IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 67/08
5075304

	BETWEEN	RAY HILL Applicant
	AND	TASMAN INSULATION NEW ZEALAND LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Paul Brown, Counsel for Applicant Peter Kiely, Counsel for Respondent
Investigation Meeting:	21 February 2008 at Christchurch
Submissions received:	28 February 2008 from Applicant 17 March 2008 from Respondent
Determination:	15 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Hill was an employee of the respondent company, Tasman Insulation New Zealand Limited (Tasman Insulation). Mr Hill's employment was terminated on the grounds of redundancy, effective as at 31 August 2006.

[2] Tasman Insulation is a member of the Fletcher Building group of companies. It carries on the business of manufacturing and marketing glass wool thermal and acoustic insulation products and building membranes throughout New Zealand and overseas.

[3] Mr Hill's individual employment agreement provides that in the event of his employment being terminated due to his position being made redundant he is entitled to one month's notice, or payment in lieu thereof, and to the redundancy provisions in

the Carter Holt Harvey Limited Salaried Redundancy Agreement (the Salaried Redundancy Agreement).

[4] Mr Hill was paid the redundancy entitlement provided for in the Salaried Redundancy Agreement when his employment was terminated on the grounds of redundancy.

[5] Mr Hill's employment relationship problem is that he says he should have been paid the redundancy entitlement in the Carter Holt Harvey (Specified Companies) Employees Redundancy Agreement (the Specified Companies Agreement). Payment under the Specified Companies Agreement would have entitled Mr Hill to a larger payment in the event of redundancy than he received under the Salaried Redundancy Agreement. Under the provisions of the Specified Companies Agreement Mr Hill says he would have received an additional $7,237.90 together with payment of 17 days' sick leave. He claims those amounts from Tasman Insulation to resolve his employment relationship problem together with interest and costs.

[6] Mr Hill says that in 1996 when he was offered a position with Carter Holt Harvey he asked the manager of Carter Holt Harvey Insulation, Les Johns, for a copy of the redundancy agreement referred to in his individual agreement. He says he was shown the Specified Companies Agreement.

[7] Mr Hill said on that basis he accepted the offer of employment and signed the employment contract believing that what he had been shown was the redundancy agreement referred to in that employment contract as the Salaried Redundancy Agreement.

[8] In April 1998 Carter Holt Harvey Insulation was purchased by Tasman Insulation. Mr Hill was sent a letter dated 7 April 1998 which confirmed that he was to be offered employment on terms and conditions no less favourable than those he enjoyed at present. Whilst there was some later variations to Mr Hill's individual employment agreement to reflect legislative change there was no variation to the redundancy provision in his employment agreement.

[9] During the consultation period that led to Mr Hill's position being declared redundant, Mr Hill telephoned the operations manager Mr Mark Rassie and asked for

a copy of his redundancy agreement. Mr Hill was provided with a copy of the Specified Companies Agreement.

[10] The human resources manager of Tasman Insulation, Tanya Neary sent to Mr Hill during the process of calculating his redundancy a spreadsheet setting out his entitlement. Mr Hill responded to Ms Neary and queried the calculations.

[11] Ms Neary sent an email to Mr Hill dated 23 August 2006 explaining that Mr Hill was covered by the Salaried Redundancy Agreement which was applicable to staff commencing on or after 1 November 1995. Ms Neary said in her email that it sounded like Mr Hill was reading off the Specified Companies Agreement.

[12] Mr Hill made it clear that he disputed the calculation and that he thought he should be paid the entitlements provided for in the Specified Companies Agreement .

[13] The statement of problem lodged with the Authority on Mr Hill's behalf referred to the nature of the problem as a personal grievance that Mr Hill had been disadvantaged by an unjustified action of his employer. Mr Brown accepted in final submissions that the Authority could consider the matter in terms of a dispute or a breach of contract but because of s.103(3) of the Employment Relations Act 2000 the matter cannot be pursued as an unjustified action.

[14] Mr Brown referred in his submissions to the Contractual Mistakes Act 1977. He submitted that there was a common mistake of fact as to what redundancy agreement would apply in the event of redundancy. The Contractual Mistakes Act 1977 provides a range of powers to enable relief to be granted if Mr Hill satisfies the requirement of s 6(1) of the Contractual Mistakes Act 1977. The Authority under s.162 of the Employment Relations Act 2000 may make any orders that the High Court or a District Court may make under the Contractual Mistakes Act 1977.

[15] Mr Brown also referred to the equitable remedy of rectification in his submission.

[16] Tasman Insulation says in its statement in reply that Mr Hill's employment agreement expressly provided that the Salaried Redundancy Agreement applied to his employment and that it has discharged its obligations by making a payment in accordance with the Salaried Redundancy Agreement.

The issues

Was Mr Hill entitled to the provisions, in the event of redundancy, of the Salaried Redundancy Agreement or the Specified Companies Agreement.

- *What did the employment agreement provide?*
- *Was there a common mistake as described by the Contractual Mistakes Act 1977 as to the redundancy agreement. If there was a common mistake then did it influence the parties to enter into the contract and did it result in a substantially unequal exchange of value?*
- *Should there be relief under s.7 of the Contractual Mistakes Act 1977?*
- *Rectification*

What did the employment agreement provide?

[17] Mr Hill's individual employment agreement provided amongst other matters under the heading *Redundancy*:

> *In the event of your employment being terminated due to your position being made redundant, you will receive one month's notice, or payment in lieu thereof, and you will be entitled to redundancy provisions in the Carter Holt Harvey Limited Salaried Redundancy Agreement.*

[18] Mr Kiely referred in his submissions to the judgment of the Full Court of the Employment Court in *New Zealand Tramways and Public Transport Employees Union Inc v. Transportation Auckland Corporation Ltd* [2006] 1 ERNZ 1005 (at para.[16]) with respect to the principles of contract and construction.

> *[16] 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. Consideration must be given to the whole of the contract. The circumstances of entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction … .*

[19] The words in Mr Hill's employment agreement are the starting point. They are clear and unambiguous with respect to what redundancy agreement will apply in

the event that Mr Hill's employment is terminated due to his position being made redundant. Mr Hill is entitled to the redundancy provisions in the Salaried Redundancy Agreement.

[20] It is appropriate to look at the surrounding circumstances at the time the agreement was entered into to check that the first impression of the meaning from the words is right and to understand the setting in which the agreement was entered into. The surrounding circumstances cannot be taken into account to contradict or vary the written agreement.

[21] The circumstances surrounding the entering into the agreement are that in 1996 Mr Johns approached Mr Hill with respect to a position with Carter Holt Harvey Insulation. Mr Hill asked to be provided with an individual employment contract to look over and Mr Johns duly provided one. There were two matters that Mr Hill wanted to negotiate further. The first was that there was no provision for overtime, and the second, was that there was no redundancy provision.

[22] Mr Johns then provided Mr Hill with a new contract which had an increased salary reflecting a small amount of overtime and a redundancy clause, set out in para.[17] of this determination.

[23] Mr Hill said that he was happy with the body of the contract but that as he had been a union delegate he wanted to see a copy of the redundancy agreement referred to in the contract. Mr Hill said that Mr Johns then returned with the Specified Companies Agreement and Mr Hill said that after he had read that agreement he signed the individual employment contract.

[24] Mr Hill said that although Mr Johns gave him the Specified Companies Agreement to look at he then took it away again.

[25] The Authority was provided with a brief of evidence from Mr Johns although he did not attend at the investigation meeting as he was away from Christchurch. Mr Johns, having retired some years previously from his position, was somewhat reluctant to become involved in this matter.

[26] Mr Johns said in his brief of evidence that he did not recall giving Mr Hill the Specified Companies Agreement and considered it most unlikely that he would have done so.

[27] I decided to telephone Mr Johns following the investigation meeting with both Mr Brown and Mr Kiely in attendance by way of conference call.

[28] Mr Johns said that he *definitely knew that there was a difference between the salaried and non-salaried staff.* I shall come to the difference between the two redundancy agreements shortly which is able to be ascertained from a reading of them both.

[29] Mr Johns confirmed during the telephone conversation that he did not believe that he gave Mr Hill a copy of the Specified Companies Agreement. Mr John said to me, in the context of the difference between the agreements, *why would I.*

[30] The difference between the two redundancy agreements is important.

[31] I shall start firstly with the Specified Companies Agreement. Clause 14 of that agreement provides *This Agreement shall apply to members of the undersigned Unions who are employed by any of the nominated companies anywhere in New Zealand.*

[32] Mr Hill was not a member of one of the six undersigned unions. He said that he did not read clause 14 of the Specified Companies Agreement when he was shown the agreement by Mr Johns. If he had it would probably have been clear to him that the agreement did not apply.

[33] I asked Mr Hill some questions to assist my understanding as to how he recalled with certainty what redundancy agreement he had been shown some ten years prior to the consultation about redundancy that took place in early 2006. The Specified Companies Agreement including the front page is eight pages long.

[34] Mr Hill said that he remembered when he was provided with the Specified Companies Agreement by Mr Rassie in early 2006 that it was the same one shown to him by Mr Johns. He said he remembered this because of the redundancy compensation payment schedule and the fact that he would in the event of redundancy be compensated for unused sick leave.

[35] I did not hear directly from Mr Rassie about the context in which Mr Hill was provided with a copy of the Specified Companies Agreement in 2006. Mr Kiely in his submissions referred to Ms Neary's evidence that she checked with Mr Rassie and

was told by him that Mr Hill specifically asked for the Specified Companies Agreement. There is no dispute that Mr Hill did not ask for the Salaried Redundancy Agreement set out in his employment agreement.

[36] I now turn to the Salaried Redundancy Agreement. It defined an employee as *any salaried person who is employed by the employer at any New Zealand location on or after 1 November 1995, and also any salaried person accepting a new position, transfer or promotion, provided the employee has a choice on whether to accept the offer.*

[37] Mr Hill was a salaried employee and had been employed after 1 November 1995.

[38] I am satisfied that after talking to Mr Hill about the issue he had with his redundancy calculation Ms Neary spoke to Mr Johns, two other salaried staff and looked at Mr Hill's file. As a result of those inquiries Ms Neary gave evidence that she was not satisfied that Mr Hill's redundancy entitlement was other than as set out in his individual employment agreement.

[39] In conclusion I find that the words in Mr Hill's individual employment agreement are clear and unambiguous that the provisions of the Salaried Redundancy Agreement will apply to him in the event of redundancy. I find that at its highest, the evidence points to Mr Johns' mistakenly giving Mr Hill a copy of a redundancy agreement other than the Salaried Redundancy Agreement.

[40] I accept Mr Kiely's submission that the surrounding circumstances of entering into that employment agreement cannot be used to vary or modify the clear provisions of the written agreement. I also accept Mr Kiely's submission that the provision by Mr Rassie of the wrong redundancy agreement during the consultation period in 2006 does not assist Mr Hill in terms of which redundancy agreement applied to him.

[41] Mr Hill's evidence was that employees personnel records were poorly managed and he referred to a draft auditors report. Tasman Insulation clarified that the draft report only related to waged employees whose records were stored in Christchurch. The records relating to Mr Hill and other salaried employees were all stored in Auckland.

[42] I am satisfied that Ms Neary made some inquiries and checked Mr Hill's file and that there was nothing in writing to support that the provisions of the Specified Companies Agreement would apply to Mr Hill rather than as clearly set out in Mr Hill's employment agreement the provisions of the Salaried Redundancy Agreement.

Mistake

[43] Mr Hill claims that he was influenced in his decision to enter into the employment agreement by a common mistake under s.6(1)(a)(ii) of the Contractual Mistakes Act 1977. Mr Hill's submission with respect to mistake, as I understand it, is that there was a common intention that the provision of the Specified Companies Agreement would apply to him in the event his position was made redundant. The common or shared mistake was the insertion into the employment agreement that the provisions of the Salaried Redundancy Agreement would apply.

[44] Mr Hill asked during the negotiations that a redundancy clause be inserted into his individual employment agreement. He was given an individual employment agreement with a redundancy clause duly inserted that referred to the provisions of the Salaried Redundancy Agreement applying in the event of redundancy.

[45] The Salaried Redundancy Agreement that appeared in his individual employment agreement was the agreement that applied to salaried employees employed after 1995. Mr Hill was a salaried employee who was employed after 1995.

[46] The Specified Companies Agreement on the other hand did not apply to Mr Hill because he was not a member of one of the unions as required in clause 14 of that agreement.

[47] Mr Kiely refers to *Merbank Corporation Ltd v. Cramp* [1981] NZLR 721. He relies on *Merbank* as authority that it is Mr Hill who has the burden of proving that there was a common intention at the time he entered into his employment contract that the Specified Companies Agreement was to apply to him.

[48] Although the onus of proof has less significance in an investigative process I am required in reaching a view to be satisfied of the essential likelihood of Mr Hill's claim and the burden of proof is helpful in assessing the evidence.

[49] In this case I am not satisfied that the evidence warrants an inference being drawn that the reference in Mr Hill's individual employment agreement to the Salaried Redundancy Agreement was a common or shared mistake.

[50] Mr Hill may have mistakenly been given the Specified Companies Agreement in 1996. I do not find though that there is evidence to support a common intention that the employment agreement should refer to the Specified Companies Agreement and not the Salaried Redundancy Agreement. The employment agreement is unambiguous as to the provisions of the redundancy agreement to be applied in the event of redundancy.

[51] I do not find that there was a mistake falling within s6(1) of the Contractual Mistakes Act 1977.

[52] In terms of the claim for rectification I would need to be satisfied that there was a common intention in the minds of the parties to the employment agreement up to the point it was signed that the provisions of the Specified Companies Agreement would apply to Mr Hill. I have not found that there was such a common intention. The claim for rectification must therefore be dismissed.

Determination

[53] I find that the clear and unambiguous words of Mr Hill's individual employment agreement provide in the event of redundancy that the provisions of the Salaried Redundancy Agreement will apply.

[54] Tasman Insulation have paid Mr Hill the redundancy entitlements under his individual employment agreement and the Salaried Redundancy Agreement and in doing so has discharged its obligations.

[55] Mr Hill's claim is dismissed and there is nothing further I can do to assist him.

Costs

[56] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority