

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 169
3091912

BETWEEN

E TŪ INCORPORATED
Applicant

AND

ORORA PACKAGING NEW
ZEALAND LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Anne-Marie McNally, counsel for Applicant
Anthony Drake, counsel for Respondent

Investigation Meeting: On the papers

Submissions and additional information received: 18 December 2020 and 18 February 2021 from Applicant
18 December 2020 and 18 February 2021 from Respondent

Determination: 28 April 2021

DETERMINATION OF THE AUTHORITY

Proceedings in the Authority

[1] This matter had previously been allocated to a different Member who convened a face to face investigation meeting. That meeting did not proceed and the Member has now left the Authority. During a case management call on 18 February 2021 the parties consented to this matter being dealt with on the papers before the Authority including the statements of problem and in reply, two affidavits from Mr Gary Pollak and the submissions from the parties.

Employment relationship problem

[2] This determination deals with a dispute between the parties as to the entitlements of employees upon the sale of the business when the purchaser offered the employee's employment.

[3] E Tū Incorporated (the Union) and Orora Packaging New Zealand Limited (Orora) are parties to three collective agreements, each covering separate sites within New Zealand. They are:

- a) Orora Cartons New Zealand Collective Agreement and General Terms of Employment dated 25 May 2017 expiring on 24 May 2020 (the Cartons collective agreement);
- b) Orora Kiwi Packaging National dated 27 February 2017 expiring on 26 February 2020 (the Kiwi Packaging collective agreement); and
- c) Orora Packaging New Zealand Limited trading as Box New Zealand dated 1 July 2019 expiring on 30 June 2022 (the Box collective agreement).

[4] Orora has notified the Union and the members covered by the three collective agreements that it has negotiated the sale of parts of the business to another company Opel Limited (OL).

[5] OL has made offers of employment to the affected employees, on the same terms and conditions of employment, subject to completion of the sale.

[6] The Union claims the affected employees covered under the Cartons and Kiwi Packaging collective agreements are entitled to a severance payment and under the Box collective agreement Orora is required to negotiate with the Union for compensation for the affected employees. Orora considers it is not required to make any payments to the affected employees on the termination of their employment with it.

Issues

[7] To resolve the dispute between the parties, it is necessary to interpret the agreement. The principles of interpretation of a collective agreement are well settled.¹ The proper approach is an objective one. I need to ascertain the meaning the agreement

¹ *Kiwirail Limited v Mobbs* [2020] NZEmpC 139.

conveys to a reasonable person with the background knowledge which would have been reasonably available to the parties at the time.

[8] The ordinary and natural meaning of the text remains centrally important. However, the wider context may point to some other interpretation, even in the absence of ambiguity. Context may also assist in determining the intended meaning in cases of ambiguity or uncertainty.

[9] 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 as a result. While I have not referred in this determination to all the information and submissions received I have carefully considered all relevant material lodged with the Authority.

Background

[10] The clauses set out in the disputed collective agreements had their genesis in the early Printing & Packaging Awards which covered the industry prior to changes made under the Employment Contracts Act 1991. In its submissions the Union explained:

(a) Until 31 August 1990, when the Labour Relations Amendment Act 1989 introduced s 184A of the Labour Relations Act 1987 (LRA) “Restrictions on Compensation for Redundancy”, an employee who was made redundant by their employer upon the sale of the business and who was offered and accepted employment with the purchaser was not entitled to redundancy compensation, unless otherwise provided in an Award or Agreement.

(b) Section 184A of the LRA codified what was already commonplace in the printing and packaging industry. That is, payment of less than full redundancy compensation in a technical redundancy setting.

[11] Mr Garry Pollak in his affidavits, sets out his history in industrial relations in New Zealand since the late 1980’s. At that time he was the senior advocate and Legal Officer at the Auckland Provisional District Employer’s Association (the Association) with responsibility for the printing and packaging industry. The Association had a critical role in New Zealand’s then centralised wage fixing system. The Association has changed since 1990 and is now known as EMA.

[12] Under the Law as it was in the 1970s and 1980s, employers and employees were required to be members of registered unions and only then could a National Award be negotiated. Once signed by an appointed industrial conciliator the Award was binding on all employers and employees in the specified industry.

[13] Mr Pollak deposed:

- (a) The main or lead industry Award was the New Zealand Commercial Printers Award which had existed for many decades. The New Zealand Packaging Award, the New Zealand Newspaper Publishers Award and the New Zealand Wallpaper Manufacturers' Award were related and were always negotiated in conciliation councils at approximately the same time as the Commercial Printers Award.
- (b) From this followed the New Zealand Photo Lithographers Award and a number of other specialised printing industry Awards. The lead document was always the New Zealand Commercial Printers Award which covered many hundreds of commercial printing businesses throughout New Zealand and primarily covered printing trades and related persons.
- (c) In the early to mid-1980s, there was considerable disruption in the printing industry internationally and in New Zealand due to the rapid introduction of new technology. The technology rendered the jobs of many printers around the world and in New Zealand, redundant. Traditional trades such as typography, photo engraving, type setting, screen printing etc. became obsolete.
- (d) To ameliorate the effects of job losses and job changes, redundancy provisions were included in the commercial printing and packaging industry Awards. While unusual at the time, this was part of a general agreement with the New Zealand Printers Union to not oppose new technology and to provide a degree of financial security for the tradesmen and related employees who were losing their employment and often being required to retrain.

Redundancy and Severance compensation

[14] Mr Pollak deposed that provisions dealing with both redundancy and severance payments were included in the industrial Awards in the late 1970's. He deposed that the terms "severance" and "redundancy" were different payments to recognise different situations. Severance payments were not to recognise the loss of employment. It was a payment equivalent to 50 per cent of an employee's redundancy compensation in situations where employment was transferred to a new owner/business.

[15] Mr Pollak deposed that the terms and conditions relating to the redundancy and severance payments that were set out in the Awards, have, since 15 May 1990 and the introduction of the Employment Contracts Act 1990, continued to be included in collective agreements and some individual employment agreements.

[16] Mr Pollak attached to his second affidavit an extract from the New Zealand Packaging Award dated 4 December 1978. The extract sets out the Redundancy provisions contained within the Award. The wording reflects the wording of the provisions of the Carton and Kiwi Packaging collective agreements now under dispute.

Cartons Collective Agreement

[17] The Union seeks a determination that Orora is required to pay severance pay to affected employees in accordance with clause 29.4.2 of the Cartons collective agreement.

[18] The relevant clauses from the Cartons collective agreement are:

27 EMPLOYMENT PROTECTION

27.1 For the purposes of this clause, "restructuring" in relation to the employer's business means entering into an arrangement under which all or part of the business is undertaken for the employer by another person (contracting out), or selling or transferring all or part of the business to another person.

27.2 If the employer proposes restructuring its business so that employees' work is to be performed for a new employer, subject to confidentiality legal or commercial constraints the employer shall at the earliest possible opportunity:

- Consult with the union regarding restructuring as it affects employees. The union accepts that some of the information supplied may be confidential and its officers will give appropriate undertakings if required.

- Discuss and use its best endeavours to negotiate with the new employer and the union, a communication process to employees regarding the restructure.
- 27.3 The employer shall use its best endeavours to negotiate with the new employer terms enabling the employees to opt to transfer employment to the new employer on the same or not less favourable terms and conditions of employment.
- 27.4 If the new employer does not offer an employee employment at all, or does not offer employment in the same position and on the same or not less favourable terms and conditions and with service treated as continuous, clause 29: Redundancy of this agreement will apply.
- 27.5 If the new employer does offer an employee employment in the same position and on the same or not less favourable terms and conditions and with service treated as continuous, the employee will not be entitled to redundancy compensation.

...

29. REDUNDANCY

- 29.1 **Redundancy:** Redundancy is a condition in which the employer has labour surplus to his/her requirements because of the closing down of the whole or any part of the employer's operations or change in plant, methods, materials, or products, or reorganisation requiring a permanent reduction in the number of permanent, full-time employees.
- 29.2 An employee shall not be eligible to receive redundancy or severance compensation if he/she:
- 29.2.1 Is employed on a temporary/seasonal basis as defined in clause 25.0 of the contract.
- 29.3 The employer shall not be liable for redundancy or severance compensation where the closure or curtailment of business is attributable:
- 29.3.1 To war, earthquake, or civil disturbance; or
- 29.3.2 To a strike, stoppage, go-slow or other industrial action.
- 29.4 Alternative Employment:
- 29.4.1 In lieu of redundancy or severance compensation, the employee may be transferred to a suitable alternative position with the same company or group of companies.
- 29.4.2 In lieu of redundancy or severance compensation, the employer may arrange the transfer of an employee to a suitable alternative position with another employer and to pay the employee severance pay equal to one-half of the appropriate redundancy payment.
- 29.4.3 A suitable alternative position shall be:
- 29.4.3.1 A position at a rate of wages or under minimum conditions of employment not less favourable than those which applied immediately prior to the transfer, unless at the employees choosing.

29.4.3.2 A position in a location where the employee is not unreasonably disadvantaged by reason for time, distance or expense in travelling to his/her new location unless at the employee's choosing.

The provision of this sub clause shall not apply where the employee is provided with a company vehicle or where transport is made available by the employer free of charge.

29.4.3.3 In the event of any dispute concerning the suitability of alternative employment offered, the matter shall be dealt with under the Personal Grievance procedure of the Agreement.

...

29.8 Payment:

29.8.1 The redundancy and severance payments contained in this Agreement include compensation for loss of service and related entitlements specified under the Agreement.

Submissions of the parties

[19] I have summarised the following submissions made on behalf of the Union:

- (a) The references to redundancy and severance is a strong, unambiguous and compelling indication that each has a separate meaning. Severance is paid to the employee at a rate equal to half of the redundancy compensation, if the employee is transferred to a suitable alternative position with another employer.
- (b) An objective and reasonable onlooker would construe the provision in the same way that a plain and ordinary meaning of the words reveal.
- (c) Construed in light of the historical material there can be no room for doubt that the parties intended the language they adopted to be given its plain and ordinary meaning.

[20] I have summarised the following submissions made on behalf of Orora:

- (a) Clause 27.4 entitles an employee to redundancy under clause 29 only if the new employer does not offer the employee employment or does not offer employment in the same position and on the same or not less favourable terms and with service treated as continuous.
- (b) Clause 27.5 of the collective agreement is a disentitling clause which is expressed in clear and unambiguous language and disentitles an employee

to redundancy compensation if the new employer offered the employee employment in the same position on the same or not less favourable terms and conditions and treated service as continuous. This is sufficient to prevent the Union's claim succeeding under the collective agreement.

- (c) Clause 27.4 lists the circumstances in which clause 29 applies. Since none of those circumstances arise clause 27.4 precludes any of the affected employees from claiming an entitlement to redundancy compensation or severance pay.
- (d) In the alternative, clause 29.4.2 begins with the words "...in lieu of redundancy compensation...". These words mean in place of, or instead of. A reasonable and properly informed third party would read this as offering an alternative way forward in situations where an employee is entitled to redundancy compensation. A previous employer may find it more cost effective to help the employee find a new job and transfer them to that. This clause is predicated on the employee already being entitled to redundancy compensation.
- (e) There is a difference between clause 27 which refers to "...the new employer..." and clause 29.4.2 which refers to "...another employer...". Section 69OI under Part 6A of the Act defines "...new employer..." in the case of a sale or transfer of a business, the person to whom the business is sold or transferred. This statutory definition informs the meaning of "new employer" and "another employer" does not have the same meaning. A reasonable and properly informed third party is likely to read "the new employer" as referring to the purchaser and "another employer" as referring to a different employer who is not the purchaser.
- (f) From a business common sense approach an employee being transferred to a suitable alternative position at a completely different employer does suffer some loss: a change in position, possibly a loss of service continuity, possibly some reduction in pay. Whereas, an employee offered a job by the "new employer"/purchaser is in the same position, with the same duties, same pay, continuity of employment and suffers no loss.

(g) The affected employees under the collective agreement have not been transferred to “another employer” and clause 29.4.2 does not come into effect.

(h) Clause 29.4.2 allows the employer to transfer the employee to a “suitable alternative role” and pay them severance pay. No employees under the collective agreement have been transferred to a “suitable alternative role”. All employees have remained in the same role they were in when employed by Orora, under the same collective agreement with continuity of service. Accordingly clause 29.4.2 is not operative and the employees are not entitled to severance pay.

[21] While the arguments regarding the use of different wording in clauses 27 and 29 in reference to a “new employer” and “another employer” have some merit, the clauses were written in different decades. The wording in clause 27 reflects the current legislative framework whereas, the wording in clause 29 has been included since the 1970’s.

[22] Clause 27.5, unlike clause 27.4 does not exclude the application of clause 29. Clause 27.4 explicitly excludes the whole of clause 29 through its specific reference. Clause 27.5 only excludes the payment of redundancy compensation.

[23] I have accepted the evidence set out in Mr Pollak’s affidavit that redundancy compensation and severance payments have different meanings and compensate different situations. Redundancy compensation is to compensate for the loss of a job, whereas a severance payment is to recognise the severing of the employment relationship in circumstances where a new or alternative employer takes over the employment relationship. Where clause 27.5 applies the employee is entitled to a severance payment under clause 29.4.2.

[24] Accordingly, employees whose work is covered by the Carton’s collective agreement and who agree to be employed by OL are entitled to severance pay equal to one-half of the appropriate redundancy payment.

The Kiwi Packaging collective agreement

[25] The Union seeks a determination that Orora is required to pay severance pay to affected employees in accordance with clause 37.4.2 of the Kiwi Packaging collective agreement. Clause 37 of the collective agreement states:

37.0 REDUNDANCY

37.1 Redundancy is a condition in which the employer has labour surplus to his/her requirements because of the closing down of the whole or any part of the employer's operations or change in plant, methods, materials, or products or reorganisation requiring a permanent reduction in the number of permanent full-time employees who have not reached the recognised age of retirement.

37.2 An employee shall not be eligible to receive redundancy or severance compensation if he/she:

37.2.1 Is employed on a casual or temporary/seasonal basis as defined in Clauses 10.0 and 12.0 of this Agreement; or

37.2.2 Has reached the employers recognised age or retirement, and where the employer's retirement policy has been applied.

37.3 The Employer shall not be liable for redundancy or severance compensation where the closure or curtailment of business is attributable to:

37.3.1 To war, earthquake, or civil disturbance; or

37.3.2 To a strike, stoppage, go-slow or other industrial action.

37.4 Alternative Employment

37.4.1 In lieu of redundancy or severance compensation, the employee may be transferred to a suitable alternative position with the same company or group of companies.

37.4.2 In lieu of redundancy compensation, the employer may arrange the transfer of an employee to a suitable alternative position with another employer and to pay the employee severance pay equal to one-half of the appropriate redundancy payment.

37.4.3 A suitable alternative position shall be:

37.4.3.1 A position at a rate of wages and under minimum conditions of employment not less favourable than those which applied immediately prior to the transfer, unless at the employees choosing.

37.4.3.2 A position in a location where the employee is not unreasonably disadvantaged by reason for time, distance and expenses in travelling to his/her new location unless at the employees choosing.

37.4.3.3 the provisions of this sub clause shall not apply where the employee is provided with a company vehicle or

where transport is made available by the employer free of charge.

...

37.5.5 An employee who finds an alternative position during the notice of termination period may, with the consent of the employer, terminate his/her employment prior to the expiry of the period of notice forfeiting his/her entitlement to redundancy compensation, but receiving in lieu of severance payment equal to one-half the appropriate redundancy payment. The employer's consent in such instances will not be unreasonably withheld.

...

37.5.7 The employer shall supply written references at the request of redundant employees. All redundancy compensation payments will be calculated from the notified date of termination.

...

37.5.9 Weekly redundancy compensation payments shall be calculated on the basis of the employees average weekly taxable earnings for the 12 month period prior to termination, or since commencement of employment if less than 12 months, or the ordinary rate applicable at termination, whichever is the higher.

...

37.9 Payment

37.9.1 The redundancy and severance payments contained in this Agreement include compensation for loss of service and related entitlements specified under the Agreement.

Submissions of the parties

[26] I have summarised the following submissions made on behalf of the Union:

- (a) When the established principles of interpretation are applied to this clause, viewed objectively, and with reasonable knowledge of the printing and packaging industry from the 1970s onwards, there is no room for doubt: clause 37.4 requires the employer to pay the employee severance pay equal to one-half of the appropriate redundancy compensation payment.
- (b) The references to severance in the collective agreement show the practice of addressing payments for technical redundancies continues today and the plain meaning of the language should be applied.

[27] I have summarised the following submissions made on behalf of Orora:

- (a) The following elements set out in clause 37.5 and 39.1 imply that redundancy means a situation where the employee no longer has a job. In

this case the employees have not had a termination date, have not had to apply for other jobs, and have not had any loss of wages. This was not intended by the parties to the contract to be a “redundancy” situation.

- (b) *McCarthy v Owens Project Services* supports Orora’s submissions that because the affected employees have not suffered the loss of permanent employment the situation facing the affected employees was not a “redundancy” situation.²
- (c) For clause 37.4.2 to apply, the employees must have been entitled to redundancy compensation. However, the affected employees are not entitled to redundancy compensation because no redundancy has arisen under clause 37.1 and there has been no transfer of the employees to suitable alternative positions.
- (d) Even if redundancy has arisen under clause 37.1, clause 37.4 is not operative because Orora did not arrange the transfer of the employees to suitable alternative positions with “another employer”.
- (e) Unlike the Cartons and Box collective agreements the Kiwi Packaging collective agreement does not contain an “employee protection” clause and does not deal directly with the issues of restructuring intended to be dealt with by such a clause under Part 6A of the Act. The failure to include such a clause does not restrain Orora from completing the restructuring.

Conclusion

[28] In *Owens Project Services* the definition of redundancy was more extensive than the definition set out in the Kiwi Packaging collective agreement. In *Owens Project Services*, redundancy was defined to recognise the serious consequences that the loss of permanent employment can have on individual employees. In that case, as here, the employees were all taken on by the new employer. The Court held that the employees did not suffer the loss of permanent employment which the redundancy provisions was intended to compensate and redundancy compensation was not payable.

² *McCarthy v Owens Project Services Ltd* [1994] 2 ERNZ 572.

[29] In this case I find the affected employees fall within the definition of redundancy at clause 37.1. That is:

- (a) Orora has labour surplus to its requirements because it is closing down part of his business operations meaning there will be a permanent reduction in the number of permanent full-time employees; and
- (b) The affected employees have agreed to be employed in a suitable alternative position with another employer as required by clause 37.4.3.

[30] In that situation, instead of paying redundancy compensation Orora is required to pay the affected employees severance pay equal to one-half of the appropriate redundancy payment.

[31] Accordingly, employees whose work is covered by the Kiwi Packaging collective agreement and who agree to be employed by OL are entitled to severance pay equal to one-half of the appropriate redundancy payment.

The Box collective agreement

[32] The Union seeks a determination that Orora is required to negotiate with the Union for compensation as contemplated by clause 24, bullet point 5 of the Box collective agreement. Clause 24 states:

24. Redundancy

- All employees to be declared redundant shall receive not less than four weeks' notice of the termination of their employment. In lieu of such notice an employee shall receive four weeks wages.
- Where an employee is given notice and voluntarily terminates his/her employment before the expiry of the notice period the employee shall not be paid for the unworked period of notice.
- The union shall be notified before notice is given to the employee.
- For the purpose of this clause, redundancy is a condition in which an employer has manpower surplus to his/her requirements because of the closing down or reorganisation of the whole or part of the employers operations due to a change in plant, method, material or products, reorganisation, economic circumstances or like cause requiring a permanent reduction in the number of employees.
- Nothing in this clause shall prevent the parties discussing matters relating to redundancy when and where the issues arise, including selection and compensation.

- Employees made redundant shall receive 6 weeks wages paid at the average rate or hourly rate whichever is the greater provided the employee has completed one year's service. Employees made redundant who have completed 6 years' service, shall receive an additional 4 weeks wages paid at the average rate or hourly rate whichever is the greater.
- No redundancy (whether technical or otherwise) shall arise in the following situations:
 - (a) By reason of the sale, transfer, lease, amalgamation, succession or restructuring of the whole or part of the employer's business; or
 - (b) Where the location the employee is required to work is changed by the employer within a reasonable radius or as agreed to by the parties;

Where the employee is offered employment by the purchaser, transferee, lessee, amalgamated company, successor or the same employer, in the same or similar capacity (or any other capacity which the employee is willing to accept) on no less favourable terms and conditions of employment.

- **Employee Protection Provision:** If the employer enters into negotiation regarding a restructuring of the employer's business that could impact on the employee, the employer will notify the employee of such negotiations as soon as is reasonably practicable, taking into account the commercially sensitive nature of such negotiations. If the employee's position becomes redundant as a result of the restructuring, the employer will use reasonable endeavours to procure that the employee is offered employment by any new employer on no less favourable terms and conditions. Notwithstanding the employee protection provisions contained in the clause, the redundancy provisions of this Agreement will continue to apply.

[33] The Union has not made any submissions in respect to this aspect of its claims.

[34] I have summarised the following submissions made on behalf of Orora:

- (a) The Union relies on the fifth bullet point under clause 24 of the collective agreement, however, no redundancy has arisen in this case and there is nothing to "discuss". In any event, there were discussions between the parties regarding the business sale.
- (b) Bullet point 7 of clause 24 is a disentitling or exclusion clause and is clear that a redundancy does not arise when, by reason of sale of the whole or part of the business, the employee is offered employment in the same or similar capacity on no less favourable terms and conditions of employment.

- (c) There is no ambiguity in the wording of the seventh bullet point and the exclusion merely needs to be applied on its face:
- i. There has been a sale of part of Orora's business;
 - ii. The new employer has offered all affected employees' employment;
 - iii. All employees are in the same positions there were in when employed by Orora;
 - iv. All employees are employed on the same terms and conditions of employment.
- (d) Bullet point five is a boilerplate clause. It refers to the term "redundancy" which is expressly defined by the parties in bullet points four and seven. Bullet points four and seven do not fall into the category of "superfluous words" used to cover "loose ends" because, being interpretation provisions, they are of a nature that should have paramouncy over other clauses.
- (e) Allowing bullet point five to override bullet points four and seven renders bullet points four and seven obsolete. Whereas, allowing bullet points four and seven to restrict the application of bullet point five to situations of defined redundancy, still allows bullet point five to operate with respect to other parts of clause 24. In other words, bullet point five would not be obsolete. It is preferable to allow all three bullet points to have some utility rather than two to have none, especially where that utility is not strained or artificial.
- (f) Bullet point five does not override the contractually agreed definition of "redundancy" in bullet points four and seven, but rather incorporates that definition. Since the circumstances listed in bullet point seven as being excluded from the definition of "redundancy" have occurred in this case, the employees are not entitled to redundancy compensation. This is sufficient to prevent the Union's claim succeeding with respect to the Box collective agreement.

(g) Bullet point five does not oblige Orora to pay redundancy compensation. Orora has discussed matters relating to the redundancy with the Union and the affected employees. There was no selection process for redundancy as all employees continued employment on the same terms and conditions including the same roles and duties at the same location and with continuity of service.

[35] I have largely accepted the submissions of the respondent. Clause 24 does not require negotiation of compensation. At the most what it allows for is a discussion relating to redundancy. The clause does not go so far as to require any agreements to be reached, which would be necessary if the parties intended for negotiations to take place.

[36] In the absence of any contractual obligation, the application by the Union for an order requiring Orora to negotiate for redundancy compensation is declined.

Costs

[37] There was no application for costs in the statement of problem. Accordingly no orders for costs will be made.

Vicki Campbell
Member of the Employment Relations Authority