IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 90/10
5151196

	BETWEEN	MARK PARTRIDGE Applicant
	AND	JUKEN NEW ZEALAND LIMITED Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Peter Cranney for Applicant Gary Blair for Respondent
Investigation Meeting:	17 July 2009
Submissions received:	4 August 2009, 2 October 2009 from Applicant 15 September 2009 from Respondent
Determination:	1 March 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Partridge started work with the respondent ("Juken") in January 2000 in its Triboard Mill. Although he began with brief stints on the process line and as a Composer operator, his aim from the outset (as Juken knew when it recruited him) was to work in quality control. He moved into the quality control area in February 2001.

[2] His employment relationship problem arose in May 2008 when staff numbers in that area were reduced from four to two. Mr Partridge was not one of the two

selected to remain. Instead he was transferred to a role as a boardline operator. He took up the new role[1] under protest.

[3] The relevant collective agreement provides at Clause 3.2:

"Redundancy shall mean a situation where an employee's employment is terminated by the Company, the termination being attributable, wholly or mainly, to the fact that the position filled by the employee is, or will become, superfluous to the needs of the Company."

[4] Mr Partridge claims that he became redundant when his position as quality (laboratory) technician ceased in May 2008, and that he remains entitled to redundancy compensation. In his statement of problem, he asserted that these matters give rise to both a dispute and a personal grievance he seeks to have resolved by means of :

i. a declaration that he is entitled to redundancy compensation in accordance with the collective agreement;

ii. a compliance order requiring Juken to pay him redundancy pay pursuant to the collective agreement, and

iii. compensation pursuant to s123 (1) (c) (i) of the Employment Relations Act 2000.

[5] Juken, for its part, relies on clause 1.4 of the Collective Agreement which provides:

"Nothing in this Agreement shall limit the work which may be carried out by any employees other than the legal, statutory and regulatory requirements that may apply at any time. No employee shall be directed to perform duties inconsistent with their

[1] I use the word "role" here because both parties accepted that it could be said that Mr Partridge moved from the role of Laboratory worker to the role of Boardline Operator. Section Six of the Collective Agreement (which sets out various roles covered by the remuneration scheme) is attached here as Appendix 1.

current level of skills, training, qualifications unless they are adequately supervised and within safe working requirements."

[6] For Juken, it is argued that Clause 1.4 gives it an unfettered discretion to direct employees to other duties provided those duties are not inconsistent with that person's current skill level. It says that Mr Partridge was moved to a role at the same level as the one he had been engaged in and for which he was suitably qualified. It says there can be no suggestion that Mr Partridge was redundant.

Issues

[7] Juken identifies the issue for determination as follows:

"The fundamental issue for determination in this matter can succinctly be described as whether the Company was lawfully entitled to require or instruct the Applicant to undertake duties as a boardline operator in June 2008."

[8] For Mr Partridge it is argued that the issue is not only whether it is reasonable to require an employee to transfer to a new role, but whether the role was within the scope of that employee's employment obligations. Applying *Carter Holt Harvey v Wallis 3ERNZ 984* (where the Court found that neither the common law, nor a broadly phrased flexibility provision permitted the employer to redeploy the worker to a different position against his will) Mr Cranney argued that it must be determined whether the role of boardline operator was a different position to that of quality technician, and that this in turn is a question of fact and degree to be determined by the evidence.

[9] Juken says that this question does not arise in the present case as at all material times Mr Partridge's position remained "*Level 4 Production Worker*." Taking both sets of arguments into consideration, I approach the determination under the following subheadings:

i. Whether the role of boardline operator constituted a different position to that of quality technician;

ii. If so whether clause 1.4 entitled Juken to move Mr Partridge to that role, and

iii. If not, whether Mr Partridge is entitled to redundancy compensation or other remedies.

(i) Does the role of boardline operator constitute a different position to that of quality technician?

[10] The respondent does not dispute that there are different roles (or jobs) within the Mill, and agrees that the roles in question here (which have different job descriptions and duties) are different. However it says that the role or job held by an individual staff member does not equate to the position held by that person. It says that all Level 4 production workers across the Mill (including those in the "Woodprep" area) occupy the same position. Even if this were not to be accepted, it says that at the very least the roles of Level 4 Laboratory worker and Level 4 Boardline Operator within the Production area must be considered the same position.

[11] It was argued for Mr Partridge that it is contrary to the scheme of the Collective Agreement to argue that his "position" was that of Level 4 Production worker, since the whole agreement is organised around a concept of "position" in a way which is not consistent with the notion that everyone at the same level is in the same position.

[12] He submitted that:

i. the agreement contains a scheme by which an employee may transfer from one position to another within a skill level;

ii. there is no suggestion (in the agreement or in practice) that an employee will be transferred to a substantially dissimilar position without consent;

iii. there is no suggestion that an employee can be transferred from a higher position to a lower one, and

iv. the wage structure emphasises the notion of position.

[13] Mr Cranney noted that respondent witnesses acknowledged that the word "position" is used by the workforce to refer to the role held. He reminded the Authority that the same witnesses accepted that (in that sense) Mr Partridge's old position no longer existed and that Mr Partridge was transferred under protest to a new one. When asked the total number of production workers on his staff Mill Manager Dennis Clarke said that "*depended on what you call a production worker.*"

[14] The respondent says it is an overstatement to say that the collective agreement is organised around the concept of "position." Rather it says that the remuneration scheme is skills based. Those submissions are accepted. However the applicant's argument about the transfer provisions is accepted. Section 6 of the Collective Agreement (attached here as Appendix 1) identifies different roles within each Level, in each area of the Mill. The Collective Agreement also sets in place processes whereby staff who have completed the required skill modules may seek to transfer to a new "position." Such a transfer may be from "skilled" to "qualified" in the same role, or may be from one role to another. This not consistent with the assertion that a staff member's "position" is Level 4 production worker.

[15] I accept that within each Level, different roles may amount to different positions. Whether they do is a question of fact and degree, which brings us back to a comparison of the two roles. The respondent has conceded that they amount to different "jobs" but argues that the differences are not great and that this situation is very different to that in the *Wallis* case where there was a significant dissimilarity between the jobs in question.

[16] The key purpose of Mr Partridge's original role was provision of testing and monitoring services to the board line. It was a technical role which focussed on identification, recording and assessment of information and data regarding the quality of the product through testing programs, production testing and investigation of internal and external customer complaints. In that role his time was split between the laboratory and the factory floor.

[17] The key purpose of the other role was to ensure the continuous running of the boardline while maintaining a consistently high quality board. It was primarily a production role: quality was important but not the primary focus. Several training modules were common to both roles but others were required only for one or the other. At the time of the Authority investigation meeting, Mr Partridge had not yet completed the further training he required to become a Level 4 Boardline operator. It was expected that this would take up to six months more. In the meantime he continued to be paid as a Level 4 worker but was essentially functioning as a Level 3 boardline assistant, under the supervision of a Level 4 worker.

[18] Once fully qualified, Mr Partridge would spend much of his time in the control room; an air conditioned environment which I accept is similar to that in the laboratory. While functioning at Level 3, he was required to spend more time on the factory floor and to engage in "mundane" tasks such as cleaning.

[19] Mr Partridge argued that the new role was less senior than the old because there were more layers of management above him than in the quality area. I do not consider this point relevant because I consider the management structure a function of the size and complexity of the production area, rather than an indication of the seniority of the role, which I accept was equivalent, at Level 4.

[20] The respondent argued that:

"it is accepted that there are some different tasks to be attended to, the overall status, complexity and quality components of the two roles are very similar..."

[21] This is a fair summation however equivalence must not be confused with sameness. The tasks to be performed in the two roles were sufficiently different as to require the completion of different training programmes. Mr Partridge, who was at the "qualified" stage for the laboratory role, was not even at the "entry" stage for the role of boardline operator and required significant further training. For this reason I must conclude that the new role was different from the old.

(ii) Did clause 1.4 entitle Juken to move Mr Partridge to the role of boardline operator?

[22] Having established that the two roles were different, I now move on to consider the question asked in the *Wallis* case: "*Is there an express contractual provision… which entitled the [*employer*] to redeploy the [*employee*] to a different position against his will?*"[2]

[23] The provision at issue in the *Wallis* case provided that:

"It shall not be a variation of the employee's contract of employment where the employer deploys an employee on other duties the employee is reasonably able and competent to do or will be able and competent to do after training by the employer"

[24] The court concluded that this amounted to a "flexibility provision" and that it did not go so far as to create a right to forcibly redeploy a worker (for whatever reason) to a position that was not substantially similar.

[25] Juken seeks to distinguish *Wallis* by arguing that flexibility is the foundation of the whole way in which work is organised at the Mill, and this is reflected throughout the Collective Agreement. It says that it is implicit in agreements around training and explicit in clause 1.4 that employees may be required to undertake any duties "*within their sphere of competence*." It also says that if there had been an intention to limit the roles to which individuals could be deployed the parties would have used clear words to that effect.

[26] The respondent also notes uncontested evidence that Mr Partridge has demonstrated this flexibility during his employment having held more than one position during his time at the Mill and having assisted in several different areas (including the warehouse and the boardline) on occasions when required. Juken also notes that in previous redundancy situations the union party to the collective agreement took a very different approach to the one Mr Partridge is taking now, and argued that all production workers should be entitled to redeploy to other production positions at the same level as those they had been on.

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[2] *Wallis* paragraph [35]

[27] Both the collective agreement, and the work practices in place at the Mill, are premised on an understanding that the workforce will be multi-skilled and flexible. This is consistent with prevailing approaches to work organisation across the manufacturing sector. I have heard nothing to indicate, however, that the circumstances in *Wallis* were any different. For this reason, I do not accept that *Wallis* can be distinguished in the way argued.

[28] As well I note that the discretion in Clause 1.4 is not unfettered. As Juken conceded:[3]

"it does not suggest that it could transfer an employee to another role for which that employee was not properly trained or appropriately qualified"

[29] It is hard to square the implication that Mr Partridge was properly trained and appropriately qualified for the new position with the undisputed evidence that at the time of the investigation meeting (approximately one year after the transfer) he was not yet qualified to take up full duties of the boardline operator role, and even with supervision, was performing only as a Level 3 "*operator's assistant*."

[30] Once again, the need for significant further training is the obstacle on which the respondent's arguments founder. I am not satisfied that the discretion set out in clause 1.4 was sufficiently broad to permit Mr Partridge's redeployment to a role in which he could not work, even with supervision, almost a year after the move had been made.

[31] To summarise, Clause 1.4 does give the respondent a wide discretion. The findings in this determination should not be read as precluding the transfer of a worker to a different position (even from that of quality technician to boardline operator) where the individual concerned had the requisite skills already.

[3] Paragraph [29] supplementary submissions 15 September 2009.

(iii) Remedies

[32] The applicant seeks to be put in the position he would have been in, and relies on *Ma'alo v Marine & Industry Safety Inspection Services Limited* (WET25/00 unreported, 10 February 2000) as authority for the principle that he remains entitled to redundancy compensation after working on "*under protest*."

[33] The respondent argues that the redundancy provisions cannot apply because Mr Partridge's employment was not terminated by the company directly. It also says that if the Respondent committed a repudiatory breach of the contract by compelling Mr Partridge to accept a new position, Mr Partridge must either:

a) *"continue to accept the breach and remain in employment, and …[*claim*] such damages as may arise from the breach (which would not include redundancy compensation as his employment had not been terminated), or*

b) *require the Respondent, by order of the Authority, to terminate his employment and pay him redundancy compensation."*

[34] The respondent also distinguishes *Ma'alo* on the basis that in that case, the applicant had been offered redundancy and accepted it before the respondent later "*reneged on this binding agreement*.[4]"

[35] It is correct that the facts in *Ma'alo* can be distinguished in this way from those of the present case. As well, the decision provides no details of the redundancy provisions in question in that case. I cannot rely on that case as being applicable to the facts of this one.

[36] Given that the respondent has acted outside the scope of its discretion, this matter falls to be determined on whether the respondent's action in transferring Mr Partridge amounted to either a repudiatory breach or to an unjustified action to his disadvantage.

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[4] *Ma'alo v Marine & Industry Safety Inspection Services Limited* (WET25/00 unreported, 10 February 2000) at p.12

[37] I cannot conclude that the breach was repudiatory in nature. Mr Partridge felt able to work on and his pay rate was unchanged. I accept however that the transfer did amount to an unjustified action to his disadvantage. Mr Partridge told me that he was very unhappy in the new role; to the point where he said he would rather have taken a position as a Level 1 warehouse worker than work on the boardline, because he would then have been spared the stress of acquiring new skills in an area where he was not comfortable.

[38] So that there can be no confusion about the effect of this determination, I note that Mr Partridge is entitled to decline the role of boardline operator should he still wish to do so. However I do not accept that this leads automatically to a redundancy situation. At the time the number of quality technicians was reduced, the respondent formed a view that the Level 4 boardline operator role was the most suitable for Mr Partridge. I was told however that other roles were available at the time, including the Warehouse role already mentioned, which Mr Partridge told me he would have been prepared to accept. The parties must now return to that point in the process and discuss what alternative redeployment options currently exist.

[39] In the circumstances I conclude that Mr Partridge is entitled to compensation for the disadvantage arising out of the disruption of the transfer and out of being required to undertake further training.

[40] **I order the respondent to pay to the applicant compensation of $5,000.00 pursuant to s.123 of the Employment Relations Act 2000.**

Costs

[41] This issue is reserved. If any application is to be made for costs, it should be lodged with the Authority within 30 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority