

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 17
5427386

BETWEEN	WAYNE BISHOP Applicant
A N D	MADAGASCAR (No.1) 2013 LIMITED Respondent

Member of Authority: David Appleton

Representatives: Carren McDonald, Advocate for Applicant
Ralph Webster, Advocate for Respondent

Investigation Meeting: 28 January 2014

Submissions Received: 28 January 2014 from Applicant and Respondent

Date of Determination: 3 February 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant was entitled to be paid a redundancy compensation payment upon his dismissal for redundancy. He is also due bonus payments.**
- B. The applicant was not unjustifiably disadvantaged in his employment.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Bishop raises a personal grievance for an unjustified disadvantage on the basis that the respondent has failed to pay redundancy compensation pursuant to an individual employment agreement that Mr Bishop asserts was a binding employment agreement between him and the respondent company. He also seeks a compliance

order in respect of the payment of redundancy compensation and of three bonuses. He also seeks an enquiry into penalties.

[2] The respondent does not admit that Mr Bishop was entitled to receive a redundancy compensation payment upon his dismissal by reason of redundancy, which took place on or about 18 July 2013. The respondent admits that Mr Bishop is owed three bonus payments although, at the date of the investigation meeting, it was unable to verify the amounts which are claimed by Mr Bishop.

A brief account of the events giving rise to the claims

[3] The respondent was formerly known as International Cargo Express Limited (ICE) and changed its name to Madagascar (No.1) 2013 Limited on 29 July 2013, after Mr Bishop's dismissal. ICE was a family run business, owned and operated by the Carville family.

[4] Mr Bishop was employed by the respondent company from October 1993. It is his evidence that he joined the company as it was being set up from scratch and therefore had a good memory of the terms of the agreement upon which he was employed. Mr Bishop was, indeed, referred to by Mr Adam Carville, the current managing director of the respondent, as a founder employee in his evidence to the Authority.

[5] Mr Bishop's evidence is that, when he was given a copy of his individual employment agreement in 1993, it was at a meeting at the premises of DS Duns & Co, business consultants and chartered accountants, and that nine other people were present. Mr Bishop said that he signed the agreement immediately, being the first to do so. He said that he handed it to Mr Dave Carville the managing director at the time. (Dave was Adam Carville's father, with whom Mr Bishop had become friends prior to 1993).

[6] Mr Bishop's evidence is that he recalls that the 1993 employment agreement provided that his pay would be the same as he had been receiving at his previous company, which I understand had also been run by Mr Dave Carville. He also recalls that the agreement provided that he would receive 2% profit share on pre-tax profits, a company vehicle within two years, and that he and his family would be covered by a medical insurance plan.

[7] Mr Bishop says that he also recalls that, whilst there was no superannuation scheme, there was a redundancy compensation clause in the 1993 agreement providing that he would receive compensation if he were to be made redundant of four weeks' pay for the first two years of service and two weeks' pay for each subsequent year of service.

[8] It is Mr Bishop's evidence that he did not keep a copy of this agreement. The respondent states that it cannot find a copy either.

[9] Mr Adam Carville gave evidence that he had very recently spoken to an accountant who was present at that original meeting in 1993, as well as to one of the original directors of the company, and that neither of them remember the redundancy compensation payment being in the employment agreement for the staff. Mr Carville said that the accountant could not recall a written employment agreement at all. Unfortunately, Mr Dave Carville passed away in 2010 and Mr Adam Carville was only 8 years old at the time when Mr Bishop commenced employment with the respondent company.

[10] Evidentially, as neither the accountant, nor the director to whom Mr Adam Carville spoke gave evidence to the Authority, Mr Adam Carville's evidence being hearsay, it carries less weight than that of Mr Bishop. I therefore accept Mr Bishop's evidence on the presence of the redundancy clause in the 1993 agreement.

[11] Mr Bishop says that, around 2002, the consultancy company, Sheffield Limited, was appointed by Mr Dave Carville to assist the company with HR matters. They advised the company that it needed to put in place new employment agreements in light of the fact that the Employment Relations Act 2000 had come into force.

[12] Mr Bishop's evidence is that he worked closely with Sheffield Limited in relation to drafting job descriptions for the employment agreements and that he was given a copy of an intended agreement for his role. His evidence is that he recalls getting the intended employment agreement and flicking through it. He says it was the same as his previous employment agreement, just with the changes required for the 2000 Act. He says that he does not recall signing it, but knows that he did not object to any of the clauses. He also says that he was not requested to sign it and that that was something Mr Dave Carville did not pursue with any of the staff.

[13] The Authority saw a copy of this 2002 agreement, which had been found by Mr Bishop after he had been told that he was being made redundant. His evidence is that he was clearing out his drawers and he found the copy in a folder. The agreement is dated January 2002, but is unsigned by either party. The parties are named and clause 11.6 reads partly as follows:

Redundancy: If the Employee's position becomes superfluous to the Employer's needs, then this Agreement may be terminated by reason of redundancy.

11.6.1 Redundancy compensation will be paid to the Employee as provided for in Schedule A. The Employee will also be entitled to notice as set out in Schedule A. The Employee may be required to either work out that notice or will be paid in lieu, at the Employer's discretion.

[14] Schedule A of the 2002 agreement is in the form of a table and has been completed with Mr Bishop's details. It cites Mr Bishop's original commencement date, his position of administration manager, his remuneration at the time of \$42,500 per year, and his extra remuneration of a 2% profit share of the profit made by the ICE Christchurch operation only.

[15] Schedule A also set out Mr Bishop's other benefits of a company car (for private use) and membership of the ICE medical scheme for himself and his partner. It set out his total annual holiday entitlement, together with his special leave entitlement (including three days special leave, together with extra leave at the discretion of his manager). It set out his hours of work and notice required. It also set out the following in respect of *redundancy*:

4 weeks gross pay for the first year, plus two weeks gross pay for every subsequent year. Final amounts calculated on a pro rata basis for part years. One month notice of a redundancy.

[16] Mr Bishop says that, in the folder which he found in his drawer, there was also another document dated August 2003, which was in the form of a template employment agreement. The employer was cited as International Cargo Express (Perishables) Limited but did not cite Mr Bishop's name. It contained the same wording at 11.6.1 as the 2002 agreement and, although Schedule A was largely uncompleted, it stated Auckland as the location, an entitlement to three weeks' total holiday entitlement and two weeks' notice. Notably, it also set out the same wording

with respect to calculation of a redundancy compensation payment as was contained in Schedule A of the 2002 agreement.

[17] Mr Bishop's evidence was that this template agreement was provided by the manager of an associated company in Auckland when the new Holidays Act 2003 came into force in 2004. This appears to be credible as the Schedule A template contained handwritten notes indicating changes that would be necessary in the light of the new Holidays Act at that time.

[18] Mr Bishop says that, in 2011, Mr Adam Carville had taken over as the managing director following Mr Dave Carville's death the previous year, and engaged an employment consultant called Decipher to put together job descriptions and employment agreements for the staff at that time. Mr Bishop says that he believes that a new employment agreement was prepared for him but none was ever given to him because of some uncertainties about his role. The Authority saw a copy of the agreements that were put in place on the advice of Decipher. Mr Bishop said in evidence that he had never seen an agreement of that kind (which were distinctive in their appearance). The copy of the Decipher prepared agreement given to the Authority does not contain a right to receive redundancy compensation upon termination for redundancy.

[19] Mr Bishop says that, in late 2012, he was advised that his position had been dissolved and that, when he requested his redundancy compensation, he was told that there was no signed agreement and therefore he was not entitled to redundancy. Mr Bishop was not dismissed for redundancy at that time, however, but was offered a contractor's agreement. Mr Bishop objected to that, largely on the basis that most of his benefits to which he had been entitled up to that point as an employee were not provided for in the draft contract. Mr Bishop listed these benefits in a letter to the company dated 2 April 2013, which included reference to a redundancy compensation payment. Mr Bishop says that Mr Adam Carville agreed to allow him to stay on as an employee and that he was told shortly afterwards that the respondent had sold the business to a third party.

[20] Mr Bishop was later told that he was to be made redundant on 18 July 2013. He was told that he was not entitled to a redundancy compensation payment. Mr Bishop says that, it was after he had been told of his redundancy, that he came across the two employment agreements, dated 2002 and 2003 respectively.

The issues

[21] The Authority must determine the following issues:

- (a) Whether Mr Bishop is entitled to be paid a redundancy compensation payment by the respondent.
- (b) If so, how that redundancy compensation payment is to be calculated.
- (c) Whether Mr Bishop has suffered an unjustified disadvantage in his employment as a result of the refusal to pay redundancy compensation.
- (d) Should a penalty be imposed upon the respondent?

Is Mr Bishop entitled to a redundancy compensation payment?

[22] Mr Adam Carville said in evidence to the Authority that he does not dispute Mr Bishop's evidence but that, essentially, the company declines to make the redundancy payment because it has no evidence of a signed employment agreement giving Mr Bishop the right to one. Specifically, Mr Adam Carville does not argue that the 2002 and 2003 agreements produced by Mr Bishop are not authentic, nor that Mr Bishop found them in the way he says he did, after he had been told of his redundancy.

[23] Mr Bishop had a very detailed memory of the terms of his 1993 agreement, and attributes that to the fact that he had been part of the company when it was set up, working with Mr Dave Carville. It is my view that Mr Bishop is telling the truth both about the fact that he signed an employment agreement in 1993, and as to his recollection of the terms. In particular, it is notable that Mr Bishop says that he recalls that he was entitled to a redundancy payment worked out on the basis of four weeks' pay for each of the first two years of service, followed by two weeks' pay for every subsequent year and that, when he was given the agreement in 2002, he did not notice that it had changed to four weeks' pay for the first year only, together with two weeks' pay for each subsequent year of service.

[24] It is my belief that, if Mr Bishop either could not recall the details of that clause in the 1993 agreement, or was being dishonest as to its terms, he would simply have said that the terms were the same as those contained in the 2002 agreement. In addition, when Mr Bishop first asked for a redundancy compensation payment around

December 2012, prior to finding the 2002 agreement, he had referred to being entitled to eight weeks' pay in respect of the first two years of service (instead of six weeks' pay).

[25] I am further persuaded that Mr Bishop's original 1993 agreement contained provision for a redundancy compensation payment by the fact that the Schedule A to the 2002 agreement contains all of the details of Mr Bishop's remuneration package, which Mr Adam Carville conceded were accurate in every other regard. It is also of interest to note that, in the 2003 template document, which had been obtained from the Auckland office (as confirmed in Schedule A), the same redundancy compensation calculation is set out as in the 2002 agreement. This would suggest that this redundancy compensation was a term of other employees across the group of companies at that time and was not just a term of Mr Bishop's agreement. In other words, Schedule A of the 2003 template was not filled in with any particular employee's details; therefore the existence of the redundancy compensation calculation in it proves to my satisfaction that redundancy compensation was a benefit common to staff across the group company in 2003.

[26] With respect to there being no signed copy of an agreement, Mr Bishop's evidence was that he signed the employment agreement in 1993. No-one was able to give evidence from the respondent to refute this. The fact that Mr Bishop was present at a formal meeting at the foundation of the company, at which the respondent company's accountants were present, leads me to believe that it is more likely than not that Mr Bishop did sign the employment agreement as part of the formal process. The fact that the 2002 agreement was not signed does not, in my view, undermine Mr Bishop's right to a redundancy compensation payment because that agreement does not vary the right to such a payment (although it does vary how it is calculated). I will consider this point below.

[27] In light of this evidence, I am entirely satisfied that, when Mr Bishop commenced employment with the respondent company in 1993, one of the terms and conditions of his employment was the right to receive a redundancy compensation payment were he to be made redundant. The respondent does not argue that this right was in any way varied or lawfully withdrawn from Mr Bishop before his dismissal.

How is the redundancy compensation payment to be calculated?

[28] Mr Bishop's evidence is that, in 1993, he was given an employment agreement which entitled him to redundancy calculated on the basis of four weeks' pay for the first two years of service, followed by two weeks' pay for every subsequent year. The document presented to the Authority dated 2002 provides that the redundancy compensation payment is to be calculated by the payment of four weeks' pay for the first year plus two weeks' pay for every subsequent year of service. There would therefore appear to have been a purported variation of the terms entitling Mr Bishop to a redundancy compensation payment.

[29] There is no evidence that any consideration was paid to Mr Bishop so as to make this variation, which acts to Mr Bishop's detriment, binding upon him. However, at the Authority's investigation meeting Ms McDonald stated that Mr Bishop is only seeking a redundancy compensation payment based upon the formula set out in the 2002 agreement, which results in a gross sum of \$62,996.25. In view of this statement on behalf of Mr Bishop, that is the sum I award to Mr Bishop.

Has Mr Bishop suffered an unjustified disadvantage in his employment by way of the non-payment of his redundancy compensation?

[30] Section 103(1)(b) of the Employment Relations Act 2000 (the Act) provides that a personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim that the employee's employment, or one or more conditions of his employment (including any condition that survives termination of the employment) is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[31] In the absence of an express term to the contrary, I believe that payment of the redundancy compensation fell due at the point when Mr Bishop's employment ended by reason of redundancy. It is at this point, when payment of the redundancy compensation payment was not made, that a disadvantage in Mr Bishop's employment was capable of arising. Alternatively, the right to receive a redundancy payment is a term of employment that survives termination, and so continuing non-payment of the redundancy compensation payment is capable of causing a disadvantage in Mr Bishop's employment.

[32] However, s103(3) of the Act makes clear that unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement. In this case, the respondent does dispute the right of Mr Bishop to receive a redundancy compensation payment, and so I believe that Mr Bishop's disadvantage personal grievance is precluded by virtue of s103(3) of the Act.

[33] However, if I am wrong in that analysis, I also need to consider whether the employer's refusal to pay a compensation payment upon Mr Bishop's redundancy was unjustified.

[34] Section 103A of the Act provides:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*

- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[35] This is a situation where Mr Adam Carville became the managing director of the company upon his father's death. Before that, although he had worked for the family company, I understand he had not held any management positions. Certainly, he was not aware of the detailed terms and conditions that long standing employees were employed under.

[36] At the time when Mr Bishop was told that he was to be dismissed by way of redundancy, neither he nor the respondent had available a copy of the 2002 or 2003 agreements. No version of the 1993 document existed. Once it was found, the 2002 agreement was unsigned. In addition, the respondent company was, at that point, suffering significant financial difficulties, the details of which do not need to be set out in this determination. Mr Bishop accepts that.

[37] Therefore, under these circumstances, I believe the respondent company was justified in declining to pay to Mr Bishop what amounts to a significant sum of money. Essentially, although much of the factual evidence has been agreed between the parties, this is a dispute as to an entitlement to a contractual payment. In light of that, I do not believe that the respondent declined to make the payment for an unjustified reason. In other words, I believe that the refusal to make the payment in all the circumstances at the time the refusal was made, was the action that a fair and reasonable employer could have made.

[38] Accordingly, I decline to find that Mr Bishop has suffered an unjustified disadvantage in his employment by way of the refusal of the respondent company to pay a redundancy compensation payment.

Should a penalty be imposed?

[39] Ms McDonald submits that Mr Bishop seeks a penalty to be imposed against the respondent for the failure to retain a copy of any agreement and, further, the

failure to provide a new agreement when it was apparent that the respondent did not have a copy of any agreement on hand.

[40] No one knows when the 1993 copy of the agreement became lost by the respondent. However, I am satisfied that it is unlikely that there was any deliberate failing on the part of the respondent to retain the agreement. In addition, it is likely that it would have been lost prior to the statutory duty to retain employment agreements being imposed upon employers. I therefore decline to impose a penalty upon the respondent for this alleged failing.

[41] In addition, I do not believe that the terms of the 2000 Act, which was in place when the company found out in around 2010 that it did not hold an agreement for Mr Bishop, require an employer to provide a copy of an individual employment agreement to an existing employee, as opposed to a new or intended employee. I therefore decline to impose a penalty for this alleged failing.

[42] I note from the statement of problem that a penalty was also sought for breach of Mr Bishop's individual employment agreement. Presumably, this relates to the breach of the term entitling Mr Bishop to a redundancy compensation payment.

[43] For the reasons articulated above, when I declined to find that the respondent's refusal to pay redundancy compensation constituted an unjustified disadvantage in Mr Bishop's employment, I do not accept that it would be appropriate to impose a penalty upon the respondent for failing to make the payment, given that there was a genuine dispute between the parties as to whether or not the payment was due.

Orders and directions

[44] I order the respondent company to pay to Mr Bishop the following sums:

- (a) The gross sum of \$62,996.25 in respect of a redundancy compensation payment. Interest shall accrue upon this sum, at the rate of 5% per annum, as prescribed under s.87(3) of the Judicature Act 1908, from the date of this determination until payment of the sum in full.
- (b) The gross sum of \$12,371.76 in respect of a bonus payable to Mr Bishop, which fell due in June 2011. The respondent shall have seven days from the date of this determination to verify whether or not

it agrees with the sum stated by Mr Bishop to be owed. If it does agree, the agreed sum shall be paid to Mr Bishop within 14 days of the date of this determination. If it does not agree, the respondent must, within 14 days of the date of this determination, write directly to Mr Bishop, or to his representative, setting out the sum that it believes is owed, and how it calculates that sum. Upon agreement, the agreed sum shall be paid to Mr Bishop within seven days of agreement being reached. In the absence of an agreement between the parties of the sum to be paid to Mr Bishop being reached within 28 days of the date of this determination, Mr Bishop may apply to the Authority for a determination on the correct sum owing. Interest at the rate of 5% per annum shall accrue upon the sum of \$12,371.76, or upon such alternative sum that has been agreed between the parties, from the date when payment is due in accordance with this sub paragraph, until payment of the sum in full.

- (c) The sum of \$19,710.92 in respect of a bonus payable to Mr Bishop that fell due to be paid in June 2012. The respondent shall have seven days from the date of this determination to verify whether or not it agrees with the sum stated by Mr Bishop to be owed. If it does agree, the agreed sum shall be paid to Mr Bishop within 14 days of the date of this determination. If it does not agree, the respondent must, within 14 days of the date of this determination, write directly to Mr Bishop, or to his representative, setting out the sum that it believes is owed, and how it calculated that sum. Upon agreement, the agreed sum shall be paid to Mr Bishop within seven days of agreement being reached. In the absence of an agreement between the parties of the sum to be paid to Mr Bishop being reached within 28 days of the date of this determination, Mr Bishop may apply to the Authority for a determination on the correct sum owing. Interest at the rate of 5% per annum shall accrue upon the sum of \$19,710.92, or upon such alternative sum that has been agreed between the parties, from the date when payment is due in accordance with this sub paragraph, until payment of the sum in full.

[45] Within seven days of the date of this determination, the respondent is to set out in writing to Mr Bishop, or his representative, the exact sum owing to Mr Bishop in respect of the *5% airline claim bonus*, together with details of how the sum has been calculated. Mr Bishop shall advise the respondent in writing within 14 days of the date of this determination whether or not he agrees with the sum and its calculation and, if not, is to present his alternative calculations. The respondent is to then pay the agreed sum to Mr Bishop within seven days of agreement being reached. In the absence of an agreement between the parties of the sum to be paid to Mr Bishop being reached within 28 days of the date of this determination, Mr Bishop may apply to the Authority for a determination on the correct sum owing. Interest at the rate of 5% per annum shall accrue upon the agreed sum, from the date when payment is due in accordance with this sub paragraph, until payment of the sum in full.

Costs

[46] Costs are reserved.

[47] If Mr Bishop seeks a contribution to his legal costs he should first seek to agree the basis of that contribution with the respondent. In the absence of such an agreement within 28 days of the date of this determination, Mr Bishop may, through his representative, lodge and serve a memorandum and the respondent may, through its representative, lodge and serve a memorandum in reply within a further 14 days.

David Appleton
Member of the Employment Relations Authority