

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 226
5436887**

BETWEEN

PULP AND PAPER INDUSTRY
COUNCIL OF THE
MANUFACTURING AND
CONSTRUCTION UNION INC
First Applicant

DAVE NUKU
Second Applicant

KINGI HOUKAMAU
Third Applicant

AND

NORSKE SKOG TASMAN LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim Oldfield, Counsel for Applicant
Kylie Dunn, Counsel for Respondent

Investigation Meeting: 6 May 2014 at Rotorua

Submissions received: 6 May 2014 from Applicant and from Respondent

Determination: 10 June 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The first Applicant, the Pulp and Paper Industry Council of the Manufacturing and Construction Union Inc (PPWU), has applied to the Authority to resolve a dispute concerning whether or not the actions of the Respondent, Norske Skog Tasman Ltd (Norske Skog):

- (i) breach the terms of the Pulp and Paper Industry Council of the Manufacturing and Construction Union Inc Paper Machines and Paper Day Services Collective Agreement (the Paper Machines Collective Agreement) and/or the Emergency Response and Security (ERS) Department Kawerau Site Collective Agreement (the ERS Collective Agreement); and/or

(ii) breach the Variation to The Pulp and Paper Industry Council Collective Agreement (the Variation Agreement)

in respect of the second Applicant, Mr Dave Nuku, and the third Applicant, Mr Kingi Houkamau.

[2] In the case of Mr Nuku, it is also claimed that his employment on a fixed term basis is in breach of clause 66 of the Employment Relations Act 2000 (the Act)

Issues

[3] The issues for determination are whether or not:

- Mr Nuku's employment as a fixed term employee breaches either the Paper Machines Collective Agreement and/or s 66 of the Act
- Mr Nuku has been unjustifiably disadvantaged as a result of being appointed as a fixed term employee
- A compliance order should be made requiring Mr Nuku to be employed by Norske Skog as a full time employee
- Mr Houkamau's employment as a fixed term employee in the 13th man cover position breached the ERS Collective Agreement.
- Mr Houkamau has been unjustifiably disadvantaged by being appointed to the 13th man cover position on a fixed term basis
- A compliance order should be made requiring Norske Skog to appoint a permanent employee to the 13th man cover position
- A penalty should be awarded against Norske Skog for breach of the ERS Collective Agreement

Background Facts

[4] Norske Skog operates a paper mill in Kawerau (the Mill). It is part of the Norske Skog group of companies. Norske Skog's main product is newsprint and apart from shutdowns, the Mill operates 24 hours a day, seven days a week, 365 days of the year.

[5] The Mill employs 172 employees and currently runs one paper machine (PM3) although previously there were a total of three paper machines. There are a number of unions and collective agreements at the Mill.

[6] Due to both the number of, and the size of, newspapers printed decreasing worldwide the market for newsprint has reduced significantly. As a result, there have been several restructuring initiatives at the Mill over the past decade. These have resulted in many redundancies and the closure of plant, including two paper machines; Paper Machine 1 (PM1) which was shut in 2006, and Paper Machine 2 (PM2), which was shut in January 2013 as a result of unacceptable profitability. The closure of PM2 resulted in approximately 120 positions being made redundant at the Mill.

[7] The Paper Machines Collective Agreement and the ERS Collective Agreement contain fixed manning numbers and prohibitions on forced redundancy which means that outside of “major change events” such as the closure of a paper machine, Norske Skog is not able to restructure or make redundancies during the term of a collective agreement.

[8] Clause 11.3 of the Paper Machines Collective Agreement sets out the manning levels for the paper machines:

11. MANNING

11.1 Subject to clause 11.2, the manning for the term of this Agreement (27 January 2012 to 26 January 2015) will be as per Clause 11.3 (Paper Machines Manning) and Clause 11.4 (Paper Day Services Manning).

11.2 Should there be a major change event, for example an asset closure, sale of part or all of the company, the manning may be changed subject to Clause 7 (Consultation), Clause 18 (Redundancy) and Clause 19 (Employee Protection Provision), as applicable.

11.3 Paper Machines Manning

<i>Machine tender</i>	<i>10</i>
<i>Back tender</i>	<i>10</i>
<i>Winder Operator</i>	<i>10</i>
<i>Winder Assistant</i>	<i>20</i>

<i>Stock Preparation Operator</i>	<i>06</i>
<i>Machine Utility Operator</i>	<i>10</i>
<i>Total</i>	<i>66</i>

[9] With the exception of the Stock Preparation Operator, there is a hierarchy of positions, starting with the Machine Utility Operator (MUO) and rising to Machine Tender. Each employee is trained to move up one position and move down one position in the hierarchy for the purposes of providing cover for personnel absences. When not covering an absence, the MUO is an extra person available to the Shift Winder Crew and also to complete his/her own training.

[10] The MUO positions were set at 10 in the Paper Machines Collective Agreement because at the time it was negotiated there were two paper machines operating and the MUOs were all trained to work across both PM2 and PM3. At the time of the closure of PM2 the Paper Machines area was restructured with positions being disestablished pursuant to clause 11.2 of the Paper Machines Collective Agreement. The manning levels were varied at that time and the number of MUO positions reduced from 10 to 5.

[11] The Paper Machines Collective Agreement also makes provision for the employment of fixed-term employees at clause 14 which states:

14 Fixed Term Employees

14.1 Fixed term employees will only be employed during the full utilisation of the Machine Utility Operators.

[12] A vacancy had arisen in August 2013 when a Winder Assistant had been promoted to an on site Safety Advisor role and a MUO was promoted to a Winder Assistant position, thereby creating a vacancy for a MUO.

Mr Nuku

[13] Mr Nuku was employed by Norske Skog on PM2 from 14 August 1978 until 9 January 2013 when his employment was terminated by reason of redundancy. At that time he received a significant redundancy payment in accordance with the Paper Machines Collective Agreement and clause 4 of the Redundancy and Redeployment Policy.

[14] In August 2013 due to internal promotion, a vacancy arose for a MUO and Norske Skog decided to recruit a fixed term employee for the role. At that time Norske Skog had

been considering the possibility of restructuring its ERS Department on the expiry of the ERS Collective Agreement in October 2014.

[15] However Mr McCarty, the Mill General Manager, stated that he was aware of Norske Skog's obligations to consult with the PPWU and that the manning level of the ERS team had been fixed at 13 employees.

[16] The reason put forward by Norske Skog for deciding that the position for a MUO should be made on a fixed term basis was that, should a restructuring of the ERS Department occur in October 2014 and lead to demanning in that Department, the MUO position could be disestablished in October 2014 or used as a redeployment opportunity for permanent employees in disestablished positions.

[17] Mr Tane Phillips, Secretary of the PPWU, said that in July 2013 Ms Gaylene Turpie, Human Resources Manager, had informed him that due to the Winder Assistant being promoted, there was a vacancy for the 5th MUO position and asked whether any of the PPWU members made redundant in January 2013 would be interested in applying for the MUO position.

[18] The Norske Skog Tasman Limited Redundancy and Redeployment Policy (The Redundancy and Redeployment Policy) applied in this case, stating at clause 3.13 :

3.13 Where an employee is made redundant pursuant to Clause 3.12, and a vacancy occurs within the role from which they were made redundant (or below but within the same promotion line) the following will apply, (refer attached flowchart)

Stage 1: Internal Applications/Clause 3.12 applicants

- (a) Applications will be called from existing full time employees; and*

- (b) Past employees terminated pursuant to Clause 3.12 who within 2 years of termination continue to keep the Company informed as to their current contact details and remain available for re-employment, they will have their details passed to the promotion/selection panel for consideration.*

[19] Mr Phillips said that Ms Turpie also advised him that Norske Skog was going to appoint to the vacant 5th MUO position on a fixed term basis. He said that the PPWU was not

happy about the proposal and its view was that Norske Skog was unilaterally changing the terms of the Paper Machines Collective Agreement rather than negotiating for a variation.

[20] Notwithstanding its opposition to the fixed term position proposal, the PPWU advised Ms Turpie that Mr Nuku would be interested in applying for the MUO position. He was subsequently interviewed, offered and accepted the MUO position for the period 7 September 2013 until 2 October 2014 after he and Mr Phillips had been advised that it was a fixed term position due to the possibility of future restructuring.

[21] It is agreed by Norske Skog and the PPWU that Mr Nuku accepted the fixed term employment agreement on the understanding that the PPWU and Norske Skog would resolve the dispute regarding the status of the vacant position through application to the Authority.

Mr Houkamau

[22] Mr Houkamau commenced employment at Norske Skog on 7 October 2013 on a fixed term employment agreement in the 13th position in the ERS team, and is employed under the ERS Collective Agreement.

[23] Mr Houkamau had been engaged on fixed term contracts to provide cover for the ERS team. Namely for Mr Bryan Reed, a permanent full-time employee in the 13th man cover position in the ERS team; who had become unwell and had been on long term sick leave for some time.

[24] In November 2013 Mr Reed was medically retired thereby leaving a vacancy in the ERS team for the 13th man cover position.

[25] Clause 20.1 of the ERS Collective Agreement set the manning level and stated:

20.1 The Company and the Union agree that the manning for the term of this Agreement 3 October 2011 to 2 October 2014 shall be fifteen (15) based on the Five Shift Roster. The Sixteenth Position is provided for through a cover roster as per Clause 9.5.

[26] Mr Phillips said that after the closure of PM2 it had been agreed between Norske Skog and the PPWU to reduce the ERS team from 15 to 12 so that what had been the 16th man cover position became the 13th man cover position.

[27] The ERS Collective Agreement also made provision for a fixed-term cover position at clause 21 which stated:

21.1 Fixed term employees may be employed to cover:

(a) Long term absences exceeding two (2) consecutive rostered work weeks resulting from sickness or ACC or

(b) Absences caused by training and holiday leave where the Company determines the engagement of such additional resources as necessary or desirable.

[28] Norske Skog decided to appoint on a fixed term basis for the 13th man cover position due to the possibility of the restructuring of the ERS Department at the expiry of the ERS Collective Agreement in October 2014.

[29] Mr Houkamau applied for and was appointed to the 13th man cover position in the ERS team on a fixed term basis for the period 29 November 2013 until 2 October 2014.

[30] It is agreed by Norske Skog and the PPWU that that Mr Houkamau accepted the fixed term 13th man cover position in the ERS team on the understanding that the PPWU and Norske Skog would resolve the dispute regarding the status of the position through application to the Authority.

[31] Mr Houkamau has since been appointed to a permanent (12th) position of ERS Officer within the ERS team as a result of a vacancy due to an internal transfer.

Determination

The Law relating to collective agreements

[32] In *NZ Amalgamated Engineering, Printing and Manufacturing Union v Amcor Packaging (New Zealand) Limited*¹ Judge Ford introduced a summary of the law regarding the interpretation of collective agreements as follows:²

The leading authority on contract interpretation in this country is the decision of the Supreme Court in Vector Gas Ltd v Bay of Plenty Energy Ltd³ That decision related to the construction of a commercial contract but the Court of Appeal in Silver Fern Farms

¹ [2011] NZEmpC 135

² Ibid at para 12]

³ [2010] NZSC 5, [2010] 2 NZLR 444

*Ltd v New Zealand Meat Workers and Related Trade Unions Inc*⁴ made it clear that the principles of interpretation prescribed in *Vector* had equal application to employment agreements.⁵ The court is required to apply a principled approach to the interpretation of employment agreements and disputes as to meanings must be determined objectively. *Vector* highlighted the significance of the awareness of context as a necessary ingredient in ascertaining the meaning of contractual words emphasising commercial substance and purpose over semantics and the syntactical analysis of words.

[33] In *NZ Meat Workers & Related Trades Union Incorporated v Silver Fern Farms Ltd (formerly PPCS Ltd)*⁶ (“*Silver Fern Farms*”) Judge Shaw referred to the principles of construction in interpreting collective agreements as having been summarised by the Employment Court in *New Zealand Tramways and Public Transport Union Inc v Transportation Auckland Corporation Ltd*⁷. The Employment Court in that case had observed that:⁸

The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction ...

[34] In *Silver Fern Farms* Judge Shaw also referred to the Court of Appeal decision in *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd*⁹ in which the Court of Appeal had referred to the use of the surrounding circumstances to ensure the correctness of the natural meaning of the words as ‘cross-checking’.

[35] Judge Shaw had further approved of the view of Judge Colgan (as he then was) expressed in *ASTE v Chief Executive of Bay of Plenty Polytechnic*¹⁰ that the interpretation of a collective agreement should not be narrowly literal but should accord with business common sense, stating at para [23] that:

The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Even if the drafting is inept, the Court should be able to give effect to the underlying intent. Moreover, if a literal interpretation gives rise

⁴ [2010] NZCA 317

⁵ See [36]-[37]

⁶ [2009] ERNZ 149

⁷ [2006] ERNZ 1005

⁸ *Ibid* at para [16]

⁹ [2001] NZAR 789 (CA)

¹⁰ [2002] 1 ERNZ 491 at 500

to nonsense in practice, the Court should endeavour to find a more liberal interpretation which satisfies business common sense and fulfils the parties' purpose.

Does Mr Nuku's employment as a fixed-term employee breach either the Paper Machines Collective Agreement or s 66 of the Act?

(i) Breach of the Paper Machines Collective Agreement

[36] It is the PPWU and Mr Nuku's submission that he should have been employed as a permanent employee on the basis that fixed-term employment to fill an established MUO vacancy is inconsistent with the Paper Machines Collective. In making their submission reliance is placed on clause 11 (the Manning level clause) which sets the current manning level of MUOs at 5 and clause 14.1 of the Paper Machines Collective Agreement which deals with fixed term employment.

[37] Norske Skog submits that it was never intended that MUOs could never be employed on a fixed term basis because whilst a position may have been established as permanent, the incumbent of that permanent position may be employed on a fixed term basis, citing coverage by fixed term employees in instances of parental leave or long-term sickness absence.

[38] Norske Skog further submits that clause 14.1 was a new clause in the January 2014 Paper Machines Collective Agreement. Prior to this agreement, occasions had arisen where there had been employees filling established MUO positions with capacity, but the PPWU had insisted on the engagement of fixed term employees for cover. This had occurred when there was additional capacity on one machine and a vacancy on the other.

[39] Accordingly, Norske Skog submits that clause 14.1 was intended to ensure that Norske Skog would not be required to go to the additional expense of employing a fixed term employee if it could meet the need with existing resources. On that basis, Norske Skog submits that clause 14.1 of the Paper Machines Collective Agreement permits the employment of fixed term employees..

[40] In regards to the submission by Norske Skog that permanent positions may be filled by fixed term employees, I observe that in the instances cited in support of that proposition, the fixed term employees are filling permanent positions as cover for a permanent incumbent who is temporarily unable to work pending their return to work.

[41] Moreover I find that the wording of clause 14.1 to be clear and unambiguous: "*Fixed term employees will only be employed following the full utilisation of the Machine Utility Operators.*". Whether or not the MUO positions are fully utilised I find is to be ascertained

by looking at the agreed manning levels in clause 11 which the parties agree sets the number of MUOs as 5 following the closure of PM2.

[42] I further find that the manning levels set out in clause 11.3 of the Paper Machines Collective Agreement may only be amended in limited circumstances as set out in clause 11.2. In addition, I find that the Paper Machines Collective Agreement differentiates between the established MUO positions referred to in clause 11.3 and fixed term employees in clause 14.1 thus that the positions are mutually exclusive.

[43] I determine that the vacant MUO position established pursuant to clause 11.3 of the Paper Machines Collective Agreement can only be filled by the appointment of a permanent employee, thus it follows that Mr Nuku's employment as a fixed term employee is in breach of clause 11.3 of the Paper Machines Collective Agreement.

(ii) *Breach of s 66 of the Act*

[44] Having found Mr Nuku's employment as a fixed-term employee to be a breach of the Paper Machines Collective Agreement, it is not strictly necessary for me to address this issue. However as it has been raised as a matter for determination by the Authority, I shall proceed to do so.

[45] Section 66 of the Act states:

66 Fixed Term Employment

(1) *An employee and an employer may agree that the employment of the employee will end-*

- (a) *At the end of a specified date or period; or*
- (b) *On the occurrence of a specified event;*
- (c) *or at the conclusion of a specified project.*

(2) *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must-*

- (a) *Have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
- (b) *Advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*

- (3) *The following reasons are not genuine reasons for the purposes of subsection (2)(a):*
- (a) *to exclude or limit the rights of the employee under this Act;*
 - (b) *to establish the suitability of the employee for permanent employment;*
 - (c) *to exclude or limit the rights of an employee under the Holidays Act 2003.*
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing-*
- (a) *The way in which the employment will end; and*
 - (b) *The reasons for it ending the employment in that way.*

[46] It is the PPWU and Mr Nuku's submissions that there are no genuine reasons based on reasonable grounds for employing Mr Nuku on a fixed term basis.

[47] The reason for Mr Nuku being employed on a fixed term basis is stated at clauses 3.1, 3.2 and 3.3 of his employment agreement as being:

3.1 You are being employed for a fixed term period from 7 September 2013 until 2 October 2014, being the expiry of the Emergency Response and Security (ERS) Department Kawerau Site collective employment agreement unless terminated earlier pursuant to clause [15].

3.2 The reason you are being employed on a fixed term basis to cover the vacancy which resulted from the transfer of a permanent employee to another area. As a result, we need to employ an employee to work as a Machine Operator to ensure we maintain manning levels for the term of the Paper Machines collective agreement. However, it is possible that demanning may occur at the expiry of the ERS collective agreement. Therefore the Company requires a fixed term employee in the vacant Machine Utility Operator role to maintain manning levels and preserve this as a redeployment opportunity until it has considered any redeployment requirements that may arise from demanning in ERS.

3.3 The reason your employment will cease at the end of this fixed term period is that the Company anticipates being in a position to determine whether the Machine Utility Operator role is required for redeployment purposes.

[48] The PPWU and Mr Nuku further submit that regardless of whether or not there is a restructuring in ERS, there will be an ongoing need for a 5th MUO such that fixed term

employment will not be justified, citing *Canterbury Westland Free Kindergarten v NZEI*¹¹ as support for this submission.

[49] As the reason given for Mr Nuku's fixed term is not a potential restructuring in Paper Machines, but in a different department to preserve a redeployment opportunity, the PPWU and Mr Nuku submit that this is not a genuine reason based on reasonable grounds.

[50] Norske Skog submits that case law has upheld fixed terms of employment which have been agreed with the purpose of maintaining manning levels pending a restructuring, citing *Carter Holt Harvey v McAuley*¹² in which the Employment Court upheld four consecutive fixed terms of employment with the reason of providing resource pending a restructure, and *Norske Skog Tasman Limited v Clarke*¹³.

[51] In the latter case Mr Clarke had been employed on a fixed term basis to maintain agreed manning levels until collective bargaining was concluded and manning numbers in the relevant work area were finalised. The Court of Appeal held that the reason for the fixed term was a genuine reason based on reasonable grounds.

[52] In the present case Norske Skog submits that Mr Nuku's fixed term is genuine.

[53] I find that the first requirement under s 66(1) of the Act is met in that there is agreement that the employment will end at the close of a specified date or period as set out in clause 3.1 of the employment agreement. At issue is the requirement under s 66(2)(a) that the employer has genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way.

[54] Mr Peter McCarty, Mill General Manager, stated that while there is no longer likely to be demanning which requires more than one redeployment opportunity for ERS employees, he is still considering the possibility of demanning in the Paper Machines area. On that basis, Norske Skog will require Mr Nuku's services until at least January 2015 when the Paper Machines Collective Agreement expires.

[55] The Mill has had a history of change, restructuring and a significant number of redundancies over the past decade. Clause 7.1 of the Paper Machines collective Agreement states that: "*The parties agree that the company must continue to effect changes to the manner in which it operates its business*"

¹¹ [2004] 1 ERNZ 547

¹² [2012] NZEmpC 48.

¹³ [2004] 1 ERNZ 127

[56] From the evidence provided I accept that that process of change has not yet concluded and that it is more than likely that it will affect the on-going labour requirements. The fixed term agreement proposed by Norske Skog was for the purposes and duration of a possible restructuring project.

[57] In that situation I find that to appoint the 5th MUO as a fixed term position, albeit that I have found it to be in breach of the Paper Machines Collective Agreement, was based on reasonable grounds on the part of Norske Skog.

[58] I determine that the fixed term agreement under which Mr Nuku was employed was for genuine reasons based on reasonable grounds.

Has Mr Nuku been unjustifiably disadvantaged as a result of being appointed as a fixed-term employee?

[59] Mr Nuku was aware at the outset of the offer of employment that it was to be on a fixed term basis. However I have found that his appointment on a fixed term basis to be a breach of the Collective Agreement.

[60] Section 103(3) of the Act states:

In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[61] The PPWU brought to the Authority for determination a dispute about the interpretation and application of the Paper Machines Collective Agreement. The PPWU submitted that Mr Nuke had a personal grievance as a result of a term of his employment, being a term of the Paper Machines Collective Agreement, being breached.

[62] In *NZ Resident Doctors Assn v Waikato Area Health Board*¹⁴ Judge Travis applied *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd*¹⁵ and commented¹⁶ that:

... it is our view that if the claim of unjustified disadvantage relates solely to the application of [an employment agreement], even if

¹⁴ [1992] 1 ERNZ 582

¹⁵ [1990] 1 NZILR 1027

¹⁶ Ibid at page 590-1

there is absolutely no dispute about the application of the [agreement], that claim cannot be dealt with by way of a personal grievance.

[63] In *The Red Beach School Board of Trustees v New Zealand Educational Institute (Inc)*¹⁷ Judge Couch remarked:¹⁸

... secondly, s103(3) only relates to actions of an employer deriving 'solely' from the interpretation, application or operation of an employment agreement. Thus, if any of the teacher aides could establish by evidence that Red Bach School was motivated in its grading by any other factor, there may be scope for pursuing a personal grievance notwithstanding s 103(#0).

[64] In the case of Mr Nuku, I find no evidence that Norske Skog was motivated by 'any other factor', rather I find that Mr Nuku's a claim of disadvantage through his employment as fixed term employee to derive solely from the interpretation and application and resulting breach of clause 11.3 of the Paper Machines Collective Agreement

[65] Accordingly I determine that Mr Nuku does not have a claim for unjustifiable disadvantage pursuant to s 103(3) of the Act.

Should a compliance order be made requiring Mr Nuku to be employed as a full-time employee?

[66] Having made a determination that Mr Nuku's employment on a fixed term basis is a breach of the Paper Machines Collective Agreement, it is necessary for the breaches of clauses 11 and 14 to be rectified.

[67] I have considered the appointment of Mr Nuku, albeit on a fixed term basis, to be one which firstly Norske Skog agreed in consideration of the fact that Mr Nuku was an ex-employee with 35 years' service with an obvious understanding of the requirements of the job; and secondly in light of the fact that Mr Nuku would like the position to be on a permanent basis.

[68] Therefore it is clear that both breaches can be rectified by the appointment of Mr Nuku as a permanent employee to the position of MUO in line with the manning level

¹⁷ Employment Court, Auckland AC 13/07, 20 March 2007, Judge Couch

¹⁸ Ibid at para [113]

requirements of clause 11 of the Paper Machines Collective Agreement, and the breach of clause 14 is thereby also rectified

[69] I therefore make an order pursuant to s 137(1)(a)(i) of the Act that Norske Skog complies with the terms of the Paper Machines Collective Agreement, namely clauses 11 and 14, and employ Mr Nuku as a permanent employee to fill the existing vacancy for an MUO.

[70] Such compliance to be completed within 28 days of the date of this determination.

Did Mr Houkamau's employment as a fixed-term employee breach the ERS Collective Agreement?

[71] Mr Houkamau has now been employed in a permanent position, that of the 12th position. However there is still an extant dispute in respect of the 13th man position under the ERS Collective Agreement as Norske Skog has indicated that it intends to recruit a fixed term employee into that role.

[72] The PPWU submits that a fixed term employee cannot be employed in the 13th position pursuant to clause 9.5(b) of the Variation Agreement which states: "*The ERS Cover Position is provided for through one permanent, full-time role.*" The PPWU further submits that whilst clause 9.5 (b) is conclusive, s 21 of the ERS Collective Agreement supports the submission as the person in the 13th position is not being employed to cover long term absences or absences caused by training and holidays.

[73] Norske Skog submits that employing a fixed term employee to the 13th man cover position would not be a breach of clause 9.5(b) of the Variation Agreement as whilst it is a permanent position that has been established, it does not follow that a permanent employee must be employed in the role. In support Norske Skog submits that clause 21 of the ERS Collective Agreement permits the employment of fixed term employees in that it is a permissive clause.

[74] Clause 20.1 of the Variation Agreement sets the manning level at 15 with the 16th position being provided for through a cover roster (currently a manning position of 12 with a 13th man cover position). Clause 9.5 (b) of the ERA Collective Agreement states that the 13th man cover position is a: "*full-time role*". I find that the intention of clause 9.5(b) is clear and unambiguous that the 13th man cover position is established as permanent full-time nature.

[75] I therefore turn now to consider whether or not clause 21 of the ERS Collective Agreement is permissive and allows for a fixed term employee to be appointed to the permanent position of the 13th man cover role.

[76] I find that the clause permits fixed term employment in that it states that fixed-term employees “*may*” be employed which is permissive, however the clause continues in (a) and (b) to specify the only conditions when fixed term employees may be engaged:

21.1 Fixed term employees may be employed to cover:

(a) Long term absences exceeding two (2) consecutive rostered work weeks resulting from sickness or ACC or

(b) Absences caused by training and holiday leave where the Company determines the engagement of such additional resources as necessary or desirable.

[77] I find that on a plain reading of clause 21 of the ERS Collective Agreement fixed term employees may be engaged in only two situations, being that of long term absence of a specified duration, and where there are absences caused by training and holiday leave.

[78] I determine that the 13th man cover position is a permanent established role and as such cannot be filled by the utilisation of a fixed term employment agreement other than when conforming to the conditions of clause 21 of the ERS Collective Agreement.

Has Mr Houkamau been unjustifiably disadvantaged by being appointed to the 13th man cover position on a fixed-term basis?

[79] Mr Houkamau claims that he suffered stress resulting from the uncertain nature of fixed term employment when he should have been permanently employed.

[80] As in the case of Mr Nuku, I find no evidence that Norske Skog was motivated by ‘any other factor’ in relation to the employment of Mr Houkamau, again I find that Mr Houkamau’s claim of disadvantage as a result of his employment as fixed term employee to derive solely from the interpretation and application and resulting a breach of clause 9.5(b) and misinterpretation and application of clause 21 of the ERS Collective Agreement .

[81] Accordingly I determine that Mr Houkamau does not have a claim for unjustifiable disadvantage pursuant to s 103(3) of the Act.

Should a compliance order be made requiring Norske Skog to appoint a permanent employee to the 13th man cover position?

[82] I have found a breach of the ERS Collective Agreement in respect of the appointment of a fixed term employee to the 13th man cover position.

[83] Therefore it is clear that the breach can be rectified by the appointment of a permanent employee to the position of the 13th man cover position in line with the manning level requirements of clause 9.5 of the ERS Collective Agreement.

[84] I therefore make an order pursuant to s 137(1)(a)(i) of the Act that Norske Skog complies with the terms of the ERS Collective Agreement, namely clause 9.5 and employs a permanent employee to fill the 13th man cover position.

[85] Such compliance to be completed within 28 days of the date of this determination.

Should a penalty be awarded against Norske Skog for breach of the ERS Collective Agreement?

[86] The PPWU is seeking that a penalty be awarded to it in respect of the breach of the ERS Collective Agreement pursuant to s 134(1) of the Act which states:

Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

[87] The PPWU submits that there has been a sustained breach of the ERS Collective Agreement by Norske Skog refusing to employ a permanent employee in the 13th man cover position.

[88] Norske Skog submits that it and the PPWU identified a dispute regarding the interpretation of the ERS Collective Agreement and they took steps to bring the matter to the Authority for determination. Having agreed to this process, it co-operated throughout, including allowing affected employees to accept fixed term employment without prejudice to the challenge before the Authority.

[89] In accordance with the observation of the Employment Court in *Xu v McIntosh*¹⁹, whether a penalty is awarded should be decided firstly with respect to the degree of harm

¹⁹ [2004] 2 ERNZ 448

suffered as a result of the breach, and secondly it should be considered whether the breach was technical and inadvertent or flagrant and deliberate.

[90] In this case I find that as regards Mr Houkamau, the degree of harm has been minimal given that he has now been appointed to a permanent position, and the matter having been brought to the Authority, there is now a determination that will affect the possibility of any on-going breach by the appointment of a fixed term employee.

[91] In regard to the second consideration, I find that the breach of the ERS Collective Agreement to have been deliberate, however that once raised with Norske Skog it acted in good faith by taking steps to advance the matter to the Authority.

[92] In all the circumstances I determine that it is appropriate that a penalty is awarded which reflects the degree of harm and the deliberate nature of the breach, taking into consideration Norske Skog's degree of co-operation in bringing this matter to the Authority.

[93] Norske Skog is to pay the PPWU the sum of \$2,000.00 in respect of a penalty pursuant to s 134(1) of the Act.

Costs

[94] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority