

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 237
5525176

BETWEEN

TERRY ALLAN
Applicant

A N D

BRIDON NEW ZEALAND
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Lisa Keys, Counsel for the Applicant
Penny Swarbrick, Counsel for the Respondent

Investigation Meeting: 6 August 2015 at Auckland

Submissions Received: 6 August 2015 from the Applicant and the Respondent

Determination: 7 August 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Mr Terry Allan, claims that he was unjustifiably disadvantaged in his employment by the Respondent, Bridon New Zealand Limited (Bridon).

[2] Specifically, Mr Allan claims that Bridon's assessment that he resigned in 2006 is incorrect and the decision of Bridon to resile from paying him the maximum contractual entitlement of 53 weeks' compensation for redundancy breached the implied contractual terms of trust, confidence and fair dealing between the parties.

[3] Mr Allan further claims that he has been treated with disparity when compared with a colleague, Mr Peter Cuthbertson.

[4] Bridon denies that it incorrectly calculated Mr Allen's entitlement to his redundancy compensation payment, or breached its obligations to him, or that he has been treated inconsistently with other employees.

[5] It claims that it entered into a new employment agreement with Mr Allan with effect as from 12 June 2007 and that was the correct date to use as a basis for the redundancy compensation calculation.

Issues

[6] The issues before the Authority for determination are whether or not:

- (a) The calculation and payment of the redundancy compensation by Bridon to Mr Allan was in accordance with his contract of employment
- (b) There has been disparity of treatment in respect of Mr Allan;

Background facts

[7] Bridon is a multi-national company that manufactures wire rope and attachments. Mr Allan, who commenced employment with Bridon in 1965 was a Cable Sock Weaver and has highly specialised skills.

[8] In 2014 following a restructuring exercise, Mr Allan's position was terminated by reason of redundancy.

Events in 2007

[9] In 2007 Mr Allan found himself in financial difficulty and decided to resign from his employment in order to access a full refund of his superannuation payments to the Bridon New Zealand Limited Superannuation Plan (the Scheme). Mr Allan was 63 years old at that time.

[10] At that time, Mr Allan was a member of the Scheme which was operated by the New Zealand Retirement Trust. In accordance with the rules of the Scheme, members of the Scheme could not withdraw all their funds while employed by Bridon. Funds were only accessible in the following circumstances:

- (a) When the employee reached the age of 65 or thereafter;
- (b) On termination of employment (e.g. resignation, dismissal, redundancy);
- (c) On death, in which case the funds would be paid to the employee's estate; or
- (d) Where the employee becomes totally and permanently disabled

[11] Under the terms of the Scheme, an employee who was a member of the Scheme could make a once only withdrawal of up to 75% of the Member Account whilst employed.

[12] There is no financial hardship exception or other discretion for employees who were members of the Scheme to withdraw all of their funds.

[13] The terms of the Scheme were set out in a Member's Booklet which was issued to all employees who were members of the Scheme, and with which Mr Allan was familiar.

[14] In accordance with Mr Allan's intention to resign, a termination form was completed by Mr Chris Loftin, Bridon's Production Manager at that time to whom Mr Allan reported, providing a termination of employment date of 8 June 2007. The form has been signed by Mr Loftin with a date of 28 February 2007.

[15] An email sent to Ms Susan McCombie, Payroll Officer, dated 25 May 2007 stated: "*Terry Allan wants to cash up annual holiday or long service next week*".

[16] Ms Susan McCombie, Payroll Officer, processed Mr Allan's termination effective 8 June 2007. This included calculating and processing Mr Allan's holiday leave pay and any other entitlements.

[17] In the past, Bridon has agreed to other employees resigning from their employment for the purposes of accessing all of their superannuation funds from the Scheme.

[18] A New Zealand Retirement Trust (NZRT) Leaving Employment Form was completed by Mr Alan Pearson, the Bridon employee responsible for matters concerning the Scheme. Mr Pearson had ticked a box indicating that Mr Allan's reason for leaving was retirement, and signed and dated the form 22 May 2007. Mr Allan and Mr Pearson had both signed the accompanying form entitled: "*New Zealand Retirement Trust withdrawing Funds*" which was also dated 22 May 2007.

[19] Mr Allan said that on or about 6 June 2007, there was a discussion between himself and Mr Loftin, during which Mr Allan said that Mr Loftin had stated that Bridon 'did not want to lose him' and asked what he required in order to stay.

[20] The discussion concluded with an oral agreement that Mr Allan would receive an increase to his hourly rate of pay, and that his full-time hours would decrease.

[21] Mr Allan said that he had re-negotiated his hours of work and rate of pay with Mr Loftin, however he had never left, resigned, retired or commenced employment under an entirely new service agreement.

[22] A retirement party which had been arranged for Mr Allan took place on 7 June 2007 and on or about that date, there was an article published in a Bridon in-house newsletter headed: "*Terry Allen Retires after 42 years with Cookes*". The article recorded that Mr Allan had been presented with a gift, and concluded: "*All the best Terry in your "semi" retirement*".

[23] Following 8 June 2007 Mr Allan received all of his superannuation fund entitlements and he made no further payments into the Scheme. He had also been terminated from the Bridon payroll and all his statutory and contractual entitlements were paid to him.

[24] Mr Allan attended for work on 12 June 2007, explaining to his colleagues that he had not left his employment at Bridon. He initially was working on a part-time basis, although his hours subsequently increased to a full-time basis.

[25] Ms McCombie processed Mr Allan as a new employee on the payroll with a commencement date of 11 June 2007.

Restructuring process 2014

[26] Bridon had entered into a collective agreement with the Engineering, Printing & Manufacturing Union (EPMU). Employees on individual employment agreements had no entitlement to redundancy compensation but those employees who were members of the EPMU had an entitlement to redundancy compensation in accordance with clause 24.14 of the collective agreement.

[27] Mr Allan who had previously been an EPMU member some years earlier, re-joined the EPMU in 2013.

[28] On 22 September 2014, Ms Samantha Denz, the HR Manager, emailed Mr Steven Westoby, EPMU Organiser, to request a meeting and indicated that a restructure was imminent.

[29] On 22 September 2014, Mr Westoby met with Ms Denz who informed him that manufacturing operations were to be relocated overseas and as a result production at the Tamaki site was to finish.

[30] On 29 September 2014, the Bridon General Manager met with factory employees as a group and announced the restructure. Following that meeting, members of the HR Department met with affected individuals to discuss their future with the company. Mr Westoby attended all the meetings with individuals.

[31] At the meeting held with Mr Allan it was explained to him that his services were no longer required and that he was confirmed as being made redundant. Mr Allan was handed an envelope with details of his final pay and redundancy compensation.

[32] Following the meeting with Mr Allan, Mr Westoby had been in attendance at another affected individual's meeting when it was interrupted by Mr Allan raising concern at the notification of his level of redundancy entitlement.

[33] Mr Allan's understanding was that as he commenced employment with Bridon in 1965 he was entitled to the full redundancy compensation of 53 weeks' pay in accordance with clause 24.14 of the collective agreement and not the calculation of redundancy compensation set at 17 weeks, calculated using the start date in 2007, as advised by Bridon.

[34] Bridon did not accept that it had calculated Mr Allan's redundancy compensation incorrectly and Mr Westoby notified the company of a personal grievance being raised by Mr Allan on 21 October 2014.

[35] Mr Allan's last day of employment at Bridon was Friday, 24 October 2014.

Determination

Was the calculation and payment of the redundancy compensation by Bridon to Mr Allan correctly calculated?

(i) Termination of employment in 2007

[36] Mr Allan received a full refund from the Scheme of both the Member and Employer Accounts in 2007.

[37] The terms under which a full refund of the superannuation entitlement under the Scheme could be made were specified in the terms of the Member's Booklet, specifically that a member below the age of 65 years could only obtain a full refund upon the termination of employment.

[38] I find that Mr Allan who was below the age of 65 in 2007 was aware of this fact, as acknowledged by him during the Investigation Meeting, and indeed this knowledge had motivated Mr Allan's intention to resign in 2007.

[39] Acting in accordance with that intention, he completed the steps required to effect termination by signing the New Zealand Retirement Trust withdrawing Funds form also dated 22 May 2005.

[40] In addition to a full refund from the Scheme, Mr Allan also received a full refund of his outstanding pay and entitlements effective 8 June 2007. An employee cannot legally be paid statutory entitlements other than on termination of employment

[41] I find that Mr Allan's employment terminated on 8 June 2007 when he received a full refund of the superannuation benefits under the Scheme, in addition to a full refund of his employee entitlements to that date.

(ii) *Current continuous service*

[42] In accordance with clause 24.14 of the Collective Agreement the redundancy calculation was based upon the number of years of current continuous service with Bridon.

[43] I have found that there was a termination of Mr Allan's employment with Bridon on 8 June 2007.

[44] He attended for work on 12 June 2007; I accept that there was therefore there was therefore only a very short break in his employment. However his employment with effect from 12 June 2007 was different to his full-time employment which ended on 8 June 2007, in addition his leave and other statutory entitlements commenced afresh since he had already received a full payment of entitlements as at 8 June 2011.

[45] The termination of that period of employment was further marked by the payment of all service related entitlements as at 8 June 2007.

[46] Mr Allan's service with Bridon having ceased by way of termination on 8 June 2014, I find that there were two distinct periods of employment for Mr Allan.

[47] The first from 1965 until 8 June 2014, which came to an end by reason of Mr Allan's retirement from the Scheme initiated by Mr Allan, and the second from 12 June 2014 which had new terms and conditions of employment and from which date accrual to sickness and leave benefits commenced.

[48] There is no evidence that Bridon agreed to Mr Allan's previous service with Bridon being recognised for the purposes of the calculation of a redundancy compensation payment.

[49] Although the break in employment was only very short, I find that there was nonetheless a break in service¹ such that Mr Allan's 'current continuous service' was that which commenced on 12 June 2007.

¹ "A break is a break is a break" *Wynne v Telecom Directories Ltd* (unreported) , AT89/98, 30 April 1998 at page 4

[50] On that basis I find that Bridon correctly calculated Mr Allan's entitlement to redundancy compensation in respect of service with effect from 11 June 2007.

[51] I determine that the calculation and payment of the redundancy compensation by Bridon to Mr Allan was correct.

Was there been disparity of treatment in respect of Mr Allan?

[52] Mr Allan claims that he should have received similar treatment to Mr Peter Cuthbertson, an employee of Bridon who was made redundant at the same time as him, and whose redundancy calculation was based on service with Bridon from 1968 despite having undergone a transfer from the UK to New Zealand in 1999.

[53] Bridon NZ and Bridon UK form part of the same group of companies, although they are separate legal entities.

[54] Mr Cuthbertson had worked for Bridon UK from 1968 and transferred to work for Bridon New Zealand with effect from 22 February 1999. Mr Cuthbertson's employment with Bridon New Zealand commenced on 27 February 1999 which was the effective date used for the purposes of calculations of entitlements such as annual and sick leave in New Zealand. This was on the basis that these entitlements had been paid out to him when he had ceased employment at Bridon UK and transferred to work for Bridon in New Zealand.

[55] However, because Mr Cuthbertson's service was within the Bridon group of companies, his other service-related entitlements such as superannuation and long service leave had been carried over to New Zealand and accorded an effective calculation date with service recognised as commencing with Bridon in 1968.

[56] I note that Mr Cuthbertson received an additional week of annual leave upon commencing with Bridon New Zealand, as well as long service leave in 2003 for his 35 years of service with Bridon.

[57] The Court of Appeal decision in *Chief Executive of the Dept of Inland Revenue v Buchanan*² set out three separate issues to be considered in relation to the question of disparity of treatment:

i. *Is there disparity of treatment?*

ii. *If so, is there an adequate explanation for the disparity?*

² [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*³

[58] In the case of Mr Cuthbertson I note that, unlike Mr Allan, there was no termination of employment, rather there was a transfer within the Bridon Group, albeit from one country to another which explained the reason for the payment of holiday and leave entitlements accrued in the UK.

[59] In *Samu v Air New Zealand*⁴ the Court of Appeal stated: “*If there is an adequate explanation for the disparity, it becomes irrelevant*”.

[60] I find that there was an adequate explanation for the disparity of treatment between Mr Allan and Mr Cuthbertson.

[61] I determine that there has been no disparity of treatment in respect of Mr Allan.

Costs

[62] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

³ Ibid at para [45]

⁴ [1995] 1 ERNZ 636 (CA)