

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROHE**

[2022] NZERA 369
3158661

BETWEEN	ELECTRICAL UNION INCORPORATED First Applicant
AND	ANDREW SCHULTE, ANDRE RICHARDS, BLAINE TE KAKAU, DEAN COWELL, DIRK HANSEN, GRAHAM BULLOCK, RAU ENGELEN AND RICK SMITH Second to Ninth Applicants
AND	MERCURY LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Lou Yukich, advocate for the Applicant David France, counsel for the Respondent
Investigation Meeting:	1 and 2 February 2022 at Tauranga
Submissions Received:	At the investigation meeting with further input up to 8 February 2022
Date of Determination:	8 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants claim the respondent, Mercury, has failed to act in good faith, is undermining bargaining for a new collective agreement and has breached a number of terms

of the current agreement albeit one which has expired and whose terms apply to the employee applicants as individual employment agreements.

[2] Mercury denies the claims have validity. It says it is approaching bargaining with its best endeavours and the other claims relate to a legitimate and properly conducted process aimed at possibly reorganising its business.

The Authority's investigation

[3] The Authority's investigation was face-to-face, albeit preceded by the normal exchange of written statements. Oral evidence was offered by the applicants, their union representative and managerial witnesses called by Mercury.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received though there is discussion of the latter given this is a dispute and the submissions are crucial.

[5] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[6] Mercury is the operator of various power generation facilities which, pertinent to these claims, include five geothermal sites at Mokai, Kawerau, Nga Awa Purua, Rotokawa and Ngatamariki. The last four are all about 20 to 25 minutes from Taupo while Kawerau is some distance apart from the rest.

[7] The second to ninth applicants are members of the Electrical Union (the Union) employed by Mercury at the above power stations as production technicians.

[8] In early 2021 Mercury underwent a significant restructure which saw the formation of a generation business unit combining all previously separated forms of generation –

geothermal, hydro and wind. With that a new role of General Manager Generation was established and the appointee initiated a project to consider moving control of four of the geothermal sites to a single centralised one. At that time both Nga Awa Purua and Rotokawa were on one geothermal field with Rotokawa being remotely controlled from the Nga Awa Purua control room. For various reasons Mokai was not included in the proposal.

[9] This consideration began in late September 2021 and included issues such as the licences that would be needed to operate such a system, the training that could be required, the development of a centralised control room and how this could impact on roles. Here it should be noted the evidence shows a proposal such as this had been a known possibility for some time, as was the fact that were it to be considered the most likely site for a single control room was Nga Awa Purua. The project confirmed that last point but identified such a move would likely have a substantial impact on operations and existing roles.

[10] On 10 November 2021 Mercury advised affected staff and the union that it intended presenting a change proposal the following day.

[11] The proposal involved removing the control room function from Kawerau and Ngatamariki and introducing a single integrated control room at Nga Awa Purua which would control those three along with Rotokawa. It would also see the disestablishment of what were then 18 positions whose incumbents were responsible for both the control room and other operational activities at the site which was their then current place of work. Mercury proposed splitting those duties between two new roles – Geothermal Controller and Production Technician. Geothermal Controllers would operate the centralised control room at Nga Awa Purua, while Production Technicians would perform day-to-day operational activities at the site at which they were located (being either Nga Awa Purua/Rotokawa, Kawerau or Ngatamariki). The proposal documentation included possible job descriptions for those positions.

[12] In its original form the proposal would also have seen a reduction in overall staff numbers. Fourteen positions were envisaged with these being six Geothermal Controllers, six Production Technicians, one trainee and a Training and Competency Co-ordinator. Change was also envisaged to the hours of work with Production Technicians working 40

hour weeks, Monday to Friday, as opposed to the then current 24/7 shift. Geothermal Controllers would remain shift workers.

[13] The proposal, as it then was, envisaged an implementation date 1 June 2022 as a number of issues would have to be addressed should it go ahead. These included changes to operating licences, training and equipment installation.

[14] The presentation went ahead but the union had by then advised Mercury its members would not attend. Instead, both the union and its affected members were sent a copy of the proposal on 11 November 2021 and they then attended a separate meeting on 12 November. Also present was Mr Yukich, the union's secretary.

[15] Further meetings occurred between then and 25 November with Mercury meeting with all affected employees. Mercury also encouraged feedback on all aspects of the proposal and, as a result, received some 150 pieces of input. This included feedback from the union and the two met again on 25 November 2021 to discuss the union's views. These included alternate operating models with different roles – indeed the union was of the view that its model could, if adopted, be operational within weeks as opposed to Mercury's proposal which was envisaged to need some five months training. Also included was an apparent challenge to the proposed appointment process though ultimately the union did not provide any feedback in this regard.

[16] All affected employees were advised of the outcome on 2 December and this was detailed in a document entitled 'Change Decision: Geothermal Shift Production Technicians'. The union also received a copy. Included therein were a number of changes that had resulted from the feedback. Key amongst these was a decision to increase the number of Geothermal Controller roles from six to ten primarily to ensure no one would be rostered alone at night and answer concerns that the envisaged role was too large for one person alone. It would also address concerns about the original proposals onerous on-call and cover requirements. It would also mean alterations to the need for on-call work and changes to both the roster pattern and job descriptions

[17] As one of the 18 current positions was then vacant this meant 16 of the 17 affected employees could be accommodated in one of the new roles. It was considered, by both

parties, that none should be appointed to the trainee role but Mercury guaranteed the 17th would be offered a redeployment opportunity of some form.

[18] Following the announcement all affected employees were invited to complete an expression of interest (EOI) form for the new roles. During this process the union continued to engage with Mercury with this including getting its members to complete and present its own version of the EOI form which included variations to the terms and conditions under which the applicants were then employed. Here it should be noted the parties were, around this time, engaged in protracted bargaining aimed at securing a new collective and a number of the term and condition variations reflected the union's position in bargaining.

[19] Mercury rejected these alternate forms on the grounds their content did not align with the new structure and on 9 December the union forwarded copies of Mercury's form completed by its members. This was done on the basis it was without prejudice to future action it might take on their behalf. They were not signed by the employee concerned.

[20] Notwithstanding that Mercury assessed the responses and the suitability of each employee to particular roles. Mercury then advised the union of its assessment of its members on 15 December and invited feedback.

[21] The union responded by asking about redeployment options for its member who had been unsuccessful with his application. That led Mercury to discover a mistake in the scoring information which affected one of the union members. It meant he was to be appointed to his second choice position as opposed to his first. Mercury decided to advise all affected employees of this. It also sent the relevant documentation to the union and asked for its feedback. That led, in turn, to a challenge to the selection process with an allegation there had been no consultation about it and that there were elements of age discrimination.

[22] Mercury responded and also advised they were still waiting for a reply regarding the error's impact on the member in question. There has been no reply.

[23] There has also been further interaction over terms and conditions, particularly salaries. Mercury had proposed a scenario under which Geothermal Operators would be paid more than the current roles but those retained as Production Technicians would see a significant reduction, largely due to the loss of shift allowances. That said, there are also

strong indications that process is also affected, indeed impeded, by the contemporaneous negotiations for renewal of the previously expired collective agreement and confusion appears to have resulted.

Discussion

[24] It is the union's view that Mercury's decision is contestable for a number of reasons. They include:

- (a) A claim the restructure is a sham with the new roles being no more than title changes;
- (b) That Mercury is prevented from unilaterally introducing the new roles by way of a restructure as the existing IEA's contain a work scope clause which covers the work and activities associated with their roles;
- (c) That the proposed changes ... *are provided for or enabled by [the] existing terms and conditions including multi site competence, change of location and alterations of hours of work and that Mercury is therefore trying to alter those terms by falsely claiming there are new roles when there are not.*
- (d) That Mercury is attempting to undermine current bargaining for a replacement collective agreement; and
- (e) That Mercury has breached the duty of good faith. This is, in essence, a claim Mercury's consultation was deficient and the union was not provided with all relevant material especially with respect to job descriptions, selection criteria and the terms and conditions applicable to the new roles.

[25] The evidence clearly contradicts the claim Mercury's proposal is a sham with the most telling point being the evidence from more than one applicant witness that centralisation, which was the heart of Mercury's proposal, was not only expected but a prudent and inevitable business choice. Indeed, Mr Yukich's evidence was that would be perfectly acceptable provided Mercury adopted the Unions proposal regarding implementation and conceded various conditional changes as these would, in its view, provide Mercury with benefits additional to those it envisaged from its approach.

[26] These concessions exhibit what it really going on here which is the union's pursuit of a new collective employment agreement on their terms. In doing so they have, however, conceded Mercury's proposal is underpinned by a legitimate business case and centralisation of the control function was inevitable.

[27] Even if that were not the case I would not accept the allegation the restructure was a sham with the new roles being nothing more than a title change. The test to be applied when reaching this conclusion that outlined by Chief Judge Inglis in *Waikato District Health Board v Archibald*.¹ There the Judge said:

Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the employee, consider that there was sufficient difference between the roles to break the essential continuity of the employment?

[28] Here the evidence confirms clear differences with, if nothing else, the incumbents of the new positions performing what was previously only a portion of what was previously expected. I say "*if nothing else*" as the evidence shows the changes go further than that but even if it didn't, that would be enough. It is well established no job is inviolable and an employer may, provided a valid rationale and adequate consultation, remove, create or change a job or its content. Splitting a role must be a legitimate option if it means the business can operate more efficiently and here I again note the union effectively conceded there exists a legitimate rationale for centralising the control function.

[29] Returning to the new roles and my conclusion the changes go further than merely splitting two existing functions.

[30] The evidence shows the current approach sees staff focus on control room duties and they struggle to perform their duties with respect to the safe operation and maintenance of site equipment. This was emphasised by Mercury's witnesses and confirmed by the applicants who spoke of difficulties efficiently and effectively completing site-based duties such as isolations, permit issues and management, station rounds, and other operational activities across the site. The new site based Production Technician roles will address this by allowing incumbents to concentrate on these activities and ensure their completion without

¹ *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [39]

being distracted by control room duties though, in any event, that would now be impossible given the fact control room operators will only be performed from one site thus precluding an ability to perform these duties at the other sites.

[31] With respect to the proposed Geothermal Controller role the evidence shows that aside from physical centralisation the skill set will also change. This is due to operators having to monitor and analyse data from all four geothermal sites simultaneously and then make decisions for the optimal benefit of the entire integrated system as opposed to the current structure where decisions only benefit one site. The differences here are perhaps confirmed by the extensive training requirement which was outlined in evidence.

[32] Finally there are far less esoteric differences which relate to hours and location of work. As already said, the evidence convinces me the roles are different and not a re-labelling sham.

[33] Moving now to the argument the “Scope of work” clause in the collective employment agreement precludes the proposed change.

[34] It is here the applicants face an insurmountable obstacle. There is no collective employment agreement with over a year having passed since the previous one’s expiry.² The applicant employees are on individual employment agreements which means terms may be altered either by agreement or by a valid restructuring as, I have concluded, is occurring here. There is no limitation imposed by a collectives’ coverage clause.

[35] Even if that was not the case the applicants' argument the work scope clause prevents the restructure without agreement is comparable to that unsuccessfully run by the Corrections Association (CANZ) in *Chief Executive of the Department of Corrections v Corrections Association of New Zealand Inc.*³

[36] CANZ argued the employer could not unilaterally restructure by disestablishing a Senior Case Manager position and replacing it with a Case Manager position because the roles were covered by the coverage clause. CANZ argued the coverage clause covered the

² Section 53 of the Employment Relations Act 2000

³ *Chief Executive of the Department of Corrections v Corrections Association of New Zealand Inc* [2017] NZEmpC 78

work of both the disestablished and replacement roles so any change had to be by variation of the collective agreement. The argument failed⁴ and here it is even weaker given the absence of a current collective employment agreement. It follows the argument the change is enabled, and somehow then prohibited by an extant collective also fails.

[37] Turning now to the claim Mercury is undermine bargaining. Since *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd*⁵ it has been recognised that employers are permitted to restructure during bargaining, and on its own, such action does not constitute undermining the bargaining.

[38] Here I revert to the fact conceded by the applicants that the centralisation proposal was not only expected but a viable and positive way forward for the business. There is nothing to suggest the restructuring proposal was a mechanism designed to undermine bargaining especially when the evidence is Mercury is not only willing to enter into a collective covering all staff engaged in its production operations but desirous of such an outcome.

[39] Finally there is the argument an alleged lack of consultation precludes the proposed change. In my view this argument lacks any substance. The above chronology shows Mercury engaged in a comprehensive and proper process of consultation. Indeed, it went so far as to make considerable changes to its initial proposal as a result of the feedback it received, including that from the union. It also reverted to the union for additional information with no response to those requests (refer [22] above).

[40] The evidence leads to a conclusion the applicants' argument is simple – Mercury refused to accept their input. That approach fails to recognise the legal requirement. Mercury is required to consider the input – not agree and the evidence clearly shows that consider it did. The evidence leads me to conclude that I have no option but to revert to where this claim initially came from – the applicants are despondent Mercury did not accept their view as to how centralisation should be implemented and, more particularly, did not concede their claims with respect to the renewal of their long expired collective.

⁴ Above n 3 at [36] to [39]

⁵ *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597 (EmpC)

[41] Short answer – it didn't have to but the parties interactions both here and elsewhere lead me to conclude they remain capable of resolving the issues.

Conclusion and orders

[42] For the above reasons I conclude the applicants' claims lack merit and the orders sought should not be granted. Mercury may proceed with its proposal though it is cautioned to engage with the Union over the terms that might apply once it institutes whatever structure is finally considers appropriate.

[43] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Mercury may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date the applicants will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.⁶

Michael Loftus
Member of the Employment Relations Authority

⁶ www.era.govt.nz/assets/Uploads/practice-note-2.pdf