

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Murray Derecourt (Applicant)
AND Owens Cargo Company Limited (Respondent)
REPRESENTATIVES Bill Nabney, Counsel for Applicant
Michael Sharp, Counsel for Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 24 January 2006
SUBMISSIONS RECEIVED 7 February 2006 and 10 February 2006
DATE OF DETERMINATION 13 April 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The employment of Mr Derecourt was terminated by reason of redundancy on 17 December 2004. He was paid redundancy compensation, based on his service being calculated from when he commenced full-time employment with Owens Cargo Company Limited (“the Company”) on 12 July 1995. However, Mr Derecourt claims that the Company incorrectly interpreted the relevant employment agreement and that his redundancy compensation should have been calculated based on service previously recognised by his employer going back to 25 February 1985. Mr Derecourt claims that if his previous service is taken into account, then he is entitled to be paid the equivalent of a further 10 weeks pay, being the sum of \$9,711.50.

Background Facts and Evidence

- [2] Mr Derecourt originally began working for the Company¹ on 25 February 1985. He resigned effective from 1 April 1994. After an absence of some 15-16 months, Mr Derecourt was re-employed by the Company as a casual employee on 12 July 1995. It appears that the casual employment became permanent, on a fixed term basis, in February 1996.
- [3] The evidence of Mr Derecourt is that prior to the fixed term contract expiring, he was approached by his Supervisor at the time, Mr Brian Fulcher, and was advised that he would be offered a permanent employment contract rather than a fixed term one. Mr Derecourt says that Mr Fulcher also advised him that the Company were willing to take into account his previous employment with them, that is, the period 25 February 1985 to 1 April 1994.

¹ It was then called Owens Services B.O.P. Ltd

The 1997 contract

- [4] Mr Derecourt and the Company (Owens Services B.O.P. Ltd) entered into an *Individual Employment Contract* pursuant to section 19 of the Employment Contracts 1991. Contrary to Mr Derecourt's evidence of what he was told by Mr Fulcher, the contract does specify a fixed term, being from 29 June 1997 to 31 May 1998. The contract also provided under a heading; PREVIOUS TERMS AND CONDITIONS that:

"It is a condition of this contract that any award registered pursuant to the Labour Relations Act 1987 or any previous contract of employment, whether written or verbal, shall be superseded by this contract.

However those specific service entitlements of length of service, annual leave and sick leave accrued by the employee whilst employed by Owens Services B.O.P. prior to the date of this contract shall be transferred into and form part of this contract."

- [5] At the bottom of the first page of the contract, the following words appear:

"Original Commencement Date with employer 25 February 1985."

- [6] Then, at subclause 6.3 of the contract there is a provision for long service leave:

"To further reward long service, after 10 years service and after each additional 5 years (ie. 15, 20, 25) years of completed service a special leave of 5 days will be available on a "that year only" basis."

- [7] The final relevant provision is under the "Payroll Summary of Conditions where it is stated:

"Original Commencement Date with employer 25 February 1985
(10 years accrued service)"

- [8] There is no provision in this contract for redundancy.

- [9] The evidence of Mr Derecourt is that after entering into this contract, his leave and other entitlements were calculated and provided on the basis that he had ten years service. In particular, Mr Derecourt says that he received the 10 years long service entitlement provided by subclause 6.3 of the contract. (See above.)

The 1999 contract

- [10] While the fixed term of the contract was deemed to expire on 31 May 1998, it is accepted by the parties that it continued or "rolled over" until Mr Derecourt was provided with another contract that was signed on 20 April 1999.

- [11] The evidence of Ms Kiri McRae, the Corporate Services Manager for the Company, is that the 1997 employment contract was for a fixed term specific to the requirement of Mr Derecourt to supervise a contract that the Company had with MacKay Refined Sugar. Because it was a fixed term contract, there was no provision for redundancy, nor was there any superannuation - this is normally offered after one year of service.

- [12] Ms McRae says that the 1999 contract did not contain any clause recognising total service and when Mr Derecourt entered into this contract, the Company did not consider that he had a period of service beyond the current term that commenced in July 1995.

Redundancy 2004

- [13] In late 2004, the Company had a need to make some employees redundant in the area that Mr Derecourt worked. Employees were asked to indicate if they wished to take voluntary redundancy and Mr Derecourt did so.
- [14] The 1999 employment contract provides for termination by reason of redundancy:
- “If Owens Services B.O.P. Ltd finds it necessary to terminate your employment due to redundancy, entitlements will be in accordance with the current applicable company policy.”
- [15] The evidence of Ms McRae is that in late 2004, the Company’s policy was to pay redundancy compensation based on 6 weeks pay for the first year of service and a further week’s pay for each further year of service to a maximum of 20 years.
- [16] Via a letter dated 13 December 2004, Mr Derecourt was offered redundancy compensation based on the above formula in addition to one week’s pay in lieu of notice. The letter informed Mr Derecourt that:
- “You commenced full time with the company in [sic] 12/07/1995.
- Based on this formula, you will be entitled to 15 weeks redundancy pay.”
- Mr Derecourt was requested to sign a copy of the letter; “acknowledging the full and final settlement of all matters arising out of, during or related to your employment with The Owens Cargo Company Ltd and all issues under the Employment Relations Act 2000.”
- [17] Mr Derecourt signed and returned his acceptance of voluntary redundancy but struck out “12/07/1995” and inserted “25/02/1985”. In regard to the redundancy pay entitlement, he struck out “15” and inserted “25”. Mr Derecourt initialled the changes.
- [18] The evidence of Ms McRae is that upon receiving the letter back from Mr Derecourt, she informed him that the Company would not be offering him redundancy on the basis of his alteration to the offer and that if he wished to accept voluntary redundancy, it would need to be on the terms of the original offer. Alternatively, Mr Derecourt could withdraw his offer to take voluntary redundancy and remain in employment with the Company. Ms McRae says that Mr Derecourt conveyed that he had accepted another offer of employment and would be taking the voluntary redundancy.
- [19] The employment of Mr Derecourt with the Company was subsequently terminated on 17 December 2004 and he received payment of 15 weeks redundancy compensation along with other final payments due.
- [20] In January 2005, the Company received written notification that Mr Derecourt was disputing the redundancy payment received but it also appears to accepted that Mr Derecourt’s lawyer raised the issue on 21 December 2004.

Analysis and Conclusions

- [21] In essence there are two issues that the Authority has to determine

1. Were the terms of the 1997 contract, in regard to Mr Derecourt's original commencement date and accrued service, carried through to the 1999 contract by implication or otherwise, and if so, do those terms apply to the calculation of redundancy compensation?
2. Did Mr Derecourt accept the Company's terms applying to the redundancy compensation by taking receipt of payment on 23 December 2004?

[22] Were the terms of the 1997 contract in regard to service, carried through to 1999 and are they applicable to the calculation of redundancy compensation?

It is not in dispute that in 1997, the Company chose to recognise Mr Derecourt's past service albeit his service was broken by an absence of 15-16 months. As of 29 June 1997, the Company recorded and accepted that Mr Derecourt had 10 years of "accrued service." The contract does not use the term "continuous service" as is the usual practice.

Common meanings of "accrue" are to accumulate, amass, build up or be credited with. It seems to be a reasonable conclusion on the part of Mr Derecourt that the Company was prepared to accept his total service with it, despite an absence for some time, and there was no qualification or exclusion placed on that acceptance.

While there is no mention of the accrued service in the 1999 contract, neither is there any exclusion of conditions that had previously been agreed to. It is my conclusion that having recognised Mr Derecourt's past service back to 25 February 1985, and in the absence of any agreement to the contrary, the Company remained bound to continue to recognise that service for the total period of Mr Derecourt's employment.

Given this conclusion, I also find that consistent with the "applicable Company policy" pertaining to the calculation of redundancy entitlements, Mr Derecourt was entitled to have his total accrued service recognised for that calculation.

[23] Did Mr Derecourt accept the Company's terms applying to the redundancy compensation by taking receipt of payment on 23 December 2004?

I find that it is established that Mr Derecourt did not accept the Company's terms in regard to the redundancy compensation that he was offered. He also communicated that clearly to the Company immediately that he became aware of the Company's position, and then again as soon as reasonably possible after the termination of his employment, via his lawyer. I do not accept that Mr Derecourt effectively waived his rights to dispute the Company's interpretation of his redundancy entitlements merely by receiving a payment on 23 December 2004 after his employment terminated.

The reality is that Mr Derecourt only became aware on 13 December 2004 that the Company was not going to recognise his accrued service. He ceased his employment on 17 December 2004 and had already committed to alternative employment. I have to say that it is a hollow argument to espouse that he could have simply rejected the offer being made and continued with his employment at such a late stage.

Determination

- [24]** For the reasons set out above, I find that Mr Derecourt was entitled to have his total accrued service from 25 February 1985 to 17 December 2004, taken into account for the calculation of

his entitlement to redundancy compensation when his employment was terminated due to accepting voluntary redundancy.

It follows that Mr Derecourt is entitled to be paid a further 10 weeks pay amounting to the sum of \$9,711.50.

Owens Cargo Company Limited is ordered to pay to Mr Murray Derecourt the gross sum of **\$9,711.50**, plus interest at the rate of 7% per annum, from 23 December 2004 (when Mr Derecourt received part payment), until payment is made.

Costs

- [25] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority