Determination Number: AA 89/07
File Number: 5049057

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

BETWEEN	Lili Ma
AND	Hansells (NZ) Limited
REPRESENTATIVES	T Oldfield, advocate for Lili Ma P Tremewan, advocate for Hansells (NZ) Limited
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	24 January 2007
DATE OF DETERMINATION	22 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Hansells (NZ) Limited ("Hansells") employed Lili Ma as a process worker in its Aztec Mexican Corn Chip factory, commencing in March 1996. The applicable terms of employment were contained in the Krispa Foods and Aztec Mexican Foods Hansells (NZ) Ltd collective employment agreement in force at the relevant time ("the cea"). The Service and Food Workers Union Nga Ringa Tota Inc ("the union") was the union party to the agreement.

[2] After the sale of the Aztec and Krispa brands in 2005, Hansells announced the closure of the two factories involved. Ms Ma had been absent from work on accident compensation for an extended period when the company implemented the resulting redundancies. The parties are in dispute over:

(a) how a 'weeks pay' should have been calculated for the purposes of redundancy compensation payable under the cea; and
(b) whether Ms Ma was entitled to a 'severance payment' as well as a 'redundancy payment' under the cea.

[3] In association with her view of the meaning of the relevant provisions in the cea, Ms Ma has claims for unpaid monies owing.

Calculating Ms Ma's 'weeks pay'

[4] The formula for calculating redundancy compensation is set out as follows in clause 29.3 of the cea:

> "(a) Krispa site. The employee will be given a minimum of four weeks notice of termination of employment. Redundancy compensation will be paid to employees with more than 12 months service. Compensation will be calculated on the basis of 4 weeks for the first year of service plus an additional 2 weeks pay for each subsequent year's service.
>
> (b) Aztec site. The employee will be given a minimum of four weeks notice of termination of employment. Redundancy compensation will be paid to employees with more than 12 months service. Compensation will be calculated on the basis of 3 weeks for the first year of service plus an additional 3 weeks pay for each subsequent year's service.

[5] Ms Ma was off work on accident compensation from 1 September 2004 until a brief return on 17 May 2005, then was off work again from 28 June 2005.

[6] Hansells announced the sale of the Aztec and Krispa brands in October 2005, and consulted with the union and the staff about how the associated closures would be handled. Hansells had also been in discussions with the union prior to the announcement. By letter dated 20 December 2005 Ms Ma was formally advised of the pending plant closure. She was also advised that her position would cease to exist as at 27 January 2006. She would receive the redundancy payment to which she was entitled on 27 January 2006.

[7] The union delegate, Kofi Obeng, participated in the consultation process and had discussions with Hansells' managing director, Stuart Walker, about a number of matters including aspects of the payment of compensation to staff in general. In or about September 2005 the two reached an agreement that redundancy compensation would be calculated on the basis of average weekly earnings over the 12-month period prior to the redundancies. This, too, was announced to the staff.

[8] That arrangement was taken as meaning the relevant earnings for Ms Ma would be based on the total payment she received for the few weeks she had worked during her brief return. Averaged over a year, her 'weekly pay' would be very small, as would the amount of redundancy compensation she would receive. Mr Obeng brought the matter to the company's attention in or about January 2006.

[9] Messrs Walker and Obeng discussed how the matter could be addressed. One suggestion was that compensation be calculated on the basis of Ms Ma's average annual earnings over the 9 years prior to her absence. Mr Walker believed that, if such an approach were to be taken, it should be applied to all staff. Since it would disadvantage most of them, he asked Mr Obeng to put it to them.

[10] Mr Obeng did so. The staff voted in favour of having their compensation calculated with reference to the previous 12 months' earnings.

[11] Mr Walker also raised the prospect of calculating Ms Ma's earnings on the basis of the difference between what she would have earned for a 40 hour week over the preceding 12 months, and what she received as accident compensation. Because that calculation yielded a greater amount than a calculation based on actual earnings for the preceding 12 months, it was used. The total compensation came to $3,084.20. It was paid on or about 27 January 2006.

[12] By letter dated 14 March 2006 the union organiser advised Mr Walker that the union sought a more equitable payment for Ms Ma. By letter dated 12 July 2006 the union advised that there was a dispute about the meaning of 'weekly pay'. Its view was that Ms Ma should have been paid on the basis of what she would have earned under the cea had she been working. The company view was that there was no actual weekly pay for the relevant period. Taking into account Ms Ma's receipt of earnings related compensation, it was appropriate to calculate redundancy compensation on a notional basis of 20% of Ms Ma's weekly pay.

The meaning of a 'weeks pay' and the claim for redundancy compensation

[13] There is no issue between the parties over what amounts to a 'weeks pay' in respect of any one week. The problem here lies in which 'weeks pay' is the correct measure for the purposes of the redundancy provisions, or if an average is to be taken, how should it be calculated. The cea does not address that matter.

[14] In general the parties reached a sensible and practical consensus that an average 'week's pay' over the preceding twelve months would be the basis for the

calculation of redundancy compensation. In that respect they created their own dictionary. I do not accept the union's submission that the meaning of a 'weeks pay' is so clear as to render inadmissible evidence about the parties' discussions or pre-empt any inquiry into what the parties meant. On the contrary, evidence of an agreement about how the parties would identify which 'weeks pay' was to be taken into account or how any average was to be calculated is relevant and important.

[15] For similar reasons I do not accept the submission that the agreement purported to amount to a variation of the cea. Rather, it addressed a difficulty for which the cea did not provide.

[16] Further, I do not accept that Ms Ma is excluded from the ambit of the agreement the union reached with Hansells. The parties to the cea are expressed to be Krispa Foods, Aztec Mexican Foods, and the union. The coverage provisions identify the employees to be covered by the cea. There has not been any suggestion that Mr Obeng acted without authority in the course of the consultation process or in agreeing to the method of calculating a 'weeks pay'. If Ms Ma believes her interests were not adequately represented, that is between her and the union.

[17] There remains a question about how Ms Ma's 'weeks pay' in respect of her last twelve months of employment should be calculated. One approach is suggested by a decision of the Labour Court in **Electricity Corporation of New Zealand Limited v New Zealand Public Service Association.** [1] The employee concerned had been on unpaid study leave during most of the last year of his employment, when he took voluntary severance under the relevant collective agreement. The applicable formula for the calculation of compensation specified percentages of the 'last year's ordinary pay'. The employee's union, the PSA, said compensation should be paid at the annual salary current immediately before the end of employment, while the employer said actual earnings during that year should form the basis of the calculation.

[18] The court found that the proper measure of compensation was the amount the employee would have received if the employment had not been suspended. [2] It reached its decision with reference to specific provisions in the agreement as

[1] [1991] 1 ERNZ 426
[2] At p 430

well as the wider proposition that it could not have been in the contemplation of the parties that an employee of 20 years' standing, who had spent the last year of service on leave without pay, would receive nothing by way of compensation for voluntary severance.

[19] The combined effect of the relevant provisions of the cea here, the agreement to calculate 'weekly pay' with reference to the preceding twelve months' earnings, and Ms Ma's extended absence from work other than on full pay, makes the present difficulty with Ms Ma's compensation very similar to that in the **Electricorp** case. In that case, the agreement was construed as I have set out above. Here, I conclude that the cea, together with the parties' agreement regarding earnings over the preceding twelve months, should be construed similarly.

[20] The union has calculated the amount owing as 27 weeks x [40 hours x $14.2787] less the $3,084.20 already paid. The sum remaining is $12,336.85.

[21] Hansells is ordered to pay that sum to the union on behalf of Ms Ma. There is a further order for interest on that sum pursuant to clause 11 Schedule 2 of the Employment Relations Act 2000 calculated at 7.9% from 27 January 2006 to the date of payment.

The claim for severance pay

[22] The reference to severance pay is found in clause 29.2 of the cea. That clause reads:

> "Where the employee's employment is terminated by reason of redundancy, the employer shall make a severance payment to that employee, in addition to that employee's contractual notice requirement, of 4 weeks. In the case of redundancy, the period of notice shall in no case be less than four weeks. …."

[23] The union says that, on the plain meaning of the words used, the first sentence obliges the company to pay each employee, including Ms Ma, a severance payment of 4 weeks' pay in addition to any redundancy compensation.

[24] Hansells says the reference to 'severance pay' is no more than a reference to the payment of redundancy compensation under clause 29.3. Clause 29.2

does not create a right to any additional payment, and no additional payment under clause 29.2 was made to any of the affected employees.

[25] Mr Walker deposed further that, during the 2005 negotiating round, the issue of the notice required in cases of redundancy was raised. He said that, previously, the notice period had been one week, but that is not so. Clause 29.2 as it then was provided staff on the Krispa site were to receive four weeks' notice of redundancy, and staff on the Aztec site were to receive two weeks' notice. Mr Walker went on to say there was an agreement to extend the minimum notice period to four weeks. He said the change was confirmed in the reference to '4 weeks' in the first sentence of the renegotiated clause 29.2.

[26] There could be room for ambiguity about the meaning of '…, of 4 weeks' at the end of that first sentence. The company says it is a reference to the preceding 'notice requirement', while the union says it specifies the amount of severance pay payable under the provision. The union position arguably requires the reading-in of the word 'pay' after the words '4 weeks'.

[27] However the company's position is defeated by the placement of the commas in the sentence. As a matter of ordinary English usage, commas separate the provision 'in addition to that employee's contractual notice requirement', from the dominant provision which otherwise reads 'the employer shall make a severance payment to that employee … of 4 weeks.' I find that quite unambiguous. For clause 29.2 be capable of bearing the meaning the company contends, the comma between 'requirement' and 'of 4 weeks' would have to disappear.

[28] As for the failure to add the word 'pay' after the words '4 weeks', the same omission is evident in clause 29.3 when the word 'pay' was clearly intended. Accordingly my conclusion is unaffected.

[29] I consider the wording of the provision to be too clear to warrant looking to additional evidence in an attempt to construe it.[3] Its ordinary English meaning is to provide for a severance payment of 4 weeks' pay for redundant employees. While this construction does provide employees with a payment in addition to the agreed redundancy compensation, it is not unusual for a 'severance' payment to

[3] See the tests in **Dwyer v Air New Zealand Limited** [1996] 2 ERNZ 146 and **Dwyer v Air New Zealand Limited (No 2)** [1996] 2 ERNZ 435

mean something different from a 'redundancy' payment. I do not accept the company's submission that as a matter of practice 'severance' and 'redundancy' mean the same thing. Often they do, but the wording of the cea does not persuade me that is so here.

[30] None of this amounts to such an unreasonable or absurd result that it cannot have been the parties' intention, as identified from the words they used.

[31] If Hansells' view is, nevertheless, that the intention of both parties was to do no more than confirm a minimum notice period of four weeks for redundant employees, then clause 29.2 has not put that intention into effect. I have not been asked to pursue whether there was a mistake in the drafting of the agreement, or any argument to the effect that the mutual intention of the parties has not been correctly expressed. It appears that, in any event, it is not possible to obtain the necessary evidence from the union regarding its intentions because I am told the official concerned has left the union's employ and is no longer in New Zealand.

[32] I therefore conclude that Ms Ma was entitled to a 'severance payment' of four weeks' pay under the cea. According to the union the amount is $2,284.60, being 4 x [40 hours x $14.2787 per hour]. Hansells is ordered to pay that sum to the union on behalf of Ms Ma, together with interest at the rate of 7.9% from 27 January 2006 to the date of payment.

Summary of orders

[33] Hansells is ordered to pay to the union on behalf of Ms Ma:

(a) $12,336.85 as redundancy compensation, plus interest as specified; and
(b) $2,284.60 as severance pay, plus interest as specified

Costs

[34] Costs are reserved.

[35] The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and serve memoranda setting out their positions within 28 days of the date of this determination.

R A Monaghan
Member of Employment Relations Authority