

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 242/08
5046906

BETWEEN NATIONAL DISTRIBUTION
 UNION
 Applicant

AND GORDON & GOTCH (NZ)
 LTD
 Respondent

Member of Authority: James Wilson

Representatives: Greg Lloyd for the applicant
 Peter Hodge for the respondent

Investigation Meeting: 3 June 2008

Submissions received: 22 February 2008 from the applicant
 29 February 2008 from the respondent

Determination: 10 July 2008

SECOND DETERMINATION OF THE AUTHORITY

Background

[1] For a number of years prior to August 2006 Gordon & 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) were effected by this change of location. These employees are employed in terms of the *Gordon and Gotch Collective Employment Agreement, distribution division*. (the CEA). In its original *statement of matter* the Union said that in terms of the CEA its members were entitled to negotiate a *relocation payment*. The company said 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 were unable to reach

agreement on the correct interpretation of the CEA and requested that the Authority interpret the agreement for them.

[2] In a determination dated 11 January 2007, I determined that:

[9] Without evidence of the individual circumstances of the employees concerned it is not possible, and not appropriate, for me to 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.*

Request to determine individual eligibility

[3] In November 2007 Mr Lloyd, for the Union, advised:

...the parties attended mediation in August and successfully settled the claim for one of the applicants.... The claims for (2 employees) remain unresolved. Mr Wilson concludes his determination by inviting the parties to discuss what additional information he will require to allow him to make an informed determination. We are in a position to progress this matter and suggest a telephone conference is arranged to sort out the details of the investigation meeting.

[4] In February 2007 the Union filed statements from the two Gordon & Gotch employees whose claims remain unresolved. The two employees are Muriel Honey and Eleanor Young. On 29 February 2008 Mr Hodge, for Gordon and Gotch filed a statement in response and on 3 June 2008 I met with the parties' representatives to discuss their respective submissions. Unfortunately, despite further discussion the parties have not been able to reach agreement on the appropriate payments, if any, payable to Ms Honey and Ms Young. The purpose of this determination is to determine their respective entitlements.

Eleanor Young's circumstances

Ms Young's perspective

[5] Ms Young has worked for Gordon & Gotch for 24 years. At the time the Company relocated to Wiri, Ms Young was, and still is, living in Avondale. While the Company was located at Carr Road Ms Young travel to work by car – a trip that took about 15 minutes. She says that the trip to Wiri takes her approximately 30 to 40 minutes and requires travel on the motorway which she finds very stressful. In addition Ms Young says that the cost of petrol is more than double that required when the Company was located at Carr Road. Ms Young says there is no suitable public transport available as at the Wiri end of the journey she would have to walk about 30 minutes from the nearest bus or train station to and from work. Ms Young also says that prior to relocating to Wiri she provided child care for her granddaughter a couple of times a week. She says that because of the new location her daughter is having to pay for additional childcare at a cost of approximately \$20-\$25. In her statement Ms Young says:

The main issue is really the cost incurred as a consequence of the relocation and the disruption it has caused my life. Having to drive on the motorway can also be very stressful. I have had to change my hours so I can travel to and from work outside rush-hour traffic.

The Company's prospective

[6] The Company says that public transport is available to Ms Young and would transport her to a point approximately 800 metres from the new Wiri site. They say that Ms Young's previous hours were from 8 a.m. to 4:30 p.m. and they have subsequently adjusted her hours to 7:30 a.m. to 4.00 p.m. thus allowing her an earlier departure which will assist in travelling outside peak hours and for picking up her granddaughter as required. The Company says it is still willing to allow some further flexibility to start and finish times if this would be of further assistance.

Muriel Honey's circumstances*Ms Honey's perspective*

[7] At the time of the relocation, Ms Honey had worked at Gordon & Gotch for approximately 32 years. Prior to the move she drove to work -- a journey of about 10 minutes from her home in Avondale. Ms Honey says that she has an anxiety disorder which means she is incapable of driving long distances and, at the time of the relocation, she advised the company that she was incapable of driving to Wiri. At the time of the relocation the Company arranged for another employee, who was unable to drive, to travel by taxi from the old location to the new. For the first few weeks Ms Honey drove from home to the old location and shared the taxi with the other employee to Wiri. After five weeks the company withdrew the payment for the taxi and Ms Honey says that as she was unable to get to and from work she *had to just stop going*.

[8] Ms Honey says that to travel to the new location would mean that, if she used public transport, she would be away from home for a total of approximately 11 hours per day whereas previously she was away from home for about 8 1/2 hours per day. She says that public transport would require taking two buses and a walk of approximately 30 minutes both night and morning. She argues that even if she could drive to the new location the extra cost would be an additional \$60-\$70 per week in petrol. Ms Honey has attached to her statement an assessment from a psychiatrist which says in part:

It is evident that (Ms Honey) suffers from severe anxiety which is at its most severe when driving. It is unfortunate that (Ms Honey) was not referred for

treatment at the outset or at least at the time the company knew they were relocating as (Ms Honey) knew this would be a problem for her. At this clinic we manage many similar cases and they usually resolve well although slowly.

[9] Ms Honey says that the biggest issue is her inability to drive and the fact that there are simply no alternative options for her. She says that the additional cost both financial and on her personal life would be too great.

The Company's perspective

[10] The Company says that there is public transport available to Ms Honey to travel to and from the Wiri location and that the Company has been flexible in allowing staff to vary their hours to suit individual circumstances. Although they do not directly address Ms Honey's anxiety regarding driving they do suggest that this flexibility of hours would allow staff to avoid peak traffic etc.

Discussion

[11] As discussed in my earlier determination in this case, the wording of the collective agreement which applies to both Ms Young and Ms Honey is somewhat problematic. In that determination I pointed out that only those staff who are redundant in terms of the collective are eligible to negotiate a relocation payment. In other words the test of whether an employee is redundant must be made before the parties negotiate whether or not the employee is to receive compensation (a relocation payment) for any additional costs incurred as a result of the relocation. This is unfortunate in that in attempting to assess whether it is reasonable for an employee to relocate, i.e. whether or not the employee is redundant, entitlement to compensation for additional cost would seem to be an integral part of the assessment.

[12] In the light of the interpretation set out in my earlier determination (which has not been challenged) the first question to determine is whether or not Ms Young and Ms Honey are redundant. If they are not redundant then they are not entitled to either

redundancy payment or to negotiate a relocation payment. If they are redundant the collective agreement provides for two options:

- (i) To be paid redundancy compensation as set out in the collective, or
- (ii)(a) To relocate to a suitable *alternative position ... acceptable to the employee and to renegotiate a relocation payment... to compensate for any additional expense or disruption...*; and
- (b) If within the first eight weeks at the new location the employee finds the position is unsuitable the employee *shall receive the redundancy payment he or she would have received less any relocation payment made.*

[13] The law in respect to redundancy when a work site is relocated is well established. The question of whether an employee can reasonably be expected to relocate is a matter of fact and degree. In 1979 the Arbitration Court, in *NZ Printing IOUW. vs. Sigma Print ERNZ* (1979) Sel Cas 1, said:

It follows that, in principle, an employer is not entitled to order an employee to work at a place other than the place at which he expressly or impliedly agreed to work under his contract. With the generality of that we are in agreement. Nevertheless, there must be particular circumstances which can detract from the universal application of the principles stated. For example, if the defendant company in this case had decided to transfer its works from Petone to say Lower Hutt, a distance of 3-4 miles, bearing in mind that its employees would still be living in the same localities and be able to travel without difficulty to the new works, then we would not be prepared to hold that a redundancy situation was created by the transfer operations. If to take the other extreme, the defendant company's works were to be transferred from Petone to Auckland, a much greater distance obviously, then we would certainly hold that a redundancy situation was created even though there were offers of employment in Auckland.

And

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, it seems to us clear that the employer has manpower surplus to his requirements because of the closing down of his operations in Petone. The reinstatement of his operations in a place as different from Petone as Featherston 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.

[14] As I said in my earlier determination:

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 Mt 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).

Determination

[15] The question to be determined therefore is whether or not it was reasonable for the Company to expect Ms Young and Ms Honey to relocate their place of work from Carr Road in Mt Roskill to Plunkett Ave in Wiri. In answering this question it is necessary to consider the individual circumstances of the employees. It is also necessary to consider the general conditions relating to commuting, whether by private vehicle or public transport, in the Auckland metropolitan area. It is generally accepted that travel within Auckland, particularly when the travel required is not on one of the main transport corridors, is often difficult. While it is true that the public transport options between Avondale and Wiri are somewhat circuitous the same is true of travel between Avondale and Mt Roskill. Both Ms Honey and Ms Young chose to travel to work in their own cars when they worked at Carr Road, no doubt because this was more convenient than the available public transport. In this case the

Company had a genuine and pressing business requirement to relocate. While clearly there is an obligation on an employer to consider the individual circumstances of employees when asking them to relocate to a new workplace, there is also some responsibility on employees to be flexible and understanding of the employers business requirements.

Eleanor Young

[16] Ms Young has successfully relocated to Wiri. The consequences of that relocation are additional 15 to 20 minutes travel by car night and morning, the additional cost of petrol (which I estimate at no more than \$30.00 per week) and the difficulty in continuing to provide child care for her granddaughter a couple of days a week. The Company have resolved the last of these difficulties by allowing Ms Young to vary her hours of work. Many employees are required to commute through difficult sometimes stressful traffic conditions to maintain their employment and the additional time spent by Ms Young is not unreasonable in the circumstances. **Ms Young was not rendered redundant by the requirement that she relocate to Wiri.**

[17] Although I have found that Ms Young is not redundant because of the Company's relocation to Wiri, I must emphasise that I have found that the relocation, and Ms Young's circumstances, was reasonable by only a narrow margin. Had the collective agreement provided that she would be paid a relocation payment regardless of whether or not she was redundant there would be absolutely no doubt that the relocation was reasonable. The absence of some form of compensation for the additional cost of relocation made the determination more marginal.

Muriel Honey

[18] Ms Honey's situation is complicated by her anxiety disorder. The fact that the relocation was to take place was known to the Union and its members well before it actually occurred. It is unfortunate that Ms Honey did not make her condition known to her employer at the time the relocation was being considered. Several months before the relocation employees were asked to complete a questionnaire regarding their individual circumstances and whether or not they wished to relocate. Ms Honey advised that *with the added stress, cost of travel and time involved travelling the extra distance it would no longer be feasible on my current wage and going to Wiri would mean an added risk of accidents on the motorway and travelling at peak traffic hours*

of the day. She did not mention her anxiety disorder. When the Company stopped providing a taxi to the new location Ms Honey simply stopped going to work. There appears to have been no communication with the Company other than a request from the Union that the Company wave the notice period to allow Ms Honey to resign immediately and not work out the normally required notice.

[19] Other than her anxiety disorder, Ms Honey's circumstances are similar to those of Ms Young and many other employees. The Company had demonstrated that it had a flexible approach to hours of work to enable employees to make suitable transport arrangements to the new location. Even at the current high price the additional cost of petrol is likely to be no more than \$30 per week – not the \$60 to \$70 per week estimated by Ms Honey. The Company was however unaware of Ms Honey's anxiety disorder and was unable therefore to take that into account. For the same reasons as with Ms Young, it **was not unreasonable for the Company to expect Ms Honey to relocate to Wiri. Ms Honey was not redundant.**

Costs

[20] Costs are reserved. Should the Company seek a contribution towards its costs they should discuss this matter with the Union in the first instance. Should the parties not be able to reach agreement on this issue the Company may file and serve submissions within 28 days of the date of this determination. In that event the Union will be given 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority