QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Queensland Services, Industrial Union of Employees v Unitywater* [2015] QIRC 079
PARTIES:	**Queensland Services, Industrial Union of Employees** (Applicant) **v** **Unitywater** (Respondent)
CASE NO:	B/2014/34
PROCEEDING:	Application for the interpretation of a certified agreement
DELIVERED ON:	5 May 2015
HEARING DATES:	11 September 2014
MEMBER:	Deputy President O'Connor
ORDERS:	**1. Application dismissed.**
CATCHWORDS:	INDUSTRIAL LAW - APPLICATION FOR THE INTERPRETATION OF A CERTIFIED AGREEMENT - Where the employer moved employee positions to a different location - Whether the location change of the positions constituted a redundancy under the Certified Agreement - Where the employees had to travel significant distances to the new location - Where the employee positions became redundant - Whether the employees were transferred to a new location and therefore entitled to payments or entitlements under the Certified Agreement - Where the employees were not transferred
CASES:	*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Coates Hire Operations Pty Limited* [2005] AIRC 945 *Commonwealth Bank of Australia v Finance Sector Union of Australia* [2002] FCAFC 193 *National Union of Workers v Tontine Fibres (A Division of United Bonded Fabrics Pty Ltd)*

[2007] AIRC 952
National Union of Workers v Tontine Fibres (A Division of United Bonded Fabrics Pty Ltd)
[2007] AIRCFB 1016
Redundancy Case Supplementary Decision
[2004] AIRC 564
United Rubber (Aust) Pty Ltd v National Union of Storeworkers, Packers, Rubber and Allied Workers Munro J, MacBean DP, Griffin C, 9 August 1989, Print H9091

APPEARANCES: Mr N. Henderson, for Queensland Services, Industrial Union of Employees, the Applicant.
Mr M. Rodgers, Agent for Unitywater, the Respondent.

Decision

Background

[1] The application filed by Queensland Services, Industrial Union of Employees ("the applicant") in the Industrial Registry on 7 July 2014 seeks an interpretation of the *Unitywater Certified Agreement No. 1 2011* ("the Agreement").

[2] The questions before the Commission are:

> "1. Have the roles, in which the Metering Services Officers named Sandra Ingham, Wayne Inch and Bill Iverson (the "Metering Services Officers") were employed by the Respondent prior to 20 January 2014 (the "Roles"), become redundant for the purposes of clause 6.5.2 of the Agreement?
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> 2. If the answer to question 1 is "no", is the Respondent permitted to redeploy or retrench any of the Metering Officers while the Roles are not redundant?
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> 3. In relation to the transfer of the Metering Officers from their work location at the Respondent's Southern Service centre at Weier Road, Morayfield to a new work location at the Respondent's Northern Corporate Centre at Maud Street, Maroochydore, are the Metering Officers entitled under clause 2.10.2 of the Agreement to any and each of the following:
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> (a) payment for actual travel time that is required outside the employee's normal start and finish times;
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> (b) a Unitywater vehicle or payment for kilometres travelled to the new work location;
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> (c) backpay in respect of the entitlements referred to in subquestions "a" and "b", for some or all travel since 20 January 2014."

[3] Ms Sandra Ingham, Mr Wayne Inch and Mr Bill Iverson ("the workers") were, prior to 1 July 2010, employed by the Moreton Bar Regional Council as Metering Services Officers based at 67 Weier Road, Morayfield.

[4] Unitywater ("the respondent") was formed to take on the responsibility of water supply and sewerage services from the Moreton Bay Regional Council and the Sunshine Coast Council effective 1 July 2010.

[5] The workers were transferred to the respondent as and from 1 July 2010.

[6] The workers were covered by the Agreement as well as the Queensland Local Government Officers Award 1998 ("the Award"). All three workers were classified as Level 2 employees under the Award.

[7] On or about 28 September 2013, the respondent notified the workers that they were going to relocate the Metering Services Team from Morayfield to Maroochydore and that their positions will cease to exist (notification of a significant change as per cl 6.4 of the Agreement).

[8] On or about 28 November 2013, the respondent informed the workers that effective as at 20 January 2014, the Metering Services work which was performed in the Southern Service Centre at Weier Road, Morayfield would be relocated to the respondent's Northern Corporate Centre at Maud Street, Maroochydore.

[9] The workers were advised that effective 20 January 2014 they could:

"(a) trial driving to the Northern Corporate Centre in work time and be paid mileage for 13 weeks; or

(b) report each day to the Southern Services Centre, and as a group, drive a Unitywater pool vehicle to the Northern Corporate Centre to mitigate fatigue issues; or

(c) seek redeployment within another area of Unitywater and if no redeployment options could be found they would be made redundant. While seeking redeployment the 3 employees would from 20 January 2014 be based at the Northern Corporate Centre."[1]

[10] On 19 December 2013, Mr Craig Dearling, the Employee Relations Manager for the respondent received an email from Ms Ingram seeking a record of the meeting held between representatives of the respondent and the workers.

[11] By email dated 19 December 2013, Mr Dearling wrote to the workers in relation to the options that were discussed at the meeting of 17 December 2013. They included redeployment, travel arrangements, clarification of the relocation timeframe of 13 weeks' assistance, redundancy, redeployment, relocation assistance if the workers chose to relocate and reside at the Sunshine Coast, work hours during and after the

[1] Affidavit of Craig Dearling (Exhibit 4).

allowed travel assistance and clarification of the deadline to accept or decline the offer.

[12] On 27 February 2014, the workers and representatives of the applicant met with Mr Dearling. Mr Dearling confirmed during the meeting that the work undertaken at the Northern Corporate Centre had not changed from the work previously undertaken at the Southern Service Centre at Morayfield.

[13] By letter dated 24 March 2014, the respondent advised the workers as follows:

(a) their previous positions at the Southern Service Centre ceased to exist as and from 20 January 2014;

(b) that Unitywater had been exploring options for redeployment since 20 January 2014 as well as allowing a trial period where the workers were able to travel to the Northern Corporate Centre to decide if they wished to voluntarily accept an alternate position at that location; and

(c) that Unitywater would continue to explore suitable alternative employment options until 22 April 2014 and that if redeployment was not possible, the workers had the option of voluntarily accepting an alternate position at the Northern Corporate Centre, as an alternative to retrenchment or instead to receive a retrenchment payment.

[14] On or about 14 April 2014, the respondent sent a letter of offer for the new positions as Metering Services Officers at Maud Street, Maroochydore. None of the workers signed the letter of offer but continued to work each day at the Northern Corporate Centre after 22 April 2014.

[15] The respondent wrote to each of the workers on 6 May 2014 advising them that if they reported for duty after 12 May 2014, they would be deemed to have accepted the new role at the Northern Corporate Centre.

[16] Since 12 May 2014, the workers have continued to work at the Northern Corporate Centre as Metering Services Officers.

[17] On 7 July 2014, the applicant filed an application in the Queensland Industrial Relations Commission for the interpretation of the Agreement.

Did the relocation constitute a redundancy?

[18] It is the applicant's contention that the relocation of the workers did not constitute a redundancy rather that the workers were transferred to another location and so are entitled to payments pursuant to the travel assistance provisions contained in cl 2.10.2 of the Agreement.

[19] The Award defines redundancy as:

> "32.1.2 Redundancy occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and that decision leads to the termination of employment of the

employee, except where this is due to the ordinary and customary turnover of labour."

[20] The definition contained in cl 32.1.2 of the Award is consistent with the definition of redundancy contained in the Termination and Redundancy Model Clause, determined by the 2004 Termination and Redundancy Full Bench of the Australian Industrial Relations Commission in its Supplementary decision.[2]

[21] Section 6.5.2 of the Agreement defines when a role is redundant as when:

"(a) Unitywater's need for the work of that role has diminished considerably or ceased; or

(b) The role description is changed to such a degree that the present incumbent does not hold the requisite skills or qualifications to perform the new role and is unable to demonstrate the ability to readily acquire them with support and retraining."

[22] The respondent submitted that the positions of the three employees at 67 Weier Road, Morayfield were no longer required and that the job that they had been performing at that location would no longer be performed by anyone. As a consequence, that gave rise to a potential redundancy.

[23] It is the contention of the respondent that the three workers' positions are redundant and have been so since 20 January 2014.

[24] Having regard to the fact that the Award was previously a Federal Award, it is instructive to refer to some of the Federal authorities which have consider the definition of redundancy.

[25] In *National Union of Workers and Tontine Fibres (A Division of United Bonded Fabrics Pty Ltd)*[3], the Full Bench had to consider whether a decision by United Bonded Fabrics (UBF) to close its Mooroolbark site operations and require NUW members to continue their employment at UBF's Coburg site, in another suburb of Melbourne, approximately 40 kilometres from the Mooroolbark site constituted a redundancy.

[26] The NUW sought a declaration from Commissioner Eames that each of the Mooroolbark employees was entitled to the redundancy benefits specified in the 2005 Agreement. Tontine argued that, because alternate employment had been offered at its Coburg site, there was no redundancy and no entitlement to redundancy payments under the 2005 Agreement.

[27] Commissioner Eames concluded:

"The clause talks about 'redundant functions' and again in this case, the functions will not be redundant, but are required to be performed at another

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[2] *Redundancy Case Supplementary Decision* [2004] AIRC 564, Appendix A; PR062004 Appendix A.
[3] *National Union of Workers v Tontine Fibres (A Division of United Bonded Fabrics Pty Ltd)* [2007] AIRCFB 1016.

> site. The employees are not being made redundant, per se, nor are their functions."[4]

[28] In this case, the appellant took a similar approach arguing that the relocation of the positions to Maroochydore does not give rise to a redundancy situation within the meaning of that term in the Agreement. They contended that there is no change to the tasks or duties required to be performed. Only the location has changed.

[29] However, the Full Bench in *National Union of Workers v Tontine Fibres* took a different view finding that Commissioner Eames erred in concluding that the functions performed by the Mooroolbark employees were not redundant and that the employees were not being made redundant. The Full Bench wrote:

> "But in any event the conclusion is inescapable that UBF had decided that it did not want the Mooroolbark jobs performed by anyone. While UBF argued that the jobs were simply being relocated to the Coburg site, we think that the closure of the Mooroolbark site speaks for itself."[5]

[30] The Full Bench went on to conclude:

> "Another consideration is the distance employees will have to travel to work at the Coburg site. The evidence indicates that the increase in the daily travel requirement will be very significant. Employees will be required to travel distances up to 80 kilometres extra per day, adding up to more than an hour and a half to their travelling time, These calculations are based on the most direct route and do not allow for peak hour conditions which might apply on the roads. While some employees will not be disadvantaged in this way, they are quite a small minority. UBF has undertaken to transport employees between the Mooroolbark site and the Coburg site and to pay one hour of travelling time per day. This arrangement is temporary, however, and will cease after 12 months. Employees who take responsibility for their own transport during the first 12 months, and all employees after 12 months, will incur very considerable extra costs."[6]

[31] In coming to its conclusion, the Full Bench was mindful of the significant distance between the employment locations and the considerable additional travelling time and costs associated with the alternative employment.

[32] In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Coates Hire Operations Pty Limited*[7], Commissioner Richards (as he then was) wrote:

> "[86] The approach by the Full Bench in *Re: United Rubber* also appears to have been adopted implicitly, at least, by the Full Bench in *Appeal by NHP*

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[4] *National Union of Workers v Tontine Fibres (A Division of United Bonded Fabrics Pty Ltd)* [2007] AIRC 952 at [72].
[5] *National Union of Workers v Tontine Fibres (A Division of United Bonded Fabrics Pty Ltd)* [2007] AIRCFB 1016 at [17].
[6] Ibid at [27].
[7] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Coates Hire Operations Pty Limited* [2005] AIRC 945.

Electrical Engineering Products P/L against decision of Hingley C of 6 December 2004 37 ('Re: NHP'). In the decision, the Full Bench found as follows:

> *'We turn to the second ground, failure to apply the proper legal test as to relocation. This relates to the Commissioner's finding that there was an implied term of the contract of employment between Mr Liu and the company that there could be no relocation of the work. That finding is in paragraph [51] of the decision, which reads as follows:*
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> > *"[51] In the instant case of this applicant I think it is reasonable to construe that the contract of employment implied that the job offered at NHP was a position at Richmond Factory and on that basis the applicant accepted it over the Richmond employment entailing subsequent relocation to Bayswater. There was at this time no Laverton facility. Conversely I find that there was at the time no implied term of the contract under which the employer could require transfer to Laverton or another site."*
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> *The finding appears to have been made at least partially in response to a submission by the company that there was an implied term of the contract that there could be a reasonable relocation insisted upon by the employer. That submission was rejected. Regardless of that rejection the Commissioner's decision was ultimately based on a finding that Mr Liu's refusal to move to Laverton was legally permissible and was reasonable. For this reason even if it were found that there was an implied term of the contract permitting the company to require reasonable relocation, it would be unlikely that the result would have been any different.' [Emphasis added]*

[87] In this instance, the Full Bench in *Re: NHP* also took the view that a finding in relation to the reasonableness or otherwise of the change of the location of the place of the performance of work was the determinative and critical factor, and not whether the relevant contracts of employment did or did not contain an implied term in relation to relocation, and whether that implied term was fundamental or essential to the performance of the contract or not.

[88] It would appear the Full Bench held, as did the Full Bench *in Re: United Rubber*, that it is the judgment as to what is reasonable in the circumstances that it determinative, and this is so because an issue as to the location of the place at which work is performed does not represent a fundamental or essential term of the contract of employment."[8] (Citations omitted)

[33] In this case, the workers are required to travel a considerable distance from their homes to the new Maroochydore site.

[34] Two of the workers, Sandra Ingham and William Everson gave evidence by affidavit and were cross examined.

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[8] Ibid at [86] to [88].

[35] Ms Ingram in her evidence before the Commission accepted that she would be required to travel 2 hours and 25 minutes per day. This would represent an additional 1 hours and 25 minutes of travel per day. In her affidavit of 15 August 2015, Sandra Ingham stated that "The financial setback is the big issue in having to travel to Maud Street, but I am certainly able to continue to do that travel"[9].

[36] Mr Everson accepted in cross-examination that he would now be travelling for an extra 1 hour and 46 minutes per day. Whilst Mr Inch did not give evidence, the material before the Commission would suggest that he would be required to travel for an extra 1 hour and 38 minutes per day.

[37] There is in my view little doubt that the additional distance and travelling time has the potential to affect the family responsibilities of the workers.

[38] The evidence before the Commission is that the respondent made a definite decision to relocate its metering services from the respondent's Morayfield site to its Northern Corporate Centre at Maud Street, Maroochydore. The undertaking of metering services ceased at Morayfield on 20 January 2014.

[39] In so doing, the respondent had decided that it no longer wished the job or role that the workers had been doing at Weier Road Morayfield to be performed by anyone.

[40] The applicant argues that notwithstanding the cessation of the metering services at Morayfield, the relocation of the metering services to Maroochydore and the lack of any change in the duties required to be performed by the workers did not give rise to a redundancy within the meaning given to that term.

[41] In support of that submission, the Commission was referred to the decision of *Commonwealth Bank of Australia v Finance Sector Union of Australia*[10], and in particular, the following observation of the Full Court:

> "Severance pay is primarily designed to deal with situations in which either the person or the position is redundant in the usual sense of the word and retrenchment follows. Cl42 extends that notion so that if there is a substantial enough change in duties, or if the location of the job is sufficiently changed, then there is, effectively, a constructive redundancy and if retrenchment follows severance pay becomes payable."[11]

[42] The reasoning of the Full Court in the *Commonwealth Bank* decision does not, in my view support the contention of the applicant. The Full Bench was of the view that if the location of the job is sufficiently changed, then there is, effectively, a constructive redundancy. The applicant's submission did not address this point. I accept that the travelling distances required to be undertaken by the workers on a daily basis could not be properly regarded as reasonable. As was observed by the Full Bench in U*nited Rubber v National Union of Storeworkers, Packers, Rubber and Allied Workers*[12], it is the reasonableness or otherwise of the change of the

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[9] Affidavit of Sandra Ingham (Exhibit 1).
[10] *Commonwealth Bank of Australia v Finance Sector Union of Australia* [2002] FCAFC 193.
[11] Ibid at [29].
[12] *United Rubber (Aust) Pty Ltd v National Union of Storeworkers, Packers, Rubber and Allied Workers* Munro J, MacBean DP, Griffin C, 9 August 1989, Print H9091.

location or the place of employment which is the determinative and critical factor in deciding whether there was a redundancy. In determining the question of reasonableness, the Full Bench in *National Union of Workers v Tontine Fibres* concluded that the requirement to travel distances up to 80 kilometres extra per day could not be regarded as reasonable.

[43] I am of the view that the requirement for the workers to travel distances of between 121 kilometres and 183 kilometres per day involving daily travelling times of approximately 1 hour and 38 minutes up to 2 hours and 25 minutes could not be regarded as reasonable. That fact, coupled with the cessation of metering services at Morayfield, brought about a redundancy.

[44] It follows therefore in light of the finding the metering positions ceased to exist at Weier Road, Morayfield the respondent was, prior to any retrenchment, entitled to explore options for redeployment under cl 6.5.4 of the Agreement.

Have the employees been transferred?

[45] Having concluded that the positions were made redundant, it is not strictly necessary for me to consider the application or otherwise of cl 2.10 of the Agreement. However, should I be wrong in finding a redundancy and for completeness, I will nevertheless briefly do so.

[46] Clause 2.10.2 of the Agreement relevantly provides:

> "Employees may be transferred to a new designated work location provided that such transfers may only occur where an employee can reasonably travel to and from home on a daily basis to the new work location, and this does not cause undue hardship to the employee.
>
> …
>
> Where Unitywater makes a definite decision to permanently transfer and employee to a new designated, discussion must take place in accordance with Clause 6.4 Workplace Change Notification of this Agreement. The employee and the relevant Union/s will be given a minimum of four (4) weeks' notice of a substantive change to the employees *(sic)* work location as a result of a permanent transfer, unless a lesser period is mutually agreed between Unitywater, the employee and the relevant Union/s. Wherever possible as much notice as practical in excess of four (4) weeks will be given. The notice period will take effect at the conclusion of the consultation process with affected staff.
>
> Where the additional travel distance between home and the new work location is five (5) km or greater than the travel time between home and the former work location, the employee's Manager will decide, in consultation with the employee, if the employee will travel between home and work during the employee's normal start and finish times.

> If the Manager decides that the employee will travel outside the employee's normal start and finish times, the employee will be paid actual travel time at single time at the employee's ordinary base rate for up to 30 minutes each way.
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> Where the employee is not provided with a Unitywater vehicle and travels to the new work location in the employee's private vehicle, the employee will be paid kilometres travelled in accordance with ATO rates for the extra travel distance which is five (5) km or greater (each way) than the travel between the former work location and home."

[47] Clause 2.10.2 confers a right on the respondent to transfer an employee to a new designated work location. However, it may only do so in circumstances where an employee can reasonably travel to and from home on a daily basis to the new work location and does not cause undue hardship to an employee.

[48] I accept the submission of the respondent that they are under no obligation to transfer an employee. I further accept that the transfer of an employee to a new designated work location can only be effected where an employee can reasonably travel to and from home on a daily basis and it does not cause undue hardship.

[49] The applicant submits that the workers have been commuting to the Maroochydore worksite since January 2014 and none of them have given notice that they do not wish to travel or that they are being subjected to undue hardship.

[50] However, adopting the reasoning in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Coates Hire Operations Pty Limited,* I accept the proposition that the respondent does not have a unilateral right to transfer an employee to a new work location.

[51] For the reasons outlined above, and on the evidence before the Commission, I conclude that an employee could not reasonably travel to and from home on a daily basis to the new work location, and that a transfer would cause undue hardship to the employee.

[52] In any event, there is no evidence before the Commission to support a conclusion that that the respondent has made a definite decision to permanently transfer the workers to a new designated work location. Indeed, the evidence is the contrary. In re-examination, Mr Dealing was asked:

> "And what was your communication in relation to the fact that the team may be relocated? Did you canvass that at all? --- We canvassed a range of options that would be available to them if they wished to remain employed at Unity Water.
>
> But in relation to whether or not they were being transferred, was anything said to them about that? --- Yes, I was very clear with them that they were not being transferred and that they would have a range of options including one accepting a new role at the new location or a few other options as well as a part of that.
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> Okay. And you ---? --- Including redundancy, sorry.

> And you set that out in emails and letters to them? ---Yes, it was verbal, email and confirmed in writing in a letter, yes."[13]

[53] In my view, cl 2.10 of the Agreement has no application as Mr Inch, Ms Ingram and Mr Iverson were, for the reasons above, not transferred to an alternative designated work location and therefore not entitled to any payments or entitlements under cl 2.10.2 of the Agreement.

[54] I accept that cl 2.10 of the Agreement does not have application in circumstances where there has been a redundancy.

Conclusions

[55] For the reasons advanced above, I have come to the conclusion that the roles performed by Sandra Ingham, Wayne Inch and Bill Iverson as Metering Services Officers for the respondent became redundant for the purposes of cl 6.5.2 of the Agreement.

Order

[56] Application dismissed.

[13] Evidence of C Dearling T1-19, Ll, 15-25.