

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Ian Rouse (Applicant)
AND APN Print News and Media Limited (Respondent)
REPRESENTATIVES J Angus Burney, for Applicant
J Gibbs, for Respondent
MEMBER OF AUTHORITY G J Wood
**INVESTIGATION
MEETING** 1 September 2005
SUBMISSIONS RECEIVED By 15 September 2005
**DATE OF
DETERMINATION** 27 October 2005

DETERMINATION OF THE AUTHORITY

Introduction

1. This is an unusual case because Mr Rouse claims that the respondent (APN) should have made him redundant in February 2005. In fact APN has declined to make him redundant and has continued to treat him as an employee ever since, even though he has been unable to attend work because of a medical condition. Accordingly, Mr Rouse claims he has a personal grievance and seeks a declaration that he be made redundant and be paid redundancy and other compensation. APN denies that a redundancy situation ever occurred in which it was obliged to dismiss Mr Rouse for redundancy.

The Facts

2. The respondent is a media company. Mr Rouse works in APN's printing plant in Hastings. Mr Rouse had been working for APN since leaving school in 1979 and is

employed as a printer. His employment is covered by the Hawke's Bay Newspapers Collective Employment Agreement Pre-press and Press Departments, 25 March 2004 to 24 March 2005, to which Mr Rouse's union, the EPMU, was also party. This comprehensive document covers the days, number and hours of work that employees can be employed under, based on 40 hours per week, Monday to Saturday between 6am and 6pm.

3. The employment agreement also has a separate clause on redundancy. It states:

"27. REDUNDANCY

Where for economic reasons or as the result of a re-organisation of the employer's business or operations, the employee is dismissed because the position filled by the employee is or will become superfluous to the needs of the employer (i.e. the employee is declared redundant), the following provisions shall apply:

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

- is employed on a casual, temporary or seasonal basis or for a specified period of time only;*
- is offered suitable alternative employment during the period of notice.*

The employer shall not be liable for redundancy or severance compensation where the closure or curtailment of business is attributable to war, earthquake, civil disturbance or strike.

27.2 Alternative employment. Suitable alternative employment shall mean:

- A substantially similar post/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 of the employee's choosing.*
- A position in a location that will not require the employee to travel any greater distance, unless of the employee's choosing.*

In the event of any dispute concerning the suitability of alternative employment the matter shall be dealt with under the personal grievance procedure of this agreement.

27.3 All employees rendered redundant above will receive a minimum of four weeks' notice of the termination of their employment. It shall be optional for the employer to elect to pay wages in lieu of notice.

27.4 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. The employer's consent in such circumstances will not be unreasonably withheld.

All employees rendered redundant will be given the opportunity to attend interviews for alternative employment without loss of pay.

27.5 The employer shall supply written references at the request of the redundant employee(s).

27.6 All redundancy compensation payments will be calculated from the notified date of termination.

27.7 Redundancy compensation payment schedule:

Up to one years service ... eight weeks pay

For each year thereafter ... two weeks pay

Pro-rata for each incomplete year.

Weekly redundancy compensation payments shall be calculated on the basis of the employee's average weekly taxable earnings for the 12-month period prior to termination, or since commencement of employment if less than 12 months.

Redundant employees who have accumulated sick pay entitlements shall receive payment for such unused sick leave up to a maximum of 120 days in accordance with the provisions of this agreement.

27.8 *The redundancy and severance payments contained in this agreement include compensation for all loss of service and related entitlements specified under the agreement.*

27.9 *Where an employee's employment is terminated by the employer by reason only of the sale or transfer of the whole or part of the employer's business, nothing in this agreement shall require the employer to pay compensation for redundancy to the employee if the transferee is prepared to offer employment to the employee on, in effect, the employee's existing terms and conditions."*

4. As required under the Act, the agreement also provides for a clause providing how the agreement can be varied, described here as a review of terms clause. That clause states:

"32.2 Review of terms:

- (1) The terms of this agreement may be reviewed and changed by agreement between the parties at any time.*
- (2) Any changes agreed to in the terms of this agreement must be recorded in writing and attached as a schedule to this agreement. All such changes will form part of this agreement, and will supersede any prior provisions affected by such changed terms.*
- (3) When considering or submitting any proposal to vary the terms of this agreement, the employees shall be entitled to request the presence of the union in any meeting held with the employer."*

5. Because of changes in APN's operations in another region and because of an upgrade at Hastings, management considered it necessary to install two shifts at the Hastings plant. This would allow the plant to operate for longer hours, but it was necessarily inconsistent with the hours of work clauses in the collective agreement.
6. The proposal put forward by management involved the loss of one position on the early shift and the provision of new jobs on the late shift. Mr Rouse was the 2IC to the foreman of the press room. I accept that Mr Rouse was working as backup to the press room supervisor for many years and that this constituted more than a simple fill in arrangement. It was a specific position which was no longer going to be carried

through to the new structure. This may have provided him with an argument that his position was redundant under the redundancy clause in the collective agreement. As that point was not argued and it is not necessary, in light of my other findings, for me to determine that matter, I decline to do so. As part of the change proposal, two new positions, an early shift supervisor and a late shift supervisor, were also to be created, replacing the press room supervisor.

7. As an incentive to get the staff to agree to the proposed changes, APN later offered a lump sum of \$1,000 to all staff to agree to the new shift as well as an increase of pay by \$1 per hour. Further consultation took place and the parties agreed that the new shift arrangements would be implemented from 10 December, subject to a subsequent agreement in full and ratification.
8. It was clear from discussions between the union, its members and management that no one wanted to transfer to the late shift, so therefore one redundancy of existing staff was highly likely. The union had already told APN that Mr Rouse was prepared to take voluntary redundancy, which was at that time acceptable to APN. On 13 December, Mr Rouse gave the general manager of operations for APN Hastings, Mr Blackbourn, a letter applying for voluntary redundancy.
9. On 17 December Mr Rouse also asked for a redundancy calculation to be done. Mr Blackbourn obliged by getting payroll to do the calculation, with the notional leaving date of 17 January. This was later given to Mr Rouse.
10. Mr Blackbourn held a meeting with the union later the same day and the change to a two shift arrangement was by and large formally agreed to by all parties. The agreement was then to be put to union members for ratification. Amongst those things agreed were that “*one voluntary redundancy was accepted*”, with the date to be confirmed. APN confirmed again that it would be asking for interest in voluntary redundancy today, being 17 December, which was how Mr Rouse had come to write his earlier letter.
11. This meeting took place after the discussions with Mr Rouse and made it clear that the person accepted for redundancy was Mr Rouse. The reason no exact date could be given was because a supervisor had to be trained and appointed for the late shift.

Until then Mr Rouse was, as Mr Blackburn accepted, still required in his position. Thus whatever the letter from Mr Rouse stated, his application for voluntary redundancy had been accepted on 17 December.

12. Subsequently, the union ratified the agreement reached with APN. Neither party, however, committed it to writing and attached it as a schedule to the collective agreement.
13. In January, one of the existing day staff had a change of heart about working the late shift and took up the position as late shift supervisor, which had recently been advertised externally. In the meantime, Mr Rouse was pressing APN for a finish date, but was never given one. However, by late January, the other employee's move was cemented in and accordingly there was no longer a surplus of staff on the early shift that Mr Rouse was working.
14. Mr Blackburn accordingly met with Mr Rouse and the union on 2 February to inform him that he would no longer be made redundant as there were no longer surplus staff on the early shift. Mr Rouse stated that this was unfair, particularly as he believed that Mr Halstead, the print manager, had told him he would be leaving on 1 February. I prefer Mr Halstead's evidence that Mr Rouse was never given a clear finishing date, as Mr Rouse was unlikely to be as clear about events as other witnesses because he is so close to the situation which has affected him so deeply. However, it does not really matter what date was set between Mr Rouse and Mr Halstead, because it had been agreed that Mr Rouse would be replaced when a new supervisor for the late shift was appointed and inducted. That had been expected to be by around the end of March.
15. With regard to the additional payments, Mr Rouse was paid the \$1,000 lump sum but was never paid the \$1 per hour increase in his hourly rate. This was not surprising given that he had been offered and accepted voluntary redundancy.
16. APN's decision was then disputed by the union and the parties have been unable to agree that Mr Rouse's voluntary redundancy should stand. Since April 2005 Mr Rouse has been on sick leave because of the pressure of this situation and he has had counselling over it.

17. Mr Rouse had been making plans for life after his long term employment with APN but he had not changed his position in any respect - for example, he had looked into taking on a franchise mowing operation but no agreement was ever reached with the franchisor. Similarly he had plans to undertake certain business ventures but he had not commenced those ventures by the time his redundancy was withdrawn.

Determination

18. The real issue here is whether or not APN is bound by its offer of voluntary redundancy to Mr Rouse, when it later transpired that his position was not in fact surplus to APN's requirements.
19. I accept that Mr Rouse was never given formal notice in terms of a date as to when he would be made redundant. However, he was told that he would be made redundant once a supervisor for the late shift was appointed and inducted. That appointment was announced on 2 February and that was the date that Mr Rouse was informed that he would not be made redundant. It follows that, according to the original agreement, that was the date on which he should have been given notice to take effect from 2 March; as four weeks' notice was required and the appointee did not require any induction, being an internal applicant.
20. Certainly under clause 27 of the collective agreement, redundancy does not in fact occur until the end of four weeks' notice and as noted above no notice was given. Furthermore, clause 27.1 provides that the employee is not eligible to receive redundancy compensation if offered suitable alternative employment during the period of notice. Subject to the issue of whether or not Mr Rouse's position was in fact made redundant pursuant to an agreement that superseded the provisions of the collective agreement, it is clear that he was offered suitable alternative employment on the early shift.
21. The argument raised by APN that the position did not become redundant in the absence of formal notice does not, however, take into account the nature of the agreement between the parties. The collective employment agreement makes no provision whatsoever for voluntary redundancy, but that is not to say that the parties cannot agree that the redundancy provisions will apply on a voluntary basis or that

they can determine a selection process that is not dealt with in the agreement. Therefore the fact that voluntary redundancy is not catered for is not inconsistent with the agreement.

22. Furthermore, I do not accept that it was an implied provision of the agreement for voluntary redundancy that if Mr Rouse's position was not superfluous at the time his notice for redundancy (which had not even been given) expired, then he would not be eligible for redundancy compensation.
23. Such a term would fail to meet some of the key tests in relation to an implied term of an agreement. It is not necessary to make the agreement effective. It is also not so obvious that it goes without saying. Basically, if Mr Rouse and the union had been told that the agreement was subject to this condition they would not have responded with the view that that was obvious. It was not obvious at all and Mr Rouse made it quite clear that that was not his view when told he would not be made redundant.
24. Rather the provision of one voluntary redundancy (Mr Rouse) was part of a broad package of initiatives to get the union and its members to a significant change to their working arrangements. There is no doubt in this case that both parties intended the agreement between them in relation to the provision of an early and late shift to be binding on them both. That agreement contained a number of terms and one of the terms was that Mr Rouse had been accepted for voluntary redundancy. In these circumstances what voluntary redundancy clearly means is that Mr Rouse would be treated as redundant and paid redundancy compensation. This agreement was arrived at without reference to the provisions in the collective agreement as to notice or suitable alternative employment and is accordingly not subject to them. This was a specific arrangement which was part of the wider deal put forward by APN and ratified later by the union's members.
25. It is not now open to APN to resile from that agreement. For the agreement ever to function it had to be a variation to the collective agreement. Otherwise there was no way that a two shift, 8 hours per day system could ever be operated. Therefore, I accept that this was a variation to the collective agreement and one that certainly provided for consideration on both sides, including redundancy for Mr Rouse.

26. This is a matter that should have been formally put as a variation as required by the Act. All collective agreements must provide for variations and that provision should be given effect to. However, the fact that it has not does not mean that the agreed variation is any less effective, I find. To find otherwise would be to completely allow form to rule over substance, which could lead to significant injustices, such as potentially here.
27. In terms of the variation clause in the collective agreement, the terms were reviewed and changed by agreement. However, the changes were not recorded in writing and attached as a schedule. This technical matter cannot be allowed to derogate from the agreement that was reached. Otherwise the union could argue that APN is even now operating in breach of the collective agreement for operating a two shift system in breach of the hours of work clauses. That might prove extremely expensive for APN. While I am sure it is not a possibility that it wishes to contemplate, it shows the unfairness of the process it has adopted towards Mr Rouse.
28. I therefore declare that the applicant, Mr Ian Rouse, should have been made redundant by the respondent, APN Print News and Media Limited, with effect from 2 March 2005. APN should therefore arrange for Mr Rouse to have his final pay calculated on that basis and any moneys owing forwarded to him accordingly, subject, in equity and good conscience, to set off of the \$1,000 mistakenly paid to him.
29. Clearly this is also an unjustifiable disadvantage to Mr Rouse's terms and conditions of employment, as well as a breach of contract. No doubt many people would be largely unaffected by the impact of APN's refusal to make an employee in Mr Rouse's position redundant. However, this was not the case with Mr Rouse, who is currently off sick as a result of this situation. I therefore consider that compensation is appropriate, but the amount needs to be tempered by the fact that Mr Rouse wanted to leave APN anyway and APN should not be criticised for trying to keep an experienced printer like Mr Rouse in its employ, although its actions were unfair in this case.
30. Taking all matters into account I determine that compensation in the sum of \$5,000 is appropriate and so order.

Costs

31. Costs are reserved.

G J Wood
Member of Employment Relations Authority