IN THE EMPLOYMENT COURT
AUCKLAND

AC 22A/09
ARC 9/09

IN THE MATTER OF	Proceedings removed from the Employment Relations Authority
BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INC First Plaintiff
AND	JIM MOENGAROA AND OTHERS Second Plaintiffs
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing: By memoranda of submissions filed on 24 June, 14 and 21 July 2009

Appearances: LJ Yukich, Advocate for Plaintiffs
Peter Kiely and Daniel Erickson, Counsel for Defendant
Greg Lloyd, Counsel for NZ Amalgamated Engineering, Printing and Manufacturing Union as Intervener

Judgment: 9 December 2009

JUDGMENT NO 2 OF CHIEF JUDGE GL COLGAN

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[1] In the preliminary judgment delivered on 27 May 2009, I gave leave to the parties to be heard on the procedure to be adopted for determining the balance of issues in the case. No party applied and, therefore, the directions under paragraph [38] of that judgment took effect. I have now received and considered further written submissions from the parties on the question of compliance of the employee protection provision (EPP) with the statute.

[2] I note that Mr Yukich purported to file a further brief of evidence of Mr Moengaroa in the form of a sworn affidavit dated 22 June 2009 but in the absence of

any application for leave to admit that evidence or consent by the defendant to its filing, I have not taken it into account.

[3] I regret the delay in delivering this judgment. That has been for the following reasons. As I noted in the first judgment delivered on 27 May 2009[1], the issues coincide with the same or similar questions to be determined by a full Court in proceedings between Norske Skog Tasman Ltd and the Manufacturing and Construction Workers Union Inc. Those proceedings have only been determined today by a lengthy judgment (*Norske Skog Tasman Ltd v Manufacturing and Construction Workers Union Inc & Anor*[2]). As I indicated in the first judgment between these parties, I wished to be guided by the full Court's judgment in deciding this case as I am now able to be.

[4] The first consideration is what the statute requires. Amendments to Part 6A of the Employment Relations Act 2000 ("the Act") were introduced by s6 of the Employment Relations Amendment Act 2006 with effect from 14 September 2006. Section 69A now sets out the object of the subpart as follows:

> *The object of this subpart is to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person and, to this end, to give—*
>
> *(a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment; and*
>
> *(b) the employees who have transferred a right,—*
>
> *(i) subject to their employment agreements, to bargain for redundancy entitlements from the other person if made redundant by the other person for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and*
>
> *(ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.*

[5] Section 69OJ provides:

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[1] (2009) 6 NZELR 552
[2] AC 49/09, 9 December 2009

Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.

[6] *"Employee protection provision"* means, under s69OI:

… a provision—

(a) the purpose of which is to provide protection for the employment of employees affected by a restructuring; and

(b) that includes—

(i) a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and

(ii) the matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and

(iii) the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer

[7] Other relevant definitions including *"restructuring"*, also under s69OI are as follows:

restructuring—

(a) means—

(i) contracting out; or

(ii) selling or transferring the employer's business (or part of it) to another person; but

(b) to avoid doubt, does not include—

(i) contracting in; or

(ii) subsequent contracting; or

(iii) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or

(iv) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

[8] "*New employer*" means:

> *(a) in the case of a contracting out, person B in the definition of that term; or*
>
> *(b) in the case of a sale or transfer of a business, the person to whom the business is sold or transferred*

[9] The judgment of the full Court in *Norske Skog* expands upon the statutory requirements for EPPs at paragraphs [61] to [64]. As it was in *Norske Skog*, it is a matter in this case of analysing the relevant agreement or agreements and determining whether, collectively, they contain an EPP or EPPs. Here the second plaintiffs are employed on individual employment agreements based on the expired collective agreement by which I found they were bound when it was ratified.

[10] The "*KAWERAU MILL SITE COLLECTIVE AGREEMENT 18 July 2005 – 20 July 2008 TRADES*" contained, in its Part 5 ("*REDUNDANCY*") a clause (5.8) entitled "*Employee Protection*". It provided:

> *5.8.1 In the event of a restructuring, as defined in the Employment Relations Amendment Act (No 2), being the sale, transfer, or contracting out of all or part of the company's business to another entity ("the new employer"), the Company will:*
>
> > *(i) Provide the new employer with a copy of this agreement*
> >
> > *(ii) Meet with the new employer and, taking into account the commercial requirements and obligations of the Company and the new employer, negotiate with the new employer regarding the arrangements that would apply to affected employees in the event that the sale, outsourcing or transfer takes place. These negotiations shall include determining whether affected employees would transfer to the new employer on the same or different terms and conditions of employment.*
>
> *5.8.2 Employees are not obliged to accept any offer of employment made by the new employer. However, in the event that any employee rejects an offer of ongoing employment made by the new employer, clause 5.1.5 above shall apply.*

[11] Earlier in the collective agreement, clause 1.5 ("*Consultation*") sets out some general requirements for consultation including about "*… the process of change brought about by … Other changes affecting the welfare and employment of staff …*

”. This clause does not address any more precisely restructuring as that term is now defined in the statute.

[12] Except in clause 5.8 already noted, Part 5 of the collective agreement (*“REDUNDANCY”*) is intended *“to minimise [the] consequences”* of redundancy in specified ways. The clauses, however, deal with *“Redundancy”* defined as *“where an employee’s employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the employee is, or will become, superfluous to the needs of the employer.”* These provisions do not address the broader questions of restructuring that may be preliminaries to redundancies. Although clause 5.4 records the company’s commitment to seek suitable alternative employment within the larger group of companies of which the employer is a part, this too is linked to the redundancy of those employees, that is the loss of their jobs with the employer. The collective agreement is otherwise silent on restructuring issues.

[13] This collective agreement was executed by the employer’s representative on 25 August 2006 and the union organiser on 31 August 2006. The term of the agreement was, as set out in its title, from 18 July 2005 to 20 July 2008. It was thus subject to Part 6A of the Act as amended from 14 September 2006. The EPP was therefore required to comply with the definition of that term in s69OI, pursuant to s69OJ.

[14] Taking each of the three particular statutory constituents of an EPP set out in s69OI(1), do the individual employment agreements based on the expired collective contain EPPs? As the full Court concluded in *Norske Skog*, this is a question decided not merely by consideration of one particular provision of an agreement labelled “Employee Protection Provision” or the like. The Court must have regard to all relevant terms of the agreement. These include not only and principally clause 5.8, but also other clauses in Part 5 (*“REDUNDANCY”*). However, these latter clauses amount to a code for how redundant or potentially redundant employees will be dealt with which may or may not be a consequence of a restructuring but are logically subsequent to it. The collective agreement’s consultation provision, set out in clause 1.5, does not address restructuring issues except in the broadest way of

establishing a consultative process to discuss change brought about, among other things, by *"Other changes affecting the welfare and employment of staff"*. So, the provisions of the individual employees' agreements to be tested against s69OI(1) are essentially those set out in clause 5.8.

[15] Section 69OI(1)(b) requires, first, that the EPP will include *"a process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees"* (my emphasis). Clause 5.8.1(ii) obliges the employer to "*Meet with the new employer and, taking into account the commercial requirements and obligations of the Company and the new employer, negotiate with the new employer regarding the arrangements that would apply to affected employees in the event that the sale, outsourcing or transfer takes place*."

[16] The statutory requirement for *"a process"* appears to be addressed in clause 5.8 by the obligation to *"Meet with the new employer"*. That hardly seems to constitute a *"process"* although it may be possible to negotiate without meeting face to face. The notion of a *"process"* in the statute would seem to contemplate more than a bare requirement for "meeting" so that it would include details such as the timings of a meeting or meetings in relation to an intended restructuring process, advice to the union and/or affected employees of such meeting or meetings and their intended agendas, the method of such meeting or meetings including the identities of attendees, a process of reporting back the outcomes of such meeting or meetings and the like. Such aspects of a process would be consistent with the information sharing, bi- or tri-partisan participation and other underpinnings of the Act.

[17] It is debatable whether clause 5.8 of the expired collective agreement engages meaningfully with the second statutory requirement under s69OI(1)(b)(ii) that the provision is to include *"the matters relating to the affected employees' employment that the employer will negotiate with the new employer"*. Clause 5.8.1 provides that *"These negotiations shall include determining whether affected employees would transfer to the new employer on the same or different terms and conditions of employment."* which simply is a reiteration of the statutory requirement. Although I accept that the EPPs in this case might meet, barely, the second statutory

requirement under s69OI(1)(b)(ii), the requirements are cumulative so that this alone does not save clause 5.8.

[18] The third requirement under s69OI(1)(b)(iii) is for *"the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer"*. This purports to be addressed in clause 5.8.2 although the first sentence of the subclause sets out the position at common law (*"Employees are not obliged to accept any offer of employment made by the new employer"*). The balance of clause 5.8.2 simply states that any employee who rejects an offer of ongoing employment made by the new employer is subject to clause 5.1.5 of the collective agreement which provides:

> *5.1.5 The Company shall not be liable for redundancy compensation where, in the event of the sale of the assets of the business or the transfer of the maintenance services to a third party, the new owner/employer offers the following to employees covered by this agreement.*
>
> *(i) Continuity of service for the purposes of qualification for future service related benefits and conditions.*
> *(ii) Conditions of employment no less favourable than the employee's terms and conditions of employment prevailing under the Collective agreement at the time of sale/transfer.*
> *(iii) Employment in the same capacity as that in which the employee was employed before the sale/transfer of the business or in any other position or capacity which the employee is willing to accept.*

[19] As in the case of non-compliance with s69OI(1)(b)(i), this does not appear to set out a *"process to be followed"* but, rather, the consequences of an event. Nor does it strike me as an employee protective provision. In limiting the employer's obligations, it is more an employer protective provision. This statutory prerequisite is not met by the individual employment agreements based on the collective agreement.

[20] The remaining issue for decision builds on the finding just made that there are no statute-compliant EPPs in the employment agreements of the second plaintiffs. Their case, and that of the union, is that in these circumstances, restructuring cannot proceed unless and until EPPs are in place.

[21] That was the issue at the heart of the *Norske Skog* case. For the reasons the full Court determined in that judgment, I find the absence of EPPs does not prevent the employer from restructuring, although that may be subject to other statutory and contractual obligations and/or to whatever concessions the employer may be prepared to make as exemplified in the *Norske Skog* case.

[22] In spite of what I have concluded is the absence of compliance with s69OJ, the full Court's judgment in *Norske Skog* confirms that there are no express sanctions as sought by the plaintiffs for non-compliance in cases such as this and these are not to be implied by the Court. In these circumstances, whilst the employer must comply with Part 5 of the expired collective agreement such as it is, it cannot in law be restrained from concluding its restructuring on the ground that there is no EPP in effect that is compliant with s69OJ.

[23] For the foregoing reasons and also for those set out in the first judgment on 27 May 2009, the plaintiffs' claims must fail and are dismissed.

[24] Costs are reserved which, if they cannot be settled between the parties' representatives, may be the subject of application by the defendant by memorandum filed and served within 2 months of the date of this judgment, with the plaintiffs having the period of one month within which to reply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Wednesday 9 December 2009