IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 513/10
5280321

	BETWEEN	MANU MAUHENI
	AND	TAPU FAINUU
	AND	BILFINGER BERGER SERVICES (NEW ZEALAND) LIMITED

Member of Authority:	Yvonne Oldfield
Representatives:	Simon Mitchell for Applicants Anthony Drake and Rosemary Childs for Respondent
Investigation Meeting:	18 May 2010
Submissions received:	20 May, 28 May 2010 from Applicant 27 May 2010 from Respondent
Determination:	15 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns alleged unjustified disadvantage grievances. In early 2009 Mr Mauheni and Mr Fainuu were both employed by the respondent (Bilfinger) as water servicemen in the North Shore Services Water Department. A downturn in reactive response and planned maintenance activities meant Bilfinger needed to reduce expenditure. It proposed to do so by reducing the number of Water Servicemen by three.

[2] In a series of meetings between 5 June and 12 June Mr Mauheni and Mr Fainuu were consulted about the disestablishment of their positions and about moving to other roles at a lower hourly rate than they were currently on. Bilfinger says after

being given a choice Mr Mauheni and Mr Fainuu opted to take the new roles in preference to being laid off. Mr Mauheni and Mr Fainuu dispute this.

[3] On 19 June the two applicants were sent letters confirming that they would be "*transferring*" to the new positions. They were told they would remain on their current rate of pay for four months after which they would be reduced to the rates for the positions. When they reported for work, on 22 June, they were deployed to their new duties.

[4] The employment of the two applicants was covered by the provisions of a collective agreement.[1] Clause 6.2 of that agreement provides:

> "*Nothing in this agreement shall prevent the employer from directing the employee to perform work for which the employee possesses the necessary skills and qualifications and where this work attracts a higher rate of pay, then this shall be paid for the time so employed. Where this work attracts a lesser rate of pay then no reduction shall occur."*

[5] The argument made for Mr Mauheni and Mr Fainuu is that they were directed to different work as provided for in clause 6.2 and should not have had their pay reduced. They claim the losses they have incurred as a result of the drop in their pay as well as $5,000.00 each for hurt and humiliation arising out of what has occurred.

[6] The respondent denies that it directed the two men to perform other work pursuant to clause 6.2. Bilfinger says that the two men moved to the new roles by choice as an alternative to redundancy. It says that if they had declined the new jobs on the terms offered, their employment would have been terminated on the grounds of redundancy with the payment of redundancy compensation pursuant to clause 34, which provides:

> *"34.1 Subject to clause 34.2 below, redundancy is a situation where an employee's employment is terminated by the employer, the termination being*

[1] At the material time this was *Bilfinger Berger Services (New Zealand) Limited Employee's [sic] NAWUNZ Collective Agreement 1 March 2009-28 February 2010.*

attributable, wholly or mainly, to the fact the position filled by the employee is or will become superfluous to the needs of the employer…

34.5 Where practicable, employees with similar and appropriate skills will be offered the opportunity to be employed to [sic] *another position in the company."*

Issues

[7] The issue for determination in this case is whether Mr Mauheni and Mr Fainuu did in fact agree to move to new jobs on lower pay. If they did not then the question of remedies will also arise.

(i) The alleged agreement

[8] On 5 June Peter Batterton, Operations Manager of North Shore Services Water Department met with the applicants individually (and with another of their workmates) to tell them that it was proposed to disestablish their jobs. He also presented them with a letter (dated 3 June) which advised them:

"Where possible staff will be given the opportunity to redeploy to other departments within the Company."

[9] The men were given until 10 June to present feedback. Mr Batterton then met with each of them again. Neither had any suggestions to make and Mr Batterton proceeded to discuss alternative positions which were available in the Waste Water and Storm Water departments. Mr Batterton's evidence was that he told the men:

"if they were to accept a position in the Waste Water or Storm Water departments their terms and conditions of employment would change. In particular, I told them that they would no longer be entitled to a vehicle and the wage rate would be less than the wage rate for a Water Serviceman.

We also discussed what redundancy pay they would be entitled to if they decided not to accept the alternative position …"

[10] Mr Batterton told the Authority that the applicants expressed concern about a possible decrease in their pay rate and the loss of use of work vehicles. Nonetheless he said they both indicated that they did not want to take redundancy.

[11] After the meeting, Mr Batterton discussed the applicants' concerns with Mr Connolly (Business Unit Manager, Water and Drainage Operations) and Mr Coe (NZ Operations Manager.) He was authorised to offer to secure the current pay rate of the two men for four months if they would accept the alternative positions.

[12] On or about 12 June (a Friday) Mr Batterton met with each of the men a third time. His evidence was that he confirmed the disestablishment of their old jobs and went over the possible opportunities for redeployment. He told the Authority that he did not put firm offers on the table at that stage but did outline the terms upon which offers were likely to be made (including the four month period on the current rate of pay.) He told the Authority that Mr Mauheni and Mr Fainuu confirmed that they did not want to take redundancy and wanted to pursue work with the company. He said he understood they had "agreed in principle" to the terms he had outlined and did so because they wanted a job badly enough to take a pay cut to keep it.

[13] Mr Fainuu had expressed a preference for a job in Waste Water. Because this required experience, the next step was for him to attend what Mr Batterton described as a "casual" interview with him and the supervisor involved. This took place in the week beginning 15 June. Mr Mauheni wanted to work in Storm Water for which no interview was required.

[14] Mr Coe told the Authority that he then informed Mike Anneff of NAWUNZ that the applicants had accepted alternative positions on a lower pay rate on the basis of a four month transition period on their current rates of pay. He told the Authority that Mr Anneff responded by saying that provided the men had agreed the union would have no issues with the arrangement.

[15] On 19 June (a Friday) the Human Resources Advisor, Fleur Tapper, wrote to Mr Fainuu as follows:

"CONFIRMATION OF TRANSFER DUE TO NSS WATER RESTRUCTURE

Further to your consultation with Peter Batterton and Chris Connolly; I am writing to formally advise you with effect from Monday 22 June 2009, you will be transferred from NSS Water to NSS Wastewater.

As discussed with you and in our letter dated 3 June 2009, the reasons for this are due to a downturn in the reactive response and planned maintenance activities during April and May 2009. This has resulted in 3 positions; [sic] *one which you currently hold is no longer required by the NSS Water department.*

Your new position will report to the NSS Wastewater Supervisor who will be responsible for detailing your specific areas of responsibility and authority. All other main terms and conditions will remain the same as per your NAWUNZ Collective Agreement.

You have been advised your existing hourly pay rate of $18.50 will be frozen for a period of 16 weeks from Monday 22 June to 11 October 2009 where it was drop [sic] *to $17.50 per hour which is the classification of "experienced labourer" within your NAWUNZ Collective Agreement.*

I trust the above is in accordance with your discussions with Peter Batterton and Chris Connolly. Should there be any items in this letter which need clarification please contact me."

[16] Ms Tapper wrote to Mr Mauheni in similar terms. It is not clear when exactly the two men received the letter. There was no evidence to suggest that they received it before starting their new duties on 22 June 2009. Mr Mauheni and Mr Fainuu both told me the supervisor simply sent them off on their new duties when they arrived on that Monday morning.

[17] Management received no feedback about these matters until 1 July when a NAWUNZ representative (not Mr Anneff) rang Mr Coe to protest the planned reduction in the wages of Mr Mauheni and Mr Fainuu. The matter was not resolved in discussions between the union and Bilfinger and on 11 October 2009, at the end of the

four month transition period, the two men had their pay cut. Mr Fainuu's rate was cut from $18.50 to $17.50 and Mr Mauheni's from $19.83 to $17.50.

[18] Bilfinger's view is that the applicants accepted the change on the terms offered. In support of this view it cites what Mr Batterton said about having "agreement in principle" at the meetings on or about 12 June meeting, as well as the fact that they started in the new jobs on 22 June without further comment.

[19] Mr Mauheni and Mr Fainuu say that when they started their new duties on Monday 22 June it was on the basis that they had already registered concern about the planned cut to their pay. Mr Mauheni told the Authority that at the meeting on 12 June he was angry and felt that it was unfair, after his long service, for him to be redeployed to this new job. However he said that when he cooled down he agreed to take the job and remarked that (in relation to the pay) he would "*see what happens after four months.*" Mr Batterton acknowledged in his evidence that Mr Mauheni did say something like this.

[20] Until he heard that Mr Mauheni recalled a meeting on or about 12 June, Mr Fainuu struggled to remember whether there had even been one, let alone what was discussed at it. His recall was so poor that his evidence added nothing to what Mr Batterton had told the Authority.

Determination

[21] I accept that Mr Batterton's recollection of the meeting of 12 June is largely accurate. It did not differ significantly from what Mr Mauheni remembered and as indicated already, Mr Fainuu could not give a credible account of the meeting at all. Nonetheless I am not satisfied on balance that the respondent has established that the applicants agreed to accept a pay cut.

[22] Although what Mr Batterton heard from Mr Mauheni and Mr Fainuu indicated that they "agreed in principle" such a general indication could not be binding in circumstances where they had not received a firm offer. Until the terms of the proposal were confirmed the applicants were not in a position to seek advice on it or respond to it.

[23] As for the proposition that the letter of 19 June contained an offer which was accepted by conduct, it is argued for the applicants that the letter "*is very clear that the Company is not relying on agreement from the employees that they would move to the new duties.*"

[24] I accept this submission. The contents of the letter are not framed as an offer. Even if they were, I note also that it was not certain that Mr Mauheni and Mr Fainuu received it before starting work on the Monday. Neither of them recalled this and the respondent witnesses had no knowledge as to whether they did or not.

[25] Bilfinger has made much of the fact that the union did not contact Mr Coe until 1 July to protest what was being done. I do not accept however that this was a serious delay. Given that the letter was only written on Friday 19 June, the earliest the two applicants are likely to have received it was Monday 22 June. Between then and Wednesday 1 July the two union members had first to put their concerns to the union before the union took steps to follow up with the respondent. It is entirely credible that this could have taken six working days.

[26] In summary, the respondent has not established that there was agreement to move to new positions on new terms.

(ii) Remedies

[27] As noted already, the submission for the applicants is that without their agreement, the 'transfer' amounts to a direction under clause 6.2 and so cannot be accompanied by a reduction in pay. It is also asserted that because the pay system in the collective agreement is skills based a change of duties cannot, by itself, justify a change in pay. In support of this submission the applicants rely on Clause 13.2 which provides:

> "*The duties of skill based hourly paid employees shall include any work required in connection with the business of Bilfinger…*"

[28] The respondent says that what happened here is something more than the sort of variation in duties which might be envisaged pursuant to clauses 6.2 or 13.2. It says the applicants' positions were disestablished leaving them facing potential redundancy. As an alternative, they were offered what amounted to redeployment (in terms of clause 34.5) to new positions, but in acknowledgement of the fact that the positions were at a lower rate of pay, the option of taking redundancy pay was left open to them also.

[29] The collective agreement does base pay increments on skill levels and allows flexibility in the deployment of staff. Nonetheless it also retains the notion of a "position" along with the notion of such a position becoming redundant. I accept that the situation in this case was one where positions became redundant and (as the respondent asserts) clause 34 applied rather than clause 6.2.

[30] It is also argued for the applicants that Bilfinger was not entitled to rely on clause 34.5 as a basis for redeploying staff to lower paid positions. Were Bilfinger seeking to do so without consent, this argument would have some force. That is not however what the evidence indicates. The respondent acknowledged that the men were entitled to decline the new roles without losing their entitlements to redundancy compensation.

[31] I am satisfied that it was legitimate and reasonable for the respondent to put two options to the men: either take redundancy under the terms of the collective agreement or accept a new role on different terms. Had the offer been properly put to the two men (preferably in writing) and time allowed for them to consider it and seek advice before responding there could have been no criticism of the actions of the respondent.

[32] To the extent that these things were not done, Bilfinger's actions were not those of a fair and reasonable employer, and have led to a situation where it has not been possible to establish that the applicants accepted the new roles on agreed terms.

[33] This conclusion leads me to adopt the following approach to remedies. The respondent remains entitled to put before Mr Fainuu and Mr Mauheni the same two choices that were available on 19 June 2010: redundancy in terms of the collective

agreement, or ongoing employment on altered terms. Meanwhile, the applicants are entitled to reimbursement of the losses they have incurred to date.

[34] The respondent is therefore ordered to make the following payments:

i. to Mr Mauheni, the sum of $2.33 per hour for every hour worked between 11 October 2009 and the date of confirmation of new terms of employment or the date of redundancy, whichever applies, and

ii. to Mr Fainuu, the sum of $1.00 per hour for every hour worked between 11 October 2009 and the date of confirmation of new terms of employment or the date of redundancy, whichever applies.

[35] Should any issues arise in relation to calculation of quantum, the parties have leave to apply to have that issue determined.

Costs

[36] This issue also is reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority