

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 156/07
File Number: 5097812

BETWEEN EDWARD JOHNSON
 Applicant

AND SALAMANDER ENTERPRISES
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Anthea Hughes for Applicant
 Darren Mitchell for Respondent

Investigation Meeting: 15 November 2007 at Wellington

Determination: 29 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent, Salamander Enterprises Limited (Salamander) is denying Mr Edward Johnson's claim that he should have been made redundant upon the transfer of Salamander's business premises from Miramar to Upper Hutt.

[2] Mr Johnson has been a furniture assembler for Salamander for nine years. During that period Salamander has expanded from being a very small business to one involving over 20 people. As a result of a sustained increase in business over a long period, it was required to find larger premises. Upon reviewing available premises in the eastern suburbs of Wellington, the Managing Director of Salamander, Mr Anthony Salter, concluded that it would be very difficult to find such premises and therefore extended his search to the greater Wellington region. It was not until approximately June 2007 that he found premises that he felt were suitable for Salamander, in Maidstone Avenue, Upper Hutt. The new premises are 5-10 minutes

walk from the Upper Hutt Railway Station and there are free parking facilities for staff at the factory.

[3] Mr Salter and his wife, who operate Salamander, told staff about this move and gave them plenty of notice of relocation. They indicated that they envisaged that there would be no redundancies, as they considered Upper Hutt a reasonable place for their staff to commute to and they wanted to retain all of them. Staff were to be paid two retention payments of 10% of their wages or salaries for the preceding three months if they relocated to Upper Hutt. The process adopted by Salamander in raising the move in advance, working through the issues with staff and making retention payments can not be criticised and reflects its demonstrable commitment to staff and their welfare.

[4] Mr Johnson did not want to relocate to Upper Hutt from his home in Strathmore and enlisted his union's support in seeking to have his position declared redundant. Mr Johnson would be eligible for redundancy compensation of around 12 weeks pay, no doubt a strong incentive for him to seek to be declared redundant, but that is completely irrelevant to the legal issue before the Authority.

[5] Despite discussions between the union and Salamander, including the use of mediation services, no agreement has been reached. Since October Mr Johnson has been commuting to the Upper Hutt premises without prejudice to his rights.

[6] Mr Johnson does not consider it reasonable to require him to commute from Miramar to Upper Hutt for a number of reasons. He rents a Housing New Zealand house specifically chosen in Strathmore for its proximity to Salamander's former premises. He has two young children and does not want to be away from them for the extended period required because of the extra commuting time, which he also finds impacts negatively on his osteoarthritis. He and his family have only one car, which his wife needs access to on most days in order to assist her and the children. Financially, Mr Johnson already found it "*often a struggle to meet all our daily living expenses*" before the shift. He now pays approximately \$45 per week in travel expenses.

[7] The distance between Mr Johnson's home and the new work place is approximately 86 kms (return) compared with only 6 kms (return) when Salamander was operating out of its premises in Miramar.

[8] Mr Johnson gets to work by taking his scooter to the Botanical Gardens, where he meets a friend at 6.45am, who takes him out to his work in Upper Hutt. Mr Johnson then takes his friend's car for the additional 5 kms to get to work some time between 7.30 and 7.50am. The process is reversed at night and appears to be a permanent arrangement.

[9] Mr Johnson therefore claims to be away from home by more than 2 ½ hours extra each day. I do not accept the totality of that claim. My assessment is that Mr Johnson's commute would start at about 6.25am (when he leaves to go to the Botanical Gardens) and that he would normally be at work by 7.30am. On the way home I accept that he would leave at about 4.25pm and not get home until 5.30pm, or later, depending on the traffic in Wellington city. This is of course significantly extra travel time compared to the minimal commuting he had to do before the shift.

[10] Mr Johnson also has the option of taking public transport. I accept that the most convenient, cost effective method would be by using the 'Airport Flyer' bus. In that case Mr Johnson would in fact have to leave earlier than he does at present (to ensure he caught the bus at Wellington airport or the Kilbirnie shops) and would also not get home until later. Furthermore, the cost of the Flyer would not be significantly less than the cost incurred in his private arrangements and there would be issues surrounding where he could safely park his scooter (at the airport or Kilbirnie shops) at a minimal cost.

[11] Mr Johnson has been offered, on an informal basis only, the opportunity to participate in a casual car pooling arrangement that exists with other staff. I do not accept that Mr Johnson should be required to car pool with other staff, but it is an option that may be of assistance to him should it be determined that the relocation of Salamander's premises is within a reasonable commuting distance. I accept the evidence of another Director of Salamander, Mrs Jennifer Salter, that the average commuting time between Miramar and Upper Hutt, being the car pool route, is approximately 40 to 48 minutes per journey.

[12] All of the staff but one have chosen to relocate to the new premises and that staff member, who resigned after the shift, now wishes to be re-hired by Salamander.

The Law

[13] As the employment agreement is silent as to whether or not a shift in location brings the redundancy provisions into issue, it is necessary for the Authority to determine what is reasonable in the particular circumstances of the case. As the Employment Court held in *Tuilaepa v. Auckland Area Health Board* [1992] 2 ERNZ 114 at 121:

Whether any claimant is entitled to redundancy, based on the redundancy agreement depends first on whether she is genuinely redundant. Whether genuinely redundant depends on whether, as a matter of fact and degree, the worker can show that the transfer of her position to Carrington effectively took that position away ...

...Actual travel arrangements, bus timetables etc must be taken into account and better alternatives if available may be ruled out only if shown by the worker to be unworkable for some good reason...

Th[e] issue is whether the worker concerned has been constructively dismissed by reason of the fact that her position has been relocated to a work site so far removed from the present work site that the worker can no longer reasonably be expected to attend for work as she would otherwise be required to do by her employment contract.

[14] While this is not a claim for constructive dismissal, the principles are the same in this case, I determine.

[15] In assessing reasonable commuting distance under an employment agreement, the Court of Appeal in *Westpac Banking Corporation v. Money* [2004] 1 ERNZ 576 held that the Employment Court was entitled to take into account the distance involved, the travelling time, the transport options and other relevant factors. In that case, albeit one where an employee was trying to argue that the distance between Palmerston North and Wanganui was a reasonable commuting distance, in order to stave off redundancy, the Court had found that an additional 74 kms, approximately 150 kms and 2 ½ hours extra travelling time per day, was reasonable to expect Mr Money to drive, given that that was what he wanted to do anyway.

[16] In *NZ Printing IUOW v. Sigma Print Ltd* [1979] ACJ 279 the Arbitration Court held that a shift of premises from Petone to Featherston, some 60kms, was not a reasonable distance or travelling time. Of course in that case workers were being required to commute through or over the notorious Rimutaka hill.

[17] In *AMI Insurance v. Kirk* [1999] 1 ERNZ 301 it was held that in considering what a reasonable commuting distance is, personal circumstances must be relevant. This is also true in this case.

[18] The importance of personal circumstances can be highlighted by the case of *Hamilton v. Banks Shoe Co Ltd* [1998] 3 ERNZ 1139, where the Employment Court upheld the Employment Tribunal's decision that offering a staff member relocation to Lower Hutt from Wellington was reasonable in the ordinary course of events, but that because of the special circumstances of the applicant, including her need not to drive and her need to remain close to her residence, that was not a workable solution for her. At first instance the Tribunal noted that the decision was not to be regarded as a precedent in any other case.

Determination

[19] As a matter of general principle, I accept that the greater Wellington region is one labour market for many workers and that given a reasonably efficient public transport system and the wide availability of private transport to workers, that the burden of distance is not as great as the burden of extra time on commuting workers, compared to 20 years or more ago. The extra distance of approximately 80 kms a day can not therefore be seen, in its own right, as unreasonable, I conclude.

[20] I also conclude, for the above reasons, and the fact that all other staff have agreed to shift to the new premises and largely commute without apparent complaint, that the extra time per day of two hours or so per day can not be generally seen as an unreasonable burden on workers in today's economic and social climate, even although it is stretching the bounds of what could be considered reasonable. The same could not be said if the shift had been from Upper Hutt to Miramar, because although the distance is the same the travelling time would be much greater and much less consistent, given that the commute would be with rather than against the traffic.

[21] The issue for me to determine, therefore, is whether there is anything in the personal circumstances of Mr Johnson that require a different answer. Although Mr Johnson does have an osteoarthritic condition, there is no medical evidence to support the claim that this made travelling such a distance impossible and neither did he so claim. Rather he claimed that it simply made him more uncomfortable. This

therefore distinguishes this case from the *Hamilton* case, where Ms Hamilton had a professed need not to drive.

[22] I conclude that while Mr Johnson is rightly happy with his Housing New Zealand house close by his old workplace, the fact that he is a renter as opposed to a home owner means that it is in reality easier for him to relocate than other staff. Again, while Mr Johnson will be negatively impacted by the additional cost of approximately \$45 per week for travel, this is true for all staff, and commuting costs of this level are not unusual in the Wellington region.

[23] It is clearly highly inconvenient to Mr Johnson to have to commute an extra two hours at least per day and therefore lose that time with his family. There are no special circumstances, however, that would differentiate him from the average family man in this regard.

[24] Mr Johnson's circumstances can, however, be distinguished from others in that he has no second car, which would have minimised the time and inconvenience of the longer commute. His financial position is such that it is not workable or reasonable to expect him to purchase another car (*Tuilaepa* applied). Similarly, I conclude that the car pooling arrangement is not a sufficiently formal arrangement for Mr Johnson to reasonably be expected to rely on it.

[25] Another key point of difference is the commute home. There can be no certainty on any given day that Mr Johnson would have a smooth ride home of around 20 minutes from the Botanical Gardens at that time of day, i.e. the evening rush hour, even although he rides his scooter. This therefore would mean that it is more likely than not that in any given week his extra commuting time would average in excess of two hours per day.

[26] I conclude, although it is extremely finely balanced, that because of his personal circumstances (not having access to a second car and the uncertainty of the length of the commute home through central Wellington to Strathmore) that the reality of the new commute is such that he can not reasonably be expected to attend for work at the Upper Hutt premises. Taking all matters into account, therefore, I determine that it is unreasonable for Salamander to have required Mr Johnson to relocate to its new premises and that his position was in effect made redundant

because the commute was unreasonable in his particular circumstances. I reserve for later determination, if necessary, the issue of compliance.

Costs

[27] Costs are reserved.

G J Wood
Member of the Employment Relations Authority