

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 88
3067552

BETWEEN TERRY CONDON
 Applicant

AND BROADSPECTRUM (NEW
 ZEALAND) LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Peter Cranney, Counsel for the Applicant
 June Hardacre, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further 20 December 2019 from Applicant
evidence 7 February 2020 from Respondent

Determination: 26 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Terry Condon, seeks to have the Authority resolve a dispute between the parties about whether or not redundancies by the Respondent, Broadspectrum (New Zealand) Limited (Broadspectrum) are covered by clauses 46.2 and 46.3 of the collective agreement between Broadspectrum and E Tu Union Inc for a term comprising 1 July 2017 to 31 December 2018 (the Collective Agreement).

[2] Mr Condon is further seeking a compliance order in respect of the payment of two weeks wages at termination in reliance on clause 46.7 of the Collective Agreement.

[3] Broadspectrum claims that it has complied with the Collective Agreement between the parties and no remedies are available to Mr Condon.

The Authority's investigation

[4] The parties agreed to the Authority determining this issue 'on the papers' based on the Statements of Problem and in Reply and on submissions from the parties.

[5] 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.

Issues

[6] The issues requiring investigation are whether or not:

- The transfer of the Chorus Contract was a restructuring;
- The redundancies carried out by Broadspectrum are covered by clauses 46 of the Collective Agreement;
- Mr Condon is estopped from bringing any claim in relation to the application of clause 46 of the Collective Agreement;
- If Broadspectrum has not complied with the Collective Agreement and Mr Condon is not estopped from bringing a claim, it is necessary to order compliance pursuant to s 137 of the Employment Relations Act 2000 (the Act).

Background

The Collective Agreement and relevant legislation

[7] The relevant clauses of the Collective Agreement entered into by the parties state:

46.2 In the event of a restructure, as defined in the Employment Amendment Act (no 2) 2004, being the sale, transfer or contracting out of all or part of the Company's business the company will, as soon as reasonably practical taking into account the commercial requirements of the business, enter into discussions with the prospective new employer concerning the impact of the restructuring on the Employee's position. The matters that will be discussed with the prospective new employer will include:

46.2.1 Whether or not it proposes to offer the Employee(s) employment;
and

- 46.2.2. if so, whether the Employee will transfer to the prospective new employer on the same or similar terms and conditions of employment.
- 46.3 In the event of a restructure, as defined in sub-clause 46.2, the redundancy provisions of this clause shall not apply if:
- 46.3.1 The employee is offered employment with the prospective new employer on terms and conditions that are the same or similar to those provided by this Agreement (excluding superannuation); and
- 46.3.2 Agrees to treat the employee's service as being continuous; or
- 46.3.3. Has offered the Employee employment in any capacity the Employee is willing to accept.
- 46.4 The redundancy provisions of this clause shall not apply if an Employee is offered another position within this company, or an associate Company on terms and conditions that are the same or similar or in any other capacity the Employee is willing to accept.
- 46.5 The Union shall be notified of any impending redundancy prior to the Company issuing notice to the employee(s) affected. Such information shall remain private and confidential.
- 46.6 The company reserves the right to select Employees for redundancy on the basis that it retains Employees who by reason of skills and attributes are, in the company's opinion, necessary for continuing operations.
- 46.7 Unless otherwise provided in the employee's personal letter, if an employee's employment ends by way of redundancy, the Employee will be given six (6) weeks notice in writing except the following shall apply:
- 46.7 (i) If the company requires that the notice period be worked, the Employee may at his/her discretion, require two (2) weeks ordinary payment in lieu of part of the notice period.

[8] Section 69L of the Employment Relations Amendment Act (No 2) 2004 applies to employees who are not covered by schedule 1A i.e. who are not vulnerable workers) and defines restructuring:

69L Interpretation

...

Restructuring in relation to an employer's business, -

(a) Means-

- (i) entering into a contract or arrangement under which the employee's business (or part of it) is undertaken for the employer by another person; 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) the termination of a contract or arrangement under which the employer carried out work on behalf of another person; or ...

[9] Section 69OI of the the Act defines restructuring:

69OI Interpretation

...

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.

The restructuring process

[10] Broadspectrum operates across diverse industries, including property and facilities management, defence, transport (including road, rail and public transport), utilities (including water, power and telecommunications), and mining and chemical processing and hydrocarbons. Its clients include major national and international companies, and government at various levels.

[11] Broadspectrum offers the provision of field services work, which is specialised engineering work in support of major infrastructure networks. This work is undertaken by a division of Broadspectrum's Telecommunications Services division.

[12] Mr Condon was employed by Broadspectrum in Telecommunications Services. He was a member of E Tu and covered by the provisions of the Collective Agreement.

[13] Broadspectrum became aware that it had been unsuccessful in a re-tender process with Chorus to provide Chorus with field services work in connection with the provision of broadband services (The Chorus Contract). Downer EDI Engineering Group Limited (Downer) was awarded the Chorus Contract.

[14] Work undertaken by Broadspectrum under the Chorus Contract was specialised work that would not otherwise have been undertaken by Chorus because it involved specialised engineering skills and experience such as that undertaken by Broadspectrum's Telecommunications Services division.

[15] Mr Condon worked exclusively on Chorus work.

[16] As a result of the unsuccessful re-tender bid, Broadspectrum states it was required to restructure its workforce who had been engaged to work exclusively on the Chorus Contract because Broadspectrum considered it had no alternative work for the group of employees of whom Mr Condon was one, and because Downer would require some or all of them to fulfil the contract.

[17] Broadspectrum states that as a result of its work under the Chorus Contract transferring to Downer it proposed a restructure whereby the affected employees roles were disestablished, the affected employees were made redundant by Broadspectrum and, where possible, would be offered and accept employment with Downer.

[18] Broadspectrum commenced a consultation process regarding the restructure on 14 May 2019 with the affected employees. The restructure was confirmed on or around 20 May 2019 and impacted 102 union members and one non-union employee employed by Broadspectrum on the Collective Agreement.

[19] The effect of the restructure on the 103 affected employees was that 61, including Mr Condon, were made redundant. These employees were offered employment with Downer in a capacity that they were willing to accept.

[20] Of the remainder, four employees' roles were made redundant and they were redeployed at Broadspectrum in a capacity they were willing to accept.

[21] The other 38 employees were made redundant from their employment with Broadspectrum and did not received an offer of employment with Downer. Of these 38 employees:

- (i) 20 employees received six weeks' notice of redundancy in accordance with clause 46.7 of the Collective Agreement; and
- (ii) 18 employees received four weeks' notice of redundancy. For these 18 employees, Broadspectrum paid an additional two weeks' payment in lieu of notice in accordance with clause 46.7(i) of the Collective Agreement.

[22] Following the restructure, questions were raised with Broadspectrum by E Tu concerning why some E Tu members were not going to receive redundancy payments.

[23] Broadspectrum submits that it had formed the view that provided Downer offered employment on the same terms and conditions as it had offered employment, then the technical

redundancy provisions of the Collective Agreement, notably clauses 46.2 and 46.3 would be satisfied.

[24] Broadspectrum instructed its lawyers to liaise with E Tu on the issue and accordingly on 4 June 2019 MinterEllisonRuddWatts emailed Ms Anne-Marie McNally, legal counsel for E Tu stating:

... I just wanted to check I fully understand the Union's position. Am I right in understanding that if Downers do offer employment to your members on the same terms and conditions and recognising service, then the Union would accept that the provisions of 46.3.1 (continuous service) and 46.3.2 (same terms) are met, and redundancy wouldn't be payable? This is certainly my reading of the agreement?

[25] Ms McNally replied on 5 June 2019 stating: "I understand Shama confirmed on my behalf yesterday that I also read the CA as you do."

Was the transfer of the Chorus Contract a restructuring?

[26] The Collective Agreement states in clause 46.2 that: "In the event of a restructure, as defined in the Employment Relations Amendment Act (no 2) 2004". E Tu submits that it is the definition contained in the Employment Relations Amendment Act (no 2) 2004 which should apply because that is specifically agreed between the parties as set out in the Collective Agreement.

[27] E Tu further submits on that basis the termination of Broadspectrum's Chorus Contract was not a restructuring, and did not operate to affect redundancies.

[28] Broadspectrum submits that it applied the correct definition of restructuring which is that contained in s 60OI of the Act on the basis that the definition contained in the Employment Relations Amendment Act (No 2) 2004 cannot stand alone as a statutory definition.

[29] Broadspectrum further submits that referring to a definition of 'restructuring' which is no longer in force (The Employment Relations Amendment Act (No 2) 2004 definition) has the effect of contracting out of the Act.

[30] Examining the purpose of Amendment Acts as set out in the Amendment Acts themselves I find that their purpose is to amend provisions in the principal Act to which that particular Amendment Act applies:

- (i) the purpose of Employment Relations Amendment Act 2004 (2004 No 86) as stated in s 3 was to amend: "the provisions of the principal Act".;

- (ii) the purpose of the Employment Relations Amendment Act 2006 (2006 No 41) was stated in s3 as being: “This Act amends the Employment Relations Act 2000.”; and
- (iii) the note to s 69OI of the Act states that it was: “inserted, on 14 September 2006, by section 6 of the Employment Relations Amendment Act 2006 (2006 No 41);
- (iv) both the Employment Relations Amendment Act 2015 and the Employment Relations (Triangular Employment) Amendment Act 2019 each state that it: “amends the Employment Relations Act 2000.

[31] Section 23 of the Interpretation Act 1999 states: “An amending enactment is part of the enactment it amends”.¹

[32] Thus the provisions of a particular Amendment Act amend the principal Act and succeeding Amendment Acts further amend the principal Act which is at all times the governing statute.

[33] Accordingly I find that it is the provisions of the Act at the time the restructuring occurs which are relevant. To hold otherwise would I find have the effect of contracting out of the Act which is contrary to statute as set out in s 238 of the Act which states that: “the provisions of this Act have effect despite any provision to the contrary in any contract or agreement”.

[34] Accordingly I find that it is the provisions of the Act at the time the restructuring and redundancies occurred which have effect despite the reference in the Collective Agreement at clause 46.2 to the Employment Relations Amendment Act (No 2) 2004.

[35] Mr Condon was made redundant on or about 20 May 2019. The definition of restructuring as set out in the Act applicable on that date is 69OI and which sets out that restructuring applies to the: “selling or transferring the employer’s business (or part of it) to another person”.

[36] I determine that the transfer of Chorus Contract from Broadspectrum to Downer was a transfer of part of Broadspectrum’s business and a restructuring.

¹ See *Angus v R* [2019] NZCA at [23]; *Securities commission v Midavia Rail Investments BVBA* [2005] 3 NZLR 433 at [19]; *Gregory v Thames Coromandel District Council* [2017] NZHC 3002 at [52]

Were the redundancies carried out by Broadspectrum covered by clauses 46 of the Collective Agreement?

[37] I have determined that the transfer of the Chorus Contract to Downer was a restructuring. Clause 46.3 of the Collective Agreement set out that in a restructuring situation, the redundancy provisions of the clause would not apply provided that:

- a) The Employee was offered employment with the prospective new employer on the same or similar terms and conditions of employment; and
- b) There was agreement that the employees service would be continuous; or
- c) The employee had been offered work in a position he or she was willing to accept.

[38] Downer offered employment to Mr Condon on the same terms and conditions of employment with continuous service. Mr Condon accepted that offer.

[39] I find that this situation accords with the situation as set out in clause 46.3 and that therefore Mr Condon is not entitled to receive the redundancy provisions as set out in clause 46.7 of the Collective Agreement.

[40] I determine that the redundancies carried out by Broadspectrum were covered by clauses 46 of the Collective Agreement.

Is Mr Condon estopped from bringing any claim in relation to the application of clause 46 of the Collective Agreement?

[41] Having determined that Broadspectrum has applied the provisions of the Collective Agreement regarding restructuring correctly, there is no need for me to determine this issue.

Is it necessary to order compliance pursuant to s 137 of the Act 2000?

[42] I determine that it is not necessary, given my determination of the preceding issues, to order compliance pursuant to s137 of the Act.

Costs

[43] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[44] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would 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.

[45] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority