IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 8A/08
5108526

	BETWEEN	JEREMY QUENTIN COX Applicant
	AND	ALLIED TELESIS LABS LIMITED Respondent

Member of Authority:	Paul Montgomery
Representatives:	Phil Shamy and Tim Mackenzie, Counsel for Applicant Penny Shaw, Advocate for Respondent
Investigation Meeting:	14 February 2008 at Christchurch
Submissions received:	3 and 7 March 2008 from Applicant 4 and 7 March 2008 from Respondent
Determination:	28 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant lodged his claims with the Authority on 4 December 2007 seeking either an urgent interim injunction restraining the respondent from dismissing him on the ground of redundancy pending an investigation of all matters or, in the alternative, an interim order for reinstatement pending a full investigation. Further, he sought the determination of a dispute regarding the interpretation, application or operation of his Employment Agreement and an application for a compliance order relating to that agreement. The applicant also lodged a personal grievance and seeks remedies claiming his conditions of employment had been adversely affected to his disadvantage by the unjustified action of the respondent. Finally, he lodged an application for *damages and/or penalties* as a result of the respondent breaching his

Employment Agreement including its obligation to deal with him in good faith. He also seeks costs in respect to these proceedings.

[2] The respondent denies it has acted improperly in any way and refutes the applicant's claims declining the remedies he seeks from it. Further, it says by way of statement in reply dated 16 January 2008, that the orders sought by the applicant are not available to him.

[3] An application for discovery of documents held by the respondent allegedly relating to the respondent's practice when dealing with redundancies was heard on 17 January 2008 with both parties represented. The application was granted in part and a determination issued on 29 January 2008.

What gave rise to the problem?

[4] Mr Cox was initially employed by the respondent as a Finance Administrator in January 1995. The role was based in Christchurch. Following the sale of that business the applicant was offered and accepted the role of Regional Accountant based in Sydney, Australia, beginning work there in March 1997. His employer was a part of the Telesis Group named Securicor 3Net Pty Limited.

[5] In June 1997 Mr Cox was advised the company was closing its Australian operations and was offered a severance package based on the redundancy provisions in his then Employment Contract. The applicant accepted this offer and a Deed of Settlement was signed providing a redundancy payment based on three weeks' salary for each year of service and providing the employment would cease on 31 December 1997. During the period prior to the severance date Mr Cox facilitated the closure of the company's operations in Sydney, Melbourne and Brisbane.

[6] Fortunately, the applicant received an offer of ongoing employment as Regional Accountant based in Christchurch and commencing on 1 August 1997. The letter of offer from the Regional General Manager, Mr Mark Hutching included a redundancy provision of three weeks' salary per year of service. If accepted, the offer would nullify the Deed of Settlement signed with Securicor 3Net Pty Limited and the terms of the new agreement with that company's Christchurch operation included the provision of three weeks' salary per year of service.

[7] Mr Cox completed the winding up of the Australian operation and began work in the company's Christchurch office on the scheduled date of 1 August 1997. Upon his return the applicant learned that Mr Hutchings had taken voluntary redundancy and that the financial aspects of the role he had held were merged with those of the Regional Accountant role to which Mr Cox had been appointed.

[8] Mr Cox, after beginning his new position, made *numerous requests* for an employment contract as he had only the signed and countersigned letter of offer. He also specifically requested, in November and December 1997, his three month review be conducted; a discussion regarding the Securicor 3Net Deed of Release which contained a severance date of 31 December 1997; and the issuing of a New Zealand based employment contract.

[9] On 16 December Teltrend UK Limited sent a fax to the applicant asking him to sign a retraction of the termination due to redundancy in Australia, but the fax did not address his other requests. Mr Cox was not prepared to sign this agreement as he had no employment contract in place and still awaited the three month review. The applicant replied on 17 December by faxed letter.

[10] The applicant says Mr Kirkland *misinterpreted this* (the applicant's) *letter believing that it discussed the redundancy provisions in the letter (from Mr Mark Hutching) of 24 July 1997, of [sic] which are currently at issue* (in these proceedings). He says his letter was to request an employment contract as he had been in his new Christchurch role for five months. Further, he says the reference to redundancy issues in his letter related to the severance package offered by Securicor 3Net Australia, and had nothing to do with the offer of three weeks' salary per year of service in the letter of 24 July from Mr Hutchings.

[11] The pivotal issue to these proceedings, is the Employment Contract, issued and signed on 19 December 1997 which is silent on the redundancy issue. However, it contains the statement at 1.2 *This agreement replaces all previous agreements between the Company and the Employee*. Mr Cox says he was unconcerned *as it was detailed in the letter of offer* which he accepted and countersigned. He said in evidence *Teltrend's standard Employment Contracts at the time were always silent as to redundancy, and the company's standard policy was to have these provisions contained in company policy or other documents issued to staff, for example the letter of offer*.

[12] Mr Cox also said he had confirmed this was the company's approach by speaking with Mr Kirkland and a Mr David McKeige, the then Managing Director of the company which was previously Teltrend, who concurred that this was correct.

[13] After receiving and signing the Employment Contract, Mr Cox signed the Deed of Release accepting that as ongoing employment had been offered and accepted, no redundancy payments for the termination of his Australian role was payable. He says *I had nothing to do with the New Zealand contract and the agreement recorded in the letter of offer for the Christchurch role.*

[14] On 4 May 2005 Mr Cox was provided with a new Employment Agreement to be signed by 13 May 2005. It contained an explicit clause stating that in the event of redundancy, no redundancy compensation was payable. After taking advice, Mr Cox declined to sign the agreement because he was not prepared to surrender his entitlement which he saw as contained in the original offer for the Christchurch position.

[15] The applicant's position was declared redundant and his final day of employment was set by the respondent as 7 November 2007. The company accepted his application for an alternative position on 13 November and he says he was unable to seek alternative employment until notified of his unsuccessful bid on 28 November 2007.

[16] The respondent's position is represented by the evidence of Dr Alan Miller, the Managing Director of Allied Telesis Labs Limited, an appointment he accepted in August 2006. He first joined the company as a Product Manager in November 2001. He says

> *In the last 20 months as Managing Director, it has been my policy to pay one month's notice plus two months' salary compensation in the case of redundancies, even though employee's contracts do not provide for any entitlement to redundancy compensation. I made a decision to make these payments, not because of any obligation to do so but in an attempt to be a "good employer" while also taking into account costs to the business of making a redundancy payment. … We were not obliged to make any redundancy payment at all, in fairness to those being made redundant and as a good employer, I did recommend and approve redundancy payments. … This formula was arrived at in preference to a formula based on length of service to minimise and cap the financial cost to Allied Telesis; in past redundancies where a length of service formula (two weeks per year of service) was used, Allied Telesis had a workforce with a lower average length of service.*

[17] Dr Miller says that the company offered this package to the applicant who declined to accept it as it varied considerably from that to which he believes he is entitled.

Issues

[18] In order to determine this matter the Authority needs to make findings on the following issues:

- Given the genuine redundancy of Mr Cox's position, was he entitled to redundancy compensation; and
- If entitled to redundancy compensation, what formula was to be applied in determining quantum; and
- Was the applicant disadvantaged by the allegedly unjustified action of the respondent, and if so, what remedies are appropriate; and
- Was there a breach of the applicant's Employment Agreement by the respondent; and
- If there was a breach of its good faith obligations, is it appropriate to level a penalty against the respondent?

The tests

[19] In regard to the dispute regarding the interpretation, application or operation of the agreement, the test is to determine the facts of this specific case and compare those facts with contractual documents between the parties and with the respondent's practice when paying redundancy compensation.

[20] In respect to the applicant's personal grievance claim, the test is as set out in s.103A of the Employment Contracts Act 2000 and its amendments. This requires the Authority to determine whether an action was justifiable on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

The investigation meeting

[21] At the investigation meeting the Authority was assisted by the evidence of Mr Cox and that of Ms Rosemary Lynn who had deposed an affidavit and also attended the meeting in person. The Authority took the opportunity to have her give her evidence orally and allowed the respective representatives to question her on it. Ms Lynn was formerly employed by the respondent as Human Resources Manager from 5 May 2006 to 30 March 2007.

[22] An affidavit was also provided by Ms Natalie Lombe. Ms Lombe was unable to attend owing to having had surgery just prior to the investigation meeting being conducted. She had been employed by the respondent as the Human Resources Director between September 2003 and July 2005 and the Authority and representatives questioned her by teleconference.

[23] Mr Simon Locke also provided an affidavit to the Authority confirming he had been employed by the respondent as Engineering Manager from 1 November 1994 to 20 April 2005 when his role was disestablished. The affidavit confirmed that his Employment Contract contained no specific clause regarding the redundancy but *in accordance with standard company practice my redundancy payment was calculated on the basis of four weeks in lieu of notice and two weeks per year for service or part thereof*.

[24] On behalf of the respondent, Dr Alan Miller, the respondent's Managing Director, gave comprehensive evidence. Mr Mark Hutchings also gave evidence before the Authority.

[25] I record the Authority's appreciation for the assistance of all witnesses and for that of the representatives. Although a little more complex in content than many matters before the Authority, the conduct of the witnesses and representatives ensured focused was maintained and the meeting concluded within a day.

Discussion and analysis

A. The redundancy dispute

[26] The key documents which throw light on this aspect of the case are:

- The letter of 24 July 1997 from Mark Hutchings providing *ongoing employment* and confirming a redundancy provision *as per current agreement ie three weeks for each full year of employment.*

- The contract dated 19 December 1997 which confirms that *employment under this agreement forms a continuous period of employment which began on 27 January 1995* and which is silent on redundancy compensation. This was signed by the applicant and the respondent.

[27] Another factor to be weighed is the evidence of Dr Miller regarding the policy he applied following his appointment as General Manager and referred to above in this determination.

[28] Regardless of whatever conditions applied to Mr Cox's contract in Australia, Mr Hutching's letter of 24 July 1997 clearly establishes the applicant's entitlement, in the event of redundancy, to a compensatory package based on three weeks salary per full year of service to the company.

[29] It is clear that Mr Cox signed the 19 December 1997 contract, silent though it was on the redundancy compensation issue in reliance on Mr Hutching's letter of offer.

[30] The critical question is simple; does the respondent, having given an explicit undertaking as to how Mr Cox would be compensated in the event of his position being declared redundant, have the right to withdraw that undertaking without explicit notice to him?

[31] The respondent relies on the omission of any reference to entitlement to redundancy compensation in the 19 December 1997 contract and on clause 1.2 quoted above. There was no evidence before the Authority which specifically informed him that in signing the 19 December 1997 contract, Mr Cox would surrender his right to three weeks' redundancy compensation per year of service.

[32] It has also to be borne in mind that the applicant for some months had sought a New Zealand based contract from his employer which was now based in the United Kingdom. The proposed contract arrived by fax on 18 December 1997, was silent on the matter of redundancy compensation and was signed by the applicant in reliance of the genuine commitment of his New Zealand manager that in the event of his position

being declared redundant, his compensation would be calculated on the basis of three weeks' salary per year of service.

[33] I have carefully considered the evidence of Dr Miller. The Authority has no quarrel with the policy of paying a month's notice and two months' salary to those employees being made redundant regardless of any written contractual entitlement. His authorising such a payment regardless of contractual entitlement does him credit.

[34] The difficulty in this specific case is that, regardless of his policy, the applicant had a written undertaking from Mr Hutchings, that his entitlement was for three weeks per year of service.

[35] I am persuaded by the evidence before the Authority, and particularly by Mr Hutchings genuine inability to record the events and details some eleven years later, that the applicant's claim based on Mr Hutching's letter of 24 July 1997 needs to stand.

[36] The reasoning is this: an explicit term cannot be overturned by an omission in a later contract. Fair dealing and good faith requires explicit advice that a previously agreed term of employment be explicitly excluded in a later contract or by a written agreement.

[37] While bearing in mind Dr Miller's policy, the fact is that Mr Cox was not explicitly advised of any change to the company's policy in a redundancy setting prior to his Christchurch position being declared to be surplus to requirements. The applicant's refusal, on advice, to sign the contract presented to him in May 2005 which explicitly barred any compensation for redundancy is consistent with the applicant's reliance on the clear terms of Mr Hutching's letter.

[38] As a result of the discovery ordered in the Authority's preliminary determination, the respondent provided the Employment Agreements of 15 employees declared redundant immediately prior to Mr Cox and that of one employee declared redundant after Mr Cox. The synopsis provided and a study of these documents, indicate that redundancy compensation paid prior to May 2007 was paid on the basis of a formula involving length of service, specifically, two weeks' salary per completed year of service.

[39] From 16 May 2007 the practice changed to two months' salary compensation regardless of service duration.

[40] It is also clear that payments were made where individual contracts or agreements either excluded or were silent on redundancy compensation.

[41] What distinguishes Mr Cox's situation is the letter of offer from Mr Hutchings. Whether the offer of three weeks salary for each year of service is a mistake on Mr Hutchings' part is not important. What is important is that is what he offered and what Mr Cox accepted. Mr Hutchings, in reply to a question from the applicant's counsel at the investigation meeting, clearly agreed that Mr Cox had relocated to Christchurch on the basis of his letter of offer.

[42] The Authority accepts the respondent has altered its view as to how redundant employees are to be compensated. The difficulty it faces in respect to Mr Cox, is the undertaking in the 24 July 1997 letter on which, among other considerations, he was entitled to rely, and continue to rely in spite of any policy alteration by his employer.

B. The alleged personal grievance

[43] The applicant alleges he had been disadvantaged by the respondent's unjustifiable actions in not paying his redundancy compensation in accordance with the bargain struck with Mr Hutchings and recorded in his letter.

[44] Where a personal grievance is at issue in a matter before the Authority, the Authority seeks evidence of hurt and humiliation in order to justify any claim for compensation. This is often presented by those close to the grievant rather than the grievant personally.

[45] In this matter, very little evidence of distress was put before the Authority. None was provided by family or colleagues. In such circumstances the Authority, while accepting the frustration and anger of an applicant at his employer's balking at paying him what he sees as due, must consider evidence before it not only feelings endured by an applicant.

[46] The evidence from Mr Cox on the effects of the respondent refusing to pay him the compensation due was restricted to a letter from his general practitioner put before the Authority. It reads:

I saw Jeremy on 8 November 2007. My clinical note reads:

> *Going through redundancy at work. Stressed. Anxiety. Upset stomach. Managing okay without medication. Discussed.*

Yours faithfully
Simon Carson

[47] There is no doubt that any employee suffering the loss of employment will commonly experience symptoms such as those outlined in Dr Carson's letter. The difficulty facing the Authority in this case is determining whether or not the actions of the respondent can be classed as unjustifiable where a dispute exists between the parties as to the basis of the redundancy compensation payment. It is difficult for the Authority to isolate in any case, those reactions which spring from the contest between the parties regarding quantum and the actual loss of the job itself.

[48] Given the relatively sparse evidence before the Authority in respect to the personal grievance application, I am unable to accept that this aspect of Mr Cox's claim has been made out. Accordingly, I am unable to award any compensation under this head.

Determination

[49] Returning to the issues set out above in this determination, I find:

- Mr Cox is entitled to redundancy compensation upon his employment being terminated by the respondent.

- The formula to be applied is that set out in the 24 July 1997 letter, that is, three weeks salary for each full year of service. This payment of compensation is distinct from any payment in respect of notice.

- The evidence of the alleged disadvantage falls short of establishing a personal grievance especially when at the heart of this matter is a dispute over the operation and interpretation of an agreement. The personal grievance application is declined.

- A dispute existed between the parties and while there was spirited debate on the part of each, no breach of Mr Cox's Employment

Agreement has been made out and the application for penalties is declined.

[50] I order the respondent to comply with the terms set out in the 24 July 1997 letter in respect of the applicant's redundancy compensation entitlement within seven days of the date of issue of this determination. Counsel are to confer to establish the quantum with leave reserved to approach the Authority in the event of disagreement.

[51] I order the respondent, under s.11 Schedule 2 of the Act to pay the applicant interest on the quantum established at the 90 day Bill rate set at the date of issue of this determination. The period to which interest applies is to begin on the date on which Mr Cox's notice period expired and finish on the date on which payment is made.

Costs

[52] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority