Determination Number: CA 180/06
File Number: CEA 190/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Jack Crimmins (Applicant)
AND	McVicar Timber Group Ltd (Respondent)
REPRESENTATIVES	David Fleming, Counsel for Applicant Peter D Zwart, Advocate for Respondent
MEMBER OF AUTHORITY	James Crichton
FURTHER MEETING	21 November 2006
DATE OF DETERMINATION	21 December 2006

DETERMINATION OF THE AUTHORITY

History

[1] I had dealt with the substantive matter between these two parties in a determination dated 12 December 2005.

[2] In that determination, inter alia, I decided that Mr Crimmins was entitled to redundancy compensation and I directed that the parties were to negotiate with each other to determine the quantum of that redundancy compensation.

[3] In the event that the parties were unable to resolve the matter within a reasonable time, I reserved leave for them to revert to the Authority.

[4] The parties have not been able to resolve matters between them and accordingly have applied to the Authority for the matter to be determined. All other matters between them have been resolved, either by agreement or by way of my original determination of 12 December 2005.

[5] It was originally contemplated that the determination of quantum could be dealt with on the papers; however it became clear that each party had a witness they wished me to hear and accordingly a further investigation meeting was scheduled for 21 November 2006.

The law

[6] The leading case on the legal principles involved is *Canterbury Spinners Ltd v. Vaughan* 1 ERNZ 255 (CA).

[7] The importance of this decision is that it confirms that the Authority may set a redundancy payment where negotiations between the parties have failed, provided the relevant provision in the employment agreement, properly construed, allows for that possibility.

[8] There was a view, advanced by the Authority at first instance in the *Canterbury Spinners* case that the effect of s.161(2) of the Employment Relations Act 2000 precluded the Authority, as a matter of principle, from setting a redundancy payment because of the belief that such an act would constitute a determination about a matter relating to *bargaining*.

[9] The Court of Appeal decision effectively disabuses the Authority of that view but only in the context of the Authority having first satisfied itself that the relevant contractual provision does allow for the possibility.

[10] There are two relevant provisions in the employment agreement. Clause 17.5 contains the following statement having referred to the notice that redundant employees will receive:

> *The terms and conditions of such redundancy shall be negotiated by the employer and the Union (refer to the Schedule re yard closures).*

[11] That schedule is in fact Schedule A of the agreement and it contains the following relevant provision:

> *Where relocation is not an agreed option between the parties then redundancy compensation will be paid to the affected employee.*
>
> *The calculation of the redundancy compensation will take into consideration the impartial statistics recorded by Victoria University for the timber industry.*

[12] In my opinion, the evidence discloses that the parties have negotiated with each other as to how the calculation of the redundancy payment for Mr Crimmins is to be arrived at and they have not been able to reach any conclusion as to that calculation. By the Authority determining what that redundancy compensation for Mr Crimmins ought to be, there is in my opinion no sense in which the Authority is making *a determination about any matter relating to – (a) bargaining; or (b) the fixing of new terms and conditions of employment*: s 161 (2) Employment Relations Act 2000.

[13] This is a case where the parties have tried and failed to reach an agreement based on the relatively sketchy guidelines provided in the collective employment agreement. It cannot be fair and equitable as between the parties for Mr Crimmins to be denied consideration of any redundancy compensation simply because the parties are unable to agree its quantum; if for no other reason than the Authority's equity and good conscience jurisdiction, Mr Crimmins is entitled to the calculation being made and the matter being determined so that both parties can conclude the matter and move on.

The parties' positions

[14] Mr Crimmins submits through his Union that he is entitled to receive redundancy compensation calculated in accordance with the relevant Victoria University of Wellington statistics (the publication).

[15] Specifically, it is suggest that Mr Crimmins should receive six weeks pay for his first year of service and two weeks pay for each subsequent year, capped at a total of 44 weeks.

[16] While conceding during questioning that the Authority could properly consider matters other than the Victoria University statistics in determining the quantum of redundancy compensation, Mr Crimmins' position, by way of submission is that regard should only be had to the University statistics.

[17] For their part, the McVicar Timber Group Limited (McVicars) urge me to award no redundancy compensation to Mr Crimmins or to award less redundancy compensation than the Union claims for Mr Crimmins on the basis that:

(a) Mr Crimmins was, it is said, offered an alternative position in exactly similar terms to the one he was vacating; or

(b) In the alternative, the Authority should consider alternative evidence extraneous of Victoria University of Wellington statistics as to what appropriate redundancy compensation might be; or

(c) In the further alternative, the Authority should consider Victoria University statistics which go beyond the statistics referred to in the contracted provision that related to *the timber industry*.

Issues

[18] There are a number of challenges to determining this matter and it is appropriate to define these now. The first challenge is to decide the meaning of the first paragraph of the relevant provision in Schedule A of the agreement which is set out in paragraph 10 above.

[19] Then I need to decide the meaning of the second paragraph of the relevant provision in Schedule A of the agreement which is also set out in paragraph 10 above.

[20] Next I need to consider if I should consider matters other than the *relevant* statistics from Victoria University.

[21] Finally, having made the various decisions contemplated by the issues I have just identified I need to make the necessary calculation.

When is redundancy compensation paid?

[22] The first paragraph of the relevant provision in Schedule A says:

> *Where relocation is not an agreed option between the parties then redundancy compensation will be paid to the affected employee*.

[23] McVicars say they offered Mr Crimmins a new job on exactly similar conditions to the one he was vacating by reason of restructuring and that that offer was *an offer of alternative employment rather than relocation.* If that argument were to be accepted then that would provide further support to McVicars' position that the redundancy compensation should be set at zero.

[24] McVicars say they accept my earlier determination that Mr Crimmins is redundant and therefore the redundancy provisions in the contract fall for consideration. The fact is that relocation was not *an agreed option between the parties* so redundancy compensation is triggered in consequence. If, as McVicars claim, Mr Crimmins turned down an exactly similar job then that presumably calls into question the genuineness of the original redundancy.

[25] The factual position which I disposed of in my earlier determination is that McVicars only made their job offer after they saw the redundancy claim advanced by the Union on Mr Crimmins' behalf and the Union only advanced that claim after McVicars' Mr Ockenden told the Union's organiser that Mr Crimmins was *in a redundancy situation* and invited the Union to submit a claim for redundancy compensation: Paragraphs 40-44, determination number CA 161/05 dated 12 December 2005.

[26] In the circumstances I do no consider that McVicars acted in good faith to genuinely offer an alternative similar position; I have already disposed of this issue and no fresh evidence has been advanced which would encourage me to change my view. I do not think Mr Crimmins was made *a genuine offer* by McVicars and I reject their submission that I should take that into account.

[27] It follows that I think the paragraph in question should have its ordinary meaning; given the clear absence of agreement on relocation, redundancy compensation is payable.

[28] For the sake of completeness I deal now with McVicars' argument that it is available to me to determine the compensation payable at zero. I do not believe that the relevant provision in Schedule A can be construed in this way. The first paragraph refers to the fact that after the trigger event *redundancy compensation will be paid*. It seems to me to do violence to common sense to say that this provision could be construed to mean that the compensation that will be paid is nothing.

[29] Further, the second paragraph of the relevant provision commences with the phrase *the calculation of the redundancy compensation ….* It is difficult to see how there can be a *calculation* if there is in truth no calculation at all because the compensation is zero. Calculation must be given its ordinary meaning which is defined in the Concise Oxford Dictionary as either *the act or process of calculating, a result got by calculating or a reckoning or forecast.* Each definition implies or requires a mathematical computation which cannot be required if the compensation is zero rated.

The Victoria University statistics

[30] The second paragraph of the relevant provision in Schedule A says:

> *The calculation of the redundancy compensation will take into consideration the impartial statistics recorded by Victoria University for the timber industry.*

[31] I accept the submission of Mr Crimmins' counsel to the effect that the appropriate collection of statistics is the one for the period 2003-2004 entitled *Employment Agreements: Bargaining Trends and Employment Law Update*.

[32] The contractual provision requires reference to the *impartial statistics recorded by Victoria University for the timber industry*. There are in fact no particular statistics recorded by Victoria University of Wellington for the timber industry. The appropriate industry group is *wood and paper manufacturing*.

[33] There was evidence at the second investigation meeting about why the agreement refers to *the timber industry* and the Victoria University publication (the publication) refers to *wood and paper manufacturing.* Susan Stewart, who was the Union's lead negotiator, said it was simply a mistake and it became clear that she had provided the employer with a copy of the publication during the negotiations so it is difficult for McVicars to allege misrepresentation.

[34] I accept Mr Crimmins' submission that this is no more than a misdescription and that both parties knew what the publication referred to.

[35] It is also plain from the clear words that consideration of the publication is mandatory. Applying the publication alone produces a clear outcome in terms of the quantification of the redundancy compensation. The real question is how far one should go in considering other matters. Both parties accept that I may consider the matters but only McVicar encourage me to consider other material.

[36] I have formed the view that it is inappropriate to consider other material. I believe the evidence I heard at the second investigation meeting encourages me in the view the parties were clear that the publication formed the basis of any consideration and while the words of the agreement contemplate other material being considered, the absence of any guidelines to assist me discourages me in any innovation.

The criteria for the calculation

[37] The only issues that remain for decision are the number of weeks pay that should apply for the first year of service and the number of weeks pay that should apply for each subsequent year of service, together with any overarching maxima which limits the total quantum of the package.

[38] The information from the *the publication* indicates that 43% of agreements provide for six weeks' compensation for the first year of service and between seven and 10 weeks in 39% of agreements, and in 74% of agreements, two weeks' compensation is payable for the second and subsequent years of service.

[39] I think it is appropriate then for Mr Crimmins to receive six weeks pay for the first year of service and a further two weeks pay for each of the subsequent years of service, basing those decisions on the intelligence contained in the publication.

[40] The publication is less clear on the maximum entitlement issue. Generally, the most common maximum entitlement is between 40 and 52 weeks but the second most common approach was to have no maximum at all and over 52 weeks was the third most common situation.

[41] Mr Crimmins accepted that a 44 week cap was appropriate and in all the circumstances that seems sensible to me.

[42] I am influenced in reaching the decision I have by the fact that Mr Crimmins has served his employer for, by modern standards, an extraordinary length of time which amounts to several generations of the family of the employer, that Mr Crimmins' weekly wage is hardly elaborate and there is no evidence before me that the employer is unable to meet redundancy compensation of the figure indicated.

Determination

[43] I order McVicar Timber Group Limited to pay to Mr Crimmins the sum of $23,566.40 gross being the calculation derived from a payment to Mr Crimmins of six weeks' wages for his first year of service, two weeks' wages for each subsequent year of service, and a 44 week cap being applied to the total calculation.

[44] Given the delay in having this matter addressed, Mr Crimmins is entitled to interest and I direct that McVicar Timber Group Limited pay to Mr Crimmins interest on the redundancy compensation just referred to at the rate of 7% per annum from the date of the termination of Mr Crimmins' employment down to the date of this determination.

Costs

[45] Costs are reserved.

James Crichton
Member of Employment Relations Authority