Determination Number: AA 5/07
File Number: 5046906

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN	National Distribution Union. applicant
AND	Gordon and Gotch (NZ) Ltd, respondent
REPRESENTATIVES	David Fleming, for the applicant Peter Hodge, for respondent
MEMBER OF AUTHORITY	James Wilson
INVESTIGATION MEETING	20 November 2006 in Auckland
DATE OF DETERMINATION	11 January 2007

DETERMINATION OF THE AUTHORITY

Background to the dispute

[1] For a number of years prior to August 2006 Gordon and Gotch were located at Carr Road, Mt Roskill, Auckland. At the end of August 2006 the company moved its premises to Plunket Avenue, Wiri. The distance between the two locations is approximately 15 kilometres by road. A number of members of the National Distribution Union (NDU/the Union) are effected by this change of location. These employees are employed in terms of the *Gordon and Gotch Collective Employment Agreement, distribution division*. (The CEA). The Union says that in terms of the CEA its members are entitled to negotiate a *relocation payment*. The company says that a *relocation payment* is only payable to employees who are redundant and who are offered, and accept, an *alternative position which requires a change of location to a new site.* The parties have been unable to reach agreement on the correct interpretation of the CEA and have requested that the Authority interprete the agreement for them.

The collective employment agreement

[2] The Coverage clause of the CEA says:

> *Only employees who are members of the Union and are engaged pursuant to clause 3 and new employees employed in the duties as per clause 3 in their first 30 days of employment are covered by this Agreement.*

Clause 3, ***Scope of the Agreement****,* says:

> *This Agreement shall cover any employees engaged by the Company within the distribution division who carry out a range of duties and functions associated with the warehouse operation…..*

There is nothing in the CEA which relates to the location of the *distribution division.*

Clause 32 **Redundancy** says:

32.1 Redundancy is a situation 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 worker is, or will become, superfluous to the needs of the employer.

32.2 The Company recognises the serious consequences that the loss of permanent employment can have on individual employees and proposes to minimise this by relocation and/or training of the individual. Both parties agree that it is preferable that individuals be encouraged to remain in relocated employment rather than be paid redundancy compensation.

32.3… (not applicable)

32.4… (not applicable)

32.5.. (not applicable)

32.6 The Company will advise the union representing redundant and/or relocating employees of any impending redundancy/relocation situation, at least two weeks prior to issuing notice to the affected employees……

32.7 (deals with redundancy entitlements and compensation)

32.8 (not applicable)

32.9 ***Alternative Employment within the Company***

32.9.1 In lieu of redundancy compensation the Company may offer to relocate an employee to a suitable alternative position in another division within the Company provided that such a position is acceptable to the employee, who will not unreasonably withhold his or her acceptance.
32.9.2 Where an employee accepts a suitable alternative position, which requires a change of location to a new site, the Company will negotiate a relocation payment with the union to compensate for any additional expense or disruption which may be incurred by the employee as a result of the relocation.
32.9.3 A suitable alternative position shall be a position at a rate of wages and under minimum conditions of employment not less favorable than those which applied immediately prior to the relocation, unless at the employees choosing, after consultation with the union.
The 2.9.4 If subsequent to formal notification of relocation or prior to the end of the 8th week in the alternative position, the employee finds that the position is unsuitable, that employee shall receive the redundancy payment he or she would have received at the time alternative employment was commenced, less any relocation payment that may have been made.

32.10 (Deals with the criteria for selection of redundant employees)

32.11 (Outlines redundancy compensation payable)

The rules of interpretation

[3] The rules to be applied when interpreting the provisions of an employment agreement are well established. As pointed out by Mr Fleming these were summarised by the Employment Court in *ASTE v Chief Executive of Bay of Plenty Polytechnic*. [2002] 1 ERNZ, 491:

> *… Agreements should be interpreted with reference to the factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question. The law has now moved on from the earlier position that such evidence was only admissible when the words of the agreement were ambiguous or unclear. Indeed, the current state of the law appears to be that in all cases such reference is possible and even desirable. The Court of Appeal has developed the following approach in contract cases. One looks first at the words used - they must obviously be the starting point - and then at the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.*

The Unions interpretation

[4] The Union says that its members have been offered an *alternative position, which requires a change of location to a new site*. i.e. in terms of clause 32.9. They say that clause 32.9 forms part of clause 32 which relates to redundancy and the employer is required to negotiate a relocation payment.

The Company's interpretation

[5] The Company's position relies on a simple, linear, interpretation of the words of the CEA. They say that:

> (i) Clause 32.9, which requires the company to negotiate a *relocation payment,* only applies where an employee (a) has been made redundant and (b) has been offered and accepts, relocation to a *suitable alternative position.*
>
> (ii) The employees concerned are not redundant. The company has merely relocated the place of work to alternative premises and the new premises are of such proximity as to not constitute a disestablishment of the old positions.

Discusion

[6] The law in respect to redundancy when a work site is relocated is well established. In 1979 the Arbitration Court, in *NZ Printing IOUW. vs Sigma Print* ERNZ (1979) Sel Cas 1, said:

> *We think this matter falls to be decided on the facts of the case. If we find, as we do, that the offer of employment at a town some distance away and with some transport difficulties amounts in fact and in truth to a termination of employment at the Petone base in it seems to us clear that the employer has manpower surplus to his requirements because of the closing down of his operations at Petone. The reinstatement of his operations in a place as different from Petone as Featherston is is, we think, an offer of new employment under entirely different conditions and entirely different circumstances and geographical localities. In our view therefore the employer,, by closing down his works at Petone, has created a redundancy situation.*

Cases decided subsequent to *Sigma* have discussed what distance and under what circumstances it would be considered reasonable to expect an employee to relocate without it being considered that the closure of the old location amounted to the termination of the employees employment i.e. in terms of the present dispute, under what circumstances would the positions at the Mount Roskill location become *surplus to the Company's requirements* and

the employees redundant. (see *NZ Post Office Union v NZ Post Ltd* (1990) 3 NZILR 913; *Tuiaepa v Auckland Area Health Board* [1992] 2 ERNZ 114).

[7] I accept the company's submission that a relocation allowance is only negotiable where an employee is redundant. This, I find, is the plain meaning of the words of the CEA. Except for those employees who were advised at the time of their appointment that their jobs would be transferring to a new location (see paragraph [8] below), there is nothing *in the surrounding circumstances* that *requires modification to that most natural meaning*. However I do not accept ithat none of the employees can be considered to be redundant. It is clear from the case law that such a determination can only be made by considering the personal circumstances of each of the employees. In some cases the individual circumstances of the employee may make the relocation to the Wiri workplace no less convenient, and possibly more convenient, than the Mt Roskill workplace. The company assert, and the union do not appear to disagree, that the positions at the new workplace are substantially similar, if not identical, to those at the old workplace. Under the circumstances it is difficult to see that there is any other disruption to the employees than that resulting from the transport difficulties caused by the change of location. It may be that the Union can convince the company otherwise.

[8] Evidence was produced during the course of my investigation that some staff were advised, when they were appointed at the Mount Roskill warehouse, that the company's operations, and therefore their positions, were to move to Wiri i.e. they knew when they took up the position that the location of their employment was to change and accepted the position on that basis. If this is the case those staff cannot be said to be disadvantaged by the move to Wiri and any disruption was foreseeable when they accepted the offer of employment. They cannot therefore be said to be redundant. As they are not redundant, they are not entitled to a relocation payment.

Determination

[9] Without evidence of the individual circumstances of the employees concerned it is not possible, and not appropriate, for me too determine which employees can be considered redundant and which therefore may be entitled to negotiate a relocation payment. The parties have not requested that I do so. What the parties have requested is that I interpret the relevant clauses of the CEA.

[10] As indicated above I find that only those staff who are redundant in terms of clause 32.1 of the CEA are eligible to negotiate (through the union) a relocation payment in terms of clause 32.9. However it is not appropriate, on the evidence I have, to state either that all employees who are relocated are, or are not, redundant. Such a determination can only be made taking into account the individual circumstances of each employee. These circumstances will include such factors as: what, if anything, the employee was told at the time of their appointment regarding their location; where the individual lives, their transport arrangements to the old location and available transport options to the new location and; whether the degree of any additional cost, time and disruption to that individual can be considered reasonable under all of the circumstances.

[11] In the light of my interpretation of the CEA the parties should now consider, on an individual basis, which employees are redundant and the level of any relocation payment which should be paid. If the parties are unable to reach agreement on either of these questions leave is reserved for them to request the Authority to determine individual cases. Should this be necessary the Authority will discuss with the parties what additional information should be provided to allow me to make an informed determination.

Costs

[12] Costs are reserved. To aid the parties discussions on this issue, it is appropriate that I express my preliminary view that this is a case where costs should be allowed to lie where they fall. However, if the parties are able to agree on the other outstanding issues but are unable to agree on the issue of costs, either party may file a submission in respect to costs. The other party will then be given 14 days in which to file a response.

James Wilson
Member of Employment Relations Authority