IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 332
5442125

	BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS' UNION 1995 INCORPORATED First Applicant
		WAYLON HEREWINI & 16 OTHERS Second Applicants
	A N D	TSNZ PULP & PAPER MAINTENANCE LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	L J Yukich, Advocate for Applicants K Dunn, Counsel for Respondent
Investigation Meeting:	19-20 September 2016 at Tauranga
Submissions Received:	20 September 2016 from both parties
Date of Determination:	29 September 2016

DETERMINATION OF THE AUTHORITY

A. The application for compliance and wage arrears orders are dismissed.

B. Costs are reserved.

Employment relationship problem

[1] The applicants allege TSNZ Pulp & Paper Maintenance Limited (TSNZ) made representations in February and March 2009 to the First Applicant that all members would have the same terms and conditions irrespective of when they may join the Union. They say other Union members who are ex-ABB Limited employees were

found by the Employment Court[1] (the *Harris* case) to be entitled to have included in leave pay calculations both taxable and non-taxable elements of salary. They assert TSNZ are estopped and should apply to the second applicants the same terms and conditions.

[2] The applicants' also submit TSNZ's behaviour in May 2015 breached a duty of good faith by resiling from the February/March 2009 promise and TSNZ engaged in misleading and deceptive behaviour under s.12 of the Fair Trading Act 1986.

[3] The applicants seek a compliance order and an order requiring payment of wage arrears.

Relevant Facts

[4] TSNZ is a maintenance contractor for OJI Fibre Solutions NZ Limited (OJI) at its pulp mill at Kawerau. TSNZ has provided maintenance services to OJI and its predecessors since 10 March 2009.

[5] By consent the first applicant's name is amended to Eastern Bay Independent & Industrial Workers' Union 1995 Incorporated (EBIIWU or the Union). The EBIIWU is a registered Union.

[6] The second applicants are members of the Union employed by TSNZ between 18 May 2009 and 20 October 2015 by TSNZ. It is accepted none of the second applicants were aware of the representations made to the Union at or before the time they were employed.

The Harris case

[7] It is common ground the relevant collective employment agreements and the Holidays Act 2003 do not expressly provide for the inclusion of non-taxable allowances in calculating holiday leave.

[8] It was the practice of TSNZ's predecessor, ABB Limited to include non-taxable allowances in calculating holiday leave. The *Harris* case was brought by an ex-ABB Limited employee seeking to rely upon promises made to them in 2009 about their terms and conditions.

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[1] *Weeraphong Harris v TSNZ Pulp & Paper Maintenance Ltd* [2015] NZEmpC 43; ARC79/12.

[9] The Court found TSNZ conveyed an assurance to Mr Harris that employee engagement would be on the same terms and conditions as the ex-ABB employees had enjoyed.[2] TSNZ was estopped from asserting the application of the collective agreement which contradicted the assurances given to Mr Harris. Mr Harris was entitled to have the non-taxable allowances included in calculation of his holiday leave.[3]

[10] Following the issue of the *Harris* case decision, TSNZ paid additional holiday pay to all ex-ABB employees. It declined to make any payments to those employees who were not previously employed by ABB such as the second applicants. They now seek a determination they are entitled to the same terms and conditions under the collective agreement as the ex-ABB employees.

[11] Although this application was filed on 4 December 2013, it was adjourned at the parties request pending receipt of an Employment Court decision issued on 2 April 2015[4] (the *Harris* case). It has also been delayed by a reference to mediation and the late receipt of the amended statement of problem in 2016 and an interim application for removal to the Court which was declined.

Issues

[12] The following issues were identified for hearing:

(a) Is TSNZ estopped from resiling from representations made to the EBIIWU that the second applicants would have the same terms and conditions as the ex-ABB Limited employee union members?

(b) Did the respondent breach its duty of good faith to the second applicants by its advice in May 2015 that it would not pay them on the same basis as the ex-ABB Limited employees?

(c) Did the respondent breach its duty of good faith to the first applicant by resiling from a promise made in 2009 that terms no less favourable than in previous ABB CEA would apply to all union members?

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2 *Harris* at [61].
3 *Harris* at [82]-[83].
4 *Weeraphong Harris v TSNZ Pulp & Paper Maintenance Ltd* [2015] NZEmpC 43; ARC79/12.

(d) Has the respondent engaged in misleading and deceptive behaviour under s.12 of the Fair Trading Act 1986 by resiling from promises it made to the first applicant which led it to believe that the CEA would have universal effect for all of its members?

Is TSNZ estopped from resiling from representations made to the EBIIWU that the second applicants would have the same terms and conditions as the ex-ABB employee union members?

[13] EBIIWU relies upon the equitable doctrine of estoppel. It submits TSNZ made a promise to the Union it would enter into a collective agreement on terms and conditions no less favourable. It relied upon those representations to its detriment. It submits that it would be unconscionable to allow the respondent to resile from its promise.

The law

[14] There are four elements required to raise an estoppel[5]:

(a) A belief or expectation must have been created or encouraged through some action, representation or omission to act by the party against whom the estoppel is alleged;

(b) The party relying on the estoppel must establish that the belief or expectation has been reasonably relied on by that party alleging the estoppel;

(c) Detriment will be suffered if the belief or expectation is departed from; and

(d) It is unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

[15] The burden lies with the applicants to prove the estoppel.

Evidential Issues

[16] There has been a notable lack of evidence from the applicants to support any of the issues including estoppel. The applicants filed a two page sworn affidavit from

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5 *Weeraphong Harris* at [76]

Matthew Malcolm (ERA affidavit). Mr Malcolm was an ex-ABB employee. He attended two meetings held on 10 February and 10 March 2009 where a Mr Webster made representations on behalf of TSNZ.

[17] Mr Malcolm was not a witness to any direct discussions between the EBIIWU and TSNZ or the collective bargaining. He had also sworn an affidavit in the *Harris* case (Harris affidavit). On the first day of hearing I directed the respondent provide a copy of Mr Malcolm's Harris affidavit together with the transcript of his evidence.

[18] I raised the lack of evidence with the parties on 21 July 2016. No steps to provide further evidence have been taken. Two further directions were made to allow the applicants' time to produce further evidence two days prior to hearing and on the first day of hearing in September 2016. The applicants' declined to do so.

[19] At hearing several potentially relevant witnesses for the applicants were present including Waylon Herewini, Lou Yukich and Bill Gardner. Mr Yukich advised none of them especially himself would be giving evidence. The applicants preferred to continue to hearing with Matthew Malcolm's evidence only despite the indications given about its insufficiency.

[20] No evidence was led from any of the second applicants. They took no discernible part in the proceeding other than as a named party.

[21] Mr Yukich then sought to introduce evidence about by way of submissions. I declined to hear it. It was unfair to the respondent and the Authority, untested by cross-examination and the applicants' had declined three prior occasions to submit this in advance of hearing. Even at hearing the applicants' declined to depose and produce their witnesses for cross examination in the usual way. This was despite having sufficient time to do so.

[22] TSNZ's evidence was produced by consent.

Matthew Malcolm

[23] Mr Malcolm's ERA affidavit only addressed the alleged promise made by TSNZ. He gave no evidence about the remaining elements of estoppel and no evidence about the three remaining issues for hearing.

Was there evidence of a promise made by TSNZ to the Union?

[24] Mr Malcolm's ERA affidavit at paragraph 4 sets out the alleged promise to the Union made at these meetings:

> *Mr Webster [TSNZ representative] went to great trouble to assure us that they had been corresponding with both of the site Unions and that their offers of employment were on the basis that the collective agreement's would be undisturbed and would continue to be applied no less favourably than they were by ABB.*

[25] This was not in the evidence he gave 3 years earlier in the *Harris* case about the same meetings. This was added for the ERA proceedings.

[26] Mr Malcolm also added further new evidence at paragraph 5 stating:

> *At no stage did Mr Webster distinguish between the terms and conditions of existing and future employees.*
>
> *It was clear to me that everyone including future employees were being offered the same terms and conditions that were previously in effect with ABB and on an ongoing basis.*

[27] Under cross-examination Mr Malcolm accepted that the above evidence about the alleged promise to the EBIIWU was new. When asked why added this new evidence he stated "I added this after speaking about our case with Lou [Yukich]." There were no contemporaneous notes taken by Mr Malcolm from those meetings. There was nothing further to explain why he omitted this new evidence from his evidence 3 years earlier. His evidence about the promise appears motivated to assist the applicants' case.

[28] Mr Malcolm agreed TSNZ were at the time only addressing the ex-ABB Limited employees concerns. He accepted the promise was made to re-assure the ex-ABB Limited employees that they would not be disadvantaged if they transferred their employment to TSNZ. He then stated this was because there were no employees other than ex-ABB Limited employees on the worksite at the time. Therefore TSNZ would have had no reason to reassure anyone else.

[29] The requirements for estoppel must include "a clear unambiguous representation or promise by one party to the other which created a belief or expectation in the other."[6] There is no clear and unambiguous promise to the EBIIWU or second applicants that employees whom were not transferring from ABB Limited would receive the same terms and conditions as the ex-ABB Limited employees.

[30] There was no evidence of reliance by or detriment to the EBIIWU or the second applicants. Neither party gave evidence of any change in their position in reliance upon any promise. The EBIIWU and the second applicants appeared to have accepted the terms and conditions of collective employment agreement and signed irrespective.

[31] There is no evidence the applicants took any proactive steps at the time to ensure future employees such as the second applicants were to receive covered by the same reassurances given to the ex-ABB Limited employees. I do not accept the applicants submissions this was estoppel by acquiescence arises.

[32] There was no evidence it was unconscionable for TSNZ to enforce the terms and conditions set out in the collective employment agreement.

[33] The cause of action based on estoppel fails.

Did the respondent breach its duty of good faith to the second applicants by its advice in May 2015 that it would not pay them on the same basis as the ex-ABB Limited employees?

[34] The only evidence in support of this issue was produced by consent on the first hearing day. This was an email from S Urbanc dated 27 May 2015. On its face there is no evidence of any breach of good faith.

[35] There was no evidence from Mr Yukich or any other union official with whom TSNZ was corresponding to explain how the alleged breach arose based upon that email. There was no evidence from the second applicants about any alleged breach of duty.

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6 *White v Bank of New Zealand* [2013] NZHC 1087 at [23] citing *John Burrows*, *Jeremy Finn* & *Stephen Todd*Law of Contract in New Zealand (4th ed, Lexis Nexis, Wellington, 2012), at 4.7.4.

[36] This cause of action must also fail.

Did the respondent breach its duty of good faith to the first applicant by resiling from a promise made in 2009 that terms no less favourable than in previous ABB CEA would apply to all union members?

[37] The applicants relied upon Mr Malcolm's evidence to show a breach of good faith as well. Given my above finding about the promise made, no such breach can have occurred.

[38] The cause of action must fail.

Has the respondent engaged in misleading and deceptive behaviour under s.12 of the Fair Trading Act 1986 by resiling from promises it made to the first applicant which led it to believe that the CEA would have universal effect for all of its members?

[39] Section 12 of the Fair Trading Act 1986 provides:

> **12 Misleading conduct in relation to employment**
>
> No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.

[40] This requires a two stages enquiry - firstly, determining whether a breach has occurred and whether the conduct objectively had the capacity to mislead or deceive a reasonable person in the claimant's position. Secondly, examine whether the applicants suffered loss or damage by the conduct complained of. This second stage requires consideration of whether the applicants were actually misled or deceived by the conduct, and (if so) whether the conduct was an operating cause of the applicants' loss. There must be a "clear nexus" between the conduct and the loss or damage.[7]

[41] There is no evidence from the applicants about the conduct complained being misleading or deceiving. Equally there is no evidence the applicants' were actually misled or deceived and whether the conduct complained about caused this.

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7 *Hutton v ProvencocadmusLtd (in rec)* [2012] NZEmpC 207 at [124].

[42] This cause of action also fails. The application for compliance and wage arrears orders are dismissed.

Costs

[43] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority