IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 166/10
5152705

	BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INC, IMMO BEIJERLING & ORS, applicants
	AND	ABB LTD respondent
Member of Authority:	James Wilson	
Representatives:	Lou Yukich for the applicants Gillian Service for the respondent	
Investigation Meeting:	9 November 2009 at Rotorua	
Submissions received:	19 November 2009 from the applicants 4 December 2009 from the respondent	
Determination:	12 April 2010	

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] In an amended statement of problem the applicants have raised two separate problems:

(i) That the respondent, ABB Ltd. (ABB), has not complied with section 4 of the Employment Relations Act 2000 (the Act) by not consulting with and not providing relevant information to the Eastern Bay Independent Industrial Workers Union (EBIIWU/the Union) prior to the decision to terminate the employment of Union members;

and that ABB did not comply with clause 27 of the relevant collective employment agreement (cea) in that they did not notify and did not consult with the Union prior to the issue of termination notices to the Union's members;

and that ABB did not pay redundancy compensation in accordance with the cea to members of the Union employed by ABB to provide maintenance services at the Carter Holt Harvey Ltd Tasman Pulp Mill, Kawerau.

(ii) That the second, third and fourth respondents, Immo Beijerling, John Young and James Berryman each have a personal grievance against ABB Ltd in that:

- they were unjustifiably dismissed by ABB because ABB failed to advise the Union in accordance with its duty under clause 27 of the cea and under s.4 of the Act prior to issuing notices of termination of employment; and
- failed to pay them redundancy compensation
- failed to consult with them or the Union, and
- failed to give one months notice to Mr Young and Mr Berryman.

[2] In her final submissions Ms Service summarises, from ABB's perspective, the issues in dispute as being:

(a) whether ABB complied with clause 27 of the expired collective agreement between ABB and the Union;

(b) whether Mr Beijerling, Mr Young and Mr Berryman were justifiably dismissed by ABB on the grounds of redundancy; and

(c) whether ABB has complied with its duty of good faith.

The historical background

[3] In September 2004 ABB signed a contract for the provision of maintenance services at the Carter Holt Harvey Ltd (CHH) Tasman Mill at Kawarau. (the commercial contract) That contract had a five-year term expiring on 1 December 2009.

Termination of the commercial contract

[4] At 1 p.m. on Thursday, 5 February 2009 ABB's chief operating officer Mr Grant Gillard met with senior managers of CHH. At this meeting Mr Gillard was advised that CHH had decided to terminate the ABB contract for maintenance services at the Kawarau Mill. Mr Gillard says, and I accept, that prior to the meeting he had no indication from CHH that they intended to terminate this contract. Mr Gillard was given written notice that the termination of the contract would take effect from 7 am on 10 March 2009. The following day, Friday 6 February, was a public holiday. At 9.00 am Monday 9 February, Mr Gillard advised the ABB Tasman site manager, Mr Jansonius, of the termination of the contract with CHH. At 9:30 Mr Gillard and Mr Jansonius met with other senior ABB staff to discuss how best to tell ABB staff about CHH's decision. As a result of this discussion a meeting was arranged for 11 a.m. that morning with as many of the ABB staff as were available At this meeting Mr Jansonius advised staff of the termination of the commercial contract. He also advised them that CHH had awarded a new contract to Transfield Services Pulp and Paper Ltd. (TSNZ) and the TSNZ would be contacting staff regarding employment opportunities.

[5] On 10 February 2009 Mr Simon Batters, an employment consultant, met with Union delegates, Mr Gardner and Mr Beijerling, to discuss the termination of the commercial contract. It is relevant to note that the Union are adamant that these delegates were not authorised to represent the Union for the purposes of fulfilling the consultation requirements of either the cea or the Act. Only the Union Secretary, Mr Yukich, the Union says, had this authority. There is some dispute regarding the sequence of events and who instigated the communication but it is clear that the first communication directly with Mr Yukich was a telephone conversation between Mr Batters and Mr Yukich on 10 February. Mr Batters says that on that same day he e-mailed Mr Yukich a copy of a letter to be given to all employees the following day.

[6] On 11 February 2009 Mr Jansonius wrote to all staff formally advising them of the termination of the commercial contract and advising them of the termination of their employment with ABB with effect from 10 March 2009 *subject to no suitable redeployment options being agreed before that date.* The letter also advised staff that *ABB had been informed by CHH of the intention for all CEA and most IEA staff to transition to (TSNZ) on substantially similar terms and conditions.*

For completeness I should note that not all staff were able to attend the meeting on 9 February 2009 and, despite being couriered to all absentee staff on 11 February 2009 the letter from Mr Jansonius took several days, possibly due to absence on leave, to reach at least one staff member.

Communications with the Union

[7] On 18 February 2009 Mr Yukich wrote to Mr Jansonius making a formal request for consultation in terms of clause 27 of the relevant collective agreement and in another letter sent on the same day requested information from Mr Jansonius *relevant to the continuation of the employee's employment, about the decision including but not limited to alternative positions within the ABB group of companies including any available positions at the Carter Holt Harvey Ltd Kinleith mill as well as any agreement arrangement or undertaking that might impact upon the future or continued employment of the affected employees.*

[8] On 20 February 2009 Mr Jansonius wrote to Mr Yukich setting out the steps ABB had taken in respect to consultation and continuing:

> *As set out in the 11 February letter, CHH have informed ABB that it is intended that all employees employed on the collective agreements will be offered employment with TSNZ.... I note your request for consideration of redeployment options with ABB. ABB is happy to meet to explore these issues. However, our strong view remains that the best employment opportunities for our employees/your members is remaining at Tasman with TSNZ Pulp and Paper. A delegates meeting will be arranged where these matters can be addressed. You are of course welcome to attend. In the meantime, please advise if any of your members are interested in redeployment within ABB and if so, how many in order that we can identify ABB vacancies.*
>
> *In the event that an offer from TSNZ Pulp and Paper is made to your members in accordance with the last paragraph of clause 27.2 of the EBIIWU collective agreement, no redundancy compensation will be payable. ABB will consider any request from an employee to terminate employment prior to the expiry of the notice. (and any associated entitlements) on an individual case by case basis. However, as already noted, payment of any redundancy compensation*

> *will depend on whether the employee has been made an offer in terms of the final paragraph of clause 27.2*
>
> *….*
>
> *…. TSNZ have informed us that offers will be made by 2 March. If any of your members do not receive such an offer, we will schedule another meeting to address options for these employees at that time.*

[9] Although there is some disagreement regarding which of the Union's members were interested in redeployment to other positions with ABB, Mr Jansonius says that he was only aware of two members who sought redeployment.

Offers of employment with TSNZ

[10] On or about 27 February 2009 TSNZ made offers of employment to the effected ABB staff. These offers were said to be *on the same or similar capacity on similar terms and conditions of employment and will recognize your prior service with ABB Ltd.* The letter went on to discuss what was happening with the renegotiation of the relevant cea and said:

> *Agreement has not been reached with the union in regard to the new collective agreement but we are hopeful this will be reached within a short period.*

And

> *The terms and conditions of this employment, personal to you, as detailed in this offer comprise part of your terms and conditions of employment. Additional terms and conditions of employment include the terms and conditions contained in the proposed TSNZ and EBIIWU collective agreement.*

The letter indicated a commencement date at TSNZ as *7a.m. 10 March 2009*, and that TSNZ *agreed to treat (the individual employee's) employment as continuous and that all holiday and leave entitlements and any other employee benefits…will be recognized by TSNZ.* The letter also made it clear that:

> *Your remuneration entitlements will be the same as the remuneration entitlements applicable to your employment with ABB Ltd as at 9 March 2009*

However in accepting the offer of employment the employee was also required to sign a waiver in the following terms:

> *By accepting this offer I waive any entitlement which I might have to redundancy compensation or notice, or pay in lieu, which waiver is given in favour of ABB Ltd., and I acknowledge that I have had an opportunity to take advice as to the meaning and effect of my proposed terms and conditions of employment with the company, which I understand is conditional on my giving this waiver in favour of ABB Ltd.*

[11] All of the Union's affected members eventually accepted the offer of employment from TSNZ. However many, including the second, third and fourth applicants attached the following statement to their acceptance letters:

> ***Undue influence and economic duress***
> *At the time of entering into this employment agreement with TSNZ Pulp & Paper Maintenance Ltd. (TSNZ), and in respect of my agreement to the waivers sought by TSNZ as a condition of the employment offer made to me by TSNZ;*
>
> *I was induced to enter into agreement to the waivers by undue influence in the nature of economic duress in breach of s68(2)(c) Employment Relations Act 2000 and have as a consequence been disadvantaged.*
>
> *The seeking of waivers in this manner is objectionable and unconscionable conduct by TSNZ and has excessively impaired my consent.*
>
> *But for the waivers sought being a condition of my employment with TSNZ I would not have otherwise agreed to them and do not enter into this agreement freely.*

[12] The second third and fourth applicants position in respect to the acceptance of employment with TSNZ is set out succinctly in Mr Beijerling's statement of evidence:

When (union) members approached ABB prior to 10 March seeking an estimate of their redundancy entitlements they were told that there will be no redundancy compensation for anyone, whilst TSNZ told EBIIWU that a condition of employment with TSNZ was a written waiver by the prospective employee of their right to redundancy compensation and notice.

It doesn't make sense that TSNZ required a waiver in favour of ABB whilst ABB is saying we have no right to redundancy compensation.

I considered that the requirement of a waiver of rights to a very significant feature of my terms and conditions of employment, sought by TSNZ in favour of ABB, renders the terms and conditions of employment offered to me by TSNZ to be dissimilar to my terms and conditions of employment with ABB, i.e. they are less favourable.

I did not enter into the agreement with TSNZ freely and would not have otherwise agreed to the waiver ***but for*** *its being a condition of my securing employment with TSNZ. In effect we have had our employment transferred into a holding company which is a wholly-owned subsidiary of TSNZ and as a consequence will never receive the benefits of redundancy in any further restructure of TSNZ business. It is most probable that if I had received my redundancy compensation that I would not have taken up employment with TSNZ. (Underlining added)*

It is the norm for contract employees to receive redundancy compensation at the conclusion of a long-term contract.

[13] I have deliberately underlined the comments in Mr Beijerling's evidence regarding the possibility of being denied redundancy payments should TSNZ undertake a consequent restructuring of its business. It seems that this concern was at the root of the employee's suspicion regarding the termination of the commercial contract and the awarding of a new maintenance contract to TSNZ. Despite Mr Yukich's attempts to convince me otherwise, I have seen no evidence that such a Machiavellian course of action formed any part of the motivation for the rearrangements by CHH of its maintenance contract arrangements at the Kawerau

mill. It is unfortunate that this suspicion has caused obvious concern and stress to the employees concerned. Under other circumstances while any upheaval such as this would have caused some stress, the employees would at least have had the reassurance that their employment, on the same terms and conditions and recognizing previous service <u>including future redundancy entitlements,</u> was assured.

[14] While there is no evidence of any ulterior motivation driving this rearrangement of maintenance arrangements at the Kawerau mill the applicants have raised a number of important questions which must be addressed.

Good faith provisions

[15] The Union says that ABB have breached its duty of good faith set out in section 4 of the Act and seek a penalty for that breach in terms of section 4A. The relevant parts of section 4 state

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.

…

…

(2) The employment relationships are those between--

(a) an employer and an employee employed by the employer:

(b) a union and an employer:

(c) ….

…

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

(a) ...

(b) ...

(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees collective employment interests, including the effect on employees of changes to the employer's business;

(d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business;

(e) making employees redundant;

(f) …

[16] Section 4A of the Act provides that a party who fails to comply with the duty of good faith may be liable to a penalty if:

a. the failure is deliberate, serious, and sustained;

The Collective Employment Agreement

[17] The Union also says that ABB have failed to comply with the various requirements of the cea as to consultation and that, contrary to ABB's view, the employees are entitled to receive redundancy compensation. A number of sections of the collective agreement are relevant.

25 Termination of Employment

Termination of Employment -Notice

One pay period’s notice in writing from either party is required. Where the employee gives more than one pay period notice, the employer shall not be required to accept such notice or be liable to pay more than one pay period in lieu where the employer does not require the employee to work out the notice period.

…

Redundancy

Redundancy is a condition in which the employer has an employee, or employees, surplus to requirements because of the discontinuation of the whole or any part of the activities associated with the employer's operations resulting in a permanent reduction in the number of permanent employees (but

does not include a technical redundancy arising from restructuring of the business .

Ineligibility for Redundancy Compensation

…

Procedure & Notice

Where the employer identifies the need for redundancies, the matter shall be discussed over a period not less than two weeks with the appropriate union/delegates.

If agreement cannot be reached the employer shall make the final determination.

If this involves redundancy, further discussions shall take place regarding the persons involved, which shall involve consideration of several options including voluntary redundancy, with the "last on, first off" process being the last resort.

These discussions shall also be limited to a period of not less than two weeks.

Where the employer identifies the need for restructuring of labour, the matter shall be discussed over a period of not less than two weeks with the appropriate union/delegates.

If agreement cannot be reached, the employer shall make the final determination.

The employer shall then notify in writing the employee or employees to be declared redundant.

This shall not preclude any redundant employee disputing this through any legal procedure.

One month's notice in writing shall be given to any employee whose employment with the employer is to be terminated by way of redundancy.

…

…

Criteria for selection of redundant employees

….

Redundancy Compensation

…

Technical Redundancy

27.2 Employee Protection Provisions

The purpose of this provision is to provide protection for the employment of employees if their employer's business is restructured and shall be construed to this end.

If the employer proposes to sell or otherwise restructure its business (so that its business, or some aspect of it, is undertaken by another party) the employer will negotiate and agree the arrangements with the new employer, while at all times respecting the right of the union(s) to represent its members **.**

Such arrangements shall form a part of any sale or transfer agreement.

In respect to those matters directly affecting the employee's employment arising from the proposed restructuring the employer will, prior to the restructuring, ensure that the union has an opportunity to meet with the proposed employer to discuss those matters

No redundancy compensation shall be paid to an employee if the employee's employment is terminated due to redundancy as a result of a restructure, amalgamation, outsourcing or sale or transfer of any part of the employer's business, if the new employer, the amalgamated company, or the person or entity acquiring the business offers the employee employment in the same or a similar capacity on similar terms and conditions of employment with recognition of prior service.

The applicant's argument.

[18] Mr Yukich, for the applicants, has put forward a series of arguments. For the sake of brevity I have attempted to précis these arguments but apologize to Mr Yukich if I have not done them justice. In summary Mr Yukich says:

(i) The events leading to the termination of the employment of the Union members are not *technical redundancies* and did not *arise from a restructuring of ABB's business***.** The Unions members were therefore redundant and entitled to redundancy compensation.

(ii) There was no consultation with the Union or the affected employees in terms of section 4 of the Act.

(iii) The consultation process set out in clause 27 of the cea was not carried out. This process required that when the employer identified the need for redundancies the matter would be--

- *discussed over a period of not less than two weeks with the appropriate union/delegates*
- *further discussions……. limited to a period not less than two weeks*

And

> *One month's notice in writing shall be given to any employee whose employment with the employer is to be terminated by way of redundancy.*

This provision, the Union argues, requires that after a period of consultation of at least one month (two weeks plus 2 weeks) a redundant employee will be given four weeks notice of the termination of their employment.

(iv) The letter to the Union's members dated 10 February 2009 described the circumstances and justification for termination as being:

> *Because… there will be a discontinuation of activities associated with ABB's operations and a permanent reduction in the number of permanent employees is the likely result.*

These are the words of the collective agreement, Mr Yukich argues, that describe redundancy. These letters did not distinguish between redundancy or technical redundancy as justification relied on upon by ABB and therefore preclude ABB's subsequent reliance on technical redundancy to exclude payment of redundancy compensation.

(v) In any event ABB was neither restructuring its business (as defined in part 6A of the Act) nor was it transferring anything to TSNZ, therefore clause 27.2 did not apply.

(vi) It is disingenuous of ABB to call these events restructuring, and to rely on clause 27.2 of the cea to avoid paying redundancy compensation when they clearly defined similar events, in October 2008, as being other than restructuring.

(vii) The requirement for employees to sign a waiver of *entitlement to redundancy compensation and forgo notice or payment in lieu of notice from ABB* as a condition of employment with TSNZ amounted to an individual variation of terms and conditions of the cea, was a reduction in those terms and conditions, was not agreed and was procured under duress (as set out in the **Statement of Grievance for Unfair Bargaining** signed by individual employees set out in paragraph 11 above).

ABB's response

[19] On behalf of ABB Ms Service has provided me with extensive submissions covering all the key areas of concern. Again I have taken the liberty of summarizing her arguments and again I apologize if I have not done these justice.

Compliance with the collective agreement

[20] Ms Service submits that ABB were faced with a situation that was not contemplated by the provisions of the collective agreement. She says that *ABB was unexpectedly presented with a fait accompli and to follow the consultation processes set out in clause 27 would have been a pretence and to no effect and would have caused confusion.* She argues that ABB did everything in its power to comply with the terms of clause 27 including:

- Within two hours of ABB site management hearing of the termination of the current commercial contract (on 9 February 2009) they arranged a site meeting to brief all available employees.
- ABB disclosed to employees all the information they had.
- On 10 February ABB met with the delegates of the unions.
- Also on 10 February Mr Batters spoke to Mr Yukich and advised him of the loss of the commercial contract and on the same day e-mailed Mr Yukich a copy of the letter ABB proposed to send to all employees the

following day. Mr Yukich did not make any comments regarding this letter.

- On 11 February 2009 ABB wrote to all the affected employees formally giving them one month notice of the termination of their employment. This letter included the information that it was CHH’s intention *for all CEA and most IEA staff to transition over (to TSNZ) on substantially similar terms and conditions*
- Employees were invited to consider the redeployment within ABB but ABB emphasized that employee's best opportunity for employment was to stay at the Tasman mill and accept offers of employment with TSNZ.

[21] Ms Service says that ABB's actions, when advised of the termination of the commercial contract, were heavily influenced by two factors -- the lack of warning and CHH’s assurance that TSNZ would make offers of employment to staff on substantially similar terms with continuity of service recognized for all employees.

[22] Ms Service rejects the argument that ABB failed to comply with its obligation to consult with the Union. She says that the union delegates, Mr Beijerling and Mr Gardner did not raise the question of representation at the meeting they attended on 10 February 2009. She says it was therefore reasonable for ABB to consider itself to be meeting with them as representatives of the Union as it had done many times in the past.

[23] Despite the Union’s assertion to the contrary Ms Service says that ABB did not withhold any relevant information.

Entitlement to redundancy compensation

[24] ABB says that the individual employees were justifiably dismissed on the grounds of redundancy and that, as a matter of contract, redundancy compensation is not payable because the technical redundancy provision in clause 27 applies. Ms Service submits that the technical redundancy clause was triggered when each of the individual applicants were offered employment by TSNZ. She accepts that the location of a technical redundancy clause in the cea does open up the argument put forward by the Union that the parties intended the clause only to apply to restructuring situations as defined in subpart 3 of part 6(c) of the Act. However she says such an

interpretation is inconsistent with the wording of the clause itself. She goes on to submit:

> *... it is more likely that the location of the clause is simply an error and it should be located between the heading "technical redundancy" and the heading "employee protection provision" where they appear on page 27 of the cea.*

And:

> *Any rational reading of clause 27 must conclude that the parties did not intend for technical redundancy clause to only apply in the restrictive statutory defined situations of contracting out or sale or transfer... such an interpretation renders the references to amalgamation, outsourcing, sale or transfer redundant……. Indeed, the clause uses common technical redundancy wording that features in many employment agreements drafted prior to 2004.*

Breach of good faith provisions?

[25] ABB, Ms Service says, acted in good faith at all times following CHH's decision to terminate the commercial contract. In particular ABB conducted itself in an open honest and communicative manner consistent with its good faith obligations. ABB attempted to meaningfully consult about redeployment to the extent it was able. However, she says ABB's efforts were frustrated by the Union which chose to exert pressure on ABB through litigation and industrial action. ABB has consistently focused on trying to make the best of the situation to ensure that its employees still had work going forward, albeit with one of its competitors.

Discussion

Was there a conspiracy?

[26] During the course of my investigation into the applicants' claims in this matter the Union has implied that there has been collusion between CHH, its subsidiary TSNZ and ABB Ltd. The Union has implied that ABB must have known that CHH were intending to terminate the commercial contract well before they were formally advised in early February 2009 and that the time frame was set deliberately kept to a minimum to avoid ABB having to carry out proper consultation with its employees/union members. The Union also suggests that by requiring employees to waive their "entitlement" to redundancy compensation as a condition of accepting

employment would somehow negate the right to redundancy compensation should TSNZ subsequently make them redundant.

[27] There is absolutely no evidence of any such conspiracy or collusion and I completely reject these suggestions. It is regrettable that the employees and the Union developed these suspicions. They added a layer of mistrust between the parties which, at times, hindered communication and added unnecessarily to what was already a difficult and stressful situation for all concerned.

[28] In any event the employees concerned when employed by ABB Ltd. and it is ABB's actions that are under scrutiny. For ease of analysis it is convenient to group those actions under three headings:

(i) Did ABB comply with its obligations in terms of the applicable collective employment agreement?

(ii) Did ABB comply with its duty of good faith in terms of section 4 of the Employment Relations Act?

(iii) Are the second third and fourth applicants entitled to receive redundancy compensation, and/or

(iv) Are the second third and fourth applicants entitled payment in lieu of notice?

(v) Were the second third and fourth applicants unjustifiably dismissed?;

Did ABB comply with the collective employment agreement?

[29] In this regard I must agree with Ms Service. The cea clearly did not envisage the circumstances which were thrust upon ABB when CHH advised them of the termination of the commercial contract. This was not a state of affairs invited by ABB nor one that they anticipated. This was not a question of ABB *identifying the need for redundancies* nor *identifying the need for restructuring*. There was simply no opportunity to carry out the procedures set out in the cea. **Under these circumstances ABB cannot be said to have breached the terms of the cea.**

[30] Even if my analysis of the provisions of the cea is not correct and ABB can be said to have breached them, the appropriate remedy for such a breach is to award a penalty. Such penalty would only be appropriate if this breach had been deliberate. There is no evidence to this effect.

Did ABB fail to act in good faith?

[31] ABB found itself in what can colloquially be described as "between a rock and a hard place". It made every effort to be *open and communicative* and to act in what it considered to be the best interests of its employees. It certainly did not intend to mislead or deceive either its employees or the union. Section 4(4) of the Act required it to consult with its employees and the union regarding any *proposal... that might impact on the employees... including a proposal to contract out work... or transfer all or part of the employer's business.* It would have been pointless, and misleading, for ABB to do anything other than it did -- advise its employees and the Union that had lost the commercial contract with one months notice and that they would, in all probability be being offered employment with TSNZ on the same terms and conditions as they currently enjoyed including the recognition of their previous service. Section 4(4)(e) of the Act says that the duty of good faith applies to *making employees redundant.* **ABB were making employees redundant and, in my finding, their conduct was consistent with the duty of good faith.**

[32] Again if I am wrong in my analysis of how the duty of good faith should have been applied in the circumstances, the appropriate sanction for breach of that duty would be to award a penalty. Section 4A provides that a penalty may be awarded against any party who fails to comply with the duty of good faith if that failure was *deliberate, serious and sustained*. Any breach, had I found one, could certainly not be said to have been *deliberate* and no penalty would therefore be appropriate.

Are the second third and fourth applicants entitled to redundancy compensation?

[33] The applicants' entitlement to redundancy compensation turns on the question of not whether or not they were *technically redundant.* Mr Yukich has argued that the termination of the commercial contract CHH was not *a restructure, amalgamation, outsourcing or the sale or transfer of any part of the employer's business* and that they are not *technically redundant* and are therefore entitled to redundancy compensation. I do not agree. Part of ABB's business was to provide maintenance services at CHH's Kawerau mill. While not at the instigation of ABB this part of ABB's business was removed and a new contract awarded, for the same work, to TSNZ. The Pocket Oxford Dictionary defines *transfer* as:

> **a.** *convey, remove, or hand over (a thing etc.)* ***b.*** *make over the possession of (property, a ticket, rights, etc. to a person.*

By this definition part of ABB's business was *transferred* to TSNZ.

[34] The Union's second argument is that the requirement on employees to waive any entitlement to redundancy compensation or payment in lieu of notice from ABB was a reduction in their terms and conditions of employment. Ms Service suggests that to describe a waiver as a contracting out of, or a variation to an, employment agreement is a *mischaracterization* (by the Union). She has drawn my attention to the Court of Appeal decision in *Attorney – General v. Grant* [1998 3 ERNZ 259] and submits that this issue has been clearly determined by the Court of Appeal. While the facts in *Grant* are not entirely congruent with this case, the Court of Appeal said:

> *It is a mischaracterization to describe that* (the waiver) *as contracting out or variation of the collective employment contract. It was the acknowledgment by Mr Grant of the existing state of affairs. …… Mr Grant accepted that the appropriate contractual procedures had been carried out and that he was not entitled in that situation to a redundancy payment. It must also be treated as a waiver of any entitlement to redundancy he might otherwise have had.*

[35] I disagree with the Union. The waiver, in this case, was to any entitlement which (the employee) might have had. The employees concerned had already been told, correctly in my finding, that, if they were offered positions with TSNZ, whether or not they chose to accept them, they would not be entitled to redundancy compensation. Mr Beijerling, Mr Young, Mr Berryman were offered and, albeit under protest, accepted employment with TSNZ, *in the same or a similar capacity on similar terms and conditions of employment with recognition of prior service.* In fact they accepted positions which were exactly the same as their old positions on exactly the same terms and conditions including recognition of prior service. They are not entitled to redundancy compensation.

Are the second, third and fourth applicants entitled to pay in lieu of notice.

[36] The applicable cea provision says that:

> *One months notice in writing shall be given to any employee whose employment with the employer is to be terminated by way of redundancy.*

However this provision comes within the overall heading of redundancy and is preceded by the consultation provisions previously described i.e. where the employer identifies the need for redundancies there will be two weeks consultation with the Union followed by two weeks discussion regarding selection of redundant employees before notice of termination is given.

[37] Because of the circumstances there was no consultation process with the Union and no time (or indeed relevance) to discuss a selection criteria or process. ABB did give almost all of its employees' one months notice. (The single identified exception was the case of a particular employee who was away from home on leave at the time the letter of notification was delivered to his home address). I have already found that that the circumstances which ABB found itself in where not envisage or covered by the provisions of the cea. **It would be contradictory to now suggest that those provisions should be used to require ABB to pay the affected employees for a consultation process which they were not required, and in any event unable, to carry out.** I'm also conscious that all of the employees commenced employment with TSNZ immediately following the termination of their employment with ABB and did not as a consequence loose any remuneration**. It would be inequitable to require ABB to pay them again for time they have already been paid for.**

Where the second third and fourth respondents unjustifiably dismissed?

[38] It is well established that genuine redundancy is substantial justification for dismissal. However there is still an obligation on the employer, when making employees redundant, to treat the employee fairly and reasonably. Whether an individual employee can be said to have a personal grievance because they were unjustifiably dismissed (including for redundancy) is to be judged by the test set out in section 103A of the Act which requires the Authority to consider on an objective basis…

> *… whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[39] The applicable cea defines redundancy as:

> *A condition in which the employer has an employee, or employees, surplus to requirements because of the discontinuation of the whole or any part of the activities associated with the employer's operations resulting in a permanent reduction in the number of permanent employees (but does not include a technical redundancy arising from restructuring of the business)*

Although the headings in the cea are somewhat confusing the reference in this clause to *technical redundancy* clearly refers to a clause under the heading Employee Protection Provisions which says:

> *No redundancy compensation shall be paid to an employee if the employee's employment is terminated due to redundancy as a result of a restructure, amalgamation, outsourcing or the sale or transfer of any part of the employer's business, if the new employer, the amalgamated company, or the person or entity in acquiring the business offers the employee employment in the same or a similar capacity on similar terms and conditions of employment with recognition of prior service.*

[40] Mr Beijerling, Mr Young, Mr Berryman, the second, third and fourth applicants respectively, were *employees of surplus to (ABB's) requirements because of the discontinuation of the whole or any part of the activities associated with the employer's operations resulting in a permanent reduction in the number of permanent employees.* **They were redundant and I am in no doubt that this redundancy was genuine.**

[41] Section 103A requires that I judge ABB's actions in light of *all the circumstances at the time.* It is my finding that ABB's actions were in all the circumstances, *what a fair and reasonable employer would have done*. ABB took immediate action to communicate the situation to their employees, including the applicants, and genuinely believed that they were acting in their best interests in recommending that they accept the positions offered with TSNZ. Of course there was a financial motive -- not enforcing the technical redundancy provisions and allowing the affected employees to take redundancy compensation would have been expensive. However any employer is entitled, as one of the *circumstances*, to consider the financial impact of its actions on its business. As set out earlier in this determination ABB had no contractual obligation to pay redundancy compensation.

[42] I have found that Mr Beijerling, Mr Young, Mr Berryman, were genuinely redundant and the way in which ABB Ltd dealt with them during this process was *what a fair reasonable employer would have done in all circumstances.* **They were not unjustifiably dismissed and they do not have a personal grievance against ABB Ltd.**

Summary of findings

[43] By way of a summary of the findings set out above:

- **ABB did not breach the terms of the applicable cea; and**
- **even if I had found that ABB had breached the terms of the cea, I would also have found that any such breach was not *deliberate* and would not have imposed a penalty.**
- **ABB did not breach its duty of good faith towards either the Union or its members; and**
- **even if I had found that ABB had breached its duty of good faith I would also have found that that failure was not *deliberate* and would not have imposed a penalty.**
- **Mssrs Beijerling, Young and Berryman (the second third and fourth respondents respectively, are not entitled to redundancy compensation.**
- **Mssrs Beijerling, Young and Berryman are not entitled to payment in lieu of notice.**

- **Mssrs Beijerling, Young and Berryman were genuinely redundant and were not unjustifiably dismissed, do not have a personal grievance against ABB Ltd. and are therefore not entitled to the remedies they seek.**

Costs

[44] Costs are reserved and the parties are requested, in the first instance, to attempt to reach agreement. If they are unable to do so Ms Service, on behalf of ABB, may file and a submission in respect to costs within 28 days of the date of this determination. The respondents will then have 14 days in which to file and serve a response.

James Wilson
Member of the Employment Relations Authority