial action. This simply served to exacerbate the situation.

Resource Day 18 December 2009

[70] Included in the Outcome Communication package was reference to the setting up of a Resource Centre. This was pursuant to the requirement in clause 5.3 of the 2005 CEA that a job search programme be established. The Resource Centre was available on 18 December. All the second applicants bar Mr Ohlson attended.

[71] There is dispute about whether matters to do with redeployment were discussed. Ms Eggermont says that she discussed job opportunities within CHH and gave a list of vacancies to the employees. Two of the second applicants say there was no information regarding vacancies. The respondent has produced a list of the vacancies it says were given to the employees and that Mr Ohlson was sent a copy. Ms Eggermont said that she had discussed an opportunity in Nelson with Mr Moengaroa and pointed out the provision of relocation payments. He had expressed interest and she had contacted the Nelson site manager but Mr Moengaroa had not made any contact. He said his wife had not wanted to move to Nelson.

[72] I accept that a list was given out at the Resource Centre. There were no suitable vacancies at the Kawerau Mill but there were positions available at other locations. Mr Kiely says the employer gave consideration to alternatives both and after confirming the decision to disestablish the saw doctor positions.

[73] The prior consideration would appear to have been the decision to notify the Wood Products managers not to advertise externally.

[74] Ms Eggermont said she understood that Checkmate had advertised vacancies in the local paper.

[75] All the second applicants have subsequently obtained employment:

a. Mr Moengaroa started with Sequal on 2 march 2010 at an hourly rate of $27 averaging 31.5 hours per week;

b. Mr Mokomoko had fixed term employment with Checkmate starting on 25 January 2010, although the offer was to start on 18 January. This terminated on 7 April 210. The hourly rate was $27 for an average 60 hour week. His new employer was Sequal where he started on 11 April at an hourly rate of $27 for an average 34 hour week.

c. Mr Tait started with Checkmate on 26 January 2010 at the rate of $27 per hour for an average 48 hour week. Mr Tait could have started earlier but wanted to take some leave.

d. Mr Ohlson started work with Tim Fin Pacific Ltd in Tauranga on 7 February 2010 at an hourly rate of $13 for an average 46 hour week.

Breach of Employment Agreement: clause 5.8

[76] This provides that the respondent will:

> *Meet with the new employer and, taking into account the commercial requirements and obligations of the Company and the new employer, negotiate with the new employer regarding the arrangements that would apply to affected employees in the event that the sale, outsourcing or transfer takes place. These negotiations shall include determining whether affected employees would transfer to the new employer on the same or different terms and conditions of employment.*

[77] CHH says the provision does not impose any obligation to secure the transfer of employment; nor is there any obligation on the new employer to offer positions to the affected employees. That is correct.

[78] Mr Federink said he had had discussions with Checkmate and that information regarding the second applicants had been supplied to Checkmate. On 30 January 2009 information setting out the terms and conditions, their start dates, training and cost information had been sent. The information was updated in July 2009. None of this was discussed with the applicants or the Union; nor were they aware of it. The

accuracy of the information regarding training and proficiency was not checked. The second applicants said some of the information was incorrect. It appears the technical information was accurate but the general duties information was not. CHH's evidence was that whatever inaccuracies there were in the information would in all likelihood not have materially affected any decision by Checkmate to offer employment. I did not have evidence from Checkmate but on the balance of probabilities I accept the veracity of CHH's evidence.

[79] Mr Federink accepted he had not talked about the arrangements that would apply to the affected employees and whether they would transfer on the same or different conditions of employment; or whether they would transfer at all.

[80] Mr Federink said he had accepted the advice given in December 2009 that Checkmate had no vacancies and could meet the contract by using existing staff. This is despite Checkmate advertising for staff in the middle of 2009 and a few months before the announcement in December 2009. By December 2009 Checkmate had offered positions to Mr Pomare and Mr Tait (the latter on a confidential basis), which Ms Eggermont was aware of. Offers on a confidential basis should not have been as the process should have been transparent.

[81] CHH says that Mr Federink raised the issue of whether affected employees would transfer. This is not what he did. CHH says that having been told there were no vacancies there was no issue regarding the terms and conditions on which employees would transfer. But there clearly were vacancies – those offered to Messrs Pomare and Tait. There were no negotiations regarding transferring or conditions if transfers took place. There was no formal process between Checkmate and CHH regarding the filling of vacancies.

[82] The second applicants were not advised of any process whereby they could apply for positions with Checkmate nor whether there were any positions. That did not take place during the Resource Day, apart from the confidential offer to Mr Tait.

[83] There was no process about the contracting out to the extent it affected the second applicants or to determine what matters relating to their employment CHH would negotiate with Checkmate about.

[84] The respondent breached clause 5.8.

Consultation

[85] There was consultation regarding the proposal to contract out the services. The decision to contract out was communicated to Mr Yukich in March 2009.

[86] At the meeting on December 10, attended by two of the saw doctors the decision was explained and the reasons were set out in the Outcome Communications pack.

[87] The problem area regarding consultation lies not with the proposal to contract out but with the implementation of that decision. Section 4 (4) (e) requires that good faith be observed when making employees redundant. This is a separate provision from s 4 (4) (d) which deals with proposals that might impact on employees, including a proposal to contract out work.

[88] There was no consultation regarding the implementation of the restructuring.

The December Agreement

[89] The respondent says that a consideration of the context is necessary for this agreement to be properly understood. The respondent says, and I accept, that bargaining for a new collective and implementing restructuring during collective bargaining are not mutually exclusive: *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597. It says this is relevant to the current matter as the respondent kept the two processes separate and even assigned separate personnel to the bargaining and the restructuring.

[90] Mr Kiely submitted that the respondent's position is that it was essentially saying that it would await a Court ruling on whether it could proceed with the proposed restructure before returning to bargaining.

[91] That was not the essence of the agreement. The agreement was that the parties would negotiate for a compliant EPP if the Court found the current one was non-compliant. This agreement was breached by the respondent.

[92] Nothing in the correspondence between the parties leads me to the conclusion that the possibility of restructuring being permissible in the absence of a compliant EPP was in the minds of the Union, the second applicants or the respondent. When I

asked Mr Mackenzie whether this had been contemplated as a possibility he was unable to say it had been.

[93] What the parties contemplated was either a "red light" or a "green light": the EPP was non compliant and the restructuring could not be completed or the EPP was compliant and it could proceed.

[94] Mr Kiely says Mr Mackenzie confirmed in his oral evidence that it was not the intention of the respondent to return to bargaining if that was unnecessary. However, what was in contemplation regarding the concept of a return to bargaining being necessary or unnecessary was simply the matter of whether the EPP was compliant or not.

[95] Mr Kiely says the position is that there is no obligation, pursuant to the undertaking, for the respondent to return to bargaining when the Court has confirmed that, at law, it cannot be compelled to do so.

[96] I do not accept that argument. The respondent gave that undertaking in return for an agreement that strike action would be withdrawn. It subsequently endorsed its position in February.

[97] It was open to the respondent to have discussions with the applicants about the effect of the Court's decision; it chose not to do so.

Disadvantage

[98] Absent discussion and variation, the failure to abide by the agreement constitutes an unjustified disadvantage in that it deprived the second applicants of the opportunity to negotiate a transition on agreed and understood terms to the new employer.

[99] The failure to allow the employees to work out their notice periods constitutes a disadvantage as does the failure to notify the Union and the failure to provide proper notice.

[100] In *Atwill v Tanners Timberworld Ltd* [1994] 1 ERNZ 321 the Court referred to the importance of allowing employees to work out their notice. All the second applicants had lengthy employment, their jobs were important to them and they

gained a sense of belonging and dignity from their work. The removal of that right impacted adversely upon the employees.

Dismissal

[101] I accept Mr Kiely's submissions that the redundancies were genuine. There were no ulterior motives. However, a dismissal by way of redundancy must be carried out in a fair manner with proper consultation and notice.

[102] Clause 5.3 requires that a Job Search programme be established with a Job Search co-ordinator for the purpose of assisting employees to locate alternative employment. Clause 5.4 sets out a commitment to redeployment. There was no discussion regarding redeployment before the decision to proceed with implementing the restructuring was announced.

[103] Notice must be clear and unequivocal. Inadequate notice was given to the employees.

[104] The failure to ensure that all the affected employees were present goes to the justifiability of the dismissal. I do not accept the submission that Mr Austin, who seems to have acted as an advisor to Mr Moengaroa and sent the email of that day in Mr Moengaroa's name, could have attended the meeting as the representative of the affected employees. Neither he nor Mr Moengaroa knew what the meeting was about and there was no evidence that any of the other employees had authorised him to act for them in any capacity at any time. In any event, the issue is not what might have been in terms of representation, but what actually occurred. This was that the Union, which should have been notified, was not; that the company failed to ensure that all the employees were present in person and that they had the opportunity to be represented. Furthermore, the instruction that no information was to be given regarding the content of the meeting is breach of the obligation of good faith to be responsive and communicative. Had the employer informed the employees that the meeting was to discuss the termination of their employment it is highly likely that Mr Moengaroa, as Union delegate, would have attended. I do not agree that a meeting of this nature – to advise of the implications for employment – is not like a disciplinary meeting which requires prior advice and representation.

[105] I accept the applicants' contention that the issue of the stopwork meeting that morning is a red herring. Whether or not the applicants knew of the Court decision

and whether or not the stop meeting to discuss industrial action was related to the Court decision does not affect the process by which the applicants were informed of the meeting and denied representation.

[106] It is surprising that the CHH did not take cognisance of the fact that the Court's decision did not provide the straightforward yes or no answer that the parties had anticipated. Had the company abided by the contractual provision requiring it to contact the Union prior to giving notice it would have become aware that there was disagreement regarding the import of the Court's decision in the circumstances applying to CHH and the agreement made with the Union.

[107] Leaving aside the contractual requirements, good faith obligations required the company to communicate its views about the decision and its proposed course of action prior to hastily implementing it. The respondent could give no reasons other than the matter had dragged on for a long time, there was a sense of frustration and the end of the year was approaching to justify its precipitate implementation.

[108] In saying that, I have taken into account the fact that the Court said a noncompliant EPP was not a barrier to restructuring. However, the green light given by that had to be tempered with obligations that the company had, both contractually and statutorily.

[109] The respondent should have ensured that the employees had adequate notice of the meeting, the opportunity to obtain representation and that they had notice of what the meeting was about. The company should have ensured that all the employees affected were present at a meeting where their employment was to be terminated. I do not accept that it would have been impossible or even particularly difficult to arrange that. CHH had access to Checkmate staff who stood in for employees when they were on sick or annual leave. The termination of employment by the sending of material by courier is unacceptable.

[110] The process by which the dismissals were effected was so severely flawed that the dismissals are unjustified.

Remedies

[111] Had the respondent looked at the issues of redeployment and made efforts to negotiate with Checkmate as required by the collective, the affected employees may have been able to take up alternative employment earlier.

[112] I heard evidence as to why some of the employees had not applied for the positions that were available for them to be redeployed into. There was evidence about a further shift starting in January. Had the respondent implemented the restructuring in a fair manner, which would have included not only abiding by its contractual obligations, but also by its good faith obligations, namely to discuss the differing views regarding the Court's decision and how to deal with the undertaking that had been given regarding the negotiation of an EPP, it is likely that the giving of notice of termination would have been delayed. Further opportunities for redeployment may have emerged, particularly bearing in mind the new shift due to start in January; and CHH may have been persuaded to undertake proper negotiations with Checkmate, which may have resulted in other employment opportunities.

[113] In *GWD Russells (Gore) Ltd v Muir* [1993] 2 ERNZ 332 the Court said that in order to obtain an award of reimbursement, the employee must show that wages or other moneys have been lost as a result of the grievance. To require the applicants to prove, on balance, that the jobs would not have been lost at all, or at that time, may allow the employer to benefit from unjustifiable actions in not providing adequate consultation. There would always be a discretionary element in endeavouring to compensate an injured party but it was legitimate in the exercise of equity and good conscience to consider the case in the round. If the evidence disclosed that there was no reasonable possibility that consultation would have delayed or avoided the dismissal, the employee would have failed to establish loss as a result of the personal grievance. This appears to me to be a case where proper consultation regarding the implantation of the restructuring might have delayed the dismissal. The applicants are entitled to say that they have lost remuneration as a result of the grievance.

[114] The parties indicated that if lost remuneration were ordered they would be able to meet and resolve the matter of the actual sums involved. I therefore leave it the parties to resolve this matter. If they are unable to do so, leave is reserved to return to the Authority.

[115] As to compensation, the respondent has argued that much of the evidence regarding humiliation and distress did not relate directly to the termination of

employment but to the processes leading up to it. I agree that Mr Moengaroa spoke at length about the impact of the whole matter upon him. However, all the applicants gave evidence about the impact the actual dismissal had on them; and it is that evidence I take into account in making compensation awards.

[116] The respondent submitted that in setting a compensatory amount I should take into account the payment of redundancy compensation, the fact that the second applicants were competently represented at all times and the assistance given to them following the implementation of the outsourcing decision. None of these are valid criteria in assessing compensation. Compensation is for the humiliation and distress incurred as a result of the unjustifiable dismissals.

[117] These were long serving employees who were dismissed in a precipitate and distressing manner without the opportunity to be represented. The respondent is to pay each of the second applicants the sum of $12,000. These payments include payments for the humiliation and distress suffered as a result of the unjustified disadvantages to which they were subjected.

Breach of Employment Agreement

[118] There were a number of breaches of the employment agreement: notice was not given as required; letters were not sent out until 13 January 2010; there was no provision to determine that the notice period would be paid in lieu; the Union was not notified prior to the issuing of redundancy notices; redeployment was not considered prior to the issuing of notice; there were no negotiations with the new employer.

Penalties

[119] In *Xu v McIntosh* [2004] 2 ERNZ 448 the Employment Court noted that not all breaches were equally reprehensible. The first question to be considered was how much harm had the breach occasioned. A further issue was that of the perpetrator's culpability and whether the breach was technical and inadvertent or flagrant and deliberate.

[120] As far as the failure to send out the notices is concerned, I am satisfied that was an inadvertent breach and ward no penalty in that regard.

[121] The failure to negotiate with the new employer was not technical and inadvertent and had a deleterious effect upon the applicants.

[122] The failure to allow the employees to work out their notice periods was flagrant and deliberate. It had bad effect. I say that despite the evidence that the company was due to shut down on and not re-open until the New Year.

[123] The failure to consider redeployment was also neither technical nor inadvertent and had a deleterious effect.

[124] The failure to notify the Union was flagrant and deliberate and had an ill effect.

[125] The breaches of the employment agreement also constitute a breach of good faith in terms of making employees redundant.

[126] The duty of good faith in s4 (1A) (b) requires the parties to be active and constructive in maintaining a productive relationship in which the parties are to be responsive and communicative. It cannot be said that the respondent's actions in proceeding with the implementation of the redundancies without notifying the Union and without having discussions with the Union regarding the effect of the Employment Court's decision on the parties' agreement regarding the EPP had the effect of maintaining a productive relationship.

[127] A penalty for breach of good faith is available if the failure to comply with the duty of good faith was deliberate, serious and sustained or was designed to undermine the employment relationship. I am not of the view that the act of proceeding with the implementation was designed to undermine the employment relationship. It was serious and it was sustained but I do not think it meets the criterion of being deliberate. I say this because the respondent genuinely was of the view that the Court decision had enabled it to proceed with the restructuring.

[128] As to the failure to comply with Part 6A, there is an Employment Court decision regarding this issue.

[129] In *Salt v Fell* [2006] ERNZ 449 Couch J at para [124] said that where a remedy has been sought and granted in respect of a personal grievance, it would be unusual for a penalty to be imposed in respect of the same conduct on the basis that it

is also a breach of an employment agreement. There would need to be, as stated in *Xu*, *"special facets of the breach calling for punishment of the employer on top of compensation for the employee."* I decline to award penalties on the basis that the breaches also found the personal grievances.

Costs

[130] If the parties are unable to agree on this matter, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority