IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 248/07
5092298

	BETWEEN	GENERAL DISTRIBUTORS LIMITED Applicant
	AND	NATIONAL DISTRIBUTION UNION Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Stephen Langton, Counsel for Applicant Peter Cranney, Counsel for Respondent
Investigation Meeting:	7 August 2007
Determination:	14 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, General Distributors Limited (GDL), is the employer of members of the respondent, the National Distribution Union (NDU), who work at the Woolworths supermarket at Manurewa. Some 135 staff are currently employed there, about 76 of those being members of the NDU. A Woolworths has been at Manurewa for at least 30 years.

[2] On 28 May 2007 a meeting of staff was called by the employer. It was addressed by the General Manager at Manurewa, Mr Dave Chambers, who announced the pending closure of the supermarket on 30 September 2007. The reason for this he said was because GDL had been unable to renew the recently expired lease of the premises.

[3] In a written statement provided to each staff member, Mr Chambers declared that the closure would not result in the loss of any of their jobs. He said that staff

would be able continue their employment, without change to their terms and conditions, at one of several other supermarkets operated by GDL in adjacent localities. In the South Auckland area GDL operates Foodtown stores at Sylvia Park, Manukau, Auckland Airport, Mangere and Takanini. Mr Chambers told the staff that they would be consulted individually about their wishes with regard to relocating to one of those stores as close as possible to their homes, although he said no guarantee could be given in that regard. The staff were told that their employment would continue as usual in the meantime.

"Dispute"

[4] GDL's announcement of the closure of Woolworths Manurewa and the proposal for the relocation of the staff of that supermarket to other stores in the South Auckland area, gave rise to a "dispute" within the meaning of the Employment Relations Act 2000 between GDL and the NDU.

[5] The union's position is that upon the closure of the supermarket NDU members employed there will become "redundant" as defined by a particular provision of the GDL Combined Supermarket Collective Employment Agreement (the CEA) to which the NDU is a party. The union put forward to GDL its view that as a consequence of staff redundancy, under the CEA the staff would become entitled to the offer of relocation if alternative work was available with GDL. Offers to relocate all of its members affected by the closure of Woolworths Manurewa, were sought by the union from GDL.

[6] GDL's contrary view of the situation was that the closure of the supermarket did not give rise to a redundancy situation, because the company was able to offer affected staff the same roles or jobs, and on the same terms and conditions, as they had been undertaking prior to the closure. Those roles were available at the several Foodtown supermarkets operated by the company in South Auckland.

[7] Despite discussions between GDL and the NDU the dispute has remained unresolved. It has been referred to the Authority as an employment relationship problem, for determination in accordance with Part 10 of the Employment Relations Act 2000.

[8] Given the nature of a "dispute" as defined by the Act, and given that both parties accept the need for this particular dispute to be resolved urgently, mediation

has not been undertaken. On this occasion mediation need not be directed by the Authority.

[9] In making submissions to the Authority, Mr Cranney for the NDU commended GDL for seeking to expedite a resolution of the dispute and for its offer to make arrangements with the staff affected by the closure, at least until the dispute is resolved, to minimise disruption and inconvenience to them.

[10] GDL and the NDU seek a declaration from the Authority as to the interpretation, application or operation of certain provisions of the CEA covering staff affected by the closure of Woolworths Manurewa.

Redundancy provisions of the GDL collective agreement

[11] At the heart of the dispute is the following CEA provision:

> ***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.*

[12] Clause 3 is in Schedule E of the CEA, which also contains associated provisions relating to notification of redundancy, relocation/alternative work and redundancy compensation.

[13] Schedule E includes at clause 2 a statement of the parties' intent which, counsel are agreed, must be taken into account when considering the meaning of the clause defining redundancy:

> ***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.*

[14] Both GDL and NDU rely on this provision in support of their respective positions.

GDL's position

[15] GDL contends that the Schedule E definition of redundancy at clause 3 as reproduced above, does not apply in the circumstances accompanying the closure of Woolworths Manurewa. Mr Langton for GDL submits that because the affected employees have been offered the same roles in other supermarkets operated by GDL in the same general locality, following the words of clause 3 it cannot be said that … *the Company has labour surplus to requirements because of the closing down of … part of the Company's operation ….*

[16] Mr Langton submits that although the closure of Woolworths Manurewa will lead to a total reduction in the number of permanent employees at that particular worksite, the closing down of the supermarket has not caused the entity of the company to have labour surplus to requirements. He submits that the labour requirements of GDL may be viewed with a company-wide focus, rather than by just looking at Woolworths Manurewa and the future labour requirements of that particular store.

[17] Mr Langton further submits that the CEA definition of redundancy applied in this way will meet the intent of the parties expressed in clause 2 of Schedule E, as reproduced above. The transfer of employees' roles to other stores within the same geographical location will avoid the serious consequences that loss of employment usually has on any employee and will achieve the minimum of disruption and inconvenience to the workers affected by the closure of Woolworths Manurewa.

[18] GDL submits also that the relocation provisions under clause 5 of Schedule E only come into operation once there is a redundancy situation as defined. If that situation arises the company is required to make every endeavour to provide alternative work to any employee wishing to seek relocation within GDL. Clause 5 goes on to provide that where alternative work is requested within the company and where it is offered and accepted, relocation payments are to be made according to the scale set out in the provisions. GDL submits that because there has been no redundancy arising out of the closure of Woolworths Manurewa, the affected employees can have no entitlement to relocation payments should they choose to continue working for GDL in another supermarket away from Manurewa.

[19] GDL asked the Authority to consider the application or operation of the CEA in the situation (hypothetical in this case) where the employer had transferred the business of Woolworths Manurewa to another employer. Under the employment protection provisions (EPP) at clause 6.5 of the CEA, in the event GDL's employees were offered a transfer of employment to a similar job on similar terms by the new employer, GDL would not be liable to pay them redundancy compensation. Mr Langton submitted that it should be no different when GDL is in effect transferring the business of Woolworths internally within itself instead of externally to a new employer.

[20] I do not find that the EPP provisions support GDL's position at all in this dispute. The transfer of a business under those provisions still gives rise to a redundancy situation for the employees. There is still a termination of employment by the old employer, although at the same time there is re-employment by the new employer. There are no other grounds of termination except redundancy. The provisions do not expressly or even impliedly deem the employees not to be redundant. It is the entitlement to payment of compensation for the redundancy that is removed by the EPP provisions from any employees who are offered transfer to the new employer. That is the purpose of the provisions rather than to create a seamless transfer without any termination.

NDU's position

[21] For the NDU Mr Cranney submits that the proper focus within the definition of redundancy at clause 3 in Schedule E of the CEA, is the particular store or worksite where the employees have been performing their roles. The focus of the provision is not company-wide, Mr Cranney submits. At the Woolworths Manurewa worksite, a permanent reduction in the number of employees is clearly required. Therefore closure of that particular supermarket will leave labour surplus to GDL's requirements at that site. As authority in support of this argument Mr Cranney relies extensively on *McCain Foods (NZ) Ltd v Service & Food Workers Union Inc* [2004] 2 ERNZ 252, a decision of the Employment Court given by Judge Shaw.

***McCain Foods* case**

[22] McCains operated a plant at Fielding which had two main functions; vegetable processing and potato processing. Employees principally employed in the former

were told that McCains proposed to close that part of the plant. At the same time additional positions had become available in the potato processing part of the same plant and those positions were offered to the employees affected by the closure proposal. When they declined to take the offered positions McCains refused to make them redundant and their employment ended with the closure of the vegetable processing part of the plant.

[23] The case required the Court to consider the particular redundancy provisions of the applicable collective employment agreement, to see whether those provisions had been applied or interpreted correctly by the employer.

[24] Clause 14 of the applicable agreement defined redundancy in the following terms:

> ***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 employer's operation (including shifting materials and/or production), and/or the re-organisation or like cause requiring a reduction in the number of permanent employees, whether that reduction is handled by termination, relocation, transfer, early retirement and/or voluntary redundancy or a combination of these means.*

(The final two sentences of the clause, which deal with voluntary redundancy, are not reproduced.)

[25] The Court in its judgment noted the argument that had been advanced for McCains that under the above definition "a condition in which the Company has people surplus to its requirements" meant that before the redundancy provisions could apply McCains must have employees surplus to its requirements as a corporation. McCains argued that this was a different question from whether the "position" held by a particular employee had become superfluous. Before the Court it was argued that although the positions occupied by the employees became surplus to the company's needs when the vegetable processing part of McCain's plant closed, those employees were not surplus to the company's requirements because there was suitable alternative employment available within the company - in the potato processing part - and therefore the employees were not redundant as defined by clause 14.2.

[26] The Court rejected this argument. It held (at [69] of the judgment) that the central question in the interpretation of clause 14.2 was whether redundancy resulted when change led to a surplus of people company-wide.

[27] The Court held (at [71]) that the words of clause 14.2 were unambiguous: … *the Company has people surplus to its requirements because of the closing down of the whole or part of the employer's operation … and/or the re-organisation or like requiring a reduction ….*

[28] The Court held (at [73]) that redundancy arises when the employer closes down part of its operation and as a consequence the company has people surplus to the needs of that part of the operation.

[29] The argument was rejected (at [79]) that a redundancy situation does not exist if the employees made surplus by the closing of part of the operation can be relocated. The Court held that pursuant to clause 14.2 the employees are redundant upon the closure of part of the operation and at that point the other parts of the Collective Agreement making provision to minimise the effect of the loss of permanent positions, come into force. The Court noted that the existence of a redundancy situation is not a matter of decision making by the employer to terminate a position, but is a matter of fact that a position has been terminated by restructuring, reorganisation or like cause. Further, the Court noted (at [81]) that relocation is one of the possible outcomes of redundancy but may not be used by the employer to avoid its responsibilities under the redundancy provisions of the agreement.

Determination

[30] As was submitted by Mr Cranney, the Authority does not need to go beyond the four corners of the CEA in determining this dispute. The disputed aspect of the CEA must be construed in the context of the whole document and, for the purpose of interpreting a contract, the intention of the parties is to be ascertained from the meaning of the words they have used. These are the fundamental principles of contractual interpretation. The CEA has its own code, Schedule E, which prevails over common law principles. The structure as well as the contents of that code is relevant to the interpretation of clause 3.

[31] I find that the Court's decision in *McCain* dealt with a redundancy provision which was the same in material respects as those provisions of Schedule E that are the

subject of the present dispute between GDL and NDU. To the extent that there are some differences in the circumstances of the two cases, these were not determinative of the decision in *McCain*, as the Court expressly found the provisions to be unambiguous and therefore has based its decision on the words themselves construed in the overall context of the Collective Agreement in relevant parts.

[32] Clause 3 of the CEA is equally as plain and clear as the provision considered in *McCain*. It raises the question as to whether a surplus of labour has resulted from closure of part of an employers business. *McCain* has held that in answering that question the focus is on the particular worksite and not on the overall company-wide needs of the employer.

[33] An application of the Schedule E provisions in the way contended for by GDL would have the effect of circumventing the redundancy provisions by the offer made to the affected employees of the same roles they had at Woolworths Manurewa at different locations. This in my view is relocation under a different guise. It is clear from the scheme of Schedule E, as GDL has itself acknowledged, that the relocation provisions can only apply once a redundancy situation has arisen. Relocation follows redundancy rather than being substitutionary at the employer's election.

[34] Applying the law in the *McCain* case, I find that in the circumstances of the closure of Woolworths Manurewa the affected employees who are covered by the CEA will become redundant within the meaning of Schedule E at clause 3. The parties' dispute is therefore to be resolved with a declaration confirming as correct the NDU's position. This result of course turns on the particular provisions of the parties' employment agreement rather than on any application of general or "common-law" principles of the law in relation to redundancy.

[35] Accordingly it is therefore declared by the Authority that a redundancy situation does arise in circumstances in which GDL closes one of its supermarkets and transfers employees' roles from that supermarket to others operated by it. It is also declared by the Authority that relocation under clause 5 of Schedule E is an alternative to termination of employment on the grounds of redundancy and may be pursued at any affected employee's option. It is not mandatory for the employee to seek relocation or to accept any offer of such in lieu of redundancy and compensation for redundancy as provided for by the CEA.

[36] It appears in this case that the NDU members affected by the closure of Woolworths Manurewa have all indicated a preference for relocation. If so they will be entitled to the scale relocation payments provided under clause 5 of the CEA.

[37] Leave is reserved to the parties to apply for any further orders or directions considered necessary.

[38] If costs are in issue the parties should confer. Leave is reserved for them to return to the Authority, if they are unable to reach agreement.

A Dumbleton

Member of the Employment Relations Authority