

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 4/10
5291281

BETWEEN

EASTERN BAY
INDEPENDENT
INDUSTRIAL WORKERS
UNION INC

First Applicant

JAMES MOENGAROA,
KEVIN OHLSON, DAVE
MOKOMOKO, BENJAMIN
POMARE, GLENN TAIT

Second Applicants

AND

CARTER HOLT HARVEY
LIMITED

Respondent

Member of Authority: Dzintra King

Representatives: Kathryn Beck, Counsel for Applicants

Peter Kiely, Daniel Erickson, Counsel for Respondent

Investigation Meeting: 7 January 2010

Determination: 11 January 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The second applicants say they have been unjustifiably dismissed by the respondent, Carter Holt Harvey Limited (“CHH” or “the company”), on the grounds of redundancy on 16 December 2009. The first and second applicants (the second applicants are members of the first applicant) also claim that the respondent has breached an agreement to resume bargaining on an employment protection provision (“EPP”) and hold the restructuring in abeyance upon receiving an Employment Court decision. They say the respondent has breached the express and implied terms of the employment agreement with the second applicants; unjustifiably disadvantaged the second applicants through suspending them and refusing to allow them to work; and breached its obligations of good faith.

[2] The second applicants seek interim reinstatement and this is the sole issue for determination. The first and second applicants also seek an order that the second respondent is restrained from implementing the decision to outsource the saw doctoring service to Checkmate Precision Cutting Tools Ltd (“Checkmate”) in so far as such implementation relates to the second applicants.

[3] The respondent opposes the making of any interim orders.

Background

[4] The second applicants all work as saw doctors at the respondent’s sawmill in Kawerau. They were previously members of the Engineering, Printing and Manufacturing Union (“the EPMU”) but subsequently became members of the first applicant, the Eastern Bay Independent Industrial Workers’ Union Inc (“the EBIIWU” or “the Union”). They were covered by the Kawerau Mill Site Collective Agreement (Trades) which expired on 20 July 2008.

[5] 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.

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

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

[8] Mr Mackenzie advised that given the restructure there was no point in continuing the bargaining as it could result in the termination of the saw doctors' employment.

[9] The Union did not agree to discontinue bargaining but agreed on 6 November to adjourn bargaining until the company had made a decision regarding the restructure.

[10] On 2 December the company advised that it was considering contracting out the functions of the saw doctors. A consultative committee was established in accordance with the EPMU CEC. A consultation package was tabled. The Union and second applicants presented a number of counter proposals.

[11] Mr Yukich deposed that Mr Arnie Federik, the CHH Regional Operations Manager, said that if contracting out were to occur then there would be no opportunity for the existing saw doctors to transfer their employment to the new employer.

[12] There were four meetings of the consultative committee between January and March 2009.

[13] The respondent was advised by the Union that matters such as the transfer of new employees were to be dealt with by an employee protection provision and that the EPP was still the subject of bargaining.

[14] The Union advised the company that the EPP in the EPMU collective did not comply with the provisions of ss 69OI and 69OJ of the Employment Relations Act 2000. The Union advised it wished to resume bargaining and to focus on the EPP.

[15] The company said it would not agree to resume bargaining and believed it could rely on the EPP in the EPMU collective.

[16] Mr Lou Yukich on behalf of the second applicants gave the company a letter requesting confirmation of the restructuring proposal and asking that it be put on hold until the parties had concluded an EPP.

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

[18] Also on 5 December 2008 Mr Mackenzie confirmed that the restructuring would be held in abeyance until the issue of whether or not there was a valid EPP had been resolved.

[19] However, on 11 December the company responded by saying that it did not accept that the existing EPP was non-compliant and that the employees were protected by the redundancy provisions in the collective agreement. It did not agree to adjourn the restructuring process completely and would continue the initial consultation. It asked the Union to prepare an application to the Authority to determine the issue of whether the existing EPP was compliant with the Act. The company agreed to support the application.

[20] The parties agreed that the strike action would be discontinued and that the company would not progress the restructure until the issue of the status of the EPP was resolved.

[21] The parties applied for the matter of whether the EPP was compliant to be removed to the Court.

[22] 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.

[23] The company agreed that if the Court held there was not a compliant EPP then it would meet within seven days to renegotiate an EPP clause.

[24] The Union wished to progress other claims that were unrelated to the EPP and asked the company to meet for further negotiation. The company did not respond to these requests.

[25] On 2 February 2009 Mr Federik and Ms 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 was discussed.

[26] 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.

[27] Mr Yukich deposed that while the restructure was discussed there were no discussions regarding implementation or any issues arising out of the restructure.

[28] 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 para 21-22:

That was the issue at the heart of the Norske Skog case. For the reasons that 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 in the Norske Skog case.

In spite of what I have concluded is the absence of compliance with s69OJ, 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 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 s69OJ.

[29] It appears that the second applicants were not made aware of this decision until some time the following day. Mr Moengaraoa, the Union delegate, had a copy by 2.39pm and he emailed this to the other second applicants. Mr Yukich was on leave.

10 December 2009

[30] On the morning of 10 December the second applicants met to discuss the status of the bargaining and resolved to take strike action as of 11 December 2009. Mr Moengaraoa emailed Mr Yukich at 2pm to advise him of this decision.

[31] At 4pm on 10 December Messrs Tait and Mokokoko were called to a meeting by Mr Brett Vincent, the sawmill manager. They 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 made no attempt to contact him. Mr Tait deposed that Mr Vincent said the meeting was about the Court decision. They were required to attend the meeting immediately.

[32] 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 again asked that a Union representative be present. That request was again refused.

[33] Messrs Tait and Mokomoko were then given an Outcome Communication package which 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.

[34] 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 delegate.

[35] They contacted Mr Moengaroa and tried to contact Mr Yukich. Mr Moengaroa advised that the meeting should not proceed any further.

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

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

[38] Mr Tait said he was then advised by Mr Federink that the saw doctors were locked out (the company denies this), 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.

[39] 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 EPMU CEC 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. This clause also 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. This is pertinent in terms of the fact that the company told the employees that they were not to return to work and work out their notice.

[40] Mr Moengaroa managed to contact Mr Yukich at 6pm that evening. Mr Yukich had not checked his emails. He deposed that there had been no prior advice to or consultation with the Union over implementation of the restructuring proposal.

[41] 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.

[42] 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

[43] 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.

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

[45] 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.

[46] The second applicants, other than Messrs Tait and Mokokoko, were not told of the decision to terminate in person. The Outcome Communication packages were posted to them as were estimates of the redundancy entitlements. There is a dispute regarding the sending and receipt of individual notices of redundancy. The company says they were prepared but the second applicants deny receiving them.

[47] 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 EPMU CEC that a job search programme be established. The Resource Centre was available on 18 December. All the second applicants bar Mr Ohlson attended.

[48] 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 at the date of the hearing Mr Moengaroa had not made any contact.

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

[50] Mr Pomare and Mr Tait had, by the time of the hearing, been offered positions with Checkmate. Mr Pomare chose to accept his employment offer and withdraw as an applicant in both the interim and substantive proceedings. It was agreed there would be no issue of costs regarding Mr Pomare.

[51] Mr Tait had an agreement with Checkmate to wait until an Authority determination was delivered regarding the interim application prior to making a decision about acceptance of the job offer.

[52] The respondent says it has considered and has continued to consider alternatives to redundancy, including redeployment, and says it believes it has complied with the provisions of the EPMU CEC with regard to consultation, redundancy and restructuring.

[53] Checkmate staff were taken on to commence duties at 5pm on 10 December.

Interim reinstatement – General principles

[54] The tests for interim injunctions are well known.

- Is there an arguable case?
- Does the balance of convenience favour the granting of the injunction?
- Given the discretionary nature of the interim remedy, whether the overall justice of the case would be served by granting interim reinstatement.

Is there an arguable case?

[55] In *X v Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 at 872 the Court said:

What the Court is concerned with, so far as the evidence goes, is to see whether, assuming the plaintiff can prove all the facts he alleges, he then has an arguable case.

[56] The parties agree that the threshold for establishing an arguable case is not high. In terms of an unjustified dismissal per se that threshold is readily met in this case.

[57] Two of the second applicants were told of the termination of their employment at a meeting of which they had no prior notice and representation, although requested, was initially denied. The other three second applicants were posted notice of their termination.

[58] The hurdle faced by the second applicants is that they need to establish that if they are successful in their personal grievances for unjustified dismissal they will also be granted reinstatement and not simply monetary remedies: *Madar v P & O Services (NZ) Ltd* [1999] 2 ERNZ 174 (CA); *Cliff v Air NZ Ltd*, unreported, 24 February 2005, Colgan J, AC6A/05.

[59] Many cases where reinstatement is not practicable deal with a loss of trust and confidence, an inability to work in a congenial manner if reinstated, or doubts about performance. These are not the issues here. The issue is whether the redundancy situation would prevent permanent reinstatement.

[60] I am not concerned with issues such as the alleged disruption and alleged misleading cited by the respondent. There are other possible explanations for what is said to be misleading, one being a genuine difference of opinion regarding the meaning of the Court's decision.

[61] Redundancy per se is not necessarily a bar to reinstatement, either on an interim or a permanent basis. However, a perusal of the case law shows that generally reinstatement will be possible if the genuineness of the redundancy is contested, if there is doubt about the manner in which selection has been carried out or there is an allegation that the redundancy is a sham.

[62] In *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825 Colgan CJ confirmed that *G N Hale and Son Ltd v Wellington Caretakers etc IUOW* [1990] 2 NZILR 1079 remained good authority for substantive justification in a redundancy situation. He said that:

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or Court, even under s 103A.

[63] The applicants do not claim that there was any ulterior motive

[64] Ms Beck sought to persuade me that the applicant's concerns go not just to procedural matters but also to the substance of the case. While I am of the view that the applicants have a strongly arguable case for establishing that their dismissal were unjustified I am unable, on the evidence at this stage before me, to reach a view that they have an arguable case that they would be reinstated.

[65] In *Port of Wellington Ltd v Longwith* [1995] 1 ERNZ 87 (CA) Gault J said, at p.93, that all the circumstances of a particular case need to be taken into account when considering reinstatement and that where there was a disputed redundancy the possible impact would need to be weighed.

Balance of Convenience

[66] In *X v Y and NZ Stock Exchange* [1992] 1 ERNZ 863 the Court said at 872:

The Court, in the exercise of its discretion to grant or withhold that remedy has to weigh up the inconvenience to a defendant of having to bear the burden of an injunction before the substantive case is heard when the defendant may well win that case, and against that the inconvenience to a plaintiff who may have a just case, of having to bear the detriment of wrongful or unjustifiable action until the case has been heard. Inconvenience in this context has a stronger meaning than colloquially; it means detriment or injury.

[67] The issue is which party would be injured less by a decision made against it: *Porter v Rotaform Plastics Ltd*, unreported, 18 December 1995, AEC 132/95, Finnigan J.

[68] A numbers of factors are to be taken into consideration.

[69] In *Port of Wellington Ltd v Longwith* the Court of Appeal noted, with regard to the factors to be taken into account under this head, that case law demonstrated that “*it is a broad discretion in which all the circumstances are to be considered.*”

1. *Adequacy of other remedies*

[70] Would damages be an adequate alternative remedy to reinstatement? The right to work is a valuable one. This is not just a right that applies to people who need to continue to work in order to maintain their skill levels: *Langston v Amalgamated Union of Engineering Workers* [1974] 1 All ER 980. The detriment to the applicants outweighs that to the respondent who has the ability to make payments both to the second applicants and Checkmate.

[71] The ability of the applicants to satisfy undertakings is a factor that can be taken into account. In *McDonald v Television NZ Ltd*, unreported, 12 October 1993, Travis J, AEC 50/93 the Court noted that absence of financial means to satisfy an undertaking was not fatal but was a factor to be taken into account.

[72] The applicants will receive not insubstantial redundancy payments and there was no evidence that they might not be able to meet the undertakings. This is not a factor in favour of the respondent.

2. *Likely duration of reinstatement*

[73] At the time of making this determination no specific dates for a substantive have been set. There were discussions at the hearing and the respondent informed me that it would need to check the availability of one of its key witnesses. The latest date that could be viable would be in May; the earliest would be in March. January dates were available for the Authority but the parties were of the view that this would provide insufficient time for preparation for a matter that might need as long a week.

[74] A delay of between two and four months is a factor that weighs in favour of the second applicants.

3. *Impact on Third Parties*

[75] The third party upon whom any impact could be had would be the contractor, Checkmate and there was no evidence regarding this so it is not a factor to be taken into account.

4. *Likelihood of disruption to the respondent's business*

[76] I am not satisfied that there was evidence that the applicants would disrupt the business.

5. *Prejudice to the respondent*

[77] The respondent believes that the hybrid saw doctoring which existed before the restructuring constituted a reduced efficiency. The requirement for the respondent to bear the cost and lessened efficiency of the hybrid arrangement is a factor favouring the respondent.

[78] The respondent would have to pay increased costs because of paying the contract fee and wages. The respondent says the hardship would be that it would have to pay the costs of employing the applicants in addition to whatever financial commitments it has made to Checkmate. I was not supplied with details of these but was told that the cost would be somewhere in the vicinity of \$30,000 a month.

[79] The fact that CHH has chosen to have Checkmate staff on the premises to carry out the work previously done by the applicants would not in the circumstances of this case be a factor that operates in favour of the respondent. The decision to terminate was implemented in haste (and I have had no explanation at this stage for the necessity of that) and that Checkmate was scheduled to commence while the applicants were paid in lieu for their notice period. The respondent must be prepared to take the consequences of this action.

[80] This is a factor that cannot in fairness favour the respondent.

6. *Detriment to the Applicants*

[81] The applicants say they will have no opportunity to be considered for employment by Checkmate as part of a process between Checkmate and CHH. While it is correct that the opportunity will not be there as part of a process it is the case that Checkmate has offered positions.

[82] If the applicants were reinstated on an interim basis the benefit to them would be that they would continue to work and receive wages. However, the respondent has made a decision, which it was entitled to make, to contract out the services of the second applicants.

[83] The issue for the second applicants is the negotiation of an EPP. Whether or not this is a requirement is yet to be determined. Entry into negotiations for an EPP does not mean that an EPP would be concluded. There is no guarantee of the terms of an EPP should one be concluded. An EPP does not require an agreement that the employees will transfer to the new employer or that the transfer will be on the same terms and conditions. The evidence was that Checkmate had already advertised jobs in the local paper and that offers of employment had been made by Checkmate to two of the second applicants. It is difficult to see what definite benefit (apart from working and payment) would accrue to the second applicants.

[84] There is, as I have noted, no guarantee that there would have been agreement reached that positions would necessarily be offered in any event. This factor cannot favour the applicants.

[85] They say they will not be considered for redeployment. However, the company's evidence was that positions had been circulated to all applicants although two of the second applicants deny this.

[86] In *Eng Mee Yong v Letchumanan* [1980] AC 331 at 337 the Privy Council stated:

The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a 'probability', a 'prima facie case' or a 'strong prima facie case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried: ...

The balance of convenience favours the applicants. They have a strongly arguable case regarding their personal grievances and they will suffer a greater detriment than the respondent during the interim period.

Overall Justice

[87] This requires that the Authority stand back and exercise its discretion. It is necessary to consider all the circumstances.

[88] Despite having found that the balance of convenience favours the applicants (as was the case in *Madar*) I find that looking at the overall justice of the case (given the likelihood that permanent reinstatement would not be granted) that the application for interim injunctions must be dismissed

[89] I have considered whether some form of conditional reinstatement might be possible but this does not seem a viable option. The applicants rejected the consideration of garden leave.

Costs

[90] 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