IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 190/10
5282015

	BETWEEN	BEN CHRISTENSEN Applicant
	AND	BP OIL NEW ZEALAND LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	E Davies, Counsel for Applicant S Turner and N Van der Sluis, Counsel for Respondent
On the Papers:	17 December 2009 from Respondent 23 December 2009 from Applicant
Determination:	27 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] There is a dispute concerning the interpretation and/or application of the redundancy provisions contained in the applicant's employment agreement, and the redundancy policy of the respondent, BP Oil New Zealand Limited ("BP Oil"). Mr Christensen seeks a determination declaring that BP Oil is required to pay him a redundancy payment of six months' pay for his first year of service (commencing 29th July 1992) and one month's pay for each of his subsequent years of service in accordance with his employment agreement dated 13th July 2005 and the BP Oil redundancy policy available on the company intranet. BP Oil does not accept Mr Christensen's interpretation of his employment agreement, or the BP Oil redundancy policy.

Background Facts and Evidence

[2] On 29th July 1992, Mr Christensen commenced his employment with CORO Trading New Zealand Limited ("CORO") as a forecourt attendant. At all relevant times, CORO[1] was a 100% owned subsidiary of BP Oil. In June 2005, Mr Christensen accepted an offer of employment with BP Oil. The terms and conditions of Mr Christensen's employment were set out in a letter to him from Mr Alan Osborne, Human Resources Manager for the Company, dated 23rd June 2005. The transfer of Mr Christensen's employment from CORO to BP Oil was effective from 1st July 2005.

The terms of Mr Christensen's employment agreement

[3] The relevant provisions pertaining to the matters requiring determination are as follows:

3.8 Previous CORO Service: *Your previous service with CORO as a permanent employee will be recognised for benefit purposes as follows:*
Employee Share Plan - *……*
Retirement Plan - *……*
Termination for Redundancy reasons *– previous CORO service will qualify towards any future redundancy compensation. Any compensation is governed by BP policy in accordance with clause 16.*

9.4 Termination for Redundancy reasons

9.4.1 *In the event that your employment is terminated for redundancy reasons, you may, at BP's discretion, receive redundancy compensation. Any compensation is governed by BP policy in accordance with clause 16.*

16. BP POLICY

16.1 *BP has a Human Resources Policy on their Intranet, which covers many of BP policies and procedures that impact on its employment relationship with its staff. You must ensure that you know the policies and comply with them at all times. BP endeavours to keep the Intranet up to date, taking into account changes in the law and the necessity to meet the changing needs of the business and therefore from time to time BP may at its discretion, change aspects of the Intranet on reasonable notice to you.*
Examples of BP policies are:
(a) *……*
(b) *……*
(c) *……*
(d) *redundancy compensation*

[1] Company Owned Retail Outlets. The parties have agreed to use this as the common abbreviation, albeit an alternative (COCO- Company Owned, Company Operated) appears in some documents.

Where there is any conflict between the Intranet and this contract, the contract prevails.

21. COMPLETENESS

This contract replaces all previous written or oral agreements and understandings.

The BP Oil redundancy policy

[4] The redundancy policy provides for compensation to be paid in the event that an employee is made redundant. The formula that applies varies, depending upon when an employee commenced their employment with the company, with the effect that three different calculations can apply:

Version One

The policy on redundancy and early retirement compensation payments provided to salaried staff is as follows:

First Year of Service	*Six months' pay based on Pensionable Base Salary*
Each Subsequent Year of Service	*One month's pay based on Pensionable Base Salary*

The maximum payment is 28 months' salary (which equates to 23 years service. Service is calculated on a daily basis.

Version Two

The policy on redundancy and early retirement compensation provided to salaried staff commencing employment effective 1 July 1999 or thereafter is as follows:

Each completed Year of Service	*One month's pay based on Pensionable Base Salary*

The maximum payment is 23 months' salary (which equates to 23 years service). Service is calculated on a daily basis.

Version Three

The policy on redundancy and early retirement compensation provided to Salaried Staff commencing employment effective 1 January 2003 or thereafter is as follows:	
First Year of Service	*Eight weeks' pay based on Pensionable Base Salary*
Each Subsequent Year of Service	*Two weeks' pay based on Pensionable Base Salary*
The maximum payment is 12 months' salary (which equates to 23 years service). Service is calculated on a daily basis.	

The policy also provides that:

> *BP Grosses up tax on all such payments for all service up to 31 December 1995 for all staff to whom the redundancy and early retirement policy would normally apply. Should the tax rate increase BP shall not pay more than the current rate of tax on such payments. Should the tax rate decrease, the rate in effect at that time will apply. Tax on redundancy and early retirement payments relating to service from and including 1 January 1996 will be paid where it falls due. Under current law the employee receiving the payment would pay the tax due.*

[5] Mr Christensen says that the above provision should also apply to him and he should have the benefit of the tax advantages related to his service from 29th July 1992 to 31st December 1995, albeit he did not commence his employment with BP Oil until 1st July 2005.

Mr Christensen's Redundancy

[6] On 4th August 2009, it was confirmed in writing that the employment of Mr Christensen would be terminated by reason of redundancy with effect from 30th October 2009. The redundancy payment received by Mr Christensen is set out in the letter and he is informed it; "… *includes your 13 years COCO service* … "

[7] On 11 August 2009, Mr Christensen sought from Mr Osborne, details of how his redundancy entitlement was calculated and was informed the next day that it was based on:

COCO service – 13 years = 28 weeks = $32,953.85 gross

BP service – 4 years 122 days = 14.668 weeks = $17,263.69 gross.

Mr Christensen was not satisfied that BP Oil calculated his redundancy payment (total $50,217.54 gross - $31,134.88 net) entitlement correctly and sought legal advice.

The issues to be determined

[8] The argument for Mr Christensen is that his redundancy compensation payment should have been calculated according to Version One (above). This argument is based on a relatively simple premise. This is that, in accordance with the relevant provisions of his employment agreement, in particular clause 3.8, whereby his previous service with CORO is to be recognised for "*benefit purposes*" including "*Termination for redundancy reasons*" and the BP Oil redundancy policy, his redundancy entitlement should have been the gross sum of $113,515.80.

[9] But BP Oil say that whenever it has calculated the redundancy compensation due to an employee such as Mr Christensen, who has had previous service with CORO, it has always differentiated between the employee's service with CORO and his service with BP Oil. The Company also says that it has never paid redundancy compensation to an employee with previous CORO service based on the formulas set out in the BP Oil redundancy policy and that these formulas have only ever been applied to an employee's service with BP Oil.

[10] In regard to the compensation paid to Mr Christensen, BP Oil calculated it as follows:

(a) $32,953.85 (gross) for his CORO service – 13 years capped at 28 weeks and based on the CORO 4 + 2 formula; and

(b) $17,263.69 (gross) for his BP service – 4 years and 122 days of service based on the BP 8 + 2 formula.

[11] BP Oil says that Mr Christensen's interpretation of clause 3.8 of the employment agreement is not supported by the background to his terms of employment. The Company says that Mr Christensen's interpretation ignores the fact that there is no formula for calculating redundancy referred to in the employment agreement for the purpose of calculating compensation for CORO service. BP Oil says that it has previously advised that the Company does not recognise past service with CORO for the purpose of calculating redundancy compensation. The Authority has been referred to letters dated 14th March and 17th March 1997 which were sent to

affected employees at that time, albeit Mr Christensen was not employed by BP Oil then. The salient content of the letters is:

> *The company's position has always been that it has no obligation to recognise past service with CORO for the purposes of calculating redundancy compensation, and this remains the case.*

However, in recognition of the contribution that previous CORO employees had made to BP Oil the Company advised that:

> *… in addition to your contractual entitlement to redundancy compensation pursuant to your present contract with BP Oil, in the event that you are made redundant we are prepared to make a further ex gratia payment based on your previous service with CORO and in accordance with the CORO compensation formula, i.e. four weeks for the first year of service with CORO plus two weeks for each subsequent year. The maximum payment made to any one employee shall be 28 months pay (including payment in respect to service with BP).*

[12] Finally, BP Oil says that while the employment agreement recognises overall service, it differentiates between Mr Christensen's service with CORO and service with BP when calculating redundancy compensation.

Analysis and Conclusions

[13] In regard to the interpretation of the terms of the employment agreement, as has been submitted by both parties, the starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning.[2] Therefore, it seems to me that firstly, clause 21 of Mr Christensen's employment agreement has a very plain meaning:

This contract replaces all previous written or oral agreements and understandings.

The obvious effect being that, upon commencing his employment with BP Oil, any terms and conditions pertaining to his previous employment with CORO were revoked and replaced by his new employment agreement.

[14] I also conclude that the relevant words of clause 3.8 of the agreement are clear and unambiguous:

> ***Termination for Redundancy reasons*** *– previous CORO service will qualify towards any future redundancy compensation. Any compensation is governed by BP policy in accordance with clause 16.*

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[2] *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd* [2006] ERNZ 1005.

Breaking the clause down into its components:

"- previous CORO service / will qualify / towards any future redundancy compensation" and:

"Any compensation / is governed by BP policy / in accordance with clause 16."

[15] That takes us to clause 16 of the agreement which is also clear and unambiguous and does not appear to be disputed by the parties. From clause 16 we move to the redundancy policy. As Mr Christensen commenced his employment with BP Oil after 1st January 2003 (1st July 2005) I conclude that his redundancy compensation entitlement falls within Version Three of the above applicable options:

The policy on redundancy and early retirement compensation provided to Salaried Staff ***commencing employment effective 1 January 2003 or thereafter***[3] *is as follows:*

First Year of Service	*Eight weeks' pay based on Pensionable Base Salary*
Each Subsequent Year of Service	*Two weeks' pay based on Pensionable Base Salary*

The maximum payment is 12 months' salary (which equates to 23 years service). Service is calculated on a daily basis.

I conclude that the argument for Mr Christensen that Version One should apply is erroneous. This is because while Mr Christensen commenced his employment with CORO in 1992, and under the terms of clause 3.8 of the employment agreement, his "*previous years of service with CORO"* are "*recognised <u>for benefit purposes</u>,"* the actual and real commencement date of 1st July 2005 must stand alone as the beginning of his new employment with BP Oil, being a different and separate legal entity with whom he entered into a new employment agreement.

[16] And the argument for BP Oil, that because Mr Christensen was previously employed by CORO, the BP policy in regard to redundancy compensation, does not apply, cannot be right, given the plain and unambiguous words of the employment agreement to the contrary. This may be different for employees who received the 1997 letters (I do not know) but as Mr Christensen did not commence his employment until 2005, and in the absence of any other agreement with him, I have no hesitation in finding that it is the specific terms of his employment agreement that must prevail

[3] Emphasis added.

and these must be read in conjunction with the BP Oil redundancy policy that applied at the time that Mr Christensen was made redundant.

Determination

[17] For the reasons set out above, I find that neither of the substantive arguments advanced for the respective parties can be upheld. Rather, I conclude that the terms of Mr Christensen's employment agreement are clear and unambiguous and he should have his redundancy entitlement calculated by taking into account all of his previous years of service back to 1st July 1992, consistent with clause 3.8 of the employment agreement and Version Three of the BP Oil redundancy policy.

[18] I also find that Mr Christensen is able to obtain the tax benefits related to "grossing up" under the redundancy policy for the period from 1st July 1992 to 31st December 1995. This is because I conclude that the grossing up provision is a "***benefit***" under clause 3.8. And under the redundancy policy, in regard to compensation payments:

> *BP Grosses up tax on all such payments for **all service** up to 31 December 1995 for **all staff** to whom the redundancy and early retirement policy would normally apply.*

I conclude that Mr Christensen's circumstances fulfil all the substantive criteria in regard to the words emphasised.

[19] To summarise, it appears that in regard to the calculation of Mr Christensen's entitlement calculated on his previous total service, the effect of my findings would be to leave him in a somewhat worse position than he is currently in because, as BP Oil has pointed out, it has given him the advantage of having his first year of service at both CORO and BP Oil calculated on the basis of four weeks' pay for the first year of service at CORO, and eight weeks' pay for his first year of service with BP Oil. The effect being that if my findings were to be applied, Mr Christensen would be entitled to payment for his total service of 17 years and 122 days on the following basis:

First year of service	8 weeks' pay
Each subsequent year of service (16 years +122 days)	32.668 weeks' pay
Total:	40.668 weeks' pay

But on the calculation applied by BP Oil, Mr Christensen received payment for a total of 42.668 weeks.

[20] I have determined the matter of the correct (in my view) interpretation and application of Mr Christensen's employment agreement, and the BP Oil redundancy policy, with the effect that Mr Christensen's substantive claim for the order sought must fail. Indeed, the effect of my findings is that Mr Christensen is currently somewhat better off under the BP Oil calculation. On the other hand, Mr Christensen is entitled to the tax benefit of the grossing up provision of the redundancy policy which will result in an advantage to him for the period identified. While I do not feel it is appropriate to make an order on that matter and I leave it to the parties to arrive at a suitable outcome, it would seem fair and reasonable for a set off to be considered and I make no order for interest accordingly.

Costs

[21] Given the outcome of this determination, it is appropriate that costs should lie where they fall. It is so ordered.

K J Anderson
Member of the Employment Relations Authority