

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 219  
5406745

BETWEEN                      STEPHEN LASHAM  
   Applicant  
  
A N D                              AUCKLAND COUNCIL  
   Respondent

Member of Authority:      Rachel Larmer  
  
Representatives:              Caroline Mayston, Counsel for Applicant  
   Katherine Burson, Counsel for Respondent  
  
Investigation Meeting:      On the papers  
  
Submissions Received:      5 April 2013 from Applicant  
   26 April 2013 from Respondent  
   13 May 2013 from Applicant  
  
Date of Determination:      31 May 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The bonus and redundancy entitlements in Mr Lasham’s previous individual employment agreement with Auckland City Council are inconsistent with the terms of the collective agreement which covers his current position with Auckland Council, so the collective agreement prevails.**
- B. Mr Lasham does not have “*personal to holder*” “*saved provisions*” from his previous individual employment agreement which have been preserved under the terms of the applicable collective agreement.**

## **Employment relationship problem**

[1] This matter involves a dispute arising from agreed facts. Mr Lasham says the redundancy compensation and discretionary performance bonus entitlements set out in his individual employment agreement (IEA) with Auckland City Council (one of the councils which amalgamated into Auckland Council in 2010) were carried over into his employment with Auckland Council.

[2] Mr Lasham claims he made a counter offer to Auckland Council seeking agreement to these additional terms alongside those contained in the applicable collective agreement. He says that offer was accepted when Auckland Council appointed him to his current position which he started on 1 November 2010.

[3] Auckland Council says there was no counter offer or acceptance of a counter offer and that Mr Lasham's IEA entitlements with Auckland City Council did not carry over into his employment with Auckland Council.

[4] It says Mr Lasham's individual terms ceased to apply from 1 November 2010 because his current position is covered by a collective agreement between the New Zealand Public Service Association Incorporated (PSA) and Auckland Council (the CA).

[5] Clause 42 (Savings) and Schedule 3 of the CA preserve "*personal to holder*" terms.

[6] Mr Lasham claims his bonus and redundancy compensation entitlements are "*personal to holder*" provisions which continue to apply to him by virtue of the "*personal to holder*" provisions in the CA. Auckland Council says it assessed Mr Lasham's claim in accordance with the personal to holder process in the CA and concluded his bonus and redundancy entitlements did not fall within the "*personal to holder*" items preserved by the CA.

[7] Auckland Council says:

- a. there was no mutual agreement to incorporate Mr Lasham's individual terms with Auckland City Council into his terms and conditions of employment with Auckland Council; and

- b. the terms Mr Lasham says were carried over are inconsistent with the provisions in the CA and therefore cannot apply.

[8] The parties seek a determination as to whether Mr Lasham's bonus and redundancy entitlements under his Auckland City Council IEA form part of his terms of employment with Auckland Council.

### **Agreed facts**

[9] Mr Lasham started work as a business analyst with Auckland City Council on 25 June 2003. Although a member of the PSA Mr Lasham's role fell outside the coverage clause of the applicable collective agreement so his terms and conditions of employment were set out in his IEA.

[10] Mr Lasham's IEA contained a remuneration provision which included a discretionary performance related annual lump sum bonus (bonus). It also contained a redundancy compensation clause which provided for 52 weeks' maximum redundancy compensation (redundancy entitlement).

[11] 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 to be created Auckland Council negotiated a new CA to apply to PSA members employed by Auckland Council from 1 November 2010.

[12] The material provisions in the CA are:

Clause 41 - *"Complete Agreement"* acknowledges Auckland Council is released from all obligations, conditions and benefits which an employee may be entitled to under any previous employment except for terms and conditions in the savings section and appendices of the CA. It also states that notwithstanding the savings clause the remuneration provisions in the CA *"replace any provisions of any existing agreement that relate to salary, wages or other direct financial payments in the nature of salary and wages such as bonus payments."*

Clause 42 – “*Savings Clause*” provides the CA does not reduce terms in “*personal to holder letters*” which reflect personal to holder terms not previously contained in any collective agreement but which have been codified into the CA as per the Schedule 3 process. A process was put in place to identify saved terms and conditions to codify them into “*personal to holder letters*” and any arrangements not codified by 30 June 2011 lapsed.

Schedule 3 – “*Process for codifying Personal to Holder provisions*” states personal to holder provisions are individual terms and conditions that only apply to individuals and that are either not recorded in the predecessor collective agreements on which the harmonised CA is based or that are only broadly referred to as “*saved provisions.*”

[13] By letter dated 9 September 2010 Mr Lasham was offered employment by Auckland Council from 1 November 2010 as Senior Property Regulatory and Rates Support Analyst. The offer states the position is covered by the CA which applies to PSA members from 1 November 2010.

[14] Mr Lasham responded to the offer on 14 September 2010 by ticking the box on the offer/acceptance letter which states:

*“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.”*

[15] Mr Lasham made hand-written annotations on the offer/acceptance letter when he returned it to ATA. The material annotation is that he added a paragraph to the bottom of the offer letter (on which he indicated his acceptance of the offer) saying he wished to be transferred to the CA “*subject to grandparenting*” of his bonus and redundancy entitlements as “*personal to holder items.*”

[16] Mr Lasham’s appointment was confirmed by the website set up by Auckland Council for the purpose of communicating with employees about the transition. He started work with Auckland Council on 1 November 2010 without having there being any communications between the parties about the annotations Mr Lasham had made on his offer/acceptance letter.

## Issues

[17] In order to determine whether Mr Lasham's bonus and redundancy entitlements were carried over to his current employment the following issues are to be determined:

- Did Mr Lasham make a counter offer?
- If so, was the counter offer accepted?
- If so, are the bonus and redundancy entitlements in Mr Lasham's IEA with Auckland City Council inconsistent with the terms of the CA?
- Does Mr Lasham's personal to holder claim succeed?

*Did Mr Lasham make a counter offer?*

[18] I consider the handwritten paragraph Mr Lasham added to his acceptance letter should have put ATA on notice he did not intend to be bound by the terms of its offer letter. The addition of additional terms by Mr Lasham to his acceptance letter reasonably indicated he was prepared to accept the offer if the additional terms were agreed.

[19] I do not accept Auckland Council's submission that ATA would have viewed the additions to Mr Lasham's acceptance letter as an indication that he had personal to holder items that would need to be assessed in accordance with the provisions of Schedule 3 of the CA. First, the items claimed by Mr Lasham were not addressed in Schedule 3. Second, ATA should have communicated their view of Mr Lasham's additional terms to him so that he could then make an informed decision about his options and/or engage with ATA about its view that his additional terms would need to be assessed under Schedule 3.

[20] I consider it unreasonable for ATA to stay silent about the additional terms Mr Lasham sought to preserve from his IEA if it did not intend to accept such terms. I find ATA's failure to communicate with Mr Lasham about his additional proposed terms narrowed Mr Lasham's options at a critical point in the process.

[21] Mr Lasham's acceptance of ATA's offer was on the basis his bonus and redundancy entitlements would be grand-parented as personal to holder conditions

that would apply in addition to the terms in the CA. This is clearly a situation where Mr Lasham was putting forward different terms than had been offered by ATA and indicating his willingness to be bound by the proposed new terms.

*Was the counter offer accepted?*

[22] Acceptance requires mutual agreement between the parties to be bound by the terms of the counter offer. An offer is accepted where the offeree indicates an “*unconditional willingness to bound contractually to the offeror on the terms constituted by the offer.*”<sup>1</sup> Although willingness to be bound may be implied or inferred by conduct, it is necessary to look at the whole context of the communications to see if acceptance has truly occurred.<sup>2</sup>

[23] I find on the balance of probabilities that ATA accepted Mr Lasham’s counter offer because it employed him in circumstances where he indicated he would only accept employment on the counter offered terms.

[24] ATA processed Mr Lasham’s acceptance letter without raising any concern with him about the additional terms he sought. If ATA had not intended to accept Mr Lasham’s counter offer it needed to have communicated that to him. It did not do so. Instead it put him on the payroll and entered into an employment relationship.

[25] I find that ATA did not either through its words or action communicate to Mr Lasham that it had rejected or did not accept his counter offer. Instead ATA by its conduct implied it had accepted Mr Lasham’s additional terms.

*Are the bonus and redundancy entitlements inconsistent with the CA?*

[26] Under s.61(1) of the Employment Relations Act 2000 (the Act) ATA and Mr Lasham may agree on terms additional to those in the CA which are personal to him provided they are mutually agreed (and I have found they were) and are not inconsistent with the CA.<sup>3</sup> The issue is therefore whether Mr Lasham’s bonus and redundancy entitlements are inconsistent with the CA.

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<sup>1</sup> Laws of New Zealand, Contract para.29 citing *Airways Corporation of New Zealand Ltd v. Geyslerland Airways Limited* [1996] 1 NZLR 116

<sup>2</sup> See *Canterbury FM Broadcasting Ltd v. Daniels* High Court, Christchurch, Hardie Boys J, CP 419/88

<sup>3</sup> S.61(1)(b) ERA.

[27] Whether the additional terms the parties agreed to are inconsistent with the CA is to be objectively determined. The relevant provisions must be examined to see if they can stand together in the CA. There is usually not inconsistency where the additional terms are more favourable to the employee than the terms in the CA.<sup>4</sup> Where there is inconsistency then the terms in the CA must prevail.

#### *Bonus*

[28] I find the bonus entitlement is inconsistent with the CA. Clauses 15 and 16 of the CA deal with the remuneration system and payment of salaries respectively. They do not refer to bonus payments. Bonuses are specifically referred to in the second paragraph of clause 41 (Complete Agreement clause) which provides that the CA replaces any provisions in “*any existing employment agreement*” relating to wages salary or “*other direct financial payments such as bonus payments.*”

[29] Mr Lasham’s bonus arose under his IEA so I find it is one of the provisions which the remuneration provisions in the CA replaced. It would be inconsistent to allow Mr Lasham to retain a bonus entitlement when the remuneration provisions in the CA have been agreed on the basis they replace all previous bonus entitlements.

#### *Redundancy entitlements*

[30] The Redundancy Compensation provided for in the Management of Change clause in the CA states:

*“[...] provided that the maximum redundancy compensation payable for all the Employee’s years of service will not exceed 48 weeks’ salary.” (my emphasis)*

[31] I consider the maximum redundancy entitlement of 52 weeks in Mr Lasham’s IEA is inconsistent with the 48 week redundancy compensation maximum in the CA. The parties to the CA have turned their mind to redundancy compensation and have agreed to cap it at 48 weeks. Mr Lasham’s IEA entitlement to 52 weeks’ redundancy compensation cannot stand alongside the CA redundancy compensation provisions because it extends the limit in the CA. I therefore find it to be inconsistent with the CA.

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<sup>4</sup> *NZEMPU v Energex* [2006] ERNZ 749.

[32] I consider the position is similar to a situation where a CA records that the pay rate for a position “*will not exceed*” a specified amount in which case an individual term which pays more than the maximum in the CA for the position would be inconsistent with the CA. I consider there would be no inconsistency if the individual term(s) related to an entitlement which had not been addressed in the CA or where a cap had not been agreed.

**Does Mr Lasham’s personal to holder claim succeed?**

[1] Mr Lasham claims his bonus and redundancy entitlements continue to apply by virtue of the personal to holder provisions in the CA. I do not accept that. Mr Lasham’s bonus and redundancy entitlements:

- a. are not recorded in a personal to holder letter;
- b. are not entitlements that are covered by Schedule 3 of the CA which does not mention bonus or redundancy entitlements so they cannot be codified under the CA;
- c. are not codified. Any personal to holder terms that were not codified in the CA by 30 June 2011 lapse;
- d. are “*direct financial payments*” which under clause 41 of the CA have been replaced by the remuneration provisions in the CA;
- e. have been assessed by Auckland Council in accordance with the personal to holder process in the CA and have been held not to fall within the savings under the CA;
- f. there is no evidence before the Authority to establish Auckland Council’s assessment of Mr Lasham’s entitlements under the personal to holder process was unfair or unreasonable or unjustified;
- g. were recorded in his previous IEA so fall outside the framework of the personal to holder regime which was intended to apply where terms had been agreed outside the framework of an employment agreement.

## **Outcome**

[2] I find that the bonus and redundancy entitlements in Mr Lasham's IEA with Auckland City Council are inconsistent with the terms of the CA which covers his current position. I find Mr Lasham does not have "*personal to holder*" "*saved provisions*" from his IEA which have been preserved under the CA.

## **Costs**

[3] Auckland Council advises it does seek costs.

**Rachel Larmer**  
**Member of the Employment Relations Authority**