

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 307  
3110092

BETWEEN                      E TŪ INCORPORATED  
   Applicant  
  
AND                                NEW ZEALAND STEEL  
   LIMITED  
   Respondent

Member of Authority:        Anna Fitzgibbon  
  
Representatives:              Garry Pollak, counsel for the Applicant  
   Carter Pearce, counsel for the Respondent  
  
Investigation Meeting:        4 August 2020 at Auckland  
  
Submissions [and further    31 July 2020 from the Applicant  
Information] Received:       31 July 2020 from the Respondent  
  
Date of Determination:       06 August 2020

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**DETERMINATION OF THE AUTHORITY**

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- A.     The respondent, NZ Steel Limited, in directly approaching individual employees about redeployment options, and in failing to seek agreement with the applicant, E Tū Incorporated, that those positions were “substantially similar”, has acted in breach of clause 77.1.1 of the Collective Employment Agreement (CEA).**
- B.     Within 21 days of the date of this determination, NZ Steel Limited must comply with clause 77.1.1, by obtaining ETū’s agreement as to what positions are “substantially similar”.**
- C.     Following compliance with clause 77.1.1, NZ Steel is required, within a further 21 days, to follow each of the steps that are set out in clause 77 of the CEA.**

- D. The parties are to act towards each other in good faith during the process outlined in this determination.**
- E. Costs are reserved.**

### **Employment Relationship Problem**

[1] The respondent, NZ Steel Limited (NZ Steel) operates a large steel mill at Glenbrook in South Auckland (Glenbrook). The applicant, E Tū Incorporated (E Tū) represents the majority of employees at Glenbrook. Both E Tū and NZ Steel are parties to a “New Zealand Steel Collective Agreement” (CEA) dated 1 July 2018. Clause 77 of the CEA deals with redundancy, both its definition and the process to be undertaken, in the event of a “redundancy situation”.

[2] A dispute has arisen between the parties about the interpretation, application, or operation of clause 77. E Tū claims that NZ Steel is in breach of its obligations under clause 77. It seeks a declaration from the Authority that there has been a breach. It also seeks a compliance order under s 137 of the Employment Relations Act 2000 (the Act) that NZ Steel follow the steps in clause 77 of the CEA.

[3] NZ Steel says that it has complied with clause 77 of the CEA. It says clause 77 is a step by step process which it has followed, the dispute with E Tū it says, is the proper order of those steps.

### **Investigation meeting**

[4] The dispute over the interpretation of clause 77 of the CEA arose at a critical time for the parties, following NZ Steel’s decision to close the Pipe and Hollows section, which forms part of the Pipe and Light Plate Plant at NZ Steel’s Glenbrook site. A number of employees are concerned by the redundancy process and its effect on them and their future. The parties attended urgent mediation but the matter was not resolved.

[5] The Authority investigated the matter urgently. The investigation meeting took a full day in the Authority.

[6] Mr Mark Palmer, an E Tū organiser and a member of E Tū’s consultation team, filed a witness statement. Ms Josie Oliver, an operator employed by NZ Steel and a member of E Tū’s consultation team attended the Authority’s investigation meeting and answered questions.

[7] Ms Lisa Berry, the Employment Relations Manager New Zealand and Pacific Islands for NZ Steel, filed a witness statement in the Authority. Ms Megan Bell, People and Capability Business Partner at NZ Steel and Mr Thomas Harper, Mills and Coding Manager at NZ Steel both attended the Authority’s investigation and answered questions.

[8] Each of the witnesses giving evidence before the Authority either swore on oath or affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[9] As permitted under s 174E of the Employment Relations Act 2000 (the Act), this determination does not set out all the evidence or submissions received. The determination states findings of fact and law and makes conclusions necessary to dispose of the matter.

## **Issues**

[10] The issues for determination by the Authority are as follows:

- (a) The correct interpretation of clause 77 of the CEA
- (b) Did NZ Steel breach clause 77 of the CEA?
- (c) If so, should the Authority issue a compliance order requiring it to comply with clause 77 of the CEA?

## **The relevant provisions of the CEA**

[11] Clause 77 of the CEA contains a definition of redundancy and provides for a process to be followed “where a redundancy situation has been declared as defined in clause 77.1.1 ...”:

<b>77</b>	<b>Redundancy</b>
77.1	<b>DEFINITIONS &amp; APPLICATION</b>
77.1.1	Redundancy is a condition in which the company has labour surplus to requirements because of the closing down of the whole or any part of the operations, or to a change in plant methods, materials, products, restructuring, or like causes, requiring a reduction in the number of employees, which cannot be accommodated by attrition or redeployment to a position which is agreed to be substantially similar by the parties.

[12] Clause 77.2 is a technical redundancy clause and is not applicable to the dispute between the parties.

[13] Clause 77.3 is a notification clause and it provides as follows:

**77.3 NOTIFICATION**

77.3.1 Where a redundancy situation has been declared as defined in **clause 77.1.1** above, management will advise the union and plant area delegate of the redundancy decision.

77.3.2 All employees rendered redundant by the situation referred to above will either receive a minimum of four weeks' notice in writing of the termination of their employment, or by agreement may cease employment immediately with 4 weeks normal pay in lieu of notice.

77.3.3 Should management dismiss an employee (for reasons other than misconduct) during the notice of termination period, the employee will be paid wages in lieu of the remainder of the notice period plus the appropriate redundancy compensation entitlements.

77.3.4 Employees who find an alternative position during the notice of termination period may, with the consent of management, terminate their employment prior to the expiry of the period of notice without forfeiting their entitlement to redundancy compensation. Management's consent in such instances will not be unreasonably withheld.

[14] Clause 77.4 sets out the process in relation to volunteers for redundancy:

**77.4 APPLICATION**

77.4.1 After notification the following steps will apply subject to the selection criteria in **clause 77.6**.

77.4.2 In the first instance, volunteers for redundancy will be sought from within the identified area.

77.4.3 If there are insufficient volunteers from the identified area, then volunteers would be sought from the remainder of site taking into account skills and capability requirements of the ongoing operations.

77.4.4 If there are still insufficient volunteers, then redundancy will apply to the surplus employees in the identified area.

77.4.5 In arranging such transfers management shall give due consideration to the qualifications and skill level of the employee and shall make every effort to place the employee in a comparable position within the company. Management will not place individuals in unreasonable positions for which they are clearly unsuited.

77.4.6 Employees may refuse to accept any offered transfer of employment requiring them to change their permanent place of residence and may elect to receive redundancy pay.

- 77.4.7 Employees rendered redundant under **clause 77.1.1** shall not be entitled to redundancy pay if they fail or refuse to accept such transfer of employment not requiring them to change their permanent place of residence.
- 77.4.8 Employees refusing to accept transfer to employment arranged by the company shall be deemed to have waived all further rights to re-employment with the company.

[15] Clause 77.5 provides for assistance to employees who lose their permanent employment, including the ability to seek individual counselling, references, compensation and superannuation.

[16] Clause 77.6 is the selection criteria in the event there are insufficient volunteers for redundancy. It states:

**77.6 SELECTION CRITERIA**

- 77.6.1 It is recognised that the need to maintain an efficient workforce and an efficient operation must be taken into consideration in the selection of employees to be made redundant.
- 77.6.2 If there are insufficient volunteers then, all things being equal, management will then observe the principle of “last on, first off” in selecting employees to be made redundant.
- 77.6.3 If there are more volunteers than required then, all things being equal, management will then observe the principle of “first on first off” in selecting employees to be made redundant.

[17] Clause 77.9 deals with redeployment. It states:

**77.9 REDEPLOYMENT**

- 77.9.1 Redeployed employees found to be unsuitable during the employment period between the fourth and twelfth weeks at the alternative position shall then be declared redundant in terms of their original position and shall receive redundancy compensation entitlements.
- 77.9.2 Redeployed employees who find the alternative position or location unsuitable and resign their employment in the employment period between the fourth and twelfth weeks in the new location shall receive redundancy compensation entitlements.
- 77.9.3 Volunteers from other areas as per clause 77.4.3 will not be accepted for redundancy until it is mutually confirmed redeployed employees are suitable for the new role.

**Agreed facts**

[18] The parties agreed on facts as follows.

[19] NZ Steel operates a large steel mill at Glenbrook in South Auckland. E Tū represents the majority of employees at NZ Steel's Glenbrook site. Both E Tū and NZ Steel are parties to a CEA dated 1 July 2018. Clause 77 of the CEA deals with redundancy.

[20] The pipe and light plate plant is a plant within the Glenbrook mill, where steel pipes and other end products are produced. The pipe and light plate plant consists of the "Pipe and Hollows" section (45 employees) and the "Delta line" (13 employees).

[21] On 30 April 2020, NZ Steel began consulting with E Tū about the proposed changes to the Pipe and Light Plate plant, including the potential permanent closure of Pipe and Hollows, on grounds that NZ Steel considers those products unprofitable.

[22] On 21 May 2020, Pipe and Light Plate plant employees were informed that NZ Steel had decided to permanently close Pipe and Hollows. The "Delta line" will continue to remain open.

[23] On 29 May 2020, NZ Steel sent all affected employees a pack containing:

- (a) A letter confirming the decision to close Pipe and Hollows and advising employees that their position would be disestablished once the plant closed, which was expected to occur around 28 August 2020.
- (b) A separate letter inviting employees to indicate whether they were interested in volunteering for redundancy under clause 77.4.2 with a list of current vacancies and an expression of interest form for those vacancies.

[24] Approximately 20 Pipe and Hollows employees have indicated that they are interested in volunteering for redundancy.

[25] During June and July 2020, NZ Steel has consulted with affected employees about possible opportunities for redeployment.

[26] On 29 May 2020, NZ Steel invited Pipe and Hollows employees to apply for 8 current vacancies. Applications closed on 5 June 2020.

[27] On 19 June 2020, NZ Steel invited Pipe and Hollows employees to apply for an additional 15 vacancies. Applications closed on 25 June 2020.

[28] NZ Steel has received at least one application for each of the vacant roles. Further, every Pipe and Hollows employee (other than those who have indicated they intend to volunteer for redundancy), has applied for at least one of the vacant roles. NZ Steel met with each employee individually to discuss their expression of interest and role preferences.

[29] On 17 July 2020, NZ Steel sent offer letters to each of the Pipe and Hollows employees (other than those who have indicated they intend to volunteer for redundancy), offering to redeploy employees into one of the vacant roles discussed above.

[30] It is currently anticipated that the Pipe and Hollows section of the plant will close in September 2020.

[31] Following submission of the statement of agreed facts set out in paragraphs [10]-[23] above, on 3 August 2020, NZ Steel sought applications from the wider site for voluntary redundancy pursuant to clause 77.4.3 of the CEA. Applications must be made by 11.59pm on Sunday, 9 August 2020.

## **First Issue**

### **The correct interpretation of clause 77 of the CEA**

#### **E Tū's position**

[32] Mr Palmer is an organiser for E Tū. He was also employed by NZ Steel for 35 years. In his final six years at NZ Steel he was the Site Convenor, a role which meant he was involved in most employment matters on site for members of E Tū and other unions. Mr Palmer gave the Authority his views of how he believed clause 77 was to be interpreted and applied.

[33] Mr Palmer was part of E Tū's consultation team involved in the consultation process with NZ Steel in respect of Pipe and Hollows. Pipe and Hollows had become increasingly unprofitable and its operations subsequently ceased as a result. Mr Palmer says NZ Steel's direct consultation with Pipe and Hollows' employees about redeployment opportunities was not in accordance with clause 77. He says the definition and application of redundancy is clear in clause 77.1 and requires the following:

NZ Steel to:

- have labour surplus to requirements because of
- the closing down of the whole or any part of the operations (Pipe and Hollows closure)...

- Requiring a reduction in the number of employees
- which cannot be accommodated by attrition or redeployment to a position which is agreed to be substantially similar by the parties.

[34] Mr Palmer says that while the first three components of the definition were present at the time, NZ Steel failed to consider whether employees could be redeployed to a position “**which is agreed to be “substantially similar by the parties”**”. He says, there was never an agreement between E Tū and NZ Steel about substantially similar positions. Rather, NZ Steel directly approached Pipe and Hollows employees whose roles were to be disestablished and encouraged them to apply for a limited number of roles in a short period of time.

[35] Mr Palmer said many of those employees accepted the roles because they felt pressured to do so and were concerned about their ongoing job security. This evidence was echoed by Ms Oliver who says in her experience of the process many employees panicked, and applied for any of the limited number of roles being offered to them by NZ Steel. This, she says was because they were concerned about their future employment opportunities and being able to sustain themselves and their families.

[36] Both Mr Palmer and Ms Oliver say that those employees who accepted the roles offered to them by NZ Steel were disadvantaged. Firstly, the roles offered were not agreed with E Tū to be substantially similar to their existing roles and were not substantially similar. Further, the roles offered were limited. Finally, because they have accepted those roles the affected employees say they are not able to avail themselves of a wider range of job opportunities that may become available within the wider site, further down the redundancy process, as set out in clause 77.4.3 of the CEA.

### **NZ Steel’s position**

[37] For NZ Steel, it is accepted that the definition of redundancy requires:

- (a) Step 1: an event happens (for example, “*the closing down of the whole or any part of the operations*”) that means the company “*has labour surplus to requirements*”.
- (b) Step 2: NZ Steel explores whether surplus employees can be “*accommodated by attrition or redeployment*”. Where employees are redeployed, no redundancy arises for them. However, a redundancy situation does arise where there are surplus employees that “*cannot be accommodated*” by redeployment.

- (c) **Step 3:** If a redundancy situation arises “*as defined in clause 77.1.1*” NZ Steel must notify the union. This must include identifying how many employees need to be made redundant (i.e. the “*reduction in the number of employees*” that is required), otherwise the next steps would not make sense.<sup>1</sup>

[38] Ms Lisa Berry gave evidence for NZ Steel. Ms Berry has been employed by NZ Steel in an HR role for seven years. Ms Berry says that a redundancy situation only arises when NZ Steel has surplus labour that “*cannot be accommodated by attrition or redeployment...*” By way of example Ms Berry says if NZ Steel closes down a plant but all employees were willing and able to be redeployed, there would be no redundancy situation. If the plant with 40 employees was closed down but 15 were redeployed, no redundancy would arise for those employees. There would be a redundancy situation for the remaining 25 employees who “*cannot be accommodated by attrition or redeployment*”<sup>2</sup>

[39] A redundancy situation cannot be declared under clause 77.3.1 until the steps in clause 77.1.1 have been complied with. In Ms Berry’s witness statement and in the submissions made on behalf of NZ Steel, it was apparent that NZ Steel went as far as exploring whether surplus employees could be “*accommodated by attrition or redeployment*”. But, did not explore or agree with E Tū that the redeployment positions were substantially similar.

### **Authority’s finding**

[40] Clause 2 of the CEA specifies the parties to the CEA as being NZ Steel and E Tū. It was a clear requirement and a correct interpretation of clause 77.1.1, in my view, that E Tū be involved in the consideration of which positions may be substantially similar for redeployment purposes and then for those positions to be agreed between NZ Steel and E Tū. E Tū was left out of this process. NZ Steel approached employees individually with redeployment options. This was not contemplated by clause 77.1.1.

### **Second Issue**

#### **Did NZ Steel breach clause 77 of the CEA?**

[41] It is apparent to me and accepted by both parties that clause 77.1.1 was not complied with. In the examples provided by NZ Steel above there is no reference to the specific

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<sup>1</sup> Counsel for NZ Steel submissions, paragraph 4.

<sup>2</sup> Berry witness statement para [23].

requirement in clause 77.1.1 to agree with E Tū that redeployment “*is to a position which is agreed to be substantially similar*”.

[42] It is the Authority’s finding that NZ Steel breached clause 77.1.1 of the CEA.

### **Third Issue**

#### **Should a compliance order be issued by the Authority requiring NZ Steel to comply with clause 77 of the CEA?**

##### **Notification of redundancy (clause 77.3)**

[43] Clause 77.3 states:

Where a redundancy situation has been declared as defined in **clause 77.1.1** above, management will advise the Union and plant area delegate of the redundancy decision.

[44] It is my view that a declaration of a redundancy situation by NZ Steel under clause 77.3.1 was not able to be made until it had complied with clause 77.1.1. This was a precondition of declaring a redundancy situation.

[45] NZ Steel has proceeded on the basis that the declaration of a redundancy situation was able to be made by it and has commenced the process set out in clause 77.4, including seeking volunteers for redundancy from within the identified area (77.4.2).

[46] If NZ Steel had complied with clause 77.1.1 and identified by agreement with E Tū substantially similar positions for redeployment, NZ Steel would have been in a position to know whether there was a redundancy situation for employees. Using Ms Berry’s example, if the plant had 40 employees and 15 were redeployed to positions agreed by NZ Steel and E Tū to be substantially similar, there would be a redundancy situation for the remaining 25 employees. If substantially similar positions had been found for all 40 employees, no redundancy situation would exist.

##### **Clause 77.4 of CEA - Application**

[47] The steps that follow notification of a redundancy situation are contained in clauses 77.4.2 onwards as follows:

Step 1: Call for volunteers from the identified area (77.4.2). If there are more volunteers than required, selection criteria apply (77.6.3).

Step 2: If there are not enough volunteers from the identified area, volunteers are sought from the remainder of the site, taking into account, skills and capability requirements of the ongoing operations (77.4.3).

Step 3: As employees from the remainder of the site volunteer to be made redundant, new vacancies are created and management may transfer employees from the identified area to a “comparable” position within the company (77.4.5).

Step 4: If there are still insufficient volunteers, then involuntary redundancy will apply to the surplus employees in the identified area (77.4.4) applying selection criteria (77.6.2).<sup>3</sup>

[48] Mr Palmer agrees that these are the steps following notification of redundancy<sup>4</sup>. The steps are mandatory. However, because of NZ Steel’s failure to comply with clause 77.1.1, he says the redundancy process has been derailed.

[49] I concur with E Tū’s interpretation and application of clause 77. Following the redeployment process prescribed in clause 77.1.1, NZ Steel declares a redundancy situation and notifies E Tū. Volunteers for redundancy from the identified site are then sought. If there are not enough volunteers from the identified site, volunteers for redundancy are sought from the wider site. This creates more vacancies for those employees affected, to be transferred into.

[50] **Orders**

- (a) The respondent, NZ Steel Limited, in directly approaching individual employees about redeployment options, and in failing to seek agreement with E Tū that those positions were “substantially similar”, has acted in breach of clause 77.1.1 of the Collective Employment Agreement (CEA).
- (b) Within 21 days of the date of this determination, NZ Steel must comply with clause 77.1.1 of the CEA by obtaining ETū’s agreement as to what positions are “substantially similar”.
- (c) Following compliance with clause 77.1.1, NZ Steel is required, within a further 21 days, to follow each of the steps that are set out in clause 77 of the CEA.
- (d) The parties are to act towards each other in good faith during the process outlined in this determination.

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<sup>3</sup> Berry para[27].

<sup>4</sup> Palmer paras[15]-[18], Counsel for applicant submissions [15]-[18].

**Costs are reserved**

[51] E Tū has 14 days from the date of this determination to file a memorandum as to costs.  
NZ Steel has 14 days from receipt to file a memorandum in reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**