

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 408
5368771

BETWEEN DAVID COX
 Applicant

A N D AUCKLAND COUNCIL
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 Andre Lubbe, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 21 September 2012 from Applicant
 15 October 2012 from Respondent
 23 October 2012 from Applicant

Date of Determination: 16 November 2012

DETERMINATION OF THE AUTHORITY

A. Mr David Cox is not owed any pay in lieu of notice or additional redundancy compensation by Auckland Council as a result of the termination of his permanent employment with Papakura District Council on 31 October 2010.

Employment relationship problem

[1] By agreement this matter was deal with on the papers. The parties filed an agreed statement of facts and written submissions.

[2] In his statement of problem Mr Cox claims Auckland Council owes him two months' salary in lieu of notice as a result of the termination of his permanent employment with Papakura District Council on 31 October 2010.

[3] Although not raised in the statement of problem, Mr Cox in his submissions also claims additional redundancy compensation for the period 01 November 2010 to 05 January 2011, the date his employment with PDC would have ended had he worked out his full notice period.

[4] Auckland Council addressed that new claim in its submissions so I consider that claim is also now before the Authority. I have therefore determined both the pay in lieu of notice and additional redundancy compensation claims.

[5] Auckland Council says Mr Cox does not have any entitlement to any further payments in relation to his employment with initially Papakura District Council (PDC) and subsequently Auckland Council.

[6] Mr Cox was employed by PDC from 29 April 2002 until 31 October 2010 under an individual employment agreement (IEA). Clause 11(a) of the IEA provided that Mr Cox's employment could be terminated on three months' notice or pursuant to clause 11(b), at the employer's discretion, by payment in lieu of notice.

[7] On 01 November 2010 Auckland Council became the statutory successor to eight legacy Councils in the Auckland region, including PDC, through the Local Government (Auckland Council) Act 2009 and the Local Government (Auckland Transitional Provisions) Act 2010 (ATPA).

[8] The Auckland Transition Agency (ATA) was established to manage and oversee the transition process of amalgamating eight existing Councils into Auckland Council. ATA determined Mr Cox's role at PDC was surplus to Auckland Council's requirements and consequently would be disestablished.

[9] On 06 September 2010 Mr Cox was offered a permanent position in the newly formed Auckland Council which was substantially different to his then existing role at PDC. Mr Cox was therefore able to decline this offer and still retain his entitlement to redundancy compensation. Mr Cox declined the offer on 09 September 2010.

[10] ATA wrote to Mr Cox on 19 October 2010 recording his rejection of the offer of employment. It also confirmed his employment with PDC would terminate on 31 October 2010 and that *no additional notice will be given (or paid) to you.*

[11] ATA also advised:

However, as you have declined the offer, I confirm that pursuant to section 104(1) Transitional Act, PDC will pay you any redundancy compensation you may be entitled to, when your employment terminates on 31 October 2010.

[12] On 11 October 2010 Mr Cox asked PDC for confirmation of his proposed termination payment. He was provided with draft final pay calculations on 19 October 2010 which were based on the understanding that Mr Cox's employment with PDC would cease on 31 October 2010 and that he would be paid out his redundancy, payment in lieu of notice, and annual leave entitlements upon termination because he had not accepted an offer of employment with Auckland Council.

[13] On 29 September 2010 ATA gave Mr Cox formal notice of termination of his employment with PDC with effect from 31 October 2010. It also stated:

Pursuant to section 104 of the Act, any accrued entitlements you have under your existing employment agreement with PDC (such as redundancy compensation and holiday pay) will be paid to you upon termination.

*Nothing in this notice prevents the ATA, the Auckland Council or a CO from offering you a position with Auckland Council or a CCO on or before 31 October 2010 [...] In the event you accept a position with Auckland Council or a CO on or before 31 October 2010, **then this notice and any notice given by Papakura District Council in reliance on this decision will be void.** (Emphasis added)*

[14] Mr Cox received his notice of termination 05 October 2010 and his employment with PDC terminated on 31 October 2010.

[15] On 21 October 2010 ATA offered Mr Cox a fixed term position with Auckland Council which commenced on 01 November 2010 and ended on 30 April 2011 and which recognised his previous PDC service in respect of all entitlements except redundancy entitlements.

[16] Mr Cox accepted that offer on 26 October 2010. In accordance with s.106 ATPA Mr Cox's entitlement to be paid redundancy compensation by PDC on 31 October 2010 remained but actual payment was deferred until the conclusion of his fixed term engagement with Auckland Council.

[17] Mr Cox completed his initial fixed term contract on 30 April 2011 and was offered a new fixed term engagement by Auckland Council which commenced on 01 May and ended on 30 June 2011.

[18] Mr Cox accepted this offer and his employment ended when his fixed term engagement expired on 30 June 2011. On 01 July 2011 Mr Cox was paid his annual leave which had been transferred from PDC, unused annual leave accrued whilst at Auckland Council, and deferred redundancy compensation relating to his employment with PDC.

[19] Mr Cox believes his final pay from Auckland Council is incorrect based on the indicative figures he received from PDC on 19 October 2010. He claims it should have included payment in lieu for the balance of the notice period from PDC for the period 01 November 2010 – 05 January 2011 together with additional redundancy compensation based on a date of termination of 05 January 2011, being the date his contractual notice would have expired had he worked out his full notice period.

Issues

[20] The following issues require determination:

- (a) Is Mr Cox owed pay in lieu of notice?
- (b) Is Mr Cox entitled to redundancy compensation based on service ending on 05 January 2011 instead of on 31 October 2010?
- (c) What if anything is Mr Cox owed?

Is Mr Cox owed pay in lieu of notice?

[21] Mr Cox says the reference in ATA's 29 September 2010 letter to *any accrued entitlements you have under this existing agreement* being paid upon termination is not restricted to redundancy compensation and leave entitlements but also includes his pay in lieu of notice. Because he did not receive notice of termination until 05 October 2010 Mr Cox claims he is entitled to be paid in lieu of notice for the period 01 November 2010 to 05 January 2011.

[22] Mr Cox says that the fixed term agreement from ATA on behalf of Auckland Council did not provide for the previous PDC unpaid notice to be worked out and that the notice issue was never discussed with him at the time.

[23] The offer of fixed term employment dated 21 October 2010 provided that any entitlement Mr Cox had to be paid *redundancy compensation* by PDC on 31 October 2010 would be deferred until the conclusion of his fixed term engagement. Mr Cox says his unpaid contractual notice was part of the fixed amount of *redundancy compensation* which he submits was *the sum of any entitlements due from PDC on 31 October 2010 resulting from the notice of termination*.

[24] Mr Cox submits his view that the use of the term *redundancy compensation* includes both redundancy compensation and any associated payment in lieu of notice is supported by the Controller and Auditor-General in her report dated 03 November 2010 regarding the inquiry into payments to chief executives of dissolving local authorities in Auckland.

[25] Mr Cox relies on a reference by the Auditor-General to the circumstances of the former chief executive of North Shore City Council. Mr Cox claims this individual's redundancy compensation and pay in lieu of notice was deferred until 30 April 2011 and would only be paid if that individual did not obtain an ongoing permanent role with Auckland Council. Mr Cox therefore says his pay in lieu of notice should have been likewise deferred together with his redundancy compensation.

[26] I do not accept Mr Cox's submissions. There was no evidence before the Authority as to the terms and conditions of employment of the former chief executive of the North Shore City Council or about the basis on which the indicated potential payment in lieu would be made. Auckland Council says it has treated Mr Cox consistently with the manner in which other employees have been treated.

[27] The ATPA provided for the deferral of *redundancy compensation* only for employees who took up fixed term employment after 01 November 2010. There was no provision for the deferral of payments in lieu of notice nor was there any commitment made that pay in lieu of notice would be made to an individual who accepted an offer of fixed term employment with Auckland Council.

[28] I consider the notice of termination letter dated 29 September 2010 made it clear that if Mr Cox accepted a position with Auckland Council on or before 31 October 2010 then the notice given by ATA in its letter of 29 September 2010 and any notice given by PDC would be void and he would not be entitled to redundancy compensation or holiday pay.

[29] Mr Cox was offered a fixed term engagement by ATA on 21 October 2010 which he accepted on 26 October 2010. I therefore find that when he accepted the first offer of fixed term employment on 26 October 2010 that acceptance voided the notice he had been given by ATA and PDC that his employment would terminate on 31 October 2010.

[30] I find that the Auditor-General's report relied on by Mr Cox is not capable of creating a contractual or statutory entitlement to pay in lieu of notice where such entitlement does not already exist independently.

[31] The Auditor-General's report did not set out the specific terms of the contractual notice provisions relevant to the chief executives Mr Cox refers to in his submissions. It may be that these individuals had entitlements such as redundancy and/or notice provisions under their fixed term agreements which Mr Cox did not.

[32] The Auditor General's report did not identify whether the chief executives who had been paid in lieu for the balance of their notice had, like Mr Cox, accepted offers of fixed term or other employment by Auckland Council and if so, whether those offers contained the provision that applied to Mr Cox that acceptance of the offer would void notice of redundancy.

[33] I therefore consider that the Auditor-General's report does not advance Mr Cox's position.

[34] I also do not accept the reference in ATPA or in the notices of termination given by PDC and ATA to *redundancy compensation* also included pay in lieu of notice. Redundancy compensation and pay in lieu of notice are conceptually and functionally distinct.

[35] In that regard I am assisted by the decision of the full bench of the Industrial Relations Commission of New South Wales (IRCNSW) in *Westfield Holdings v*

*Adams*¹ which concluded the authorities it had reviewed persuasively demonstrated that there was a distinction between pay in lieu of notice and redundancy compensation. The IRCNSW stated:

Whilst a period of notice, or payment in lieu, is directed at supplementing the income of an employee immediately following termination, the focus of a redundancy or severance payment is to compensate an employee for the loss of non transferable benefits and for the inconvenience and hardship imposed by the termination. This is, in our view, not merely an additional purpose, but rather the dominant function of the redundancy or severance payments.

[36] The function of a notice period is to provide an opportunity to adjust to the change in circumstances resulting from termination of employment and to provide time to seek alternative employment. Redundancy compensation is intended to compensate for the loss of benefits and entitlements that have been built up as a result of length of service and for the inconvenience and hardship redundancy imposes on a blameless employee.²

[37] I conclude that whilst Mr Cox's entitlement to redundancy compensation was preserved and deferred until fixed term employment with Auckland Council had expired, his entitlement to pay in lieu of notice was not. I find Mr Cox forfeited his pay in lieu of notice entitlement by accepting the first fixed term engagement with Auckland Council.

[38] I therefore find that Mr Cox is not owed any outstanding pay in lieu of notice as a result of his employment terminating with PDC on 31 October 2010 or as a result of the termination of his second fixed term engagement with Auckland Council on 30 June 2011.

Is Mr Cox entitled to redundancy compensation based on service ending on 05 January 2011 instead of 31 October 2010?

[39] Mr Cox's redundancy compensation was calculated based on a termination date of 31 October 2010. Mr Cox claims his contractual notice period should be included in the redundancy calculation period irrespective of whether or not it was worked out or paid in lieu.

¹ [2001] NSWIRC 293.

² *Supra* quoting from *Fryar v System Services Pty Limited* at para 331.

[40] Mr Cox submits that if he was allowed to work out the balance of the notice period to 05 January 2011 through the continuation of his PDC contract then his redundancy compensation would have been calculated based on 05 January 2011 being the date of termination, so his redundancy compensation should be recalculated to reflect that.

[41] I do not accept Mr Cox's submission. Redundancy compensation was calculated based on the actual date of termination, which in his case was 31 October 2010. PDC ceased to exist from this date and he did not obtain any redundancy compensation entitlements as a result of his fixed term employment with Auckland Council.

[42] I find that clause 3.2 of Mr Cox's first fixed term employment agreement precluded him from accruing redundancy compensation entitlements during that engagement. Clause 3.2 stated:

For the avoidance of doubt no additional redundancy compensation will be payable to you simply as a result of the expiry of the term [the fixed term engagement].

[43] Identical wording is set out in clause 10.2 of Mr Cox's second fixed term engagement with Auckland Council.

[44] I accept Auckland Council's submission that Mr Cox accepted these terms of fixed term employment so cannot now seek recalculation of redundancy compensation to include his fixed term period of employment (or part of it).

[45] I find that Mr Cox cannot be said to have been still working for PDC after 31 October 2010 so that was the correct date to use when calculating his redundancy compensation.

What if anything is Mr Cox owed?

[46] Upon transferring his employment from PDC to Auckland Council Mr Cox's accrued annual leave entitlements were carried over and he continued to accrue leave throughout his fixed term engagements. No further payment is required to reflect that because it was paid out upon termination of the second fixed term engagement with Auckland Council.

[47] Because I have determined that Mr Cox's acceptance of the first fixed term engagement with Auckland Council voided the contractual notice previously given to him by PDC and ATA he is not entitled to have his redundancy compensation calculated based on any period following the termination of his employment with PDC on 31 October 2010.

[48] I find that Auckland Council does not owe Mr Cox any unpaid pay in lieu of notice or any additional redundancy compensation.

Costs

[49] Auckland Council as the successful party is entitled to a contribution towards its actual legal costs. However, Mr Lubbe advises that should it succeed then it waives any claim to costs. On that basis, no costs will be awarded.

Rachel Larmer
Member of the Employment Relations Authority