

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gary Cutriss (Applicant)
AND Carter Holt Harvey Limited (Respondent)
REPRESENTATIVES Mark Hammond, Counsel for Applicant
David France, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 3 March 2006
DATE OF DETERMINATION 10 March 2006

DETERMINATION OF THE AUTHORITY

[1] Pursuant to s.178 of the Employment Relations Act 2000, the applicant (Mr Gary Cutriss) has applied to have the employment relationship problem between him and the respondent (Carter Holt Harvey Limited) removed to the Court for it to hear and determine without the Authority investigating the matter.

[2] The application involves a dispute over whether the Retirement Policy number KSP433, which provides for the payment of certain benefits on retirement was a term of Mr Cutriss's employment which the respondent is unable to unilaterally delete.

[3] The retirement plan is only applicable to those employees employed at the Kinleith site.

[4] The ground for the application to remove the matter to the Employment Court is that there is an important question of law likely to arise in the matter other than incidentally under s.178(2)(a). The important question of law contended by the applicant is that irrespective of how certain terms might be described in the employment agreement or policy documentation there are specific terms that can never be altered unilaterally.

[5] The respondent opposes removal of the matter on the ground that no important question of law has been established that would justify the removal.

[6] After consideration of the submissions by both parties to this matter, it seems to me the question for which Mr Cuttriss is actually seeking an answer is narrower than that stated. What Mr Cuttriss is looking for from the Employment Court is a statement as to when remunerative based policies become so fundamental to the employment agreement that they can not be deleted unilaterally. In this matter, the deletion of the retirement benefits policy means Mr Cuttriss, would not receive the \$56,000 he would have received, but for the policy being deleted.

[7] The Act does not require an important question of law to be novel, only whether it is likely to arise other than incidentally (*McAlister v Air New Zealand* unreported, Shaw J, 11 May 2005, AEC 22/05).

[8] A review of decided cases within the employment jurisdiction highlighted the large number of cases where the Court and/or Authority has had to consider the question as to when terms are recognized in the employment agreement (see *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW* [1994] 1 ERNZ 68; *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372; *Waghorn v Canterbury Regional Council* unreported, Palmer J, 6 December 1994, CEC 33/94; *Carter Holt Harvey Ltd v Pawson* [1998] 2 ERNZ 1).

[9] These and other cases can be distinguished on the basis that in each matter the provisions under scrutiny did not relate to remunerative terms. I have been unable to find any binding decision on the question raised by Mr Cuttriss that would provide guidance to the Authority in determining this dispute.

[10] The Act allows for removal if the question of law "...arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it" (*Hanlon v International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1).

[11] I accept that an important question of law arises other than incidentally in this matter. I am not aware of any case where the Court or Authority has considered when terms expressed to be contained in policy, and which relate to remunerative provisions become so fundamental that they can not be unilaterally deleted by an employer. In considering this matter I have drawn a distinction between policies from which no remuneration will flow such as Codes of Conduct, and policies such as the one in dispute which provides for a significant payment. Mr Hammond submitted that such policies become so fundamental to the employment agreement that they simply can not be deleted without the agreement of both parties.

[12] I accept that the question of law will be, if not decisive, strongly influential in the bringing about a decision of the dispute between the parties.

[13] The resolution of this matter may also affect other employees employed at the Kinleith site of the respondent, and will provide guidance for other employers when they are deciding what should be contained in policy, and what should be contained within an employment agreement.

[14] The Authority of course has a discretion over whether or not to remove an employment relationship problem to the Court. I accept that it may be more costly for the parties to attend the Employment Court at first instance, and that it will delete an avenue of challenge, should the parties not be satisfied with the determination of the matter. However, given the importance of the question of law here, any issues are outweighed by the benefit to the parties in the certainty that will be provided by a judgment from the Court.

[15] It therefore follows that the Court should determine this matter in the first instance. I therefore order, pursuant to s.178(2) of the Act, the removal of the employment relationship problem between Mr Cutriss and Carter Holt Harvey (AEA566/06) in its entirety to the Employment Court to hear and determine, without the Authority investigating the matter.

Vicki Campbell
Member of Employment Relations Authority