

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 382  
3232119

BETWEEN                      KERESEPI TALISAU &  
   OTHERS  
   Applicants

AND                              BEVCHAIN (NZ) LIMITED  
   Respondent

Member of Authority:        Alex Leulu

Representatives:             Peter Cranney and Grace Liu, counsel for the Applicant  
   Gillian Service and Nicola Whiteman, counsel for the  
   Respondent

Investigation Meeting:      5 March 2024 and 23 April 2024 in Auckland

Oral Submissions and      23 April 2024 from the Applicants and the  
further information        Respondent  
received:

Determination:                26 June 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The 62 applicants in this case were all previously employed by BevChain (NZ) Limited (BevChain) as store persons. BevChain was previously contracted by Lion New Zealand Limited (Lion) to carry out warehousing services at Lion's distribution facility in East Tamaki, Auckland (the Lion facility). The applicants all worked for BevChain at the Lion facility.

[2]     In 2023 BevChain's contract with Lion was not renewed. This led to BevChain terminating the applicants' employment on 30 June 2023. Upon the termination of their employment, the applicants claim they were each entitled to a redundancy payment in accordance with their collective agreement with BevChain.

[3] BevChain opposed the applicants' claims because it said it offered alternative employment to the applicants. After the applicants failed to accept its offers of alternative employment, BevChain argued they were not entitled to any redundancy payments.

### **The Authority's investigation**

[4] On 5 March 2024 an investigation meeting for this matter was initially held with the parties. For the Authority's investigation, written witness statements were lodged from each applicant in support of their case. In support of BevChain, witness statements were lodged by BevChain general manager, Michael Assaf and former BevChain site manager, Hamioru Waru. Mr Assaf and Mr Waru attended the investigation meeting and each answered questions respectively under affirmation and oath from me and the parties' representatives.

[5] After hearing the evidence of both Mr Assaf and Mr Waru, the parties agreed to adjourn the matter to allow for further discussions between them. Their discussions were to include the possibility of preparing an agreed statement of facts and to agree to which witness statements could be admitted by consent.

[6] The parties agreed for all the applicants' witness statements to be lodged by consent. An agreed statement of facts was also lodged on 11 April 2024. On 23 April 2024 the investigation meeting was reconvened where representatives for each party made oral closing submissions to the Authority. Each party also provided written closing submissions to the Authority.

[7] 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.

### **The issues**

[8] The issues requiring investigation and determination were:

- (a) Were the applicants entitled to redundancy payments in accordance with Schedule 2 of the "BevChain - Lion Warehouse East Tamaki Store Persons Collective Employment Agreement" (the Collective Agreement)?

- (b) If so, did BevChain breach the redundancy provisions of the Collective Agreement?
- (c) Subject to the outcome on the first two issues, should the Authority order compliance against BevChain in accordance with the redundancy provisions of the Collective Agreement?
- (d) Should either party contribute to the costs of representation of the other party.

[9] Both parties agreed for the Authority to initially determine the outcome of the first two issues. Depending on the outcome, the parties will later confirm whether the investigation will continue in respect of the remaining claims for compliance and costs.

## **Context**

### *The Lion service contract*

[10] BevChain operates in New Zealand as a warehousing and logistics business. BevChain is a related company to Linfox Logistics (N.Z) Limited (Linfox) and is part of a wider group of Linfox companies.

[11] BevChain first started its service contract with Lion in 2018. As part of the service contract the applicants worked for BevChain at the Lion facility as members of FIRST Union (and each were party to the Collective Agreement).

[12] In March 2023 Lion decided not to renew the service contact with BevChain. Instead, Lion decided to engage MOVE Logistics and Warehousing Limited (MOVE) as its preferred service provider for the Lion facility.

[13] On 8 March 2023 BevChain met with the applicants and informed them of the loss of the contract. BevChain also explained its next steps to try and address the loss of the service contract. These steps included:

- (a) Meeting with MOVE to discuss the possibility of the applicants obtaining employment with them (and to continue work at the Lion facility for MOVE);
- (b) Initiating discussions with Asahi Beverages New Zealand Limited (Asahi) about securing a potential service contract with them; and

- (c) Considering whether there were available opportunities for the applicants to work for Linfox in similar roles.

#### *The May letters*

[14] In May 2023 BevChain sent letters to almost all the applicants (not including one applicant, Adele Teinakore). All the letters formally confirmed BevChain's loss of the Lion service contract (the May letters). However, there were two variations of the letters sent to the applicants:

- (a) Forty-four of the applicants were not offered alternate employment (Category A letters). If these applicants were not offered alternate employment by 30 June 2023, BevChain said they would be entitled to redundancy compensation; and
- (b) Seventeen of the applicants were offered alternate employment with Linfox (Category B letters).

#### *The Asahi offers*

[15] On 29 May 2023 BevChain was successful in obtaining the service contract with Asahi. The work for Asahi was to be carried out at an Asahi facility on Verissimo Drive in Mangere (Asahi facility).

[16] On 8 June 2023 Linfox withdrew its offers of employment to the applicants who received the Category B letters. Between 8 and 27 June 2023 BevChain wrote to each of the applicants offering them alternative employment at the Asahi facility. The offers were presented in three tranches:

- (a) Twenty-eight of the applicants were initially offered alternative employment at the Asahi facility on Thursday 8 June 2023 (Tranche One). These offers were due to expire on Thursday 15 June 2023. None of the offers were accepted.
- (b) Twenty-three further applicants were next offered alternative employment at the Asahi facility on Friday 16 June 2023 (Tranche Two). These offers were due to expire on Friday 23 June 2023. None of these offers were accepted.
- (c) Twenty-one of the remaining applicants were next offered alternative employment at the Asahi facility on Wednesday 21 June 2023 (Tranche Three).

These offers were due to expire on Wednesday 28 June 2023. None of these offers were accepted.

[17] Among the applicants, 13 had previously worked night shifts at the Lion facility. They previously received a higher pay rate than those who worked the day shift at the Lion facility. It was initially unclear to BevChain whether night shifts would be available at the Asahi facility. As a result, the Asahi offers to these 13 applicants were different as they were offered a rate equal to their previous night shift rate (and higher than the other Asahi offers). None of the Asahi offers were accepted by these applicants.

[18] Between 20 and 29 June 2023 BevChain informed the applicants of the termination of their employment on 30 June 2023. On 30 June 2023 the applicants' employment with BevChain was terminated.

[19] In early July 2023 BevChain closed its operations at the Lion facility. Fifty-eight of the applicants accepted employment with MOVE on 1 July 2023 and almost all started their employment on 3 July 2023 (one applicant started later on 5 July 2023).

#### *The Asahi service contract*

[20] Although none of the applicants accepted the Asahi offers, 10 other BevChain employees accepted offers to work at the Asahi facility. However, BevChain said 33 workers were required to properly perform the work required for the Asahi contract.

[21] In July 2023 there was a further restructure for those 10 employees. As a result, the 10 employees agreed to being employed by Linfox on 24 July 2023. Work under the Asahi service contract was also due to start in July 2023. However, the work was delayed and work commenced in September 2023.

### **The grounds for dispute between the parties**

#### *The terms of the Collective Agreement*

[22] The Authority has jurisdiction to make determinations about employment relationship problems which arise from disputes about the interpretation, application, and operation of employment agreements.<sup>1</sup>

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<sup>1</sup> Employment Relations Act 2000, s161(1).

[23] The dispute in this case arose from the parties' conflicting interpretation of the application of clause 1 of Schedule 2 of the Collective Agreement. Although the Collective Agreement had two versions of Schedule 2, clause 1 in each version was worded in the same way as follows:

Redundancy is a condition in which the Company has staff surplus to requirements because of the closing down or changes to the whole or any part of the Company's operation due to change in plant, methods, materials or products, contracting out, re-organisation, or like cause requiring a permanent reduction in the number of permanent employees. Redundancy shall not include the termination of a casual or temporary employee. Redundancy shall not include situations when the Company at its discretion, offers an employee an alternative position with the Company, provided that such position is on similar terms and conditions and within the capability of the employee to perform.

*The parties' areas of dispute*

[24] The dispute between the parties fell within two general areas of arguments. Firstly, whether BevChain's May letters to the applicants were to be treated as notices of dismissal. Secondly, whether the Linfox and Asahi redeployment offers to the applicants were legitimate offers of alternative positions of employment in accordance with clause 1 of each version of Schedule 2 of the Collective Agreement.

*Notices of dismissal argument*

*The applicants' claims*

[25] The applicants' primary argument was BevChain's May letters were each effectively BevChain's notice of dismissal to each applicant. The applicants argued once BevChain had issued each notice of dismissal to them, BevChain could not unilaterally withdraw each notice without consent from each respective applicant.

[26] As an example, the applicants' referred to various aspects of the Category A letter given to Christopher Taia on 17 May 2023. Mr Taia's Category A letter explained the following:

- (a) BevChain had lost the service contract with Lion and the contract was due to end on 30 June 2023;

- (b) There were no work opportunities available to Mr Taia for work with Linfox. If a redeployment opportunity arose for him to work with Linfox, he would be offered an opportunity to transfer his employment to Linfox;
- (c) In the event he was offered a role by Linfox and he did not accept the offer, he would not be entitled to redundancy in accordance with the Collective Agreement. His employment would end on 30 June 2023.
- (d) Alternatively, if he did not secure an offer for redeployment with Linfox, he would be made redundant in accordance with the collective employment agreement.

[27] In terms of the Category B letters, the applicants referred to the letter given to Atariki Atariki on 10 May 2023. The main difference from the Category A letters was the Category B letters referred to an offer to Mr Atariki of redeployment of his employment from BevChain to Linfox. Apart from this provision, much of the letter was the same as Mr Taia's Category A letter.

In accordance with your employment agreement, as your role would become surplus to requirements your role may become redundant and there are currently no internal redeployment opportunities within BevChain (NZ) Limited. However, it is proposed that you are redeployed through being offered the opportunity to transfer to a new role with Linfox Logistics (NZ) Limited. This redeployment offer would be based on retaining substantially similar terms and conditions, including, but not limited to; pay rates, existing leave balances and recognition of service.

[28] The applicants said the May letters only referred to potential redeployment opportunities (Category A letters) and redeployment offers (Category B letters) with Linfox. Because the Category A applicants were not specifically offered opportunities to work with Linfox, the applicants said they were dismissed on notice. The applicants appear to also argue the same for applicants who received the Category B letters when Linfox withdrew its offers of redeployment with them.

#### *BevChain's response*

[29] BevChain disagreed with the applicants' approach and asked the Authority to consider the conditional nature of the language used within the May letters and the context in which the letters were provided to the applicants.

[30] When the May letters were sent to the applicants, BevChain argued its focus was to try and keep the applicants in some form of employment. This meant taking steps to find employment opportunities with Linfox and Asahi. It said the Category A letters should be read as “potential redundancy”.

*Were the Category A letters notices of termination?*

[31] In considering the applicants’ arguments, the first question to consider is whether the letters were in themselves notices of termination of the applicants’ employment? The Category A letters had the following wording:

If you are unsuccessful in securing redeployment with Linfox you would be given notice that your employment would end due to redundancy.

[32] In Mr Taia’s case, he did not receive an offer of redeployment with Linfox. However, on 16 June 2023 BevChain send Mr Taia a letter offering him an opportunity to be redeployed to work at the Asahi Facility. In the letter, BevChain described Mr Taia’s Category A letter as a notice of termination as follows:

Our 17 May 2023 letter gave you notice of termination of your employment by stating that your employment with BevChain would be coming to an end on 30 June 2023. This was solely because of the loss of the Lion contract and our inability to offer you any further work with BevChain.

[33] Like all the applicants who received the Asahi offers, Mr Taia did not accept BevChain’s Asahi redeployment offer. On 26 June 2023 Mr Taia received a further letter from BevChain confirming the end of his employment on 30 June 2023 and he was not entitled to a redundancy payment.

[34] I accept the Category A letters were notices of termination for two reasons. Firstly, the timeframe for when the Category A letters were issued to the applicants was consistent with the notice provisions of the Collective Agreement. In a redundancy situation, the Collective Agreement required BevChain to provide one months’ notice of termination. Both Mr Taia’s subsequent letters from BevChain were well short of the notice period (he received the Asahi offer on 16 June 2023 and termination letter on 26 June 2023).

[35] Secondly, the potential offer of redeployment was specifically with Linfox which should be treated as a condition of the notice of termination. Putting aside whether BevChain could have relied on the viability of any potential Linfox offers to

the Category A applicants (addressed further in this determination), if a Linfox offer was made to these applicants, the redundancy provisions of the Collective Agreement would not apply to them. These applicants did not receive an offer of redeployment to work for Linfox.

*The Asahi offers of redeployment*

[36] The second question to address was whether Asahi offers could supersede the Linfox offers for the purposes of an alternate offer of employment in accordance with the Collective Agreement?

[37] The applicants relied on previous Employment Court guidance on notices of termination in redundancy cases to support its case. Specifically, the Court's decision in *Westpac Banking Corporation v Smythe* where the Court said:

Once notice of termination is given by either party to an employment relationship, that notice cannot be unilaterally withdrawn.... It is however open to the other party to the employment relationship to accept the withdrawal.<sup>2</sup>

[38] The Category A letters were a legitimate notice of termination of employment. It was reasonable for an employee to interpret the information in the Category A letter as a notice of termination with uncertain prospect of an alternative offer of employment with Linfox to being made.

[39] The applicants who received this letter did not consent to any withdrawal by BevChain of the notice of termination. BevChain could not rely on subsequent Asahi redeployment offers as an alternative offer of employment in accordance with the Collective Agreement.

[40] Although clause 1 of Schedule 2 of the Collective Agreement says redundancy is not triggered if an employee receives an offer to an alternative position, it should be interpreted alongside the wording of the May letters. In line with the May letters, BevChain was unable to provide the Category A applicants with offers of alternative employment with Linfox. Therefore, it failed to meet its condition as set out in the Category A letter. The applicants in this situation were therefore entitled to a redundancy payment in accordance with the Collective Agreement. Because BevChain

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<sup>2</sup> [2006] NZEmpC 6 at [94].

failed to pay the Category A applicants their redundancy payments, they were also in breach of clause 1 of Schedule 2 of the Collective Agreement.

*Were the Category B letters notices of termination?*

[41] The Category B letters were different to the Category A letters because BevChain made an offer of alternative employment to the applicants. The issue for these letters were whether the offers were legitimate offers. This is addressed in the next issues for discussion.

### ***Offer of alternative employment arguments***

*The applicants' views on the Linfox and Asahi offers*

[42] As an alternative argument, the applicants said the Linfox and the Asahi offers were not genuine alternate offers of employment. They argued the Linfox offers could not have been a legitimate offer of alternative employment because the applicants were not employed by Linfox.

[43] In respect of the Asahi offers, the applicants argued the offers were not on similar terms and conditions with the applicant's employment under the Collective Agreement because:

- (a) There was no guarantee of permanency because the work was subject to 33 applicants accepting the offers;
- (b) The actual work at the facility was not available until September 2023; and
- (c) The applicants were required to work at a different location.

*BevChain's arguments in response*

[44] In response BevChain disagreed with the applicants. It said it offered each applicant employment in an alternative position on similar terms and conditions as they were employed (and which was within each applicant's capability to perform).

[45] BevChain's closing submissions did not specifically address whether the Linfox offers were a legitimate offer of alternative employment in line with the Collective Agreement. Much of its submissions focussed on evidence showing the Asahi offers were legitimate offers for alternative positions within BevChain (for the same role on

identical terms and conditions). The only difference was the change in location and a change in work hours (for the 13 night shift applicants).

#### *Linfox redeployment offers*

[46] Both Category A and B versions of the BevChain's May letters referred only to the redeployment offers for Linfox. The redundancy provision of the Collective Agreement referred to redundancy not applying to the applicants if they are offered an alternative role with "the Company"

[47] At the investigation meeting, Mr Assaf confirmed the Collective Agreement's reference to "the Company" was to BevChain. He accepted there was no reference in the collective employment agreement to Linfox. I accept the applicant's position that any offer by BevChain to the applicants to work for Linfox was not in accordance with the Collective Agreement merely because Linfox was not a party to the Collective Agreement.

#### *Asahi redeployment offers*

[48] Although the offer of redeployment to Linfox did not meet the offer of alternative employment requirements of the Collective Agreement, the Category B letters still maintained their status as notices of termination. As already determined, the notice of termination could not be withdrawn without consent by the applicants.

[49] For the same reasons as previously stated, BevChain could not offer redeployment with Asahi without consent from the applicants to allow withdrawal of the Category B notices of termination. For these reasons, the applicants who received Category B letters are also entitled to redundancy payments in accordance with the collective employment agreement. Because BevChain failed to pay the Category B applicants their redundancy payments, they were in breach of clause 1 of Schedule 2 of the Collective Agreement.

#### **Compliance and Costs**

[50] For reasons specified, regardless of which category letter the applicants received, all the applicants were entitled to redundancy payments in accordance with the Collective Agreement. Also, Bevchain was in breach of the terms and conditions of the Collective Agreement by failing to pay the applicants their redundancy payments.

[51] Upon determining these first two issues for investigation for this matter, the remaining issues relate to whether a compliance order should be made against BevChain and whether BevChain should pay the applicants' costs for representation.

[52] As previously stated, both parties agreed for the Authority to suspend its' investigation into these two latter issues subject to ongoing discussions between them. Accordingly, the Authority makes no further findings in relation to this matter and will initiate the next appropriate steps subject to further communication from either or both parties.

Alex Leulu  
Member of the Employment Relations Authority