IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 258/10
5159421

	BETWEEN	MARK GILLARD Applicant
	AND	APN PRINT NZ LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Anne-Marie McInally for Applicant Dan Blackbourn for Respondent
Investigation Meeting:	1 and 4 March 2010
Determination:	28 May 2010

DETERMINATION OF THE AUTHORITY

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[1] This is a dispute about the interpretation, operation and application of the Collective Employment Agreement between APN Print NZ Limited ("APN") and the NZ Amalgamated Engineering Printing and Manufacturing Union Inc ("EMPU"). Mr Mark Gillard, is a member of EPMU and is therefore covered by the terms and conditions set out in the collective agreement.

[2] Mr Gillard claims his rate of pay is not in accordance with the collective agreement and seeks a determination by the Authority that he is entitled to receive the No 1 Printers Rate under the collective agreement whenever he takes responsibility for running the press on three or more days of a week, including those occasions when he has done so between the cessation of the payments and the determination of this dispute.

[3] Mr Gillard also claims he has grounds for an unjustified disadvantage claim with respect to a change in his hours of work which occurred without any consultation. He seeks an order from the Authority requiring APN to comply with its

obligations as to consultation and a direction to mediation to support the consultation process.

[4] APN denies the claims.

[5] The principles regarding the interpretation of a contract are well established. Where the words used in the agreement are clear and unambiguous then that should generally determine the matter.[1] The Authority must also undertake a cross checking exercise. That is the Authority must consider the surrounding circumstances to make sure the first impression of the meaning is correct and nothing in the circumstances requires modification of the interpretation[2].

No 1 Printers Rate

[6] The collective agreement at clause 6 describes job classifications. The classifications relevant to this employment relationship problem are:

Printer	Work including but not limited to cleaning, operating a reel-stand, preparing the press, webbing-up, operating a press console, washing blankets, operating plate making machinery, unsupervised operation of the presses, responsibility for printed copy, responsibility for all Employees assigned to the press. To be employed in this classification any Employees employed after the date of this employment agreement becoming effective are required to have passed Trade Certificate in Web Offset Printing and to be indentured in Web Offset Printing.
No 1 Printer	Work including but not limited to the unsupervised operation of a printing press and the supervision of Employees assigned to the press and responsibility for all copy leaving the press hall. To be employed in this classification any Employees employed after the date of this employment agreement becoming effective are required to have passed Trade Certificate in Web Offset Printing and to be indentured in Web Offset Printing.

[7] APN views the notion of a No 1 Printer as an historical concept that has no place in its current business. I agree with the submissions on behalf of Mr Gillard that irrespective of whether APN believe the clause to be current or not, the fact remains that it continues to be included in the collective agreement as a job classification.

[8] In comparing the words used in the two classifications the differences are that in order to be paid the No 1 Printers rate the employee must not just be responsible for the printed copy, but for all copy leaving the press hall.

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[1] *NZ Tramways & Public Transport Employees Union v Transportation Auckland Corporation Ltd* [2006] 1 ERNZ 1005; *Air NZ v Barker* [2002] 2 ERNZ 719.
[2] *Association of Staff in Tertiary Education v Hampton* [2002] 1ERNZ 491.

[9] It was the uncontested evidence of APN that Mr Gillard was not responsible for all copy leaving the press hall. Indeed in his oral evidence at the investigation meeting Mr Gillard acknowledged that it was the Supervisor or Plant Manager responsible for all copy leaving the press hall.

[10] With regard to surrounding circumstances it was Mr Gillard's evidence that he had been paid the No 1 Printer rate from August 2006 to March 2007. APN says Mr Gillard was paid from December 2006 to March 2007 in error and that as soon as the error was identified the Mr Gillard's rate of pay was rectified and put back to the Printer rate.

[11] I have accepted the evidence of the respondent that Mr Gillard was paid at the wrong rate for four months. APN did not seek to recover the overpayment in wages and at the time the rate was rectified, Mr Gillard did not seek its reinstatement and did not raise the issue for more than 12 months. I have concluded that on the balance of probabilities Mr Gillard was aware he was being paid at the incorrect rate between December 2006 and March 2007 and accepted the adjustment when it was made in March 2007.

[12] I find the wording in the clause is clear and unambiguous. Mr Gillard is entitled to be paid at the Printer rate of pay. He does not meet the requirements to be paid at the No 1 Printer rate as he is not responsible for all copy leaving the press hall, only the printed copy leaving his press.

Disadvantage claim

[13] I am required to examine APN's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[14] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether APN's actions disadvantaged Mr Gillard in his employment, and

secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.[3]

[15] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If APN establishes justification for a disadvantageous action, there is no grievance.[4]

[16] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.[5]

[17] In 2009 APN worked through a restructuring process which saw a number of jobs disestablished. Mr Gillard was affected by the restructuring in that his hours of work were altered when new shifts were introduced and was required to work on every weekend on a Saturday where as previously he had worked every second weekend.

[18] Mr Gillard was unhappy with the new hours of work and approached Mr Russell Wieck the Press Manager to discuss whether he could negotiate an individual agreement which would see him working Monday to Friday only.

[19] Mr Wieck was not available for the investigation meeting on 1 March, therefore arrangements were made for Mr Wieck to be interviewed on 4 March. Mr Wieck told the Authority Mr Gillard had offered to work four 10 hour days and they discussed later finishing times. Mr Gillard offered to start at 12.00noon and finish at 10.00pm or 11.00pm. At the same meeting Mr Wieck gave Mr Gillard a copy of an individual employment agreement and asked him to discuss any changes with him when he returned from a period of pre-planned annual leave. It was common ground that the individual agreement never eventuated.

[20] Mr Gillard then left on a period of annual leave. He was aware that while he was away the new shift times would come into operation. On Mr Gillard's return

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[3] *Mason v Health Waikato* [1998] 1 ERNZ 84
[4] *McCosh v National Bank*, unreported, AC49/04, 13 September 2004
[5] *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

from leave he was advised by Mr Wieck that his hours of work would be changed and provided him with the one month's notice required by the collective agreement.

[21] The new hours of work were not the same as the other employees working on the afternoon shift. Mr Gillard commences his shift at 2.45pm while other employees have already commenced work earlier and when they finish at 9.00pm Mr Gillard continues to work until 10.45pm.

[22] When Mr Gillard left on his period of annual leave he was aware his shift times and days would be changed on his return. The changes being implemented by APN to its shift patterns had been the subject of consultation with the Union of which Mr Gillard is a member.

[23] While Mr Gillard was not happy with the new shift patterns and had attempted to negotiate on an individual basis those negotiations never eventuated in a concluded individual agreement. Mr Gillard, therefore, expected that when he returned he would be working the new hours and days along with all of his work colleagues. However, that did not happen. Instead Mr Gillard was required to work different times to his colleagues.

[24] I find APN have not met its statutory or contractual obligation to consult with Mr Gillard over his altered hours of work. I find the action in unilaterally altering Mr Gillards hours of work without consultation to constitute a disadvantage and that disadvantage is unjustified.

[25] Mr Gillard seeks no monetary remedies but rather seeks a direction to mediation to allow consultation over his hours of work. That will become the order of the Authority.

APN Print NZ Limited is ordered to comply with the terms of its collective agreement and the parties are directed to mediation within 14 days of the date of this determination.

Costs

[26] Costs are reserved. I am inclined to let costs lie where they fall, however, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may

lodge and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority