

[2] From September 2006 APN began a process of closing its heat set operation at Ellerslie and having work of that sort done at its Manukau site. Printing and bindery staff were laid off through 2007. Of the five maintenance trade staff at Ellerslie, two were made redundant and one transferred to another part of APN's operations in the first half of 2007. Mr Pascoe and a mechanical engineer, Barry Freeman, were kept on to work on tasks to do with the closedown of the Ellerslie heat set operation. In May and July 2009 this included work with a team of contractors disassembling an M600 press at Ellerslie and reassembling it at APN's Manukau site.

[3] During those weeks Mr Pascoe and Mr Freeman were provided with a car to travel between the two sites. They both reported for work at Ellerslie and were paid for the time spent travelling between Ellerslie and Manukau. They returned to the Ellerslie site in time to clock off there.

[4] When the work of reassembling the M600 press at the Manukau site was nearing completion, both men were given a written instruction to report directly to the Manukau site at the start of each shift. They were told APN would no longer provide a car for their travel. Instead each man was to be paid a kilometre rate for any extra distance resulting from using their own cars to travel from their homes to Manukau rather than to Ellerslie. In Mr Pascoe's case this involved an increase of a little over three kilometres in his journey from home to work.

[5] At the time of receiving this instruction – given in a letter of 20 July 2009 from manufacturing manager Sean Parker – APN had no further useful work for Mr Pascoe and Mr Freeman at Ellerslie. APN wanted to continue using their skills by having them maintain its machines at Manukau.

[6] The letter referred to a clause in the two men's employment agreement which provided for a servicing allowance to be paid in recognition of a requirement to service and maintain equipment "*at any of the company's various operating divisions*".

[7] Through their Engineering Printing Manufacturing Union (EPMU) representative Mr Pascoe and Mr Freeman advised they would only work at the

Manukau site “*under protest*”. In their view the written terms of their employment and various verbal assurances made by APN managers meant their positions would be redundant once their work on the closedown of the Ellerslie site was complete, and they would then be eligible for redundancy compensation, unless they agreed to work elsewhere. Neither man agreed to relocation to APN’s Manukau site.

[8] Mr Pascoe resigned three weeks later. He said the requirement to go directly to work at Manukau meant longer travelling times through Auckland traffic. He had to drop off his seven-year-old daughter at school earlier and after school she had to wait on her own for an extra 15 minutes before he arrived to pick her up.

[9] Both Mr Pascoe and Mr Freeman raised a personal grievance over whether they were unjustifiably disadvantaged by not being paid redundancy compensation. Mr Freeman and APN were able to resolve his claim before the Authority investigation meeting but Mr Pascoe’s claim remained for resolution.

The investigation

[10] Written witness statements were provided by Mr Pascoe, Mr Freeman, EPMU delegate Brett Wigg, APN chief operating officer Brian Hood, former APN employee relations manager Bevan Gibbs, former APN Ellerslie site production manager Doug Hood, former APN heat set division general manager Bryan Mould, and Mr Parker. Under oath or affirmation each witness confirmed their written statements. APN human resources director Len Hatton gave oral evidence under affirmation. Mr Gibbs gave his evidence by video conference from Australia. Witnesses answered questions from the Authority member. The parties’ representatives had an opportunity to ask additional questions. The representatives provided oral closing submissions speaking to written synopses.

[11] In preparing this determination I reviewed the witnesses’ written and oral evidence, the parties’ closing submissions, and the relevant background documents provided. As allowed for under s174 of the Employment Relations Act 2000 (the Act), I have not recorded here all evidence and submissions received but state findings of facts and law and express conclusions on the issues for determination.

The issues

[12] The issues for determination were:

- (i) whether Mr Pascoe's employment agreement made Ellerslie the location of his work so that once he was no longer needed for work there, his position was redundant; and
- (ii) even if the location was a term, was Mr Pascoe's position nevertheless not redundant, as the term is defined in his employment agreement, because APN required his services for another part of its operation (at the Manukau site); and
- (iii) had APN managers made binding undertakings that Mr Pascoe would be eligible for redundancy compensation at the end of the Ellerslie closedown?

The terms of employment

[13] The first two issues require interpretation of Mr Pascoe's employment agreement. It was an individual agreement, based on a collective agreement which had expired on 4 September 2006.

[14] APN submitted that reading the agreement as a whole showed work from other locations was contemplated, through the servicing allowance, and consistent with a general term committing the parties to flexibility.

[15] It submitted case law on whether relocation of work triggered redundancy provisions required "*a common sense approach*". In this case Mr Pascoe had to travel just over 3 kilometres further to work and because there was work for him at Manukau, APN submitted he was not surplus to its requirements in terms of the definition of redundancy given in the agreement.

[16] I find a plain reading of the agreement does establish Ellerslie was intended by the parties as the primary location of Mr Pascoe's work and the definition of redundancy given in that agreement does apply to the circumstances of APN no longer needing Mr Pascoe to work at Ellerslie. I do so for the following reasons.

Sufficiently clear words

[17] The applicable principles have been accepted as usefully summarised in this way:¹

... the law of interpretation of employment agreements remained unchanged by the Employment Relations Act 2000. Agreements were to be interpreted with reference to their factual matrix. This included matters such as the background to the transaction and to industry practice. The law had moved on so that such reference was possible and even desirable. The Court was also required to adopt an objective approach to interpretation, so that evidence of what either party thought the words meant was inadmissible. The interpretation of an agreement was not to be narrowly literal, but in accord with business common sense. Nevertheless, if the words were clear and could only have one possible meaning that would generally determine the matter.

[18] I find that objectively analysed – reading the words for what they appear to mean rather than what either party might later say they were meant to mean – the agreement identified Ellerslie as the intended location of Mr Pascoe’s position. The “clues”, as Mr Pascoe submitted, are clear throughout the collective agreement from which his terms of employment derived.

[19] The agreement bore the title “APN Print New Zealand Limited, Ellerslie Engineers & Electricians Collective Agreement”. The coverage clause repeated the Ellerslie reference. The parties clause did not limit the description of the employer to the name of the registered company but added a location: “APN Print New Zealand Limited, Ellerslie”.

[20] The servicing allowance clause (A.2.2.1) recognised a “*requirement to service ... equipment at any of the company’s various operating divisions throughout New Zealand, irrespective of where the worker is primarily employed*”. It then states (A.2.2.3) that “*in recognition of those servicing requirements, electrical and engineering workers employed at the Ellerslie site shall be paid an allowance*” (my emphasis).

[21] There were two references in those clauses to staff employed at “*the city*

¹ [Spotless Services \(NZ\) Ltd v Service & Food Workers Union Nga Ringa Tota Inc](#) (unreported, EC, AC44/06, 10 August 2006, Perkins J) at [25] citing with approval the headnote for *ASTE Te Hau Takatini o Aotearoa v Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491.

premises". I accept Mr Pascoe's submission that, taken as a whole, the agreement nominated only two potential places of work – Ellerslie or the city site – and demonstrated the intention of the parties to specify the work location.

[22] A further factor supporting the location specific nature of the terms was that APN had different collective agreements for different sites, including a separate one for the Manukau site.

[23] The parties' intentions in specifying the location was also apparent in the redundancy provisions. One clause (25.2), which set out circumstances which removed eligibility for redundancy compensation, gave a definition of suitable alternative employment. That definition included reference to a possible alternative position being in "*a location that will not require the employee to travel any greater distance unless at the employee's choosing*". It plainly contemplated a fixed location of work from which such a calculation could be made – and this was consistent with the service allowance references to where an employee was primarily employed.

[24] At the point where Mr Pascoe was still clocking in and clocking out from the Ellerslie site, and travelling on company time to and from work at the Manukau site, he was primarily employed (as he had been for the previous seven years) at Ellerslie. That was so even if he was, under the terms of the servicing provisions, required from time to time to go to do some work elsewhere – and there was evidence that this was done, albeit rarely. However that changed when he was directed on 20 July 2009 to report for work directly to Manukau. From that point APN regarded Mr Pascoe's primary place of employment as its Manukau site, as Mr Parker acknowledged in answer to a question during the investigation. It was a direction to work permanently at a different location which was more than the temporary application of the servicing requirements. It was not a direction APN was entitled to make under the terms of its employment agreement with Mr Pascoe.

Position surplus

[25] I find the circumstances of Mr Pascoe's employment were by 20 July 2009, at the latest, within the definition of redundancy previously agreed by the parties. It read:

For the purposes of this clause, redundancy is a condition in which the company has a permanent manpower surplus to its requirements because of the closing down of the whole or any part of the employer's operations or as a direct consequence of external economic conditions requiring a permanent reduction in the number of permanent full time and permanent part time employees. (my emphasis)

[26] The reference to the company is to be read in the way that it is referred to in the written terms, which is not confined to naming the registered legal entity but also included a reference to the location at Ellerslie.

[27] Even if that were not so, the redundancy term applied because APN was closing down a part of its operation – heat set work at Ellerslie – even though cold set work was still done there. This was not the closure of the company's entire heat set operation – as that continued at its Manukau site – but the contractual term referred to “any” part of such operations.

[28] It is a situation where I consider the applicable principles are as identified in the Employment Court's decisions in *McCain Foods (NZ) Limited v SFWU*² and *General Distributors Limited v NDU*.³

[29] I do not accept APN's submission that the principles identified are obiter or that *General Distributors* can be distinguished because the redundancy definition in the employment agreement analysed in that matter included an additional phrase referring to “any worksite or geographic location”. The Court found those additional words provided support for its interpretation that such clauses applied where there was a permanent reduction in the numbers of staff needed in a part of an employer's operation. However those words in the clause were not the sole or primary reason for its conclusion. Rather, in interpreting redundancy clauses very similar to the one in the present matter, the Court in *General Distributors* reached conclusions expressed this way in *McCain*:

[73] ... a redundancy situation arises when and as soon as there is a decision to close down part of the operation that will result in a surplus of people to that part.

² [2004] 2 ERNZ 252

³ (2007) 8 NZELC 99,043

...

[78] *Where there are terms in the employment agreement which govern the rights and obligations of both parties, covering the closing down of whole or part of an operation, an employer cannot avoid those provisions by deciding that the possibility of relocation of employees within the company means there is no redundancy.*

[30] Rather than apply that principle to the present matter, APN urged the Authority to adopt the observation of Judge Williamson in *NZ Engineering IUOW v Dunlop NZ Limited*⁴ that it was “*ludicrous*” for an employer to be obliged to pay redundancy compensation to workers whose specialised skills were needed at another location. It also relied on the obiter observations in *NZ Printing IOUW v Sigma Print*⁵ that a transfer of operations of three to four miles which did not create travel difficulties would not be held to be a redundancy situation.

[31] APN also referred to *Swale v AFFCO New Zealand Limited*⁶ and its reference to the test applied by the Court of Appeal in *Sanson v ARC*⁷ to identify whether the change of location broke the essential continuity of employment. However I note the Court in *General Distributors* did not accept a submission on similar lines, preferring instead the emphasis given in *McCain* to interpreting the particular clause. I consider the latter approach must be followed in the present matter.

[32] A redundancy situation arose in the particular circumstances of Mr Pascoe’s employment once the tasks for which he was retained at the Ellerslie site were completed. His role was then surplus to that part of APN’s operation. It was a redundancy situation to which the terms for redundancy compensation then applied unless Mr Pascoe’s circumstances fell within six exceptions expressly identified in his agreement. They did not. He was redundant and entitled to compensation at that point which, at its latest, was 20 July 2009.

[33] The position at common law might have produced a different outcome but Mr Pascoe’s particular terms of employment, derived from the expired collective agreement provided a code for redundancy. It allowed Mr Pascoe to refuse an alternative position without losing his entitlement to redundancy compensation. The

⁴ (1987) 1 NZELC 95,473 at 95,477.

⁵ ERNZ Sel Cas 1 (AC).

⁶ Unreported, EC, AC 101/00, 18 December 2000.

⁷ [1999] 2 ERNZ 597.

code prevails.

[34] While the Authority must take a common sense approach to interpretation of such terms, it cannot substitute or impose terms which, with hindsight, might accord with prudent business practice, if that differs from the terms actually recorded as negotiated and agreed by the parties. In this case, for example, the parties could have agreed a standard 'technical redundancy' clause where Mr Pascoe would not have been eligible for redundancy compensation once offered a position at Manukau on substantially similar wages and conditions. However the parties had not made such an agreement. Unlike such clauses, the specific terms actually agreed required such an alternative position to be offered *and accepted* before an employee was disentitled to redundancy compensation. And the definition of suitable alternative employment was not limited to maintaining no less favourable wages and conditions but also expressly included a requirement that the position be in a location that would not require the employee to travel any greater distance unless she or he so chose. APN's subsequent view that three kilometres more should have accepted as reasonable is of no account. It had already agreed to terms of employment which said otherwise.

Had other binding commitments been made to pay redundancy compensation?

[35] Mr Pascoe submitted that various managers had promised he would be paid redundancy compensation at some point as a result of the closure of the Ellerslie heat set operation. He submitted he was entitled to rely on such promises.

[36] He gave evidence of discussions with Mr Heape, Mr Hood and Mr Mould which he said supported this view. Those witnesses disputed some or all of Mr Pascoe's recall of those conversations including, in Mr Hood's case, whether he was present at certain meetings as alleged.

[37] Although I have carefully reviewed the witness statements and all oral evidence given on the content of such conversations, I do not consider it necessary to make detailed findings of facts. Rather I consider Mr Pascoe did not establish, on the balance of probabilities, that undertakings were given to him as unequivocally as he recalled. Taking one example, Mr Pascoe recalled a senior manager telling him and a union representative in November 2006 that if positions were available within the

APN group of companies, they would be given to the existing Ellerslie maintenance staff, but “*if not then it will be redundancy: the option is yours*”. Mr Pascoe took this to mean the choice of either an alternative position or redundancy compensation would be his. However, fairly, he accepted in the Authority investigation that redundancy was (on his own account of the manager’s words) referred to as an option only if no alternative positions were available, not a choice between the two.

[38] There were obviously a number of informal conversations through the months in which closure arrangements were made and carried out. It is likely that the managers involved in those conversations expressed expectations or hopes about what would happen at the end of Mr Pascoe’s work at Ellerslie. However the evidence does not establish such comments had sufficient certainty to become binding oral terms of employment. If Mr Pascoe’s claim relied on that ground alone, it would have failed. He has succeeded on other grounds.

Determination

[39] For the reasons given I find Mr Pascoe’s position was surplus to APN’s requirements by 20 July 2009 at the latest. He was entitled to redundancy compensation from that date and APN breached his terms of employment by not paying him the amounts due then. His subsequent resignation did not negate that entitlement. The amount due is not affected by wages paid to him for work APN directed him to do at Manukau.

[40] I order APN to pay the amounts due to Mr Pascoe as redundancy compensation under his employment agreement.

[41] Mr Pascoe has been put out of the use of the money due to him as redundancy compensation. He is entitled to an award of interest on that amount from 21 July 2009 to the date at which it is paid. I reserve leave for Mr Pascoe to seek orders for the payment of such interest, should APN not do so voluntarily. If it does prove necessary for Mr Pascoe to make such an application, APN would have an opportunity to make submissions on the matter before an order is made. I record that if I had made such an order at the date of this determination, the rate of interest awarded would, under clause 11 of Schedule 2 of the Act, have been 5.17 per cent.

Costs

[42] Costs are reserved. The parties are encouraged to agree any issue as to costs between themselves. If they are not able to do so and a determination of costs by the Authority is necessary, Mr Pascoe may lodge and serve a memorandum as to costs by no later than 28 days after the date of this determination. APN will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this timetable unless prior leave has been sought. Typically the Authority would determine costs in a matter such as this on the basis of the familiar notional daily rate.

Robin Arthur
Member of the Employment Relations Authority