

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Harley Wilson Foote (Applicant)
AND Transpower New Zealand Limited (Respondent)
REPRESENTATIVES Joan Forret, Counsel for Applicant
Susan Hornsby-Geluk, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 22 March 2006
DATE OF DETERMINATION 19 May 2006

DETERMINATION OF THE AUTHORITY

Prohibition on Publication

I make the following order which is permanent.

An order prohibiting any reference to the name or identity or information that could lead to the identification of any person whose severance payments have been identified/described in evidence in this investigation and the details of those payments .

Employment Relationship Problem

In April 2005 the applicant was made redundant from his position with Transpower New Zealand Ltd. (Transpower) Mr Foote alleges he has personal grievances of unjustified disadvantage and unjustified dismissal in that the redundancy was not genuine and he was not treated fairly in the process. He also submits that Transpower breached his employment agreement in that it did not correctly interpret the redundancy compensation provisions such that his entitlement has been underpaid.

To remedy his alleged grievances he seeks lost remuneration and compensation pursuant to s.123 (1) (c) (i). He also asks the Authority to direct that Transpower pay him the shortfall he alleges is owed in redundancy compensation.

Background

In June 2004 a proposal emerged for the respondent to establish a Northern Field Services Office in Auckland. This had implications for the relocation of staff from the Hamilton office to Auckland. Among the affected staff was Mr Foote, a long serving staff member (36 years) based Hamilton.

Mr Bob Simpson, Manager, Grid Management was tasked with developing the business case for the decision.

On 8 July, whilst the proposal was in the early stages of development, Mr Foote emailed Mr Simpson regarding the proposal and relocation of staff He sought information as to whether or not there would be relocation assistance and what level of assistance might be available. He also asked about the business case for the proposal to relocate and he sought information on the proposed timeline. He sought an opportunity for staff discussion on the proposal.

In the meantime Mr Simpson was working on developing the business case for the proposal and undertaking research into the associated economic implications both for the business and staff. He was also working with HR team members on the preparation of a presentation to be made to staff on the proposal.

On 23 July 2004 a formal presentation was made to field service staff in Hamilton. The presentation involved the use of slides to highlight the key elements of the proposal. In that presentation Mr Simpson addressed:

- The business needs driving the proposal including the issues that would impact on any final decision.
- Transpower's preference.
- The anticipated impact on staff and the broad principles of a relocation package.
- Feedback from staff was sought and a timetable to progress the matter was included in the presentation.
- A detailed plan for consultation was signalled for presentation in September.

After the presentation staff asked for a meeting by themselves. Following that meeting staff submitted a list of issues they wished to have addressed in writing by 30 July. Those issues included:

- The structure in Auckland and the Hamilton transitional structure.
- Details on the relocation package offered.
- Remuneration adjustment for Auckland
- Implementation programme including Hamilton office closure date.

After the presentation, staff also asked about the availability of legal advice to discuss the proposal.

A decision was made by Transpower to engage Mr Hammond (an experience employment law practitioner in Hamilton) to allow staff to meet with him for discussions including individual sessions. A number of staff took up this offer to meet with Mr Hammond.

On 30 July Mr Simpson provided a detailed response to all the issues raised by staff after the 23 July presentation.

On 6 August staff met again to discuss the relocation proposals. Following that meeting they submitted more questions for answer. These questions were formally responded to on 12 August 2004.

On 30 August all staff were advised that there would be a meeting on 3 September to present the proposed Auckland structure and the process to be followed. Staff were advised this would be the commencement of the consultation process.

The timetable outlined at the September 3 meeting had the consultation period closing on 10 September with a final decision to be taken and notified to staff on 14 September. Between 15 – 30 September staff were to be made formal relocation offers with acceptances notified by 30 September. Staff accepting relocation could relocate from 1 November and 1 January 2005 was set for the start up of Auckland operations. Staff not moving would remain in Hamilton office until their positions were disestablished at which time they would become entitled to redundancy compensation in accordance with their individual employment agreements. Staff were given packages to confirm all these steps and were also provided with *draft* relocation letters which included details of the inducement package and other transfer assistance Transpower would provide.

Details of the proposed Auckland structure, the process and timetable were included on the intranet on 8 September.

On 14 September staff were advised the date for communication of the final decision had been extended from 14 September to 21 September to allow for consideration of the substantial feedback received from staff re the relocation proposal. Staff were told the final decision would now be communicated on 21 September.

On 21 September the Feedback on Consultation was notified to staff along with the final structure and the process to be adopted to progress the relocation to Auckland. Answers were provided to additional questions raised by staff in the feedback process. On 22 September Mr Foote (along with other staff) received an individual offer of relocation by letter dated 21 September. The inducement package to relocate was set out and he was asked to notify his acceptance or otherwise by 5 October.

On 24 September staff asked for an extension of time to signal their position on relocation. This was to enable them to consult with Mr Hammond prior to making a decision. This extension was granted until 8 October.

However, Mr Foote had leave planned for 1 -14 October. He sought a further extension of time to respond to the offer. This request was declined.

However, by 6 October Mr Simpson was emailing staff (including Mr Foote) to say the inducement offer to relocate had been revised to make it more attractive.

When Mr Foote did not respond to the offer Mr Simpson emailed him on 12 October and advised the deadline to indicate an interest in relocating had expired. Mr Foote was advised he would remain employed in Hamilton until such time as his position was disestablished. Mr Foote was advised he would be consulted over other options that were available and/or to look at phasing out the Hamilton office over time. Mr Simpson indicated he would like to take account of Mr Foote's preferences as part of the proposed discussions. Mr Foote was thanked for his contribution to the Field Services team. He was advised that EAP and other services were available to him through HR.

On his return from leave Mr Foote requested an extension of time to reconsider the revised relocation package. Mr Simpson agreed to this request. However, on 19 October Mr Foote emailed Mr Simpson declining the revised offer. He requested information on the "other options" indicated to him in Mr Simpson's letter of 12 October.

In November Transpower's Asset Development Group of the National Grid were advertising internally for two Transmission Line Field Engineers. Mr Simpson brought the advertisements to Mr Foote's attention. Mr Foote had discussions with Nick Coad, Acting Asset Development Manager. However, he did not apply for the positions available.

Mr Simpson met with Mr Foote and his support person on 13 December. The purpose of the meeting was to advise Mr Foote that as he had not accepted relocation nor applied for positions available in Hamilton that his position would be disestablished and he would be eligible for redundancy compensation from 8 April 2005. Mr Foote was offered CV preparation / interview training. At this meeting Mr Foote asked if there had been any adverse comments on his performance. Mr Foote's question was based on information he submits was given to him by another Transpower manager that if he employed Mr Foote it '*would be on his head*'. Mr Simpson advised him there had been no adverse comments he was aware of. In this regard Mr Simpson's evidence was that he was aware another Transpower manager had spoken to another potential employer to assist the applicant in obtaining employment with that employer.

On 17 December Mr Simpson wrote to the applicant confirming their discussions of 13 December and formally confirming that his position would be disestablished on 8 April 2005. He was advised that any suitable alternative positions would be discussed with him but that if none became available then the redundancy provisions of his IEA would apply. Attached to the letter was a calculation of his redundancy compensation. Mr Foote was thanked for his contribution to Transpower and again he was advised of his right to seek EAP or other assistance.

Mr Foote attended career transition programmes in February 2005 and on 4 March Mr Simpson again wrote to Mr Foote confirming his last day of employment would be 8 April.

Applicant's Position

The position of the applicant was set out in his substantive evidence and supported by closing submissions made on his behalf. To summarise the applicant's position it is that:

- That he was not consulted on the business decision to relocate Transpower's Field Services office to Auckland.
- He was not offered the same opportunities made available to other staff, especially in relation to a non-commuting restriction allegedly imposed on him by Mr Simpson.

- He was not offered alternatives to relocation or redundancy as required by Schedule D to his Individual Employment Agreement.
- The respondent has breached the IEA by failing to pay redundancy compensation in accordance with the provisions of the Agreement.

As a result it is submitted the applicant (who accepted a position on a lower rate of pay after his employment was terminated) has suffered a loss of chance to maintain his previous income for the duration of his reasonably expected employment life. It is also submitted that the applicant has suffered humiliation loss of dignity and injury to feeling in addition to loss of chance. Mr Foote also seeks the balance of the severance compensation he alleges he is entitled to.

Respondent's Position

The respondent disputes the applicant's allegations. It claims that the applicant's termination for redundancy was both procedurally and substantively justified and that it actively sought out alternatives to redundancy which the applicant rejected. The respondent disputes that a blanket non-commuting restriction was imposed on the applicant but not on others.

The respondent submits the applicant was paid the correct amount of compensation as required by the redundancy provisions of his employment agreement. The respondent submits that the applicant's interpretation of these provisions is completely untenable and at odds with the basis on which the provision compensates employees i.e. for service up to a maximum of 20 years.

Individual Employment Agreement (IEA)

Clause 19 of the applicant's Individual Employment Agreement provides that in the event the employee's position is redundant, Transpower will wherever possible endeavour to give the employee one month's notice of redundancy. The employee is also entitled to compensation calculated in accordance with the provision of Schedule D to the agreement. Appendix D is set out in full.

Schedule D Redundancy

In the event of restructuring of or within Transpower resulting in a diminution of responsibilities and consequential changes in the Employee's conditions of employment or the Employee's position being declared surplus to requirements, all possible attempts with be made to find an equivalent position within Transpower. If this is not possible the Employee may be eligible for severance payment on the following terms:

1. *Eligibility for severance will be determined by the Chief Executive of Transpower.*
2. *The severance payment will be calculated as follows:*
 - 2.1 *Less than 1 year continuous service; 25% of the last years ordinary pay plus 8.33% of last years ordinary pay for a partner and each dependent child.*
 - 2.2 *More than 1 years continuous service; as above plus:*
 - (i) *8% of the last years ordinary pay*

(ii) 4% of the last years ordinary pay for each year of continuous service minus one up to a maximum of 20

(iii) 0.333% of last years ordinary pay for each month of service over completed years of service, up to 20 years of service

(iv) Cessation Leave calculated in days in accordance with the following table:

<i>Length of Service in Years</i>	<i>A. Employees under 50</i>	<i>B. Employees over 50</i>
<i>Under 5</i>	<i>Nil</i>	<i>Nil</i>
<i>5-10</i>	<i>22</i>	<i>22</i>
<i>10-15</i>	<i>44</i>	<i>44</i>
<i>15-24</i>	<i>45</i>	<i>65</i>
<i>25</i>	<i>65</i>	<i>65</i>
<i>26</i>	<i>65</i>	<i>69</i>
<i>27</i>	<i>65</i>	<i>74</i>
<i>28</i>	<i>65</i>	<i>78</i>
<i>29</i>	<i>65</i>	<i>82</i>
<i>30</i>	<i>65</i>	<i>86</i>
<i>31</i>	<i>65</i>	<i>91</i>
<i>32</i>	<i>65</i>	<i>95</i>
<i>33</i>	<i>65</i>	<i>99</i>
<i>34</i>	<i>65</i>	<i>104</i>
<i>35</i>	<i>65</i>	<i>108</i>
<i>36</i>	<i>65</i>	<i>112</i>
<i>37</i>	<i>65</i>	<i>116</i>
<i>38</i>	<i>65</i>	<i>121</i>
<i>39</i>	<i>65</i>	<i>125</i>
<i>40+</i>	<i>65</i>	<i>131</i>

Legal Framework

The respondent in this matter is required to show that Mr Foote's termination was justified. Redundancy can found a justified termination albeit redundancy is a difficult basis for termination, as the worker has done nothing wrong¹. The changes leading to loss of position commonly result from commercial factors affecting the business.

The test of justification to be applied in respect of Mr Foote's is that set out in s.103A of the Act.

103A Test of justification

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of **a fair and reasonable employer ...in all the circumstances ...at the time....**

¹ *GN Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* (1990) ERNZ Sel as 843 CA

As a reason for dismissal redundancy is an area of employment law that has been exhaustively addressed. The case law is now well settled. It is convenient, in considering whether or not a dismissal for redundancy is justified, to examine the circumstances of the termination to determine if the redundancy was genuine and implemented in a fair manner.

On the matter of the genuineness of the employer's decision I am minded of the case law (expressed most succinctly by Richardson J in G N Hale & Sons v Wellington etc Caretakers etc IUOW (cited above)).

".....If for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the courts or the unions or workers to substitute their business judgement for the employer's"

So a redundancy will usually be genuine if it is made for valid commercial reasons.

However, while the Authority is not entitled to call into question the respondent's commercial judgement it is entitled to expect an adequate commercial explanation and is entitled and required to inquire into the question whether the termination was genuinely for the reason of redundancy (and not for some other reason).

Lastly a dismissal for redundancy must be implemented in a fair manner. Fairness requires there be genuine consultation on the proposal that may lead to redundancies. Alternatives to redundancy should be explored and fair treatment may call for counselling, career and financial advice, retraining and related financial support. Other considerations will be relevant in particular cases. (Aoraki Corporation Ltd v McGavin [1998] 1 ERNZ 601) New Zealand Fasteners Stainless Ltd v Thwaites [2000] 2 NZLR 565).

Issues to be Decided

- Was the termination of Mr Foote's employment the result of a genuine redundancy?
- If so, was the termination for redundancy attended by a fair process including consultation on the proposal and on alternatives to redundancy?
- Was the severance compensation paid to Mr Foote correctly calculated?

Discussion and Findings

Credibility

The applicant has made numerous uncorroborated allegations regarding the relocation proposals, the consultation process, the respondent's motivation for terminating his employment and his treatment in the process. The applicant's allegations are contrary to the weight of evidence. It was also notable that when faced, in questioning, with the weight of contradictory evidence Mr Foote chose not to address this evidence in any meaningful way but persisted in pushing flimsy and unsubstantiated allegations and arguments that the proposal to relocate was predetermined, that he was treated differently to other affected staff and that doubtful motivation attended the respondent's efforts to find alternative employment within Transpower.

As a result of these findings I must say that where there is conflict in the evidence of the parties, it is the evidence of the respondent's witnesses that I prefer.

Findings

In arriving at my determination I have had regard to the extensive evidence and submissions put to me by and on behalf of the parties. I have also had regard to relevant case law.

In summary I find that the respondent's conduct in this matter was entirely consistent with the best practice principles distilled from the settled case law that applies in restructuring/relocation situations where there is a potential for positions to be disestablished. I also find the respondent has modelled the good faith behaviours now mandated in the Act. As a result I must find that Mr Foote's termination on the grounds of redundancy was justified on genuine commercial grounds and that he was consulted and treated fairly in the process. I also find his severance entitlements were correctly calculated and paid in full.

To support the above findings I will address Mr Foote's submissions in turn.

Consultation

Leading cases on consultation include *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429 and *Cammish v Parliamentary Service* [1996] 1 ERNZ 404. In *Cammish* (above) the former Chief Judge summarised the relevant principles as follows:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation".

The evidence discloses the respondent consulted exhaustively with staff (including Mr Foote) on the proposal to relocate its northern field services operations to Auckland.

It is Mr Foote's position that the decision to and close the Hamilton office was a fait accompli from 25 June 2004 when Mr Laurie (General Manager National Grid) met staff in Hamilton informally to advise of a proposal to establish a Field Services presence in Auckland and that his persistent requests for information on the business case for relocation were declined.

I don't accept the assertion by Mr Foote that the decision to close the Hamilton office was made by 25 June. That assertion is simply contrary to the weight of evidence including documentary evidence submitted by Mr Foote. The evidence shows that when Mr Laurie met with staff on 25 June he canvassed a number of options which included the option of retaining a presence in Hamilton albeit a smaller presence².

Further on this point, if it is Mr Foote's concern that the employer had a clear preference when it entered into consultation with staff that is not evidence of predetermination in the matter.

² Doc 36 introduced by Mr Foote himself recognises this was an option put by Mr Laurie to staff at the 25 June meeting.

Transpower was entitled to have a working plan in mind as long as it kept an open mind on the matter (*Communication and Energy Workers Union Inc v Telecom* (cited above)).

I also find, contrary to the assertions of Mr Foote, that the respondent did explain the business case for the proposal and it is not the case that Mr Foote made persistent requests for information on the business case for the proposal which were declined.

The consultation with staff affected by Transpower's proposal to relocate its Northern Field Office commenced with the informal meeting between Mr Laurie and Hamilton staff on 25 June 2004 and continued until the final decision on the proposal was made and communicated to staff on 21 September 2004. The formal proposal outlined on 23 July specifically addressed the business needs driving the proposal; issues that would impact on the proposal; consideration of the impact on staff; relocation assistance available; accommodation issues and Transpower's preference. Feedback from staff was sought on the proposal in its entirety including the transitional arrangements to apply in Hamilton (which in itself did not preclude an ongoing presence there) and the evidence shows that staff provided input which was considered and responded to and that changes to the proposal came about as a result of staff input.

On the question of Mr Foote's request for information on the business drivers for the proposal I find he raised this issue in his email to Bob Simpson dated 8 July. I don't accept he otherwise sought information on this point either in emails or verbally, albeit this issue was also raised in the undated document introduced by Mr Foote at the investigation meeting (Doc 36). This document was, I find, was produced prior to and in preparation for the 23 July meeting..

The business case for the proposal presented to staff was the same case that was signed off by Transpower's board and it represents an adequate commercial explanation for the proposed change. I further find that there was no specific feedback from staff (including Mr Foote) that challenged the relocation in principle or the commercial justification for it. The evidence shows that staff concentrated their feedback on the new business structure and the implications of the move for them including the financial inducements that formed part of the proposal to relocate.

Lastly on the matter of whether or not the decision to relocate to Auckland and close the Hamilton office was predetermined I must address Mr Foote's allegation that it was clearly implied in Mr Simpson's response to staff dated 30 July that the Hamilton office would close (Doc 5). There Mr Simpson said in response to questions submitted by staff after the 23 July meeting:

"A final date for the Hamilton office closure has not been established, but we expect to relocate those remaining in Hamilton after April 2005 to another location when the lease expires."

This statement needs to be seen context of the proposals put to staff which included the stated preference of Transpower that Auckland would be the main focus of its operations going forward with decisions on the future of Hamilton yet to be determined but which could include closure of the Hamilton office. Staff quite reasonably asked (following the 23 July meeting) for an indication of the '*Ham office closure date*'. Mr Simpson's response addresses that specific question and needs to be seen in that context. It needs to be noted too, that the answer confirms that decisions regarding Hamilton have not been set in stone. Mr Simpson refers to '*staff remaining in Hamilton*' (after the proposed 1 January commencement of operations in Auckland) relocating to other premises after "*the Hamilton lease expires*" (in April 2005).

Consultation on Alternatives to Relocation or Redundancy Pursuant to the Obligations in Sch. D

Mr Foote seems to be submitting that the respondent was required - at the time it unveiled its proposals to make Auckland the primary location for its Northern Field Services - to commence consultations on alternatives to relocation or redundancy.

I don't accept this proposition. Transpower was required to consult on its proposal to establish Auckland as its primary location for its northern field services operations and its proposal to relocate Hamilton staff to Auckland. It did that and once the decision was taken to locate its Northern field operations in Auckland it offered generous inducements to all staff to relocate there.

Its obligations to Mr Foote to consult on alternatives to redundancy arose from the IEA which specifies that "*In the event of a restructuring of or within Transpower resulting in....the employee's position being declared surplus to requirements*" then "*all possible attempts will be made to find an equivalent position within Transpower.*" The obligation to consult with Mr Foote on alternatives to redundancy arose after the decision to relocate field operations to Auckland and to disestablish the Hamilton office and after Mr Foote declined the offer to relocate to Auckland communicated by him in an email to Mr Simpson on 19 October.

I find the respondent actively looked for positions within the company for which the applicant had the necessary skills. It identified two positions on the 400V project, drew these to the applicant's attention and had the responsible manager contact the applicant. That manager extended the time available to the applicant to apply for the positions in question. I do not accept the applicant's evidence that he was told by Mr Coad that he would not be a preferred candidate.

Mr Foote did not apply for the available positions. That was his prerogative. Nevertheless the respondent's efforts in bringing relevant available positions to his attention satisfied the obligations on it under the IEA and employment law.

I also note that the respondent subsequently took positive steps to recommend the applicant to another local employer and that he did obtain employment with that employer. He was also provided with CV preparation and interview training to assist him in his job search.

Lastly, on this point, the evidence does not support Mr Foote's allegation that his termination for redundancy was attended by undisclosed dissatisfaction with his performance/conduct which undermined his job prospects both within Transpower and with other employers. I find the applicant was an experienced and valued employee of Transpower whom Transpower would have preferred to retain.

Disparity of Treatment

Mr Foote submits he was treated differently to other staff in that:

- He was refused an extension of time to consider the relocation offer made and to take legal advice on it, given that he was taking leave over the period allowed for consideration and a response.
- That other employees were offered a revised relocation offer during the period he was on annual leave and that he was not provided with an opportunity to consider the revised offer before the respondent gave him the letter advising him of the disestablishment of his position.

- That he was advised he would not be able to remain domiciled in Hamilton and commute to Auckland. Mr Foote submitted he declined the offer of relocation because the ‘commute option’ was denied to him.
- That he was considered ineligible for alternative positions.

In respect of the first point made I find Mr Foote was treated the same as all employees affected by the relocation. He was required to accept or reject the proposal to relocate by 5 October as were all others. An extension of time was sought by staff to consult Mr Hammond and that extension (available to all staff) was given until 8 October. Mr Foote sought an extension beyond that date which was declined. He was, therefore, treated as all affected staff were treated and granted an extension of time to respond until 8 October. I also find the improved relocation offer advised on 6 October was advised to Mr Foote along with other staff. (Document 16). It is not the case that that offer was made to other staff and not to him, albeit I accept he did not become aware of the improved offer until his return to work after leave.

Further, as Mr Foote had not accepted the relocation offer made to him by the deadline of 8 October this was acknowledged by Transpower and, as had been advised to him in the letter of offer, it was confirmed that he would remain in Hamilton until his position was disestablished. When Mr Foote requested an opportunity to reconsider relocation in light of the improved position advised during his period of leave he was given that opportunity. There was no disparity of treatment in this respect and no unfairness arises from the fact that the consequence of his failure to accept the relocation offer was confirmed prior to his being permitted to reconsider the relocation offer.

Neither, (for the sake of clarity) do I accept Mr Foote’s claim that he had only three days to consider the relocation offer which came at a time he was working long hours. Mr Foote is an intelligent and mature man. The structure of the offer was known to him from 3 September and the only changes after that date involved improvements to aspects of the relocation inducements. Mr Foote had a good four weeks to consider and take legal advice on the offer and advise his position prior to taking leave which commenced on 1 October.

On the issue of living in Hamilton and commuting to work in the Auckland office Mr Foote has not established that there were comparable situations where other employees were told they could live in Hamilton and commute to Auckland while the opposite was communicated to him. I do accept that Mr Foote had discussion(s) with Mr Simpson on the question of commuting. However, I prefer Mr Simpson’s evidence to that of Mr Foote on this point and in particular that Mr Simpson communicated to Mr Foote that it would not permit Mr Foote to commute in Transpower’s time and at its expense. Safety considerations reasonably underscored this position. I find in particular that Mr Simpson gave no directions prohibiting Mr Foote from living in Hamilton and commuting to Auckland for work. I find further that Mr Foote did not refuse the offer of relocation because commuting was not an option available to him. He turned down the offer of relocation because the inducement offer did not ‘*offset real costs incurred*’ (Doc 18).

Mr Foote’s allegation that he was considered ineligible for alternative positions has already been addressed p 10. The respondent did not consider Mr Foote ineligible for alternative positions. On it took proactive steps to identify equivalent positions for Mr Foote within Transpower. In doing so it met its obligations to him.

Severance compensation (Ref Schedule D p.9)

A brief summary of the rules of interpretation is called for here. I have adopted this summary from a decision of the Authority in Martin v Rubicon unreported decision AA 341/02 dated 22 November 2002.

1. *The starting point is the words used by the parties in their agreement;*
2. *Agreements should be construed according to their ordinary and natural meaning;*
3. *If the words used in the parties' agreement are clear, the plain meaning of the words must be applied;*
4. *Oral evidence as to the negotiations is not admissible to contradict, vary or add to the plain meaning of the words used;*
5. *While the factual background may be relevant in determining which of two possible meanings is appropriate, it cannot be invoked when the intention is clear from the words used;*
6. *The circumstances surrounding the entry into an agreement may be taken into account not to contradict or vary a written agreement, but to understand the setting in which it was made and construe it against that background.*

To the above principles I would add the following:

An agreement is to be given such large and liberal interpretation that will best ensure the attainment of its object. In other words it is to be interpreted to give effect to its true intent, meaning and spirit.

Applying these principles to interpret the severance provisions before me I must find that the provisions are poorly drafted and parts of Clause 2 are ambiguously worded both as to the meaning of individual sub clauses and in the way the provisions are drafted to describe the compensation *package*. This has given rise to differing interpretations. In arriving at a determination that best attains the true intent of the severance compensation provisions in Mr Foote's contract, regard must be had to the wider context of the history and purpose of such provisions and custom and usage over time. The respondent has provided evidence going to the history of change management provisions and has provided numerous examples of redundancy clauses and calculations. This evidence is relevant to the interpretation of the disputed provisions.

Having regard to that historical material it is clear that provisions which compensate employees for redundancy have traditionally focussed on service as the basis for compensation. It has been and remains the case that the first years service is compensated more generously to maximize compensation for employees with less service relative to those with longer service whose severance payouts would (as a result of their service) benefit from the provision of payments based on those years of service. This approach was common to both public and private sector redundancy agreements. Such agreements were commonly referred to as 4 + 2, 6 + 2, 8 + 2 agreements, meaning, for example 4 weeks pay for the first year of service and 2 weeks for each additional year's service³. Agreements were commonly capped and state sector agreements (from whence Mr Foote's provisions are derived) were capped at 20 years. The examples submitted in evidence show this.

The history of such arrangements is canvassed and relied upon by Judge Goodard (former Chief Judge) in Goston v New Zealand Railways Corporation WEC 24/96 (Unreported) and while he was dealing with a different severance arrangement the principles approved of there have application in this matter. As a result, I find that Clauses 2.2 (i) (ii) & (iii) must be read together as building a compensation package that recognises and compensates employees for continuous service up to 20

³ Clauses 2.2 (i) - (ii) approximates a 4+2 package albeit it is expressed in terms of months/.5 of a months ordinary pay.

years with a payment of 8% for the first years service; 4% for subsequent completed years up to 20 and where total service is less than twenty years, compensation is provided for additional months (up to eleven) over and above completed years of service to a maximum of 20 years.

Therefore, I find:

- Clauses 2.1 and 2.2 (read together) are clear and unambiguous and interpreted on the plain meaning of the words provide, that as an employee with more than 1 years service Mr Foote was entitled to 25% of his last years ordinary pay plus 8.33% of his last years pay for a partner and each dependent child. There was no dispute relating to this calculation and Mr Foote was paid his entitlement under this clause. The compensation described in Clause 2.1 and passed on to Mr Foote pursuant to Clause 2.2 applies to all redundant employees regardless of service.
- The provisions of Cl. 2.2 (i)-(iv) recognise service in excess of one year. There is no dispute over the calculation and payment made to Mr Foote pursuant to the provisions of Clause 2.2 (i). Mr Foote was entitled to and was paid 8% of his last year's ordinary pay. He was correctly paid this in addition to the payment calculated pursuant to Clause 2.1.
- In respect of Cl 2.2 (ii) Mr Foote submits he is entitled to payment of 4% of his last year's ordinary pay for 20 years rather than the 19 years he was paid. I don't accept the logic of Mr Foote's submissions on this sub clause and the construction of the clause simply does not support his submission that the maximum payable under this clause is 21 years. Mr Foote himself accepts that payments under the severance provisions of his agreement are capped at 20 years and I that the words '*minus one*' properly apply to years of continuous service over one and up to a maximum of 20. The number of continuous years of service up to 20 is to be reduced by one to recognise that the first year's service is compensated pursuant to Clause 2.2 (i). Mr Foote has been correctly paid under this head.
- Mr Foote submits in relation to Clause 2.2 (iii) that he is entitled *in addition* to his entitlements under Cl 2.2 (i) & (ii) to payment for each month of service up to 20 years service at the rate of .333% per month. Effectively Mr Foote submits the plain meaning of Clause 2.2 (iii) entitles him to be compensated for the same service twice. In this he appears to rely on the word "*over*" in "*over completed years of service*" as meaning "*for the duration of his employment*" up to 20 years.

The respondent interprets the clause to mean that .333% of last years ordinary pay is payable for each month of service over completed years of service, up to 20 years where the meaning of "*over*" in "*each month of service over completed years of service*" is interpreted as meaning "*months in excess*" of completed years of service - to a maximum of 20 years service.

I have no difficulty in determining that the respondent's interpretation is the correct one. Mr Foote's interpretation would result in the absurd outcome that years of service would be compensated for twice. That cannot have been the intention of the parties in drafting these provisions and I am comforted in my finding on this point that the respondent's interpretation accords with the historical intent and application of redundancy provisions. Mr Foote has been correctly paid his entitlement under this head.

- Lastly I find that sub clause (iv) is clear and unambiguous and under that clause Mr Foote (being over 50 years) was entitled to 112 days cessation leave. Mr Foote was correctly paid his entitlement under this sub clause.

As a result of this analysis I must find that the severance compensation payable to Mr Foote has been correctly calculated by the respondent and Mr Foote has been paid his entitlements in full.

Determination

Mr Foote's employment came to an end as a result of a genuine redundancy following extensive consultation. He was fairly treated in the process leading to his termination. His entitlement to compensation for redundancy was correctly calculated by the respondent and he was paid his entitlement in full.

I must therefore decline Mr Foote's application and he is not entitled to the remedies he claims.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of Employment Relations Authority