

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 261
3020692

BETWEEN ROBIN DROUGHT
 Applicant

AND AUCKLAND COUNCIL
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Caroline Mayston, Counsel for the Applicant
 Andre Lubbe, Representative for the Respondent

Investigation Meeting: 13 August 2018

Additional documents received: 16 August 2018

Determination: 20 August 2018

DETERMINATION OF THE AUTHORITY

- A. Robin Drought has a contractual entitlement to uncapped redundancy compensation by virtue of his personal to holder conditions that were codified under the terms of the applicable collective agreement.**
- B. Auckland Council breached the collective agreement by failing to pay Mr Drought his contractual entitlement to redundancy compensation.**
- C. Auckland Council is estopped from renegeing on its promise to pay to Mr Drought the sum of 100 weeks' redundancy compensation.**
- D. Auckland Council is ordered to pay to Mr Drought the following amounts within 28 days of the date of this determination:**
- a. The sum of \$106,901, being the difference between the 100 weeks' redundancy compensation Mr Drought was contractually entitled to receive, and the redundancy compensation he has already received;**

- b. Interest on the sum of \$106,901 from 18 August 2016 continuing until payment at the rate of 5% per annum.**

E. Costs are reserved.

Employment Relationship Problem

[1] Robin Drought was employed by Auckland Council and its predecessors for nearly 47 years before accepting voluntary redundancy on 12 August 2016.

[2] Prior to Mr Drought accepting voluntary redundancy the parties agreed that he was entitled, inter alia, to receive 100 weeks' redundancy compensation. However, after his employment ended, the Council took the position that it was only required to pay Mr Drought 48 weeks' compensation.

[3] Mr Drought contends that the Council has breached the Collective Agreement (CA) by failing to pay him the agreed amount of redundancy compensation that he says was a "personal to holder" condition. In the alternative, he says the Council is estopped from reneging on its agreement to pay him 100 weeks' redundancy compensation. He says this is because the Council's actions caused him to believe he would receive the 100 weeks' redundancy promised, he relied upon the Council's promise, and he altered his position as a result by agreeing to voluntary redundancy and leaving long-term paid employment. He says it would be inequitable to allow the Council to go back on its promise.

[4] The Council denies it has breached the CA. Its position is that the CA states that Mr Drought is entitled to receive redundancy compensation not exceeding 48 weeks' salary. It submits that no personal to holder conditions relating to uncapped redundancy compensation were codified into the CA. As such, it is not bound to comply with its agreement to pay Mr Drought 100 weeks' redundancy compensation as to do so would be inconsistent with the CA and therefore breach s 61(1)(b) of the Employment Relations Act 2000 (the Act). In addition, it denies Mr Drought's claim of estoppel.

[5] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

- [6] The issues requiring investigation and determination are:
- a) Did Auckland Council breach the Collective Agreement?
 - b) If not, is the Council estopped from denying payment of 100 weeks' redundancy to Mr Drought?
 - c) If the answer to (a) or (b) is affirmative, what monies any are owing to Mr Drought under the employment agreement?
 - d) Should interest be awarded on any sums payable by the Council to Mr Drought?
 - e) Should either party contribute to the costs of representation of the other party?

Relevant Background Facts

[7] Mr Drought commenced employment with Auckland City Council on 15 December 1969 as an Analyst Programmer. He joined the union and became subject to the terms of the CA then in place. Over the years the CA was modified numerous times. Materially, it always provided for Mr Drought to receive redundancy compensation. For the first year of employment this was initially six weeks, later changing to 8 weeks, and for each subsequent completed year or part year of service 2 weeks salary.

[8] In or around 1995 the Auckland City Council asked its employees to move to individual employment agreements (IEA). The IEA was signed by Mr Drought on 1 May 1996.

The IEA

[9] In terms of redundancy compensation, the IEA provided:

Compensation for redundancy shall be made as follows:

- i) for the first year of service or part year of service with Auckland City; eight weeks salary
- ii) for each subsequent completed year or part year of service; two weeks salary

- iii) if no gratuity is being paid, five days sick leave entitlement, if there is an unused accrued sick leave entitlement.

The 2009 CA

[10] Thereafter new CAs were negotiated that covered the periods 5 May 2007 to 1 May 2009 (the 2007 CA) and 5 May 2009 until 1 May 2011 (the 2009 CA). The redundancy provisions contained in these CAs were less favourable to Mr Drought than his previous entitlements under the IEA and various CAs. However, his previous redundancy entitlements to uncapped redundancy compensation were retained and protected under Clause 5.

[11] Clause 5 provided:

Grandparenting

- 5.1 If an employee's individual agreement applicable as at 1 May 2004 provides terms and conditions of employment that are more favourable to the employee than those prescribed in the CEA, the employee shall have these benefits retained and protected.
- 5.2 If an employee has existing individual terms and conditions of employment that are more favourable to this employee than those prescribed in the CEA, the employee shall have these benefits retained and protected.

The 2010 CA

[12] On 1 November 2010 Auckland Council was formed by the amalgamation of eight councils that had previously existed in the Auckland region, including Auckland City Council. Before Auckland Council came into existence the PSA and the Auckland Transition Agency (ATA), on behalf of the newly created Auckland Council, negotiated a new CA to apply to PSA members employed by Auckland Council from 1 November 2010.

[13] The material provisions in the CA were:

41. Complete Agreement

It is expressly acknowledged that acceptance of this agreement and the letter of appointment releases Auckland Council from all obligations, conditions and benefits to which the employee is, or maybe entitled, arising from any previous Agreement of employment, except for those terms and conditions which are contained within this agreement, attached appendices and the

Savings Section. It is also expressly acknowledged by both parties that this Agreement of employment has not been entered into in reliance on any other agreement or understanding outside of this Agreement and the letter of appointment.

In particular it is agreed that, notwithstanding clause 41 (Savings Clause) the remuneration provisions of this agreement, including the agreed process for developing a future remuneration approach, replace any provision of any existing employment agreement that relate to salary, wages or other direct financial payments in the nature of salary and wages such as bonus payments.

42. Savings Clause

Except as expressly provided for in this collective agreement, nothing in this collective shall operate to reduce the conditions of employment applying to any employee covered by this collective agreement as at the date the employee became covered by the agreement, where:

1. these terms are contained in Schedule 1 and reflect clauses that have been newly grand-parented into this collective agreement as part of the harmonisation process
2. these terms are contained in Schedule 2 and reflect clauses that had previously been grand-parented into collective agreements that formed the basis of the harmonisation process
3. these terms are contained in personal to holder letters and reflect personal to holder terms that had not previously been contained in any collective agreement, but have been codified into this collective as per the process outlined in Schedule 3

unless in respect of points 2 and 3 above:

- i. these terms have been brought out by agreement
- ii. these terms are assessed as having been offset wholly or partially by either the new terms of this collective or by the harmonisation payment, with the result that an individual is not disadvantaged

Process for codifying Personal to Holder terms as per Schedule 3

During the period to the 30th June 2011, council will work with employees to identify conditions of employment in existence that are not recorded in a predecessor collective agreement or are only broadly referred to as 'saved provisions' with a view to codifying them into 'personal to holder' letters. While council may take the opportunity to renegotiate these conditions, subject to (i) and (ii) above, the intention is that if the basis on which they originally existed remains they will be respected and previously agreed arrangements will not be changed without agreement

Any arrangements not so codified by the 30th June 2011 in this collective agreement will lapse.

Savings clause - Schedule 3

Process for codifying Personal to Holder provisions

Personal to holder provisions are those individual employment terms and conditions that only apply to individuals (such as matters covered in an individual's letter of employment) and that are either not recorded in those predecessor collective agreements that have formed the basis of this harmonised agreement or that are only broadly referred to as 'saved provisions'.

The following outlines the process for dealing with conditions that are personal to holder:

Employees who have personal to holder terms and conditions will have until 30th June 2011 to bring these to the attention of the Council.

Where the conditions are the same as those referred to in Schedules 1 and 2, they will be treated in the same manner

- (a) Where the conditions are non-monetary, but are covered by the harmonised collective agreement, the collective agreement will take precedence and the employee will no longer be entitled to those conditions
- (b) Where the conditions are non-monetary and are not covered by the harmonised collective agreement, the condition will be recognised and recorded in a Personal to Holder letter
- (c) Where the conditions are financial allowances, but are covered in the harmonised collective agreement, the collective agreement will take precedence and the employee will no longer be entitled to those conditions
- (d) Where the conditions are financial allowances and are not covered in the harmonised collective agreement, these allowances will be offset to the extent that a harmonisation step as described in Appendix 1 has been received. Any remaining allowance will be recognised and recorded in a Personal to Holder letter

[14] On 8 September 2010 Mr Drought attended a union delegate meeting. Thereafter he wrote to the PSA asking for feedback on a number of issues. These issues included:

- 2) Redundancy Clause – A number of us who have retained conditions from as far back as 1996 still have a much better redundancy clause than that in the newly negotiated collective. (i.e. There is no 48 week limit). In this time of uncertainty most if not all wish to retain our current redundancy clause. Can you please confirm that the only way to retain our current clause is by leaving the union and taking across our current individual contracts.
- 4) Letters – The letters that everyone is asked to sign is silent on the right to add further "Personal to Holder" clauses that one may wish to carry across from their current agreement. I have been

recommending that people also add a clause similar to the following to their letter of acceptance:

“Subject to further satisfactory negotiations regarding clauses that I want Grand Parented as Personal to Holder conditions.”

Do you feel that this is acceptable/ the right thing to do, or can you think of improved wording that will cover this scenario. By signing the current letters it all seems to be quite final.

[15] The PSA representative wrote back the same day. In response to the foregoing issues raised by Mr Drought he responded:

2. I have spoken with the lead advocate for the new CEA bargaining. His view is that you can retain your grandparented redundancy entitlement through the Personal-to-Holder process specified in the CEA (clause 42 and Schedule 42). You do not need to leave the union.
4. See point 2. My advice is that union members have an entitlement and a process specified in the new CEA that covers Personal-to-Holder conditions. They do not need to add anything to their letters of offer. I do not know whether non-union members have a similar entitlement or process. If members wished to do something I suggest they should approach HR with a request for HR to acknowledge their condition in writing. They would then present that to the new Council as per the process in point 2.

[16] By letter dated 9 September 2010 Mr Drought was offered employment by the Council from 1 November 2010 as Senior Property, Regulatory and Rates Support Analyst.

[17] On 14 September 2010 Mr Drought responded to the Council’s offer by ticking the box on the offer/acceptance letter which stated that he was a member of the PSA and was to be covered by the PSA collective agreement, together with another box that stated:

I accept Auckland Council’s offer to employ me as Senior Property, Regulatory and Rates Support Analyst on these terms and conditions from 1 November 2010.

[18] Beside each of these boxes he placed an asterisk symbol. Underneath his signature and beside an asterisk, Mr Drought made hand-written annotations that stated:

- * Subject to the clauses/clause amendments indicated in the attached document dated 14 September 2010 being ‘Grand Parented’ as Personal to Holder’ conditions.

[19] Mr Drought then attached a document headed “Re Personal to Holder conditions for Robin Drought from 1st November 2010” (the PTH letter). This provided:

As per the savings clause (clause 42 in the Collective Agreement) the following conditions must also be part of my conditions that are carried forward as “Personal to Holder”. All these conditions are being brought forward from my current agreement with the outgoing Auckland City Council. Thus the following conditions also form part of my employment contract with the new Auckland Council from 1st November 2010 and shall be read in conjunction with the collective Agreement between Auckland Council and the PSA which is to commence on 1st November 2010.

Clause 10

Change hours from 7am and 7pm to 6.30am and 6.00pm

Clause 13

I am entitled to be paid for all authorised overtime.

Clause 24

I may accumulate/put aside up to 30 days leave, for periods of extended leave.

Long Service Leave

My current frozen long service leave entitlement of 63 days will be carried over to this agreement. For clarification, this leave will not need to be used/taken prior to annual leave.

Gratuity

My current frozen gratuity entitlement of 26 weeks will be carried over to this agreement.

Redundancy

Redundancy compensation is to be changed (i.e. the first two bullet point paragraphs are to be replaced) and will be paid as follows:

- i. For the first year of service or part year of service with the Council (including all service with the previous Auckland Council's), 8 weeks salary
- ii. For each subsequent completed year or part year of service (including all service with the previous Auckland Council's), 2 weeks salary

Car Park

I will be provided with a car park within 100 meters of my place of work

[20] Mr Drought returned this document to the Council. The Council subsequently confirmed Mr Drought's appointment to the role offered.

[21] Mr Drought started work with Auckland Council on 1 November 2010. There were no communications between the parties about his annotations to the letter of offer or the PTH letter Mr Drought had attached to his offer/acceptance letter. However:

- a) Mr Drought was provided with a car park on his first day of work (where no right existed in the CA).
- b) Mr Drought was not required to work outside of the hours specified on his personal to holder letter.
- c) Mr Drought was paid for overtime on the occasions he worked it.
- d) Mr Drought's long service leave and gratuity provisions were retained and appeared on the Council's intranet system. This was an election that needed to be made under Schedule 1 of the CA.
- e) Mr Drought's uncapped redundancy was recorded by the Council through a schedule prepared by Marinus Snetler. Mr Snetler was the Change Manager for People and Capability.

[22] On 14 June 2011 the PSA wrote to its members attaching information about the notification process of personal to holder conditions. It reminded its members that the process must be completed by 30 June 2011 and applied to members who held personal to holder entitlements from their former council employer. The information provided stated:

Notification of Personal to Holder Entitlements

Under the current Collective Agreement PSA members have until 30th June 2011 to formally notify the Auckland Council / Auckland Transport of any Personal to Holder entitlements they hold from their former Council.

The process of notification requires members, in writing to notify Karen Broome Senior Employment Relations Advisor at [...email address provided]

To assist please also copy in [...email address provided] so the PSA have verification of the information you have sent through.

To assist in determining your response please refer to extract from the Auckland Council Collective Agreement below.

... [Schedule 3 set out in full]

If in doubt send through information to council and they will assess your entitlement.

[23] That same day Mr Drought replied to the PSA attaching a copy of the personal to holder letter he had provided to the Council on 14 September 2010:

Hi Leo

I actually prepared my list of Personal to Holder conditions and attached them to my employment offer acceptance.

I also adjusted the wording of my acceptance so that it was conditional on these conditions.

I now consider these to be part of my employment conditions that were accepted by the ATA on behalf of Auckland Council.

I have attached a list of those conditions for your information.

If there is something else, that you feel I also need to do, can you let me know.

If you wish to discuss further, I can be contacted at Auckland Council ...

[24] Mr Drought was not informed there was anything else that he needed to do.

Subsequent CAs

[25] Two further CA were negotiated and ratified prior to Mr Drought leaving the Council. The first was for the period 19 April 2013 to 31 October 2015. The second CA was for the period 22 March 2016 to 31 October 2018. These provided identical Savings Clauses.

Except as expressly provided for in this collective agreement, nothing in this collective shall operate to reduce the conditions of employment applying to any employee covered by this collective agreement as at the date the employee became covered by the agreement, where:

- a) ...
- b) ...
- c) These terms are contained in personal to holder letters and reflect personal to holder terms that had not previously been contained in any collective agreement, but were codified into this collective as per the process outlined in Schedule 3 of the 2010-2012 Auckland Council PSA collective agreement

unless in respect of points 2 and 3 above:

- iii. these terms have been brought out by agreement; or
- iv. these terms were assessed as having been offset wholly or partially by either the 2010-2012 Auckland Council PSA collective agreement or by the harmonisation payment, with the result that an individual was not disadvantaged

The Redundancy

[26] In April 2016 Mr Drought was advised that Auckland Council were proposing making changes to his team. New job positions were identified and offered to all team members to apply for.

[27] On 7 June 2016 Rosalie Webster, Mr Drought's PSA representative, spoke with Mr Snetler. Following the meeting she recorded Mr Drought's position in an email. This stated:

In relation to the Property, Regulatory & Rates Change process, there is one member of the team, Robin Drought, that I am representing in terms of trying to achieve a fair and pragmatic outcome from the change process. The Change Process has been defined as minor. We have tabled that we have a question about that in relation to one member – as per the below:

This is to table the view of the PSA at this point in the process that we believe there is a question as to whether the proposed change for Property, Regulatory and Rates is minor or significant in relation to one of our members impacted by this change. In accordance with clause 30.6 of the Auckland Council and PSA Collective Employment Agreement 2016-2018, we propose that the parties meet to resolve this.

Robin himself is a highly principled individual whose concern was to make sure that the team he was part of transitioned to new roles in the change. However, in relation to his own stage in career, he does not want to now learn a whole new job and system. His PD does not reflect the work he has in fact been doing for 5 years which is report writing. The change for Robin is significant.

We propose that Robin is treated as someone in significant change. This can be argued to be the case and we could verify it with evidence of what Robin has been doing – but we are also raising this in this manner to see, rather than have an argument about whether it is significant or minor and interpreting the Collective Agreement, we come to a pragmatic resolution.

Please let me know if you would like more information or if we need to organise a meeting with Robin and his manager (who knows the work he has been doing).

[28] Mr Snetler then discussed the matter with Mr Drought's manager, Mark Denvir. Mr Denvir is the Director of IT and communications. Mr Snetler required Mr Denvir's approval before proceeding further. A proposal was then emailed by Mr Snetler to Ms Webster on or about 14 June 2016. This provided:

The proposal:

- Mark would like Robin Drought to stay on to help with the migration of GL5 and is happy to look at a redundancy in July 2017.
- It is his preference that he stays on up to July 2017.

However:

- Should Robin feel that he would like to exit earlier, Mark is happy to start conversation for a reduced redundancy payment (e.g. 30% reduction in payment). This is due to the fact that Robin is on historical terms and conditions and his redundancy payment is extremely high. On top of this, he also has significant amount of Long Service Leave and Gratuity Leave from legacy council.
- However, Mark believes that Robin will continue to work on what he is currently working on and would prefer that he stays up to July 2017 and (2) it is important that this is also seen in the light that Robin is potentially close to retirement and his redundancy payment is significantly high due to legacy agreements.

[29] Around this time Mr Snetler also approached Payroll to obtain an estimate of Mr Drought's entitlements. Based on his length of employment, Payroll prepared a document that recorded he was entitled to 100 weeks' redundancy compensation. This was made up of 8 weeks for his first year of employment and 92 weeks for subsequent years.

[30] On 19 July 2016 a second meeting was convened. Ms Webster, Mr Snetler and Mr Drought attended. At this meeting the parties discussed the proposed changes to Mr Drought's position and the Council's proposal for Mr Drought to take voluntary redundancy. This included a discussion about his entitlements to redundancy, long service leave and gratuity based on the calculations Mr Snetler had received from Payroll.

[31] After the meeting, the figures discussed, together with a copy of Payroll's redundancy calculations schedule and retirement gratuity calculations schedule, were forwarded by Mr Snetler to Ms Webster and Mr Denvir. Mr Snetler also emailed Mr Denvir advising:

I met with Robin and Rosalie (PSA) today to have a without prejudice discussion on his requirements to exit the business as a redundancy as discussed before.

Robin indicated that he met with you and he clarified to me the following key points:

1. He believes that there are several experts, e.g. Steven Lasham and Sally Waymouth, to continue any work associated with GL5;
2. He indicated that his team currently has hardly any workload leading to being bored at work and spending days in ad hoc minor tasks and leisure activities

We discussed risk and timeframes and Robin indicated:

- It is his desire to exit the business as soon as possible (redundancy); and
- He will not be taking up any other work; and
- There is no hand-over risks or business risks in him leaving; and finally
- He is available and will continue to be available should you require him at any later stage in 2017 to assist.

I would like to recommend your consideration that we proceed with an exit for Robin as redundancy as the associated cost will align with the costing for the larger IS change in Q1 budget reporting

Can you kindly let me know if we can facilitate this exit? As Robin has been a valuable member of staff, it might be good to have a farewell for him before we roll out the change process that we do not lose the importance of his contribution when people are placed in change.

[32] On 20 July 2016 Mr Denvir replied advising that he was “happy for you to facilitate this outcome with Robin.”

[33] Following receipt of approval from Mr Denvir, Mr Snetler emailed Stephanie Adams (the Council’s Payroll Manager) on 20 July 2016 providing her with approval to proceed with an exit for Mr Drought and setting out his entitlements. This included 100 weeks’ redundancy pay in the sum of \$205,401.92.

[34] Ms Adams then forwarded Mr Snetler’s email to her team for processing. It was agreed Mr Drought would be paid the agreed entitlements in the pay run on 17 August 2016.

[35] Mr Drought’s last day of employment with the Council was on 12 August 2016.

[36] On 17 August 2016 Mr Drought was not paid the agreed monies. Following multiple attempts to find out why, he was phoned by the Council's representative to advise they did not consider he was entitled to his gratuity and long service leave and they needed further time to investigate what redundancy was due to him.

[37] Subsequently the Council agreed to pay Mr Drought his gratuity and long service leave but only paid him a redundancy payment equalling 48 weeks.

Issue 1: Did the Auckland Council breach the Collective Agreement?

[38] The Council submits that it did not breach the CA. It submits Mr Drought's alleged personal to holder condition of uncapped redundancy compensation did not, under the terms of the CA, become a term of his employment after 1 November 2010. It submits that as this term was inconsistent with the CA it is barred by s 61(1)(b) of the Act.

[39] The starting point for determination of this issue is section 61 of the Act. This provides that employees bound by the terms of an applicable CA may agree to additional terms and conditions of employment which are mutually agreed and are "not inconsistent with the terms and conditions in the collective agreement".

Were the terms and conditions mutually agreed?

[40] Prior to the ratification of the 2010 CA, Mr Drought's conditions of employment included the right to uncapped redundancy compensation. This right was set out in all CAs prior to the execution of his IEA in 1995, his IEA and continued under the grand-parenting provisions in the 2007 and 2009 CAs.

[41] Clause 42 of the 2010 CA set out the process to be followed for saving additional terms of employment. In particular, a requirement that these clauses were codified into the collective per the process outlined in Schedule 3. Schedule 3 stated that employees who had personal to holder terms and conditions had until 20 June 2011 to bring these to the attention of the Council. The CA was silent on the manner in which this was to be done.

[42] I am satisfied that Mr Drought complied with this requirement by attaching his list of Personal to Holder conditions to his response to the Council's letter of offer.

There is no dispute that this was received by the Council and the PSA and neither raised an issue about the format that was used by Mr Drought.

[43] With the knowledge of the personal to holder terms and conditions that Mr Drought wished to retain, the Council did not take the opportunity to renegotiate these with Mr Drought as prescribed in Clause 42. The Council did not provide him with a harmonisation payment and the terms were not offset wholly or partially by the new terms of the CA so as to avoid him being disadvantaged.

[44] I find the Council accepted the Personal to Holder conditions specified by Mr Drought and these were codified into the CA. I am fortified in this view by the following factors:

- a) The Council employed Mr Drought in circumstances where he indicated he would only accept employment on the terms contained in his personal to holder letter.
- b) At no point, either through its words or actions did the Council communicate to Mr Drought that it had rejected or did not accept the terms set out in Mr Drought's personal to holder letter. Instead, the council complied with all terms in the personal to holder letter. This included different hours than provided for in the CA and the provision of a car park.
- c) The Council conceded through its representative that, at all material times prior to Mr Drought's termination, it had accepted that Mr Drought's redundancy provisions had been grand-parented into the 2010 CA and into subsequent CAs. This concession was borne out by the evidence that established:
 - i. The Council's Payroll records recorded Mr Drought as having uncapped redundancy entitlements. The calculations it provided to Mr Snetler were based on these records and/or from the records held on Mr Drought's personnel file.
 - ii. Following the ratification of the 2010 CA, the Change Team, managed by Mr Snetler, prepared a spreadsheet that set out employees' personal to holder terms and conditions. This spreadsheet was prepared based on information contained in an employee's personnel file. It was used

by the Change Team to provide the Council with costings when the Council was considering restructuring and/or redundancies. Mr Drought's entitlement to a "superior redundancy entitlement" was listed on this spreadsheet.

- iii. Mr Snetler was required to work with Mr Denvir and obtain his approval to redundancy terms before they were implemented. Mr Denvir was Mr Drought's manager from the time he signed the 2010 CA. The email correspondence shows that Mr Denvir knew that Mr Drought was to receive 100 weeks' compensation. In addition, the email correspondence shows that he understood Mr Drought was on "historical terms and conditions ... and his redundancy payment is significantly high due to legacy agreements".
- iv. Lastly, in its Statement in Reply, the Council accepted the pleading at paragraph 2.7 of the Statement of problem. Namely, "*throughout the remainder of his employment [i.e. from acceptance of the 2010 CA] the respondent ... accepted that the above redundancy entitlement was part of the applicant's terms of employment.*"

Were the PTH terms inconsistent with the CA?

[45] In *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Energex Ltd*, the Court held that the question of inconsistency under s 61 is the same as that considered in *NZ Meat Processors Union v Alliance Freezing Co (Southland) Ltd*¹ so that the following principles are "still largely applicable":²

- a) The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.
- b) The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.
- c) The definition of inconsistent is that in the Oxford English Dictionary [2nd ed]

¹ (1990) 3 NZELC 98,287 (CA114/90).

² Employment Court, Auckland AC 48/06, 28 August 2006, Judge Shaw.

Not agreeing in substance, spirit or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous.

- d) If the additional terms are more favourable to the employee than the CEA, there is usually no inconsistency.
- e) Where there is a true inconsistency and where the two provisions cannot stand together, the CEA must prevail whether the result is perceived as favourable or unfavourable to the employee.

[46] Applying these principles to the present case, I am satisfied that the redundancy provisions contained in the personal to holder letter can live together with the CA. This is because, for the reasons I have set out earlier, I am satisfied that the terms contained in the personal to holder letter were codified into the CA by the savings provisions set out in Clause 42 of the 2010 CA. They were thereafter preserved by the savings provisions in the CAs that followed.

[47] I accordingly find there is no inconsistency between Mr Drought's personal to holder right to uncapped redundancy and the redundancy provisions contained in the CA that provided a maximum entitlement of 48 weeks' redundancy compensation. The two can stand together.

Has the Council breached the CA?

[48] The Council has breached the CA by failing to pay Mr Drought's contractual entitlement to 100 weeks' redundancy compensation.

Issue 2: Estoppel

[49] In light of my finding on Issue 1 it is not necessary for me to consider the alternative argument raised by Mr Drought in regard to estoppel. However, for completeness, I have done so and set out my findings below.

[50] In order to be successful in an estoppel claim, Mr Drought must establish:

- a) The Council acted in a manner that has caused him to have a certain belief or expectation.
- b) He must have reasonably relied upon that belief or expectation.

c) He must demonstrate that he will suffer detriment if the belief or expectation is departed from.

d) It must be unconscionable for the Council to depart from the belief or expectation.³

Council's actions

[51] In the present case it is very clear that the Council acted in a manner that caused Mr Drought to believe or expect that he would receive 100 weeks' redundancy compensation. Mr Snetler clearly and unambiguously told Mr Drought and Ms Webster orally and in writing that the Council would pay Mr Drought 100 weeks' redundancy compensation.

Reasonable reliance?

[52] The Council submits it was not reasonable for Mr Drought to rely on the representations made in circumstances where he was aware of the Authority's determination in *Lasham v Auckland Council*.⁴ In that case the Authority determined that Mr Lasham was not entitled to rely on an agreement to pay him 52 weeks' redundancy compensation because such term was inconsistent with the terms of the 2010 CA and was therefore barred by s 61 of the Act.

[53] The Council submits the *Lasham* determination should have put Mr Drought on notice that he was not entitled to uncapped redundancy compensation.

[54] I am not persuaded by the Council's argument. While I have viewed an email from Mr Lasham to Mr Drought attaching a copy of the Authority's determination, Mr Drought said he could not recall reading the determination. Even if he had read the determination, he said that he considered the circumstances in that case were distinguishable from the present case such that they did not apply. I agree. The key difference in this case is that I have found the term that Mr Drought is seeking to enforce was codified into the CA by the personal to holder process. In the *Lasham* case the Authority found Mr Lasham did not have personal to holder conditions.

[55] If the Council considered that the *Lasham* determination applied to Mr Drought, and his personal to holder conditions did not apply, then it ought to have

³ *Hansard v Hansard* [2014] NZCA 433 at [63].

⁴ *Lasham v Auckland Council* [2013] NZERA Auckland 219.

informed Mr Drought. The Act requires parties to an employment relationship to act in good faith. This includes being communicative and responsive and not doing anything, directly or indirectly, to mislead or deceive each other.

[56] It is more likely than not that the Council did not raise this determination with Mr Drought because it considered the case did not apply to him. This appears to have been the position taken by Mr Snetler and Mr Denvir. Both men worked for the Council at the time the Authority released its determination in *Lasham*. Mr Denvir was Mr Lasham's manager and therefore it is more likely than not that he would have been aware of the determination. If Mr Snetler or Mr Denvir considered the circumstances in Mr Lasham's case to have applied to Mr Drought then it is reasonable to assume they would have said so. They did not.

[57] I am satisfied Mr Drought reasonably relied upon the representations made by the Council. The Council's representations reflected the terms agreed by the parties in the personal to holder terms, which terms had remained relatively unchanged during Mr Drought's 47 odd years of service with the Council. Mr Drought had no reason to doubt the Council's representations. In all respects it appeared to him, understandably so from the correspondence I have viewed, that those that needed to approve the payment had been consulted and had approved the payment.

Detriment?

[58] Mr Drought is 67. At the time he began discussions with the Council he had three hefty mortgages and a further debt of \$30,000. The amount he was to receive by way of compensation was of utmost importance to him. He said this was because his superannuation benefit was insufficient to service his mortgage repayments unless he repaid a significant sum.

[59] In reliance on the Council's agreement to pay him 100 weeks' compensation, Mr Drought agreed to take voluntary redundancy and leave his permanent and well-paid employment. This employment had been long and successful. Mr Drought had formed a number of close relationships with his colleagues and left on good terms. It was a significant step for him to take which I find would not have been made without reliance on the representations made by the Council.

[60] Following the Council's confirmation that his 100 weeks' would be paid, Mr Drought made an appointment with his bank manager to discuss repayment of two of

his loans. This appointment had to be cancelled when the Council refused to pay him what was promised. Since that time Mr Drought has been able to repay one of his three mortgages but has struggled to meet the mortgage repayments on the remaining two. He has incurred additional interest charges on these mortgages and will continue to do so if the Council is permitted to depart from its representations.

Unconscionable?

[61] It is clear that, whether intentional or not, the Council misled Mr Drought. It would be unconscionable for the Authority to permit the Council to depart from the representations that it made to Mr Drought.

Finding on Issue Two

[62] Mr Drought is successful in his claim of estoppel. Auckland Council is estopped from reneging on its promise to pay to Mr Drought the sum of 100 weeks' redundancy compensation.

Issue 3: Remedies

[63] The Council is ordered to pay to Mr Drought the sum of \$106,901 being the difference between the 100 weeks' redundancy compensation he is entitled to receive and the redundancy compensation he has already received. Payment of this sum must be made within 28 days of the date of this determination.

Issue 4: Interest

[64] Mr Drought claims interest on the sum of \$106,901. In the circumstances I consider it appropriate to order interest is payable by the Council from the date the parties agreed this money was to be paid to Mr Drought.

[65] The Council is ordered to pay interest on the sum of \$106,901 from 18 August 2016 continuing until payment at the applicable rate of 5% per annum.⁵ Payment of this sum must be made within 28 days of the date of this determination.

Issue 5: Costs

[66] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

⁵ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4.

[67] If they are not able to do so and an Authority determination on costs is needed Mr Drought may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Council will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[68] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].