

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 7
5389409

BETWEEN MICHAEL DOUGLAS BEAUCHAMP
Applicant

AND CHIEF OF THE DEFENCE FORCE
Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person
Craig McCall, Counsel for Respondent

Investigation Meeting: 4 November 2014 at Wellington

Submissions Received: On the day from the Applicant
On the day from the Respondent

Determination: 23 January 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael Beauchamp was employed by the New Zealand Defence Force as a Financial Controller, and later Finance Director, from November 2003 until 13 April 2012. At that time his employment was terminated by reason of redundancy following a restructuring. He was paid redundancy compensation of \$42,778.

[2] Mr Beauchamp says this was significantly less than the amount to which he was contractually entitled. He seeks payment of the difference between the amount he received as redundancy compensation and the amount specified in his individual employment agreement, which was \$116,400.

[3] The Chief of the Defence Force (NZDF) says Mr Beauchamp was paid the redundancy compensation to which he was entitled under his employment agreement. NZDF says there was an error in Mr Beauchamp's 2008 employment agreement where his base annual salary as of 1 April 2006 had been stated as the value of his frozen redundancy entitlement. This either did not reflect the agreement between the parties or Mr Beauchamp recognised the mistake and entered into the 2008 agreement with this knowledge. The error had been carried through to the parties' 2011 employment agreement.

[4] NZDF says the error in the redundancy compensation amount in Mr Beauchamp's employment agreement requires correction through the doctrine of rectification. Alternatively, NZDF asks the Authority to correct the mistake through the Contractual Mistakes Act 1977.

Issues

[5] The main issue to be determined is the correct amount of redundancy compensation to which Mr Beauchamp was entitled under his employment agreement at the time his employment was terminated for redundancy.

[6] The determination of this question will entail consideration of the doctrine of rectification, and/or mistake and the application of the Contractual Mistakes Act 1977 (CMA).

The employment agreements

[7] The individual employment agreement Mr Beauchamp signed with NZDF in November 2003 provided for redundancy compensation to be paid if he was made redundant in accordance with the following formula:

- (i) *For the first year of service - six weeks payment of ordinary pay; and*
- (ii) *For second and subsequent years' service, up to a maximum of 19 years of service - two weeks payment of ordinary pay;*
- (iii) *The total amount paid to employees under (i) and (ii) above, shall not exceed \$42,000.*

[8] In 2006 Mr Beauchamp was offered, and accepted, a new Individual Management Agreement (IMA) to replace the 2003 individual employment

agreement. The letter of offer accompanying the IMA included an appendix with a provision for *Frozen Redundancy Compensation*. The provision was as follows:

NZDF will value any entitlement you may have to a redundancy compensation payment, using the formula in your current employment agreement, calculated on the salary provided in the new Employment Documentation as at 1 April 2006. This value will be frozen and will be paid to you in the event that you become eligible for a redundancy compensation payment.

At your request NZDF will provide you with a calculation of your frozen redundancy entitlement. The effective date for calculating this balance is 01 Oct 05.

If you become eligible for a redundancy compensation payment, the payment will be the greater of the frozen Redundancy Compensation payment as set out above, or three months' salary calculated on the base salary you are on at the time that your position is disestablished and you are made redundant.

[9] The appendix also contained a *Total Fixed Remuneration* provision that stated Mr Beauchamp's total fixed remuneration from 01 Oct 2005 as \$119,892.00. This amount comprised salary of \$116,400.00 and NZDF's Superannuation Contribution of \$3,492.00.

[10] In October 2008 Mr Beauchamp was offered a variation to his current IMA following a realignment of NZDF's senior manager salary scales. The letter of offer stated that the documents recording the complete terms and conditions of Mr Beauchamp's employment with NZDF were:

- (a) *This letter of Offer, including the Appendix ('this letter'),*
- (b) *The standard NZDF IMA, of which you already have a copy and have signed as applying to you in your employment with NZDF, and*
- (c) *NZDF's Code of Conduct ('the Code') which you have already signed.*

The Appendix to this letter sets out details of proposed additions and/or variations (if any) to the Standard NZDF IMA, not detailed in this letter that shall apply to you.

Where there is any inconsistency between the terms and conditions of your employment in this letter and any other document that is part of the terms and conditions of your employment, this letter will prevail. (Emphasis added)

[11] The Appendix attached to that letter contained a provision for redundancy compensation as follows:

If you become eligible for a redundancy compensation payment, the payment will be the greater of \$116,400.00, being the value of your frozen redundancy compensation payment as at 1 October 2005 or three (3) months' salary calculated on the salary you are on at the time that your position is disestablished and you are made redundant.

[12] In March 2010, following a restructuring in the Finance Division of NZDF, Mr Beauchamp's position was disestablished and he was offered, and accepted, reassignment to a new position with a different job description at the same remuneration level. There were no other material changes to his terms and conditions of employment.

[13] In January 2011 Mr Beauchamp received a letter of offer of a new individual employment agreement reflecting changes made to the NZDF IEA and was informed he had the choice to accept the new IEA or remain on his current one. The new IEA contained the following provisions of note:

Accurate data

Every attempt will be made to give accurate data, but there are always reasons as to why genuine mistakes can occur. Where a mistake has been made by NZDF and it is in your favour, we will correct it. If we become aware in the future that is (sic) in our favour, then we reserve the right to apply the calculations correctly especially if the information was known to be incorrect by you.

Variations

You currently have a variation related to a previously agreed frozen entitlement to redundancy provisions. As such this provision will continue to be recognised.

A copy of this approved variation for you is attached as Appendix B.

[14] Appendix B contained the same redundancy compensation provision as the appendix attached to the letter of offer of 2008, that is, the greater of \$116,400.00, being the value ascribed to Mr Beauchamp's frozen redundancy compensation payment as at 1 October 2005 or three months' salary calculated on the salary he was on at the time his position was disestablished and he was made redundant.

The parties' positions

[15] Mr Beauchamp said he did not know, and had no reason to believe, that the quantum of redundancy compensation specified in both the appendix to his 2008 letter of offer and 2011 individual employment agreement was erroneous. When he had accepted a new IMA in 2006 the redundancy compensation amount was referred to,

but not included, in the document he signed. He had not calculated the amount himself and had not asked his employer to provide him with a calculation.

[16] He accepted that, if he had done the calculation at that time, he would have realised, when he received the 2008 letter of offer, that the redundancy compensation amount was incorrect. As he had not done the calculation, he had no such realisation. Mr Beauchamp said his base annual salary increased by more than \$50,000 per annum in the IMA offered to him in October 2008. Although the amount of the frozen redundancy compensation payment was higher than he had expected, it did not seem implausible to him.

[17] He said he had commented on the amount to a Human Resources (HR) Advisor employed by NZDF and was reassured by her response. She had told him the amount was based on his grand-parented terms and conditions of employment and joked that, if she had a similar provision, she “would hope, nay seek, to be made redundant”. Mr Beauchamp said this conversation took place after he had signed the employment agreement and was returning it to her.

[18] The HR Advisor gave evidence to the Authority that she was not involved in the preparation of the 2008 letter of offer to Mr Beauchamp and did not know what it should have contained. She could not specifically recall having a conversation with him over the amount specified as his frozen redundancy entitlement but said that it would not have been unusual for her to have made such a flippant comment to him.

[19] If he had asked her to look more closely at the amount she said she would have researched it and contacted the person who had drafted the letter to ask him to verify the frozen redundancy compensation sum. As Mr Beauchamp did not ask her to investigate the amount, she said she had no reason to do so.

[20] Michelle (Shelley) Thompson, HR Manager for the respondent, gave evidence that it was a former manager who had prepared the redundancy calculations. That person was no longer employed by NZDF. She said the role of the HR Advisors was a “post box” in that they would facilitate the distribution of letters of offer to the relevant employees. They would then receive and forward the employees' acceptances to the appropriate personnel. The HR Advisors had not been involved in the preparation of the letters and their roles did not entail checking the calculations contained in them.

[21] Ms Thompson said she found it hard to accept that Mr Beauchamp had not noticed, and formally queried, the “obvious error” in the calculation of his redundancy compensation. In her view he had not acted in good faith in not bringing the error to his employer’s attention.

[22] Mr Beauchamp said he did not recognise the amount of the frozen redundancy calculation as being the same as his base salary as at 1 October 2006. He did not anticipate his position being made redundant at that time and those provisions were not his major focus. He denied realising the amount specified was a mistake, or deliberately concealing his knowledge of the error. Mr Beauchamp said he accepted the redundancy compensation amount specified in his employment agreement in good faith.

[23] By the time redundancy was becoming a real possibility during a restructuring of NZDF Finance in 2011, Mr Beauchamp said he had factored the amount of redundancy compensation into his decision-making. If he had known the compensation was intended to be limited to three months' salary he said it is likely he would have made more timely and strenuous efforts to obtain new employment at that time.

[24] Instead he said he focussed on retaining a role in Finance in the belief that he would have approximately nine months' salary in redundancy compensation to fall back on if his efforts were unsuccessful. Mr Beauchamp gave evidence that he did not obtain alternative employment until five months after leaving NZDF, and that was a relatively short-term role.

[25] He had become aware that NZDF intended to pay him \$42,778 in redundancy compensation only when he received written notification of his final working day at Defence. Mr Beauchamp said he immediately notified the Chief Financial Officer (CFO) of the discrepancy between that amount and the amount he expected to receive. He said he was subsequently informed that HR had made a mistake in inserting the sum of \$116,400 into his employment agreement as the value of his frozen redundancy compensation.

[26] In Mr Beauchamp's view both parties accepted the amount that was inserted into his 2008 employment agreement, and carried through into his 2011 agreement. No one raised any issue with the amount at the time, or at any time until Mr

Beauchamp was informed in writing of the details of his termination payment. He believed NZDF was contractually bound to honour the amount of frozen redundancy compensation specified in his employment agreement.

[27] In NZDF's view the figure of \$116,400 in Mr Beauchamp's employment agreement was a mistake and Mr Beauchamp was paid the amount of redundancy compensation to which he was entitled. It said Mr Beauchamp's 2003 employment agreement set out his entitlement to redundancy compensation and the intent of the provisions in the 2008 agreement was to freeze and preserve his entitlement as of 1 October 2005. Mr Beauchamp had been working for NZDF for one year and ten months at that time. NZDF said this gave him an entitlement to a redundancy compensation payment of six weeks' ordinary pay, which equated to \$13,430.77 on his then base salary of \$116,400.

[28] That was the amount NZDF said should have been inserted into Mr Beauchamp's 2008 employment agreement. In the event of redundancy he was entitled to that amount, or to three months' salary based on his salary at the time of the redundancy, whichever was the greater. NZDF said that, due to an error it was not then aware of, Mr Beauchamp's base annual salary as of 1 October 2005 was inserted into the agreement instead of the amount that represented six weeks' salary at that time.

[29] Counsel for NZDF, Mr McCall, submitted that the shared intention of the parties was evident from the history of the dealing between them. He referred to the 2003 employment agreement that had contained a redundancy compensation provision linked to tenure of service and salary. The value of the compensation was not to exceed \$42,000. The 2006 employment agreement had provided fixed figures from which, applying the formula in the previous employment agreement, the frozen redundancy entitlement could be calculated. That frozen figure was not intended to change over time.

[30] Mr McCall referred to the elements required for the test for rectification to apply as articulated by Tipping J in *Westland Savings Bank v Hancock*.¹ In that case the Court said it must be satisfied the following four points were established:

¹ [1987] 2 NZLR 21

- (1) That, whether there is an antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.
- (2) That such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
- (3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.
- (4) That the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.

[31] Mr McCall submitted that the facts of the current case satisfied all four elements. He said there was a shared intention between the parties that was evidenced by the 2008 employment agreement. The intention was to preserve Mr Beauchamp's frozen redundancy entitlement from 1 October 2005. The entitlement was to the amount of \$13,430.77, although this was incorrectly stated as being \$116,400 in the agreement.

[32] In NZDF's view that shared intention continued to exist in the minds of both parties in 2011 when they entered into their final employment agreement. The provisions were again intended to preserve Mr Beauchamp's entitlement to the frozen redundancy payment.

[33] NZDF's view was that Mr Beauchamp was well aware what the figure of \$116,400 was intended to represent and that when he sought to check the figure with an HR Advisor, he was raising the matter with the wrong person. He should have raised it with the author of the 2008 letter of offer, Major General Jones. Even so, he received confirmation of the intent behind the figure from the HR Advisor and, in Mr McCall's submission, both Mr Beauchamp and NZDF executed the 2008 and 2011 employment agreements in the mistaken belief that they contained the frozen redundancy compensation entitlement preserved in the 2006 agreement.

[34] The "objectively apparent" element was satisfied, in NZDF's submission, by the intention of the parties being formally communicated by being included in the 2008 and 2011 employment agreements. It was reconfirmed when Mr Beauchamp questioned the HR Advisor about the figure in the 2008 agreement.

[35] The final element of the rectification test would be satisfied, in NZDF's submission, if the 2011 employment agreement, which did not match the intention of the parties, were to be rectified by the replacement of the figure of \$116,400 with \$13,430.77 as the frozen redundancy entitlement.

[36] NZDF also noted that Mr Beauchamp accepted the risk of a mistake in the terms of his employment agreement by virtue of the "Accurate Data" provision contained in the letter of offer. This made it clear that, if there were a mistake in the agreement that was in Mr Beauchamp's favour, NZDF would correct it.

[37] In the event that the Authority determined rectification not to be available, Mr McCall submitted the CMA provided an alternative remedy where a party was influenced by a mistake to enter a contract.

Are there grounds for rectification?

[38] The remedy of rectification is available to the Authority under s. 162 of the Employment Relations Act 2000 (the Act). Judge Travis has described rectification as:

...an equitable remedy, preserved by the Contractual Mistakes Act 1977, available where an agreement has not been recorded in a way that accurately reflects the intentions of the parties. The party seeking rectification must show that there was a common intention between the parties prior to the contract being entered into and that the terms of the contract did not accurately reflect that mutual intention.²

[39] NZDF invites me to accept that it and Mr Beauchamp had a common intention regarding redundancy compensation when they entered into the 2008 and 2011 employment agreements. That common intention was that Mr Beauchamp was entitled to the greater of an amount calculated in accordance with the formula specified in Mr Beauchamp's 2003 employment agreement and based on his salary as at 1 April 2006, or three months' salary calculated on his base salary at the time of the redundancy.

[40] I find it most likely there was such a common intention at the time Mr Beauchamp entered into the 2006 employment agreement. However, I accept Mr Beauchamp's evidence that the possibility of redundancy was remote and therefore

² *Goodall v Department of Corrections* [2001] ERNZ 688 EmpC at [37].

not in his mind at the time of entering into that agreement. He was not provided with a redundancy calculation by his employer at that time and he did not ask for one to be provided. Therefore, the common intention of the parties regarding redundancy compensation referenced a formula rather than a quantified dollar value.

[41] That was not the situation when Mr Beauchamp entered into his 2008 employment agreement with NZDF. His salary had risen dramatically and the frozen redundancy compensation amount was now inserted into the letter of offer to him. I have no reason to doubt Mr Beauchamp when he says that, although he noted the redundancy compensation was higher than he had expected, it did not strike him as obviously wrong in light of the more than \$50,000 rise he had received to his annual salary.

[42] When he mentioned the amount of the redundancy compensation to an HR Advisor, the light-hearted response he received did not convey to him that he should query the matter at a higher level. I find it more likely than not that the conversation with the HRA occurred much as Mr Beauchamp described it. I also find the HRA's response was likely to have allayed any questions he may have had about the size of the redundancy compensation. I accept Mr Beauchamp's evidence that it did.

[43] I have considered Ms Thompson's view that Mr Beauchamp did not act in good faith in not bringing the frozen redundancy amount to his employer's attention more formally than commenting on it to an HR Advisor who had not been involved in its calculation. As NZDF provided no evidence that gave me cause to believe that Mr Beauchamp was anything other than a valued and honest employee who held a responsible senior management position I must reject her view.

[44] I also note that the wording of the letter of offer of 14 October 2008 which I have highlighted at paragraph 10 above makes it clear that, in the event of any inconsistency between the terms and conditions of employment between the letter of offer and any other document, the letter would prevail. The appendix containing Mr Beauchamp's frozen redundancy entitlement was stated to form part of the letter of offer.

[45] The list of documents making up the complete terms and conditions of Mr Beauchamp's employment included the standard NZDF IMA which he had signed in 2006. There was an inconsistency between the redundancy provisions of that IMA

and the letter of offer. The 2006 IMA referred to the formula by which Mr Beauchamp's frozen redundancy entitlement would be calculated while the 2008 letter of offer specified a dollar value for that payment that did not match that formula. The precedence accorded to the terms and conditions contained in the letter of offer would have reinforced Mr Beauchamp's acceptance of \$116,400 being the correct value of his frozen redundancy compensation entitlement if he had turned his mind to it.

[46] I accept that NZDF's intention was, and continued to be, that the formula in Mr Beauchamp's 2003 employment agreement would apply, and continue to apply, as his frozen redundancy entitlement and that the figure entered into his employment agreement did not accurately reflect that intention. I do not accept that Mr Beauchamp shared this intention when he agreed to vary his terms and conditions of employment in 2008. I find he accepted the accuracy of the amount entered into his employment agreement in 2008 and this superseded any earlier shared intention over the mechanics of arriving at that amount.

[47] It follows that by the time the parties entered into the 2011 employment agreement, which perpetuated the error over the frozen redundancy compensation, there was no shared intention regarding Mr Beauchamp's entitlement.

[48] In the absence of a shared intention which, as previously noted is an essential element for the test of rectification to apply, I find there are no grounds for rectification of the 2011 employment agreement as sought by NZDF.

Does the Contractual Mistakes Act 1977 apply?

[49] NZDF submits that, if the Authority determines Mr Beauchamp was aware of the mistake concerning the amount of his frozen redundancy compensation entitlement before the 2008 and 2011 employment agreements were executed, and further determines that rectification is not available, it should apply the provisions of ss. 6 and 7 of the Contractual Mistakes Act (the CMA).

[50] In essence section 6 provides that relief may be available to a party to a contract where that party was influenced to enter into the contract by a mistake; the mistake was known to the other party; and the mistake resulted in a substantially unequal exchange of values or the conferment of a benefit which was, in all the circumstances, a benefit substantially disproportionate to the consideration therefor.

[51] Counsel for NZDF submitted that the employer in this instance mistakenly believed both the 2008 and 2011 employment agreements contained the redundancy entitlement originally frozen, but not quantified, in the 2006 agreement. NZDF argues that its error results in an unequal exchange of values or the conferment of a benefit disproportionate to the consideration therefor. That error provides Mr Beauchamp with a frozen redundancy compensation entitlement more than \$100,000 higher than the amount intended to be frozen under the 2006 employment agreement. Counsel noted that the error also ignores the \$42,000 cap on redundancy payments that was part of the original redundancy entitlement provisions and intended to be preserved in the 2006 frozen entitlement.

[52] Mr McCall submitted it would be just for the Authority to vary the employment agreement, using its power under s. 7(3) of the CMA, to replace the sum of \$116,400 with \$13,430.77. He emphasised that his submissions regarding the CMA were made on the basis that Mr Beauchamp was aware of the error in his employment agreement and failed to take appropriate action to correct it.

[53] I find Mr Beauchamp was not aware of the error before he entered into the 2008 and 2011 employment agreements. I have accepted his evidence that, although he found the amount of his frozen redundancy compensation entitlement in the 2008 letter of offer to be higher than he had expected, he did not believe it to be incorrect. I have also accepted that he was reassured, after mentioning it to an HR Advisor, that he had no reason to query the sum.

[54] In these circumstances I find there are no grounds for varying Mr Beauchamp's employment agreement to reflect the amount of frozen redundancy compensation NZDF intended to apply.

Is the "Accurate data" provision relevant?

[55] This provision, which I have replicated at paragraph 13 above, first appeared in the final letter of offer given to Mr Beauchamp in January 2011. It appears to give NZDF the right to correct any mistake in favour of Mr Beauchamp that NZDF may have made.

[56] The second part of the provision gives the employer the right, if it becomes aware in the future that a mistake is in its favour, "to apply the calculations correctly especially if the information was known to be incorrect by you". I find that part of the

provision odd because if a mistake was discovered to be in NZDF's favour, and the employee knew it to be incorrect, it seems obvious that it would be in the employee's best interests to have that mistake corrected.

[57] Notwithstanding that puzzling wording, if the "Accurate data" provision had been included in the 2008 letter of offer to Mr Beauchamp, which might have been a sensible precaution for the employer to take, NZDF would have been entitled to rely on it when it discovered the error in the frozen redundancy compensation calculation. However, the 2008 letter of offer contained no such provision.

[58] Turning to the 2011 letter, its main purposes were to inform Mr Beauchamp about a new individual employment agreement he had the choice of moving to, and to identify the key changes the new agreement contained. The letter explained the key differences between the 2006 and 2010 employment agreements. These related to NZDF's move to a Total Remuneration basis, and annual leave provisions.

[59] Part of the letter identified the impact of the changes for Mr Beauchamp if he decided to move to the new employment agreement. It provided information about the changes to his superannuation arrangements and about the increased annual leave to which he would be entitled. The letter then informed him, under the heading "Variations", that his "current variation relating to a previously agreed frozen entitlement to redundancy provisions" would continue to be recognised.

[60] I find that NZDF cannot rely on the "Accurate data" provision in the 2011 letter of offer to correct the mistake made in the frozen redundancy compensation amount contained in the new employment agreement. There are two reasons for this. Firstly, the redundancy provision in the 2011 employment agreement was the same as that contained in the 2008 variation to Mr Beauchamp's employment agreement. The sum was not newly introduced in the employment agreement offered to Mr Beauchamp in 2011. NZDF is effectively asking that the 2011 "Accurate data" provision be used to correct, retrospectively, an error originally made in the 2008 variation and simply repeated in the 2011 agreement.

[61] Secondly, Mr Beauchamp's entitlement to the previously agreed provisions was confirmed by the 2011 letter under the heading of "Variations". The letter was stated to form part of his complete terms and conditions of employment if he accepted

the new employment agreement. In the circumstances I find he was entitled to rely on that confirmation in accepting the new agreement.

Determination

[62] Mr Beauchamp is entitled to receive the frozen redundancy compensation amount of \$116,400 specified in his 2011 employment agreement.

[63] NZDF is ordered to pay Mr Beauchamp the sum of \$73,622, being the difference between that amount and the \$42,778 it has already paid him.

Costs

[64] The issue of costs is reserved. Although Mr Beauchamp represented himself at the investigation meeting he incurred legal costs in preparation for bringing his claim to the Authority. He has indicated he is seeking a contribution to those costs.

[65] If the parties are unable to resolve the matter of costs between themselves they may make submissions to the Authority on the matter in the usual manner.

Trish MacKinnon
Member of the Employment Relations Authority