

Determination Number: WA 122/06

File Number: 5033964 & 5046357

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Bernard Spink (applicant)
AND	APN New Zealand Limited t/a APN Print - Wanganui (respondent)
REPRESENTATIVES	Tony Wilton for the applicant Susan Hornsby-Geluk for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North, 24 August 2006
SUBMISSIONS RECEIVED	31 August and 8 September 2006
DATE OF DETERMINATION	13 September 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Spink had two employment relationship problems. In respect of the first he continues to seek a determination that he is entitled to redundancy compensation – statement of problem filed on 15 March 2006. In respect of the second, he said the Company acted unlawfully when it deducted money from his pay; he seeks a

penalty in respect of that deduction, plus interest – statement of problem received on 28 July in respect of the deduction.

2. The Company says it has not unjustifiably disadvantaged the applicant and declines to pay him redundancy compensation as, it says, he is not surplus to its business requirements – statement in reply received on 5 April. It also says it was entitled to not pay the applicant for the work time he spent preparing for his grievance.
3. The parties have undertaken mediation.
4. During a telephone conference convened on 26 April, the parties agreed to a one-day investigation in Palmerston North on 24 August. They usefully provided witness statements and, the Company, a bundle of relevant documents for the investigation.

Partial Settlement Achieved

5. Part way through the 24 August investigation, and following the advice that the applicant had been dismissed by the respondent earlier that week in respect of a separate matter, but by way of a settlement between the parties of the second employment relationship problem (the matter set out in 5046357), the Company agreed to pay \$40 (forty dollars) to the applicant who, in turn, withdrew his claims in respect of the deduction from his wages.
6. Mr Spink's counsel, Mr Tony Wilton, also confirmed that – had the applicant not been dismissed – he would have accepted the respondent's requirement that he resume operating the print or press console (the console).

Agreed Facts

7. Mr Spink commenced employment as a web offset apprentice with the Company in 1998. On completing his apprenticeship he became a printer. He was subsequently trained to operate a console, in which capacity he acquired considerable experience.

8. From October 2000 he held the position of Day Shift Deputy Foreman until relinquishing the position in July 2002, when he reverted to his former role of printer.
9. By way of an agreed variation to his employment agreement, effective from 13 August 2004, Mr Spink assumed the responsibilities of a second in charge, the deputy or acting shift supervisor (refer to document 4 in the respondent's bundle). His key tasks were identified as:

When the Day Shift Foreman is on leave, sick or required elsewhere, Bernard is required to ensure jobs continue to be printed in a timely efficient manner. This involves controlling the Press console and folder, and the delegation of staff to respective printing units.

10. The variation also stipulated that Mr Spink did "... not wish to be acting shift supervisor for long periods of time", but only "... for ... up to 3 months" (above).
11. In October 2005 the Company, in consultation with Mr Spink, his union – the Engineering, Printing and Manufacturing Union – and other workers, undertook a review of its manufacturing structure. Proposals were put forward for a flattened structure (document 6): employees' views were sought. Various changes were contemplated including doing away with the day shift supervisor's position and Mr Spink's role as acting shift supervisor.
12. In November 2005 the Company confirmed its final restructuring (document 7), including the fact that Mr Spink's acting shift supervisor position was no longer required. Mr Spink's application for the new position of deputy floating supervisor was unsuccessful.
13. Pursuant to the employment agreement provisions, the Company required the applicant to revert to the position of printer or press operator. Mr Spink took issue with that requirement: he says the offer did not amount to, "*suitable alternative employment*" (clause 32.2 of his collective employment agreement) and that he was therefore entitled to redundancy compensation. The applicant does not otherwise contest the restructuring process and its outcome.

Parties' Positions

Applicant's Position

14. Mr Spink relies on the test set out in *Carter Holt Harvey v Wallis* [1998] 3 ERNZ 984, at 995, that, viewed objectively and essentially as a question of fact and degree:

Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the respondent, consider that there was sufficient difference to break the essential continuity of the employment?

15. in this instance, and via Mr Spink's collective agreement at clause 32.3, the parties have defined "suitable alternative employment" (clause 32.2) as:

A substantially similar position at a rate of wages and under minimum conditions of employment no 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.

16. The applicant argues the relevant formulation introduces an element of subjectivity, by its use of the word "favourable". The question must be posed, he says, favourable to whom? The answer must be, he says, to himself. The Company is therefore required to take account of the applicant's view, particularly because of the effect of the words, "unless of the employee's choosing".
17. The new position does not have the authority inherent in the old. When the foreman was absent, the deputy became the foreman, for all intents and purpose. This happened with significant frequency: "It will not happen with anything like the same frequency for Mr Spink as an ordinary printer" (par 6. (b) of his submissions). The applicant has also lost his former status, that of member of the management structure. Status was held to be significant in *Wallis* (above).

18. This void is not filled by the expectation that when Mr Spink is required to operate the console his judgement will be backed up by management, in the absence of his managers: that level of authority arises from his personal skills and experience and not from his new position. It is different in nature and degree.
19. The change does not result in Mr Spink remaining at the same level of authority, with those below him being brought up to his level. In the flattening of the structure, authority and responsibility have moved upwards away from the applicant.
20. The term “*conditions of employment*” has a wide ambit: see Court of Appeal in *Tranz Rail v RMTU* [1999] 1 ERNZ 460, which found it includes all rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment contract and encompasses status, authority, responsibility and arguably job satisfaction.
21. Mr Spink valued the status, authority and responsibility of his position in the management structure and he feels deeply the loss of those benefits in the position to which he has been redeployed, including the loss of future prospects, resulting in a serious loss of job satisfaction.
22. The position of an ordinary printer cannot therefore be regarded as a suitable alternative. He is therefore entitled to both redundancy compensation and to modest compensation for the effect of the Company’s dogged refusal to recognise his legitimate claim.

Respondent’s Position

23. Because of my determination in this matter there is no need for me to summarise the Company’s argument.

Discussion

24. I find against the applicant’s claim for the following reasons.

25. The parties agree on the relevant case law, including *Wallis* (above) and *Pilgrim v Director-General of Health* [1992] 3 ERNZ 190. They accept that the suitability of an alternative position must be determined objectively, not by the subjective view of the employee or employer, but by the conclusions a reasonable but disinterested person would take, taking into account the nature, terms and conditions of each position and the characteristics of the respondent. As a result, I find that it is therefore no more a matter of Mr Spink's feelings about the new position, than it is of the Company's, when determining the proper, objectively determined outcome.
26. I find that, objectively scrutinised, Mr Spink's role post restructuring is substantially similar to the work he undertook prior to the restructuring, and is therefore suitable alternative employment. This is because his duties then and his duties now, stem from the operation of the console. While the applicant has lost his title of deputy shift supervisor, he continues to undertake the same duties when operating the console, i.e. the job he is primarily engaged to undertake. As such, Mr Spink continues to have the same responsibilities for directing staff, managing work flow, quality control, etc, as the machine continues to be, effectively, at the heart of that part of the Company's operations.
27. During the Authority's investigation, Mr Spink accepted that – post restructuring and in the event of him being the console operator and having at the same time a staff issue – management would back him up in the same way he expected it to do before the restructuring (even though in fact no such occasion previously arose).
28. Mr Spink similarly accepted that his level of responsibility remained the same, following the Company's restructuring. What emerged from the applicant during the Authority's investigation, were Mr Spink's admissions that his main concerns were being unable to go to another employer saying he held the position of deputy and that his immediate supervisor, doing what he – Mr Spink – used to do, was paid \$24 per hour while he remained on \$19 per hour. The Company does not accept that latter claim.
29. Mr Spink remains at the same location. He works the same hours and enjoys the same pay. His daily duties are unchanged. He employs the same skills, abilities, and experience as he previously did. As his witnesses acknowledged, they would

still do what he required of them post restructuring as he did pre restructuring. All that has changed is the fact that Mr Spink can no longer use the title deputy shift supervisor, either in the workplace or – as he remarked during the investigation – in a C.V. Mr Spink's position post restructuring is therefore suitable as it is – excepting for a change of title – substantially similar to the position he occupied prior to the restructuring.

Determination

30. I find against the applicant, Mr Bernard Spink's, claim against the respondent, APN New Zealand Limited t/a APN Print - Wanganui, that he is entitled to redundancy compensation and compensation for unjustified disadvantage.

31. As requested by the parties, costs are reserved.

Denis Asher
Member of Employment Relations Authority