IN THE EMPLOYMENT COURT
AUCKLAND

AC 52/07
ARC 53/07

IN THE MATTER OF	de novo challenge to a determination of the Employment Relations Authority
BETWEEN	GENERAL DISTRIBUTORS LIMITED Plaintiff
AND	NATIONAL DISTRIBUTION UNION Defendant

Hearing: 31 August 2007
(Heard at Auckland)

Appearances: Stephen Langton, counsel for the plaintiff
Peter Cranney, counsel for the defendant

Judgment: 7 September 2007

JUDGMENT OF JUDGE B S TRAVIS

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[1] This is a dispute between the parties as to whether employees at the plaintiff's Woolworths Manurewa Supermarket are entitled to redundancy compensation or relocation allowances when the plaintiff's lease over those premises expires on 30 September 2007. Because of the urgency of this matter the challenge has been accorded a priority fixture.

[2] The Employment Relations Authority, in a determination issued on 14 August 2007, applied the decision of Judge Shaw in *McCain Foods (NZ) Ltd v Service & Food Workers Union Inc* [2004] 2 ERNZ 252 and concluded that a redundancy situation does arise in circumstances in which the plaintiff closes one of its supermarkets and transfers the employees' roles from that supermarket to others

operated by it. The plaintiff company has challenged that determination and sought a rehearing of the whole matter.

[3] The parties have helpfully been able to reach an agreed statement of facts and produced an agreed bundle of documents. The following background facts and the relevant clauses from the collective agreement (the "CA") are taken from that material. The oral evidence was limited to brief statements from one witness from each side, which I shall summarise.

Background facts

[4] The plaintiff operates the Foodtown, Woolworths, Countdown and Woolworths@Gull supermarkets, including Woolworths Manurewa. The defendant is a registered union. The plaintiff and the defendant are parties to a CA that covers work undertaken by permanent employees who are members of the defendant union (excluding management) at the plaintiff's Woolworths, Foodtown and Countdown supermarkets.

[5] The plaintiff employs 132 employees who, except for those who have been transferred to other supermarkets pursuant to an interim arrangement between the parties, work at Woolworths Manurewa. This number includes 72 employees who are members of the defendant union and bound by the CA.

[6] On 28 May 2007 the plaintiff informed all employees at Woolworths Manurewa of the impending closure of that supermarket due to the lease of the premises expiring on 30 September 2007. A document confirming the plaintiff's advice was provided to those employees at that time. The document stressed the closure was not a reflection on the efforts of the staff and stated:

> *We recognise continuity and security of employment is **paramount to our employees**. We are pleased to confirm that there will be **NO** loss of jobs. All team members will continue to be employed by GDL on their current terms and conditions (i.e. wages, days, hours etc,) as we will, with your input, transfer you to another store. None of your terms and conditions will change unless **you** want to change your hours or days etc and we can agree on this… any changes must be **mutually agreed.***

[7] The document then outlined the process of individual meetings and observed that the plaintiff could not guarantee that the staff would be relocated to another store closest to their home, but that the plaintiff would do its best to accommodate this.

[8] By letter dated 20 June 2007 the defendant informed the plaintiff of its position in relation to its members' entitlements to redundancy and relocation payments under the CA. The plaintiff responded on 25 June. It was clear that a dispute had arisen between the parties over the interpretation and operation of the CA.

[9] Following a further exchange of correspondence the plaintiff and the defendant reached an interim agreement as to the transfer of employees to other supermarkets. In July 2007 the plaintiff transferred the on-line shopping part of its business at Woolworths Manurewa to Foodtown Manukau and Foodtown Sylvia Park. The defendant's members who worked in those roles at Woolworths Manurewa transferred in accordance with the interim arrangement that had been reached. Approximately half the Manurewa employees working in online shopper roles transferred to Foodtown Manukau on 16 July 2007. The remaining Manurewa employees working in online shopper roles, with the exception of 3 employees, transferred to Foodtown Sylvia Park on 23 July 2007.

[10] Aston Moss, the General Manager Human Resources, employed by Progressive Enterprises Limited, the parent company of the plaintiff, gave evidence that in addition to the online shopping business that is being transferred, the plaintiff intends to transfer the remainder of the roles at Woolworths Manurewa to other supermarkets the plaintiff operates in the vicinity, including Foodtown Sylvia Park, Foodtown Manukau, Foodtown Airport and Foodtown Takanini. The plaintiff wishes to have all the staff to transfer within their roles and anticipates that the custom at those other supermarkets will increase upon the closure of Woolworths Manurewa.

[11] Margaret McBeth gave evidence for the defendant that she had worked at Woolworths Manurewa for almost 30 years and had been a union member for 29½ years and a union delegate for 29 of those years. Some of the staff were members of

the defendant union of whom the majority were are 30 years or over, although there were also some younger members. Her house was about 5 minutes drive from the store. Many of the other staff of Woolworths Manurewa live nearby and walk to work and many have no transport. At the staff meeting when the document was handed out she questioned the plaintiff's representative, Dave Chambers, about the employees' rights, for example to take time off to look for new employment and their entitlements to redundancy and relocation payments. Her evidence was that Mr Chambers stated that the plaintiff was at odds with the defendant about these issues. She gave evidence about another employee at Woolworths Manurewa who had applied for two positions in other supermarkets operated by the plaintiff but was unsuccessful.

The collective agreement

[12] The plaintiff is the only employer party to the CA, trading as Woolworths, Foodtown and Countdown. All members of the defendant union who are permanent employees of Woolworths, Foodtown or Countdown, excluding management, are covered by the CA, which expired on 29 July 2007.

[13] The CA is divided into various parts; clauses 1 to 9 contain terms applying to all union members; the three appendices contain the disciplinary and investigation procedures and the work rules which apply to all union members. Pages 27 to 29 contain the wage rates and classifications and the redundancy provisions for Countdown employees. Pages 31 to 34 contain the wage rates and classifications and the redundancy provisions for Foodtown employees. Pages 36 to 54 contain the wage rates and classifications and the redundancy provisions for Woolworths employees. The schedules are not expressly referred to in any of the general parts of the CA.

[14] In the general part of the CA, clause 2.3 provides that where the plaintiff needs, for demonstrable commercial reasons, to change or reduce specific hours or duties a particular process will apply. No employee is to be required to change unless they possess, or are provided with, relevant training and skills. The plaintiff is required to first call for volunteers but where there are insufficient the plaintiff

can issue two weeks notice to affected employees and then change or reduce the hours or duties. Any employee affected by the clause has the first option to take up any additional hours when they become available. The key objective of this clause is expressed to be the reaching of mutual agreement.

[15] Clause 2.4, also relied on by the defendant, provides:

> ***Temporary Variation of Duties***
> *Where the employer wishes to make a temporary change to the duties of an employee, or request he/she work temporarily in another store, this will be by mutual agreement. Agreement shall not be unreasonably withheld. While employed in an alternative capacity, the employee will be paid the rate of pay applying to that position or his/her normal rate of pay, whichever is the higher.*

[16] Countdown and Foodtown members have separate, but materially identical, redundancy clauses which define redundancy as meaning a situation where employment is terminated by the employer "*the termination being attributable wholly or mainly to the fact that the position filled by the employee will become superfluous to the needs of* [the employer]". The provisions common to Countdown and Foodtown remove any entitlement to redundancy compensation for employees offered work in an associated company or if work is offered by a person to whom the business is sold or transferred. The provisions do not deal with relocation.

Redundancy and Relocation Agreement

[17] The clauses central to this dispute are found in schedule E, under the heading "*REDUNDANCY AND RELOCATION AGREEMENT*". They apply to all members of the union employed by the plaintiff at Woolworths and its subsidiaries, but casual or temporary employees are excluded. The relevant clauses are as follows:

> ***CLAUSE 2. INTENT***
>
> > *Both parties recognise the serious consequences that the loss of permanent employment has on an individual employee and on the community as a whole. Therefore the parties agree to work together to achieve a minimum of disruption and inconvenience to individuals involved.*

CLAUSE 3. DEFINITION

Redundancy is a condition in which the Company has labour surplus to requirements because of the closing down of the whole or any part of the Company's operation due to a change in plant methods, or re-organisation or like cause requiring a permanent reduction in the number of permanent employees at any worksite or geographic location.

CLAUSE 4. NOTIFICATION

(i) *The Company will advise (in strict confidence) the Union of the impending redundancies two weeks prior to informing the employees affected.*

(ii) *All employees will receive a minimum of four weeks' notice of the termination of their employment. When it is practicable the Company shall give a greater period of notice.*

(iii) *Except in the case of dismissal for misconduct, if the Company dispenses with the services of any employee who has received notice of termination, and where the period of notice has not expired, then the Company will pay wages in lieu of the remainder of the notice period for that employee plus the appropriate redundancy entitlement.*

(iv) *The payment of redundancy compensation will be contingent on the employee remaining at or available for work and performing normally his/her assigned duties until the expiry of the period of notice. Provided that where an employee finds an alternative position during the notice of termination period he/she may, with the consent of the Company, terminate his/her employment prior to the expiry of the period of notice without forfeiting his/her entitlement to redundancy. The Company's consent will not be unreasonably withheld. In such instances, wages for the unexpired period of notice will not be paid.*

CLAUSE 5. RELOCATION/ALTERNATIVE WORK

(i) *After notice of redundancy and prior to termination, where an employee wishes to seek relocation within General Distributors Limited (Woolworths), and notifies the Company, every endeavour will be made to provide alternative work. Any such offer of relocation will be communicated to the employee concerned in writing giving details of the position available, location, hours of work and rate of remuneration, which shall not be less than the rate applicable to the employee at the time of acceptance of*

the relocation offer, unless by mutual agreement a less paid position is requested/accepted by the employee concerned.

(ii) *The Company will assist in finding other work for displaced employees, outside General Distributors Limited by providing the opportunity for employees to attend a reasonable number of job interviews, during the period of notice, without loss of pay; and providing some job search assistance to identify job opportunities within the Company.*

(iii) *Where alternative work is requested and accepted within the Company, the following relocation payments will be made. These payments will compensate employees for any disruption, inconvenience or additional expense that may occur as a result of the change in their place of employment. The relocation payment will, in addition, cover appreciation for the performance of work outside normal duties and assisting in the relocation.*

The rate of relocation payment will be as follows:

(a)	*Up to one years' service*	*2 weeks' pay*
	1 year but less than 2 years' service	*3 weeks' pay*
	2 years but less than 5 years' service	*4 weeks' pay*
	5 year's service or more	*5 weeks' pay*

(b) *Where the employee's new position involves a change of workplace but not of residence and the distance between the new workplace and the employee's residence (measured by the most practical and direct route) is two kilometres or more greater than the distance between the employee's former workplace and residence, the employee shall receive one allowance of $400.00.*

(c) *Where the distance between the new workplace and the employee's residence (measured by the most practical and direct route) is sixteen kilometres or more greater than the distance between the employee's former workplace and residence, the employee shall receive one allowance of $750.00.*

Note paragraphs (b) and (c) are mutually exclusive.

(iv) *The payment shall be made in two parts. The first half will be paid on the first day at the new location and the final half on the third pay day at the new location, provided that if following the fifth pay day but prior to the eighth pay day any employee who resigns his/her employment because the new location is unsuitable shall be entitled to an additional payment based on Clause 6 <u>less</u> the amount already paid as relocation.*

This Clause (5) shall not apply to an employee who is provided with a company car or other company transport.

(v) An employee's relocation payment shall not exceed an amount equivalent to what he/she would have received had he/she become redundant.

[18] Clause 6 sets out the redundancy compensation payable. Clause 7 sets out the voluntary redundancy selection process and allows for voluntary redundancy on a site by site basis. Clause 8 provides preference for the re-employment of redundant employees.

Discussion of the submissions

[19] The plaintiff's position is that there was no redundancy condition within the terms of clause 3 and therefore all the requirements of the CA to give notice and to allow for relocation, when it is requested, do not apply. Mr Langton advised that if the plaintiff is unsuccessful in its challenge and there is a redundancy condition, as defined by clause 3, then relocation and redundancy compensation will be determined between the parties in terms of the CA. If, however, the challenge is successful, and the Court concludes that this is not a redundancy condition as defined in clause 3, then, the plaintiff submits, whether or not the positions held by the employees at Woolworths Manurewa will still be redundant will depend upon the common law tests for redundancy provided in cases such as *Carter Holt Harvey Ltd v Wallis* [1998] 3 ERNZ 984 and by the Court of Appeal in *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597. Mr Langton stated those tests were whether a reasonable person would, taking into account the nature, terms and conditions of each position and the characteristics of the employee, consider that there was a sufficient difference between the circumstances of the current employment and the new employment under offer, to break the essential continuity of employment.

[20] Mr Langton summarised the plaintiff's arguments as follows:

a) The plaintiff's closure of the supermarket will not result in a "*Redundancy Condition*":

(i) because in this case the roles undertaken at Manurewa are being transferred to other supermarkets and the plaintiff is not closing down those **parts of its operations** undertaken at that supermarket (like on-line shopping; grocery etc) but instead is moving them but closing one of its worksites.

(ii) furthermore, even if that argument is not accepted by the Court, the closure of the supermarket will not cause the plaintiff to have "*labour surplus to requirements*" because this relates to the plaintiff's overall requirements and not just those at Manurewa.

[21] The plaintiff therefore argued for a different interpretation to clause 3 than that which was adopted in the *McCain* case and instead relied on the decision of the Court in *Swales v AFFCO New Zealand Limited* unreported, Judge Colgan, 18 December 2000, AC 101/00. Mr Langton observed that the *Swales* case did not seem to have been cited to Judge Shaw in *McCain*.

[22] Mr Langton submitted the *Swales* case had correctly applied the common law right of an employer to change an employee's work, or place of work, to a materially identical redundancy definition in the applicable collective agreement. I note however that in *Swales,* Judge Colgan, as he then was, stated that it would be unreasonable for AFFCO to contend (and it did not do so) that the availability of comparable work at another AFFCO plant, but say, 200 kilometres away from the plant in question in that case, would mean the employer did not have a surplus of employees. In *Swales* the Court held that the existence of comparable work for all the employees, 27 kilometres away from the closed plant, and the employer's provision of transport from the old plant to the new, meant AFFCO did not have surplus labour that required a permanent reduction in the number of its permanent employees. AFFCO had thereby fulfilled its obligation to minimise the serious consequences of loss of employment. The Court stated:

> *Applying the test approved by the Court of Appeal in* Sanson, *I find there was not sufficient difference between the plaintiffs' work at Omanu and the defendant's proposed work at Rangiuru to break the essential continuity of the employment. It follows that the plaintiffs were not entitled to regard*

> *themselves as redundant and to redundancy compensation as they claim.* [Paragraph 21]

[23] It is not possible to say whether the clause in the present case is on all fours with that in *Swales* for the only indication of the provision in *Swales* is the statement in the judgment that:

> *Redundancy was defined as AFFCO having surplus labour because of a closure of the plant requiring a permanent reduction in the number of permanent employees.* [Paragraph 14]

[24] Mr Langton contended that the circumstances that have arisen in the present case, namely the impending closure of the supermarket because of the actions of the landlord, did not fall within clause 3. He submitted that this was not a situation where the labour surplus had occurred because of the closing down of the whole or any part of the company's operation due to either a change in plant methods or reorganisation or like cause.

[25] Mr Langton contended that as the roles at Woolworths Manurewa are being transferred to other supermarkets, the plaintiff was not closing down those "*parts of its operations*" undertaken at that supermarket but was moving them. He accepted that the plaintiff was closing down one of its worksites. He contended that clause 2, the intent clause, should be read as an agreement to avoid redundancies and to keep people in jobs. He contended that as clause 4 deals with the obligation to give notice of redundancies, these requirements would only apply after the redundancy condition has arisen and that the decisions as to who is and who is not to be made redundant would be made after clause 3 but before clause 4 comes into play. He submitted that "*redundancy condition*" and "*redundancy*" seem to be two distinct outcomes of the redundancy process in schedule E. He observed that the provisions in clause 5 did not apply if the employee was not redundant. He observed that the parties had not used the phrase "*closure of the worksite*" as being the cause of the labour surplus, and contrasted that with *Swales* where the words "*closure of the plant*" were used and *McCain* in which the employer closed down part of its operation, not a worksite. He maintained that there was no closure but merely a moving of these operations in the present case.

[26] Mr Cranney submitted that the common law relating to redundancy has little importance in this case because the CA has its own code for redundancy which must prevail and which adds an extra and binding dimension. That was the reason in *McCain* for rejecting the reliance of counsel on the following statement of the Court of Appeal in *McKechnie Pacific (NZ) Ltd v Clemow* [1998] 3 ERNZ 245, at 251:

> *If in fact another position existed within the McKechnie group in New Zealand which was suitable for Mr Clemow it could not be said that he was surplus to requirements, so that there would not be a situation of redundancy.*

[27] The common law position, as described in *McKechnie Pacific* in the quoted sentence, did not survive a subsequent decision of the Court of Appeal in *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739. In dealing with what the Court in *Thwaites* described as "*the critical sentence*" in the *McKechnie* judgment the Court of Appeal in the later case stated:

> *[23] … In that case the Court held that there was no such position. On its face this approach relates redundancy to the person rather than the position and does not reflect the established law as stated in* Aoraki[1]. *It also recognises "vitiation" of redundancy by failure to offer a different position. The references in the judgments in* Aoraki *to absence of consultation and failure to consider redeployment possibilities as in some circumstances casting doubt on the genuineness of the alleged redundancy do not go that far. The genuineness of the redundancy of one position once established cannot be negated by a failure to offer a different position. To the extent that the judgment in* McKechnie *appears to say that it can, it does not reflect the principles established in* Aoraki *which are to be preferred.*
>
> …
>
> *[25] In a situation of genuine redundancy, where the position truly is surplus to requirements, in the absence of a contractual provision to that effect, it cannot constitute unjustified dismissal not to offer the employee a different position. The relationship between employer and employee applies in respect of the position and work the employee is contracted to provide.*

[28] The position set out in *Aoraki* and *Thwaites* appears to have been developed from the adoption in *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW*

[1] *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601

[1991] 1 NZLR 151 of the definition of redundancy in s184(5)(a)(i) of the Labour Relations Act 1987, which provided:

> *(5) In this section "redundancy" –*
> *(a) Means a situation where –*
> *(i) A worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer; ...*

[29] That section of the Labour Relations Act 1987 gave statutory recognition to redundancy negotiations and agreements in response to the Wage Adjustment Regulations 1974, since revoked, which dealt with redundancy in a negative way by restricting both the amount of redundancy compensation and the entitlement of claimants. The definition in s184(5)(a)(i) appears to have been based on the Wage Adjustment Regulations 1974, Amendment No 8 (1976/96), made pursuant to the Economic Stabilisation Act 1948. When adopting the definition in s184, Cooke P, as he then was, in *Hale* stated:

> *… It is true, as the Labour Court said, that the definition is only for the purposes of that section, but it corresponds to ordinary usage, as reference to contemporary dictionaries confirms. For example,* The Oxford English Dictionary (2nd ed, 1989) *gives:*
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> > *"[2.] b. The condition of having more staff in an organisation than is necessary. Hence, the state or fact of losing a job because there is no further work to be done; a case of unemployment due to reorganization, mechanization, loss of orders, etc."*

[30] It would appear that the dictionary definitions are closer to the definition used in the present case which is not directed to a position being surplus to requirements but whether the employee, or as in this case "*labour*", is surplus to requirements. The Court of Appeal decisions which have concentrated on the position rather than on the incumbent, therefore do not assist in the interpretation of the present clause and its consequences for the parties.

[31] Mr Cranney's submissions placed reliance on clause 2, the intent provision. He noted that the words "*disruption and inconvenience*", are the very words used at

clause 5(iii), when alternative work is requested and accepted, that relocation payments will be made to compensate for "*any disruption and inconvenience*" that may occur as a result of the change to the place of employment. He submitted that schedule E proceeds on the basis that the loss of permanent employment has serious consequences and that the intent of the CA is that the parties will work together to minimise these. He submitted that a wider interpretation of clause 3, following as it does the intent clause, in the context of the subsequent provisions dealing with notice requirements, entitlements to request relocation, the obligations to grant relocation, payments for relocation and redundancy entitlements for employees who do not seek or are not offered relocation, all justify a wider interpretation than that contended for by the plaintiff. He submitted that the narrower interpretation contended for by the plaintiff renders the entire agreement largely ineffective because relocation payments would not be required, despite virtual compulsory relocation.

[32] Mr Cranney relied extensively on paragraphs from *McCain* and the following extracts appear to be relevant to the present case:

> *[69] The central question in the interpretation of clause 14.2 is whether it is triggered only when change results in a surplus of people company-wide. This is the argument adopted by McCain. Mr Towner submitted that none of the employees were redundant because, as there were alternative suitable positions available for each of them in another part of the company's operations, none of them were people surplus to the company's requirements.*
>
> *[70] The alternative interpretation is that redundancy arises when the employer closes down part of its operation (including shifting materials and/or production) which means that the company has people surplus to that part of the operation.*
>
> *[71] I am of the view that the second interpretation is correct. The words of clause 14.2 are unambiguous: "the Company has people surplus to its requirements because of the closing down of the whole or part of the employers operation . . . and/or the re-organisation or like cause requiring a reduction . . .". This gives three alternatives: people become surplus*

because of the closing down of the whole of the employer's operation; or people become surplus because the closing down of part of the employer's operation makes them surplus to that part of the operation; and people become surplus because reorganisation requires a reduction in the number of permanent employees.

[72] In each case the surplusage is linked to the cause whether it be the closing down of the whole, or part of the operation, or reorganisation of the employer's business.

[73] I agree with Ms Highfield's submission that a redundancy situation arises when and as soon as there is a decision to close down part of the operation that will result in a surplus of people to that part. When that occurs clause 14 applies.

[74] This is similar to the interpretation adopted by the Court in United Food & Chemical Workers Union of NZ v Wattie Frozen Foods Ltd[2] *where the cafeteria at Wattie's Feilding branch was let out to a contractor. The employee at the cafeteria asked to be made redundant but was told that this was not an option and she was eventually transferred, on terms, to the contractor who took over the cafeteria.*

...

[76] In the McCain agreement "manpower surplus" has been updated to read "people surplus" and the words "due to a change in plant, methods, materials or productions" has been shortened to "including shifting materials and/or production". Otherwise the relevant clauses are the same.

[77] In the Wattie *case the Court found that the closure of the cafeteria meant that the employer was reorganising the employment by ceasing the employment of the worker in the cafeteria. It said:*

> We know of no authority which has established that an employer can escape the obligations of a redundancy provision by directing an employee to accept employment by its successor.

> *[78] While the present case does not involve transfer to a successor, the principle still applies. Where there are terms in the employment agreement which govern the rights and obligations of both parties, covering the closing down of whole or part of an operation, an employer cannot avoid those provisions by deciding that the possibility of relocation of employees within the company means that there is no redundancy.*
>
> *[79] I do not accept the argument that if all people made surplus by the closing of part of the operation can be relocated then a redundancy situation does not exist. Pursuant to clause 14.2 the employees are redundant upon the closure of part of the operation. At that point the other parts of the collective agreement which aim to minimise the effect of the loss of permanent positions come into force. Like the employer in* Auckland Regional Council v Sanson[3] *McCain has concluded that, because each of the employees possessed some skills which could be used in another part of the McCain operation, they were not surplus. In so doing it has inhibited itself from recognising that the positions those individuals had filled, and therefore the individuals themselves, were superfluous. The Court of Appeal held in* Sanson *that the application of a redundancy agreement cannot turn on the employer's* decision *to terminate a position as distinct from the termination in fact of that position.*

[33] Mr Cranney submitted that the approach adopted in *McCain,* based as it was on *Wattie,* should be adopted in the present case where the contractual definition of redundancy was substantially the same as both *McCain* and *Wattie*. In *McCain* the clause read:

> ***14.2 Definitions***
> *Redundancy — is a condition in which the Company has people surplus to its requirements because of the closing down of the whole or part of the employers operation (including shifting materials and/or production), and/or the re-organisation or like cause requiring a reduction in the number of permanent employees…* (Balance of clause which deals with the way the reduction is omitted.)

[34] In the *Wattie* case the relevant part of the redundancy clause read as follows:

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[2] *[1991] 2 ERNZ 810, at p 813*]
[3] *[1999] 2 ERNZ 597 (CA), at p 604*

> *Redundancy is a condition in which an employer has manpower surplus to his requirements* ***because of the closing down of the whole or any part of the employer's operations due to a change in plant, methods, materials or productions or re-organisation*** *or like cause requiring a reduction in the number of permanent employees … (Emphasis added.)*

[35] Mr Cranney submitted this was not a case where the plaintiff had a right to transfer staff without their consent, there being a specific and agreed contractual code for such transfers in clause 2.4. He also observed that in the present case the clauses appear under the heading "*REDUNDANCY AND RELOCATION AGREEMENT*". It is the employee, under clause 5(i), who has the right to seek relocation once the employee has received notice of redundancy, prior to termination. At that point the plaintiff is required to make every endeavour to provide alternative work, and to communicate the details to the employee who has made the request for relocation. Where the alternative work is requested and accepted then the plaintiff has the obligation to pay the relevant relocation payment, based on years of service and the additional sums calculated on the distance to the new workplace. An employee who resigns following the fifth payday but prior the eighth payday, because the new location is unsuitable, is to be paid redundancy less the relocation payments already made.

[36] Mr Cranney sought to test the interpretation of clause 3 by omitting the words "*the closing of the whole or any part of the Company's operation due to a change in plant methods, or*" so that it simply read "*that redundancy is a condition in which the company has labour surplus to requirements because of re-organisation or like cause, requiring a permanent reduction in the number of permanent employees at any worksite or geographic location*". He observed that "*condition*" is defined in the Collins English Dictionary, as a "*circumstance*" and "*labour*" refers to a class of people who perform work. He accepted that the clause was somewhat different to that in *McCain* which referred to "*people*" which led to the need to consider what was required for the individuals. He observed that the word "*surplus*" means "*in excess of what is required*". He submitted that where, as here, the surplus resulting from the causes in the second part of the clause led to a permanent reduction in the number of permanent employees at any worksite or geographic location this determined the proper interpretation of clause 3.

Conclusion

[37] In broad terms I prefer and accept Mr Cranney's interpretation of clause 3.

[38] I do not accept Mr Langton's submission that the situation that has arisen as a result of the closure of the premises has resulted in only a move of the supermarket operations and not a closure of part of the company's operation. It might be arguable that clause 3 should be read down as dealing with situations which have arisen as a result of the plaintiff's own intervention, namely by closing the whole or any part of its operations because of changes in plant methods, reorganisation or like cause and therefore the intervention of a third party such as a landlord would not apply. That is an unduly restrictive reading of the clause. Regardless of the reason why the plaintiff has to close down the whole or any part of its operation, this will still result in the reorganisation of its operation by having to move from the Manurewa site, which in turn will lead to a permanent reduction in the number of permanent employees at that worksite or geographic location.

[39] I have found the Court's reasoning in *McCain* when dealing with a clause materially similar to the present, more persuasive than the approach adopted in *Swales* of applying the common law rather than interpreting the clause itself. That may be because the clause in *Swales* was materially different to those in *Wattie*, *McCain* and the present case.

[40] I am fortified in that view because in the present case there are the additional words "*at any worksite or geographic location*". These I find are of prime importance in leading to the interpretation that the "*labour surplus to requirements*" is linked to "*a permanent reduction in the number of permanent employees*" at the particular worksite or geographic location, rather than to the plaintiff's whole operation. The interpretation sought by the plaintiff has the effect of either reading those words down or giving them virtually no meaning whatsoever. Those words were not present in the *McCain* case but, had they been present, they would have provided even greater support for the interpretation there adopted.

[41] I am satisfied that these words lead to a conclusion that the "*labour surplus to requirements*" is not to be judged by the totality of the plaintiff company's operations throughout New Zealand. Instead they require the cause of the labour surplus to have resulted in a permanent reduction in the number of permanent employees at any worksite or geographic location. Thus, when the plaintiff has closed down part of its operation it will have labour surplus to its requirements in that particular worksite or geographic location.

[42] This interpretation would provide a workable means of examining other situations in which labour surpluses could have arisen. During the submissions we discussed two hypothetical cases in order to test the operation of the contrasting interpretations being offered by the parties. In one hypothetical case the plaintiff at Manurewa could have been building a brand new supermarket on the same site, say on the carpark, with the intention of demolishing the old supermarket, which has been there for 30 years, upon completion of the new. The staff working at the old premises would then be required to work in the new premises on the same terms and conditions. On the defendant's interpretation Mr Cranney accepted that they would reluctantly have to argue that that was a redundancy condition because there was a labour surplus causing a permanent reduction in the number of employees at the old worksite. That would not be a reasonable conclusion. The plaintiff would no doubt argue that the worksite would embrace a new premises or in any event the new premises would be caught as being at the same geographic location. That view would be likely to prevail.

[43] Once the new worksite is at a greater distance the issue would become more complicated. If, using the other hypothetical example we discussed, Woolworths decided to close down all of its operations in the North Island and transfer them to the South Island, would clause 3 apply? Both parties appeared to accept that it would have done but this cannot be because its meaning changes with its application to changing circumstances. The words "*at any worksite or geographic location*" provide the methodology for judging whether either of those hypothetical situations create a redundancy condition.

[44] I am further fortified in this view by the context in which clause 3 is found, namely redundancy and relocation. Those provisions, together with clauses 2.3, change or reduction to hours of work or duties, and 2.4, temporary variation of duties, provide an agreed fetter to the management prerogative to require employees to change aspects of their employment, including the place in which they are required to work.

[45] Clause 2.4 requires mutual agreement to the plaintiff's request that an employee work temporarily in another store. There is a strong implication that if such agreement is required to a temporary relocation it would also be required for a permanent relocation. If the permanent relocation is as a result of a redundancy condition, the redundancy provisions as to relocation will apply.

[46] If such clauses had not been present then the present situation would have required the application of the test approved by the Court of Appeal in *Sanson* to determine, as in *Swales*, whether or not there were sufficient differences in the work performed at Woolworths Manurewa and the circumstances of those employees compared to the work to be performed at the other stores operated by the plaintiff and how that impacted on affected employees. The distance between Manurewa and those stores would be one of the relevant considerations.

[47] I agree with Judge Shaw's rejection in *McCain* of the employer's argument that if all the people made surplus by the closure of the operation can be relocated, then a redundancy condition does not exist. In the present case a redundancy condition will exist because the reorganisation that is required as a result of the loss of the lease will in turn be a cause requiring a permanent reduction in the number of permanent employees at the Manurewa Woolworths worksite. It is in that worksite that the labour surplus has arisen.

[48] I therefore agree with the conclusion of the Authority that a redundancy condition does arise as a result of the impending closure of the plaintiff's supermarket at Manurewa. The challenge is accordingly dismissed.

[49] It will follow from this conclusion that the plaintiff is obliged to give notice in terms of clause 4, allowing the employees the right to elect under clause 5 whether to seek relocation or not. Should there be any difficulties with the implementation of this decision, leave is reserved to the parties to refer the matter back to the Court.

[50] Counsel requested that costs be reserved. If agreement cannot be reached costs can be dealt with by an exchange of memorandum, the first of which is to be filed within 60 days of this decision with a reply within a further 21 days.

B S Travis
Judge

Judgment signed at 2.30pm on 7 September 2007