

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN TLNZ Auckland Limited (Applicant)
AND Ray Allen & 6 Others (Respondent)
REPRESENTATIVES Michael Sharp, Counsel for Applicant
Simon Mitchell, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 20 December 2005
DATE OF DETERMINATION 22 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] TLNZ Auckland Limited (TLNZ) has asked the Authority to resolve a dispute between it and the respondents, all of whom are members of the Maritime Union of New Zealand (the union).

[2] The dispute is in relation to the terms of the individual employment agreements between the applicant and each of the respondents. The dispute is about whether it is open to TLNZ to identify and declare redundancies of its permanent employees including its Guaranteed Work Employees.

The Employment Agreement

[3] The terms of employment for each of the respondents' are set out in the expired Collective Employment Contract for Permanent Cargo Workers between Leonard & Dingley Limited and Auckland Tallying Services Limited dated 4 September 1995 (CEC).

[4] Clause 2(d) of the CEC acknowledges the right of management to plan, organise, manage and decide finally upon the operations of the business, including the deployment and allocation of labour.

[5] Redundancy in the CEC is defined as meaning termination of employment:

...attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer (clause 16(d)(ii)).

[6] TLNZ employs both permanent and casual employees. The CEC makes casual employment a discretionary option for the employer. The CEC limits the employment of casual labour to a ratio of 25% casual workers to the total workforce (clause 7). At the investigation meeting evidence was provided by both parties that the 25% limit has not been strictly adhered to or enforced.

[7] The CEC also provides for allowances to be included in the work rate of \$23.00 including an allowance of \$2.92 flexibility payment which is in recognition of an employee's obligation to be available for "extra hours" and additional work periods on any day of the week (clause 9(b)(v)(b)). An employee can be required to work extra hours provided a minimum of one hours notice is provided (clause 12(g)).

[8] I am satisfied that TLNZ and its employees take full advantage of the requirement and ability to work extra hours. The evidence of the parties at the investigation meeting was that it is common for staff to work between 1 and 5 extra shifts per week and that most of these shifts were back-to-back shifts meaning staff were working 16 hour days.

Guaranteed work employees (GWEs)

[9] In 2004 TLNZ and the union agreed to implement an arrangement to allow for additional permanent employees to be engaged. The employees were guaranteed at least 3 eight hour shifts each week. The stated purpose for the increase was to meet a shortage in manning levels. The employees working on the guaranteed three shift system are referred to as Guaranteed Work Employees (GWEs). 6 GWEs were engaged under this agreement in addition to 4 new permanent employees. The terms and conditions for the GWEs were the same as the terms and conditions in the expired CEC.

[10] In March 2005 a further agreement was reached whereby TLNZ moved the 6 GWEs, engaged in April 2004, onto its permanent staff and engaged 9 new GWEs. The March 2005 agreement provided for two separate rates of pay for the GWEs: one rate to be paid while undertaking skilled work (\$23.00 per hour which is the rate paid to all permanent staff) and another for undertaking unskilled work (\$16.65 per hour).

[11] It was common ground that the reason for the employment of additional staff and the variation to the rates recognising differing skill requirements, was to help TLNZ become more competitive with others in the industry.

2005 Redundancy

[12] Due to economic conditions the actual revenue for TLNZ for the 2005/2006 year is below budget. At present the company is forecasting a substantial loss for the year ended June 2006 which is very different to the budgeted surplus predicted at the beginning of the year. TLNZ has lost contracts to competitors and workload requirements have correspondingly decreased.

[13] As a result of the decreased workload the company has sought to make its operations more efficient and effective. The company says that at present and as a result of the decrease in the workloads, permanent staff members employed under the terms of the current CEC are paid at \$23.00 per hour irrespective of the type of work on which they are employed. By contrast the GWEs, when employed on unskilled work, are paid at the lower rate, and in contrast again, casual employees engaged to work on predominantly unskilled work, are paid at a lower rate again. It is the evidence of TLNZ that the costs associated with employing permanent staff to undertake unskilled work makes the labour costs unaffordable.

[14] TLNZ have attempted to renegotiate the terms of the expired collective to assist in a reduction of its labour costs, but have been unsuccessful in achieving any agreements with the union.

[15] TLNZ now propose to make 9 employees redundant. The 9 employees are a combination of both permanent and GWEs. Voluntary redundancy has been offered as an option and as a result of two employees taking up that option there are 7 positions which TLNZ wish to declare as surplus to its requirements.

[16] Assessments of the permanent and GWE workforce have been undertaken. The seven lowest scoring employees have been identified as being potentially redundant. Those seven employees are the respondents in this matter. Of the seven, four are permanent employees and three are GWEs.

Decision

[17] The purpose of this determination is not to consider whether the employees have been treated fairly or reasonably, or even to consider whether the redundancies are genuine. The sole

purpose of this determination is to consider whether the redundancies fall within the scope of the redundancy clause of the employment agreement.

[18] Section 129 of the Employment Relations Act 2000 allows any person bound by an agreement or any party to an agreement to pursue a dispute about the interpretation, application and operation of an employment agreement.

[19] The dispute in this matter, as stated earlier, is about whether the proposed redundancies fall within the scope of clause 16 of the CEC. The wording used in clause 16 is identical to the wording used to define redundancy in the Labour Relations Act 1987 (section 184).

[20] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, held that that definition corresponded with the ordinary usage of the term redundancy which includes:

The condition of having more staff in an organisation than is necessary. Hence, the state or fact of losing a job because there is no further work to be done: a case of employment due to reorganisation, mechanisation, loss of orders etc.

[21] In considering the wording of the Labour Relations Act the Court of Appeal in *Hale*, cemented an employer's right to:

...make his business more efficient, as for example by automation, abandonment or unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him. [my emphasis]

[22] Mr Gavin McNaught, Acting General Manager – Northern, says that the level of business currently being engaged in by TLNZ is very similar to that which was being done in 2004, prior to the first GWE agreement was entered into. Prior to April 2004, TLNZ employed 17 permanent employees. As the business grew and as a result of the two GWE agreements, employment of permanent and GWE numbers grew to the current levels of 33. Mr McNaught says that TLNZ wish to reduce that number to 24 to reflect the decrease in the workload.

[23] The union's argument is that the work of the employees will not disappear as TLNZ will simply employ casual labour to carry out the extra work. Mr McNaught told the Authority at the investigation meeting that there was only a certain amount of skilled work available and that there was not enough to allocate to all the permanent staff. He says that if the numbers of permanent and GWE staff is reduced TLNZ will be able to offer more hours of skilled work to its permanent and GWE employees.

[24] Mr Mitchell, on behalf of the union, referred the Authority to the decision of *McCulloch v New Zealand Fire Service Commission* [1998] 3 ERNZ 378 where Chief Judge Goddard found:

If the work is still there and needs to be done, it cannot be said that the incumbents are redundant.

[25] That case can be distinguished on its facts. The Fire Service had declared that all its staff were to be made redundant and were required to apply for jobs within a restructured fire service. The Court determined that there was no genuine commercial need to declare all staff redundant as the work was still there to be carried out and found that the work was to be the same, although differently apportioned, and it was all within the job the fire fighters were employed to do. The court also stated that

To the extent a reduction in numbers is necessary, it is the [Fire Service] responsibility to decide who should be left out and its obligation to do so...

[26] In this matter TLNZ have determined that with the reduction in workload, there needs to be a consequent reduction in manpower.

[27] Mr Mitchell, also relied on the decision of the Court of Appeal in *New Zealand Fasteners Stainless Limited v Thwaites* [2000] 2 NZLR 565 to advance the submission that the Authority is entitled to consider whether the decision by the employer is reasonable. I agree with Mr Mitchell that the Authority is so entitled. However, the question about whether the employer has acted reasonably relates to a personal grievance claim for unjustified dismissal (which may arise out of a termination of employment as a result of redundancy) where the Authority will review whether the particular redundancy was genuine. Genuineness is considered by the Court in relation to whether or not the redundancy was the actual reason for dismissal rather than being a sham (see *Staykov v Cap Gemini Ernst & Young NZ Ltd*, unreported, Travis J, AC 18/05, 20 April 2005).

[28] I am satisfied that the redundancies proposed by TLNZ come within the scope of clause 16 of the expired CEC. TLNZ are downsizing its manpower as a step toward "...cost savings". This falls squarely within the ambit of the employers' right to make the business more efficient as stated by the Court of Appeal in *Hale*.

Vicki Campbell
Member of Employment Relations Authority