IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 85
File Number: 5339828

	BETWEEN	The Rail and Maritime Transport Union First Applicant
	AND	Paul Abigail and 6 Others Second Applicants
	AND	Wellington City Transport Limited t/a Go Wellington Respondent
Member of Authority:	Denis Asher	
Representatives:	Geoffrey Davenport for the applicants Tim Cleary for the Company	
Investigation Meeting	Wellington, 13 May 2011	
Submissions Received	On the same day as the investigation	
Determination:	20 May 2011	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Is the respondent (the Company) in breach of an agreement to set up a working party? If it is, does that breach stop the Company from proceeding with a planned restructuring affecting those employees covered by the working party

agreement? Have those employees been unjustifiably disadvantaged and should they be awarded damages?

The Investigation

[2] Following the failure of mediation to resolve this employment relationship problem and a telephone conference on 2 May 2011, the parties agreed to a one-day investigation in Wellington on 13 May, as well as to time lines for providing a statement in reply and written witness statements.

[3] At the commencement of the 13 May investigation, counsel for the applicants, Mr Geoff Davenport, confirmed that the issue his clients wanted the Authority to address first was whether the Company had refused to honour a working party agreement it had entered into in 2010 (the working party agreement) and, if it had, could it proceed with an intended restructure in light of that refusal?

[4] In the alternative, the question for the Authority to determine, was, had the Company – in light of the recent *Vice-Chancellor of Massey University* v *Wrigley and Anor* [2010] NZEMPC 52 judgement of the Employment Court – complied with its obligations under s. 4 (1A) (c) of the Employment Relations Act 2000 (the Act)?

Background

[5] The Company operates a public transport system in Wellington.

[6] The applicants are employed by the Company as operations controllers or as a trainee operations controller. The controllers have oversight of rosters and how the Company's buses operate.

[7] The controllers' terms and conditions of employment are set out in a collective employment agreement that was settled in 2010 (the 2010 collective agreement).

[8] The parties agree that a term of settling the 2010 collective agreement was that, by way of separately agreed terms of reference, a working party would be set up to *"Review* (the) … *Controllers Role, Procedures and Training …"* (par 5, Terms of

Settlement", doc B in the applicants' bundle (the bundle)). The parties disagree as to whether that agreement bars the Company from proceeding with a proposed restructure.

[9] The terms of reference of the working party review are set out in doc. C of the bundle.

[10] As it happened, no steps were taken by either party to implement the working party agreement.

[11] On 20 January 2011 the Company presented the applicants with a restructuring consultation proposal (doc D in the bundle). Amongst other outcomes, if implemented, the proposed restructuring would do away with the 2nd applicants' positions.

[12] At the parties' next meeting, on 15 February, the Company was reminded of the working party agreement. By that time the Company's representative who had signed off both the 2010 agreement and the working party agreement was no longer employed by the respondent, and had been replaced by a regional general manager. The latter manager says he was not aware of his predecessor's commitment until it was drawn to his attention at the 15 February meeting.

[13] By letter dated 23 March 2011 the applicants' counsel wrote to the Company and, amongst other things, sought undertakings that its proposed restructure would be placed on hold pending the implementation of the working party agreement (doc E).

[14] In its reply dated 28 March the Company said, amongst other things, that the working party agreement did not prevent it from *"effecting a restructure"* (doc F).

[15] A dispute resulted which is now before the Authority for determination.

[16] In the meanwhile the Company has taken no further steps in respect of its proposed restructuring.

Discussion and Findings

[17] I accept the applicants' submission that the Company has to comply with its own agreement, i.e. the working party agreement. I reach this conclusion for the following reasons.

[18] The working party agreement was signed by or on behalf of the parties to this problem. The signing off took place in the context of settling a new collective agreement. As the terms of settlement make clear (doc B), the working party agreement is clearly part of the collective settlement. It has not been implemented.

[19] I am also satisfied that compliance with the working party agreement will, in the interim, require the Company to place on hold its proposed restructuring. That is because the restructuring proposal will clearly cover the same ground and issues contemplated by the working party agreement, and will impact directly on the controllers, the second applicants. That is because the work they currently perform will, if the restructuring is implemented, no longer be undertaken by the incumbents in their current roles, but will be spread across four new categories of employees. As a result, if implemented, the proposed restructuring will render nugatory the working party agreement; it would become unenforceable and therefore meaningless.

[20] The exercise contemplated by the working party agreement is on all fours with the content of the Company's restructuring proposal: consistent with the working party's terms of reference and the Company's agreement to that exercise, it is therefore entirely appropriate for the working party to be, in the first instance, the focus of any proposals by the Company to restructure the way in which the work presently undertaken by controllers is done in the future.

[21] I make these findings on the basis of the Court's observation in *NZPSA* v Electricity Corporation of NZ Ltd Marketing Division [1991] 2 ERNZ 365 at 379, that

… the employer's right to manage (is) *not available as a general pretext for avoiding legal obligations voluntarily entered into but which it is no longer convenient to fulfil.*

[22] The parties are operating in a good faith environment: having contracted into specific arrangements they are obliged to adhere to their agreement. It is therefore not open to the Company to now unpick the terms of settlement it willingly entered into in 2010 (doc B), because in 2011 one part of the agreement is no longer deemed commercially convenient: *Northern Local Government Officers IUOW* v *Auckland City* [1992] 1 ERNZ 1109 at 1125.

[23] Having the working party agreement now drawn to its attention, the Company would be acting in bad faith to ignore that agreement by proceeding with its proposed restructuring, impacting as it does on the second applicants and the positions they presently occupy, i.e. it would be acting unlawfully.

[24] As the Company has failed to comply with its obligations arising out of the working party agreement, the applicants are entitled to a compliance order: *United Food & Chemical Workers Union of NZ* v *Talley* [1992] 1 ERNZ 756.

[25] Finding in favour of the applicants' primary claim it is unnecessary for me to address their alternate position.

[26] As evidence was deliberately not brought forward in support of the claim of disadvantage arising out of unjustified actions, I reserve to the applicants the opportunity to pursue this claim on a later date.

[27] A determination is sought that the respondent's actions have been contrary to the obligations of good faith. I am satisfied this claim has not been made out, for the following reasons: the current manager says he was not aware of the working party agreement. There is no evidence to contradict that claim, particularly as the applicants do not dispute they took no steps to implement that agreement. Since notified of the applicants' concerns, the respondent has frozen its proposed restructuring. It has promptly taken part in mediation and lent itself to this substantive investigation being heard at short notice. There is no reason to believe it will act other than in good faith in light of this determination.

[28] Consistent with its terms of reference, it now behoves the parties to implement their working party agreement promptly and in good faith. This determination should not be read as an indefinite stay in respect of the Company's proposed restructuring.

Determination

[29] The Company's refusal to comply with the working party agreement is in breach of an agreement it freely entered into. The Company must now comply with the working party agreement. The Company must continue to stay its proposed restructuring in respect of the second applicants until it has complied with its obligations arising out of the working party agreement.

[30] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority