**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2011] NZERA Auckland 145
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| | BETWEEN | PULP AND PAPER INDUSTRIAL COUNCIL OF THE MANUFACTURING AND CONSTRUCTION WORKERS UNION<br>Applicant |
| | AND | NORSKE SKOG TASMAN LIMITED<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Kathryn Beck for Applicant<br>Kylie Dunn for Respondent |
| Investigation Meeting: | 15 March 2011 |
| Determination: | 11 April 2011 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] On behalf of members working on paper machines at the Kawerau site of Norske Skog Tasman Limited (the company), the Pulp and Paper Industrial Council of the Manufacturing and Construction Union (the union) sought declarations and orders about a company proposal and decision to reduce the number of Machine Hall Assistants from 10 to five.

[2] The problem was really a dispute about what certain terms of the applicable collective employment agreement (the CEA) meant and what the company might or must do when it wanted to reduce the number of jobs in a particular role. It also included questions about whether the parties had met the statutory good faith

requirements in consultation and their dealings with one another over the changes sought by the company.

[3] At its broadest the union's argument was that the company was seeking to make changes with only consultation but those changes would mean the company could not meet the requirements of other terms of the collective agreement. As a consequence of how it saw the effect of the proposed changes, the union argued its members would first have to agree to any such changes, not just be consulted. The union contended it could not participate in the consultation because the company was taking the wrong approach and, further, the consultation process that the company went ahead with anyway was faulty and misleading.

[4] The company's argument, again at its broadest, was that the collective agreement specifically allowed for changes to the number of Machine Hall Assistant (MHA) jobs provided the company followed requirements for consultation and the agreed voluntary redundancy and redeployment processes (clauses 17, 18 and 19 of the CEA). The company contended that it went ahead with necessary consultation as best it could in light of union intransigence, provided the potentially affected employees with all necessary information and opportunities to comment, and did so without misleading the union or its members about the proposal and or its effects.

**The investigation**

[5] The union's application for declarations and orders was made when the company was near the end of its consultation process. By the time the parties were heard in an investigation meeting held on an urgent basis, the company had advised that it had decided to reduce the number of MHA jobs from ten to five. It was yet to consult the affected workers and their union representatives on how that decision would be implemented

[6] For the purposes of the Authority's investigation written witness statements were lodged by the union's senior site delegate Tane Phillips, the union's secretary Harold Appleton and the company's production manager Kim Brown. The parties had also provided relevant documents including the CEA and correspondence between the union and the company. The witnesses, under oath or affirmation,

affirmed their statements and answered questions from the Authority member and the parties' representatives. The representatives gave oral closing submissions speaking to written synopses.

[7] As allowed under s174 of the Employment Relations Act 2000 (the Act) this determination does not set out all the information and background canvassed by the witnesses in their written and oral evidence or the full submissions of the representatives. Although there are important points in dispute, the sometimes-intricate factual background is well known to the parties. Rather than set out that material in detail, this determination is limited – as much as it can be – to necessary relevant findings of fact and law with conclusions on the issues the Authority considered required determination in order to dispose of the matter.

**Issues**

[8] The issues necessary for determination by the Authority were:

(i) Whether the company was prohibited from reducing the number of MHA roles unless the union agreed to the change; and

(ii) Whether the company breached its consultation obligations; and

(iii) Whether the company breached its good faith obligations; and

(iv) If the company did fail to meet its obligations, what remedies were required (with the union seeking declarations, an injunction and compliance orders)?

**Did the CEA prohibit the change proposed?**

[9] The terms of the CEA are to be interpreted objectively, not as the parties might subsequently and subjectively say they intended the words to be read. The words should be taken to mean what a reasonable person in the field, knowing all the background, would take them to mean. The interpretation should fulfill the apparent purpose or intent of the agreement.[1]

[10] In this case the parties had expressly agreed the company could review and change the number of MHA roles. It was an exception to provisions that fixed

[1] *Association of Staff in Tertiary Education Inc v Hampton* [2002] 1 ERNZ 491, 499-500 (EC).

manning levels for other roles for the duration of the CEA. Terms on manning of the paper machines fixed the number of positions in the roles of machine tender, back tender, stock tender, winder operator, winder assistant and machine assistant unless there was a "*major change event*" such as an asset closure or sale of the company. The exception for MHAs was expressed this way:

> *1.3 After 31 December 2009 the Company may review the Machine Hall assistant role and clauses [17], [18] and [19] will apply as applicable.*[2]
>
> *1.4 Any change to manning levels that occurs between 31 December 2009 and 11 May 2011 for reason other than a major change event will* ***only relate to the Machine Hall Assistant role****. (****my emphasis)***

[11] Accordingly the company was entitled to seek to review the MHA role when it did – and to propose, as a result of that review, a reduction in the number of MHA jobs. However, and contrary to the company's submission, the company did fetter its rights to conduct that review and propose changes. Those fetters included:

(i) Not being able to implement a change inconsistent with the agreed rules and guidelines for the paper machines roster set out in Schedule 5 of the CEA, unless such a change was agreed with the union.

> *9.5 … (a) The parties agree that the Mill five shift roster in itself and the rules and guidelines attached as Schedule 5* ***will only be changed by agreement*** *between the Company and the Union. Representatives of the Company and the Union will meet as needed to review the roster, with a view to reaching agreement on any proposed changed.*

(ii) Taking account of 'quality of life' matters for workers, as well as operational and competitive business requirements, when considering such changes because such an assessment was required by the stated intent of the CEA.

> *7.1 The intent of this agreement is to create a mutually beneficial relationship between the Company and the employees based on shared values and the achievement of our goals. We share responsibility for running our business successfully to maintain its competitiveness by producing a cost competitive product that meets the requirements of our*

[2] The clause numbers are changed to correct what the parties agreed was a typographical error in the CEA.

> *customers and enhances the continued operation of the Mill for the long term, while taking into account the importance of quality of life for all employees.* …

(iii) Consulting, in good faith, with the union and affected employees about any proposed changes before the final decision was made, with the express objective being to "*reach agreement on any proposed change and how it should be introduced*" (clause 17.2).

(iv) Providing all relevant information about the basis for any such proposal, with a process to explore alternatives and sufficient time for the union to respond.

(v) Acting throughout in good faith, that is consistently with the requirements of s4 of the Act not to do anything directly or indirectly likely to mislead or deceive the union and its members.

[12] The union contended that the company fell at the first two of these hurdles because a reduction of MHA roles from 10 to five would mean that the company could not meet a Schedule 5 rule on how often paper machine crew members were on the on-call roster. The provision explains its operation:

> *On call*
> *… a call in roster will be maintained where employees who are on their first two days off may be called in to cover for sickness, bereavement leave, no shows. Employees are required to be available and on call for one hour before the start of the shift and one hour after.* …
> *… The 7 operators in the line will be part of the call out roster, and the call out frequency will be 1:7 once the one up training is completed (estimated Dec 2008).*

[13] The crew work a four-days-on-and-four-days-off rotating roster. It is the first two days of the 'off' period that are subject to the 'on call' provision – which means the worker must be available by telephone at two periods in both of those two days, once around the time of the morning shift starting and again around the afternoon shift starting time.

[14] Initially the union's argument about the company's ability to operate with a 1:7 on-call roster appeared to relate to the mathematics of meeting that ratio with five MHA workers instead of ten. However I understood the company's submission to be that the ratio could be met because it related not to the number of MHA roles but the

number of crew on a machine, who each take a turn being on the on-call roster. On that basis the company would still have sufficient workers to ensure that the number of times a worker has to take their place on the on-call roster would not increase as a result in the change of numbers of MHAs – that is the company could comply with the 1:7 ratio set in the Schedule 5 'rule'.

[15] The union's point was a more subtle one. As Mr Phillips explained, when he is on the on-call roster, he must cover for absences of any of the seven crew working on that machine on each shift, that is seven in the morning and seven in the afternoon. The proposed reduction of MHAs to five meant an MHA on duty on a particular shift would have to work across two machines with both crews. So when that MHA took his turn on the on-call roster, he would have to cover not just for the prospect of one of the seven crew not turning up to work, but the prospect of one in 14 workers – that is the crew on not just one but both machines. Simply put, the odds of being called in double because that MHA is covering for the potential absence due to sickness or bereavement and 'no shows' of twice as many people.

[16] The MHA role had also enabled the company to provide cover for other operators wanting to take annual leave, including accumulated "*historical leave*" which they are being encouraged to take in order to reduce the company's overall liability. On that basis the union contended not only MHAs but also all other operators on the machines are affected by the change. With fewer MHAs to cover them, there would be fewer opportunities for other workers to take leave.

[17] Both points made by the union – the first about doubling the odds of being called in while on the on-call roster, and the second about the reduced capacity to provide a means for other workers to take historical leave – were said to show a failure by the company to comply with its obligation under clause 7.1 of the CEA to take account of the importance of quality of life for all employees. However I do not accept the evidence established a failure of the company to take account of that factor in developing its proposal, rather, other legitimate factors prevailed in its analysis. That is not to say implementation of such a change would not have the effect on workers' days off and leave as the union contends – and may well impinge on their enjoyment and therefore the quality of that time – but the CEA did not go as far as

guaranteeing workers protection from that potential detriment, only that account would be taken of it in developing proposals for change.

[18] Accordingly I find, on present facts, no actual or necessarily likely breach by the company of its obligations under Schedule 5 through the proposal to reduce MHA jobs from ten to five.

[19] There was a further argument from the union that the changes proposed could not be made until a training programme for all crewmembers was complete. The MHA role was created in 2008 to help provide cover while the company carried out a programme of training so each operator could do the job "one-up" from their present job in the hierarchy of responsibilities on each machine. That programme, for a complex range of reasons, has not yet been completed. However I do not accept the wording of the clauses allowing for a review of MHA roles should be interpreted as implying a necessary curb on change until such training is complete. If that was the parties' intention, the words would have said so. The dates referred to in those clauses may have been envisaged as providing enough time for such a training programme to be undertaken, but the parties did not contract for the event of its completion as the only trigger for review. Rather, they chose dates, and having reached them, the company was entitled to attempt the process provided for.

**Failures in consultation**

[20] Mr Brown's written witness statement set out the consultation process and rationale for the company's proposal to reduce the MHA roles from 10 to five. The proposal was notified to union members on 1 February 2011. It was a proposal which the company was entitled to make. I do not need to set out every step of that process and the reasons for it being undertaken. Instead I have stated findings on four aspects of the consultation – including good faith requirements – where the company did not meet its obligations to the necessary contractual or statutory standard.

[21] In summary the identified flaws were:

(i) Providing misleading information to union members about the company's right to make the changes proposed; and

(ii) Not providing, when requested, a copy of a legal opinion to which the company had referred as justifying its proposal and the legitimacy of it; and

(iii) Not providing a discussion paper, and possibly other material, which had been considered by company managers; and

(iv) Not meeting with the union in mediation about whether the proposal was a matter for consultation only or was legitimately the subject of a dispute over the interpretation of the CEA.

[22] A 'stand off' developed with the union early on in the company's consultation process over what was really a dispute of interpretation about whether negotiation or consultation was required. The union and most of its members then, in essence, refused to take part in much of the process. While that was a difficult situation, the company was still obliged to be accurate in the material it provided in the process with which it continued.

[23] The company distributed a "Q&A" explanation of its proposal to union members. It included this passage:

> *The demanning of the MHAs and the process to be followed is **prescribed** to occur during the term of the current CEA. The Company is complying with this agreed timetable and applying the stated process of consultation. (**my emphasis**)*

[24] Describing the reduction of the number of MHA jobs as something that must be done – as the word "*prescribed*" suggested – in the time before the CEA expired on 18 May 2011 was misleading or likely to mislead. Because it occurred as part of a proposal for change to the business, it was a breach of the statutory obligation of good faith. In the Authority investigation Mr Brown described the answer as "*phrased wrong*". Even accepting there was no intention to mislead, it was a description likely to mislead union members into believing their CEA required the change and there was no point in discussing the proposal or possible alternatives. It misrepresented the reality that while the CEA allowed for the company to cut the number of those jobs, the reduction was not mandatory.

[25] In the course of discussions on the proposal, Mr Brown offered to show Mr Phillips a legal opinion from the company's solicitors which was said to rebut the

union's argument about whether the company was entitled to proceed as it claimed. Mr Phillips took up the offer and read the opinion. That fact was then explained to union members in this way in the Q&A paper:

> *The Site Delegate raised specific questions around clauses in the CEA and the Company has obtained specific legal advice on this. The Companies (sic) legal advice has been communicated to Site delegate including Kim Brown extending the Site Delegate the opportunity to view the advice.*

[26] The union and its solicitors subsequently sought a copy of that opinion but the company resolutely refused to provide one. That was, I find, a breach of its obligation under clause 17.3(b) of the CEA to provide "*all information relevant to the proposal as soon as practicable including … information provided by third parties (unless commercially sensitive)*". The company was entitled to keep its legal advice entirely private but having chosen not to do so, in these particular circumstances, it lost that legal privilege. It chose to use the existence of that advice, and its content, as a tool to seek to persuade both Mr Phillips and union members of the legitimacy of its analysis. The union was entitled to have that information and prepare a considered response (CEA 17.3(f)). It was not sufficient to have Mr Phillips rely on what he remembered of reading the document, from which he did not take notes and of which Mr Brown would not let him take a copy. Mr Phillips, understandably, only remembered it contained "*legal jargon*".

[27] A further failure in information provision was revealed by Mr Brown's answers to questions put by union counsel at the Authority investigation. He had prepared a discussion paper which was not disclosed to the union and he had not checked whether two other senior managers had relevant information on the issue (and which then might need to be disclosed). While the substance of the discussion paper may have been in a presentation document Mr Brown gave to the union and its members, the union should also have had the opportunity to consider the analysis and options canvassed in his discussion paper.

[28] The company refused a union invitation to meet in mediation to address the basis on which the MHA proposal was being considered. It took the view that mediation was premature as the CEA consultation provisions allowed for either party to request mediation "*following the conclusion of consultation*".

[29] However the issue of whether the company was – as the union contended – really asking the wrong question, was an important part of consultation. While I accept the company's contractual interpretation was generally correct, that does not negate the legitimacy or good faith of the union's concern being properly addressed as part of the process. In this case the mediation sought by the union was not that last step in the CEA's consultation provisions, but rather to assist with a dispute over interpretation of the contract, and for which the union was entitled to seek mediation assistance under the CEA's Schedule 7 procedure for employment relationship problems. That procedure expressly included problems which were a dispute. Technically, it might be said, the effect of CEA clause 33 and s129 of the Act was that the union should have lodged an application in the Authority earlier and sought the essentially mandatory direction to mediation under s159 of the Act. However, as a matter of good faith, such formal steps should not have been necessary to get the company to follow the steps of its own CEA provisions for dealing with a dispute (even where its own view was that there is no sustainable interpretation dispute).

**Remedies**

[30] On the basis of the findings made, the following declarations and orders are required:

(i) the company's proposal on MHA positions did not breach clause 9 or Schedule 5 of the CEA however, in reaching a decision on that proposal, the company did not fully comply with its consultation obligations under s17 of the CEA; and

(ii) accordingly the company is ordered under s137 and 138 of the Act to, within 14 days of the date of this determination, recommence consultation on that proposal and comply with its obligations by:

(a) providing to the union a copy of the legal opinion; and

(b) providing the union with a copy of the discussion paper referred to by Mr Brown; and

(c) providing the union with any correspondence between the company's mill manager and the human resources manager containing relevant information on the proposals (including financial costs and options considered); and

(d) giving the union an adequate opportunity to prepare a response to the content of these additional documents.

[31] While the actions required in these orders must be done in 14 days, the timing of the measures then necessary to complete consultation on the proposal remains in the parties' hands.

[32] No direction is necessary regarding the mediation issue as the parties have since met in that forum as a result of this matter being before the Authority.

[33] In light of the findings, declarations and orders made, I have not considered it necessary to make any orders enjoining the company from implementing its early decision reached on the basis of incomplete consultation.

**Costs**

[34] Costs are reserved. My preliminary view in an interpretation case of this type would be that the parties should each bear their costs. If either party has a contrary view and wishes to pursue costs, they may do so in the following way. The parties are first encouraged to resolve the matter themselves. If they are not able to agree and want the Authority to determine costs, either party may lodge and serve a memorandum on costs within 28 days of this determination. The other party would then have 14 days from service to lodge and serve its memorandum in reply.

Robin Arthur
Member of the Employment Relations Authority