Employment Court of New Zealand

McPherson v Carter Holt Harvey Limited [2017] NZEmpC 103 (22 August 2017)

Last Updated: 28 August 2017

IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 103

EMPC 68/2016

EMPC 167/2016

IN THE MATTER OF	EMPC 68/2016 a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	EMPC 167/2016 of proceedings removed from the Employment Relations Authority
BETWEEN	STEPHEN MCPHERSON Plaintiff
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing:	23-25 May 2017 (Heard at Rotorua)
Appearances:	L Yukich and D Gilbert, advocates for plaintiff E Coats and A Codlin, counsel for defendant
Judgment:	22 August 2017

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] This proceeding is a challenge by the plaintiff, Stephen McPherson, to a determination of the Employment Relations Authority (the Authority)1 and proceedings removed from the Authority.2 It raises a number of issues relating to the calculation of leave entitlements on termination of employment, and the interrelationship between various provisions of the Holidays Act 2003 and the

applicable collective agreement. The hearing spanned three days and around 700

1 *McPherson v Carter Holt Harvey Ltd* [2016] NZERA Auckland 86.

2 *McPherson v Carter Holt Harvey Ltd* [2016] NZERA Auckland 237.

pages of documents. The submissions reflected the complexities of the issues raised by the pleadings and the way in which the claim was presented. I have attempted to reduce those complexities to their fundamentals.

The factual context

[2] Mr McPherson has been a shift worker at Kinleith Pulp and Paper Mill (Kinleith Mill) for many years. He was previously a member of the New Zealand Amalgamated Engineering, Printing and Manufacturing Union (EPMU), but resigned from it on 17 May 2015 and joined the Central North Island Pulp and Paper Workers Division of the Manufacturing & Construction Workers Union Inc. From that time he was employed on an individual employment agreement based on the terms of a collective agreement between the defendant company Carter Holt Harvey Ltd (CHH) and the EPMU, the Amalgamated Workers Union of NZ Inc and First Union Inc.

[3] Kinleith Mill operates on a 365 days per year basis. Shift employees such as Mr McPherson work a four on, four off, 12-hour shift roster pattern. Mr McPherson is paid an annual salary, the rate of which is set out in a schedule to the collective agreement. He is paid every seven days, receiving 1/52 of his annual salary. This quantum is paid regardless of the hours he has worked in any particular week. I refer to this methodology as the annualised salary method of pay. It has been in place since June 2003. Prior to that time, workers such as Mr McPherson were paid at an hourly rate. Despite the move to an annualised salary method of pay the company's payroll system continues to operate on the basis that leave is accrued and deducted in hours.

[4] Under the shift roster system, shift workers work on average 42 hours per week. Leave is accrued at 42 hours per week (10.5 hours per day). One day of leave is 10.5 hours, equating to 42 hours divided by four days. The statutory four weeks' annual leave entitlement equates to 168 hours.

[5] The value of one week of leave is calculated at 1/52 of a shift worker's

annual salary. The holiday pay attributed to the four weeks' annual leave entitlement

is calculated at four times 1/52 of the employee's annual salary. When leave is taken it is deducted from the employee's accrued leave entitlement at 10.5 hours for each rostered day the employee is taking as annual leave.

[6] The company approaches the calculation of payments for leave on termination in a different way. Any holiday pay entitlement, that is leave that has been earned ("entitled leave"), as opposed to leave that is building up but for which the anniversary threshold has not yet been reached ("accrued leave"), is calculated by dividing the employee's previous 12 months' earnings by 52 to determine the employee's average weekly earnings and then dividing that amount by 42 to get the employee's hourly rate. The company then multiplies the hourly rate by the number of hours of accrued leave the employee has at the date of termination. The only time this formula differs is when the employee's ordinary weekly pay is greater than their average weekly earnings. In this situation, the company divides the employee's ordinary weekly pay by 42 to determine an hourly rate and then multiplies the hourly rate by the number of accrued hours of leave the employee had with the company.

[7] The present claim arises against the backdrop of the sale of the defendant company's Pulp, Paper and Packaging business to an overseas company, Oji Holdings Corporation (Oji). The structure of the transaction necessitated the transfer of the employees and their entitlements. While CHH was the original employer, Carter Holt Harvey Pulp & Paper Ltd (CHHPPL) was to be the new employer. Employees and their entitlements were to transfer from CHH to CHHPPL.

[8] Not surprisingly the proposed sale, and its potential impact on employees, gave rise to a number of concerns.

[9] The workforce at Kinleith is fully unionised. The company engaged with union representatives in the lead-up to the sale. This included a series of consultative meetings. It appears that the key employee concern at the time centred on job security. An agreement was reached whereby employees would be offered employment with the new company on exactly the same terms and conditions as they currently enjoyed, together with continuity of service for all service related benefits. The offer, which I accept emerged from discussions between the company and the

unions, was contained in a letter dated 26 May 2014 sent to employees via their respective union representatives.

[10] The letter summarised the offer as follows:

1. You are being offered employment on exactly the same terms and conditions as you currently enjoy, including position and remuneration, together with continuity of service for all service related benefits.

2. You can elect to cash-out certain accrued leave entitlements and all member and company superannuation contributions made to CHH Super.

3. You are free to decide whether or not to accept this offer.

4. If you decide not to accept the offer on or before 9 June 2014 and the sale completes, you will have in effect elected not to continue to be employed in the business from the date of sale. As you will have declined an offer of employment on the same terms and conditions and with continuity of service, you will not be entitled to be paid any redundancy compensation.

5. Your transfer of employment will be conditional on the sale completing and will commence from that date. As noted above, you will be entitled to cash out leave entitlements on the sale date and superannuation contributions when you leave CHH Super, which will be within 6 months of the sale.

Full details of the offer are set out below.

...

This offer is conditional on your agreement that all your accrued and entitled leave benefits and other accrued entitlements, including accrued and entitled

annual leave, company annual leave, long service leave, statutory holidays in

lieu (alternate days), bereavement leave, sick leave, shift and service leave and gratuity entitlements ... will transfer from CHH to CHH Pulp & Paper on the Sale Completion Date (unless you elect in writing prior to Sale Completion to take your accrued and entitled annual leave, long service leave and statutory holidays in lieu (alternate days) in cash).

...

To accept the offer

Please sign and return the acknowledgement enclosed with this letter, and return this to Human Resources or your Union delegate as soon as possible and no later than 5pm on 9 June 2014.

Implications of not accepting the offer of employment on or before 9 June

2014

If you do not accept this offer on or before 9 June 2014 and Sale Completion occurs, you will be redundant from CHH as of the Sale Completion Date (without compensation for such redundancy). No redundancy compensation is payable by CHH as the offer of employment from CHH Pulp & Paper is on the same terms of employment, and with continuity of service.

Independent advice and further information

For more information or to discuss the offer further please contact your manager or HR advisor. You are also entitled and encouraged to take independent advice regarding this offer of employment, including from a union representative or support person. Otherwise we look forward to receiving confirmation of your acceptance of this conditional offer of employment.

...

Bryce Murray

Chief Executive Officer

Carter Holt Harvey Limited

[signed]

John Rydwer

Chief Executive Officer

Carter Holt Harvey Pulp & Paper Limited

[Original emphasis]

[11] I pause to note that Mr O'Brien, Group Manager Compensation and Benefits for Rank Group Ltd (within which CHH sits), agreed that the offer would probably have been better worded if it had made it clear that the Holidays Act required payment out of all outstanding leave entitlements, but that employees were entitled to accept the cash-up offer or transfer their outstanding leave entitlements to CHHPPL.

[12] In the event 85 employees elected to take up the offer to cash-up some or all of their accrued annual holiday entitlement, long service leave and days in lieu as part of their termination of employment with CHHPPL. Mr McPherson was one of them.

[13] While the letter of offer encouraged employees to seek independent advice, Mr McPherson did not do so. Nor did he seek any further information or advice in respect of the offer from either his union or from a legal representative. He signed the acknowledgement annexed to the letter on 29 May 2014 and returned it. The acknowledgment stated:

I acknowledge that:

• I have been advised of the opportunity to seek independent advice

regarding CHH Pulp & Paper's offer of employment; and

• I accept the terms and conditions as offered by CHH Pulp & Paper as set out in this letter; and

• In accepting this offer of employment with CHH Pulp & Paper, I agree that all my accrued and entitled leave benefits and other accrued entitlements, including accrued and entitled annual leave, company annual leave, long service leave, statutory holidays in lieu (alternate days), bereavement leave, sick leave, shift and service leave and gratuity entitlements ... will transfer from CHH to CHH Pulp & Paper on the Sale Completion Date (unless I elect in writing prior to the Sale Completion to take all or part of my accrued and entitled annual leave, long service leave and statutory holidays in lieu (alternate days) in cash).

[14] Mr McPherson later completed a Notice to Cash Up Leave form, on 24 July

2014. He elected to have part of his leave paid out, as follows: all of his entitled annual leave; all except one day of accrued annual leave; and all of his lieu days. As he explained in evidence, he elected to cash up all but one accrued annual leave day to ensure that his anniversary date remained intact and did not recalibrate to the date the sale went through and his employment with Oji commenced. This step reflects a degree of understanding as to how the offer was to work, and the implications of it so far as Mr McPherson was concerned. Further, it is clear that the offer and the potential benefits of retaining one day's leave had been widely discussed within the workplace. Mr McPherson indicated that he had not been involved with any such discussions, but I was not drawn to this aspect of his evidence.

[15] Enclosed with the Cash Up Leave form was a Cash Up Leave - FAQ sheet which provided an explanation of the available options. Absent from the FAQ sheet, the offer document and the Notice to Cash Up Leave form, was any reference to the methodology which would be applied to any cash-up, if elected.

[16] It is the absence of reference to the methodology which was to underpin the cash-up calculation which forms the central plank of the plaintiff's case. In essence Mr McPherson says that if he had known how the cash-up payment was going to be calculated he would not have accepted it. There are effectively two limbs to the argument advanced on his behalf:

- First, that the calculation adopted by the company in cashing up Mr McPherson's entitlements breached the terms of the collective agreement and the Holidays Act.

- Second, that the company's letter of offer amounted to misleading and

deceiving conduct in breach of s 12 of the Fair Trading Act 1986.

[17] In the event, Mr McPherson received a cash-up payment on 1 December

2014. The payment was made up of the following components:

ANNCashOut	22895.46
ANNCashOut	17032.31
Phol Al	1321.71
GROSS	41249.48

[18] These figures reflected that 39 days in lieu and 52.4254 days of annual leave had been debited, applying an hourly rate of $41.59. As I have already observed, this calculation followed the way in which the company approached the payment for outstanding leave in ordinary cases of termination. However it stands in contrast with the way in which the company approached payment for annual leave while Mr McPherson was an employee, under which a week's leave was calculated on 1/52 of Mr McPherson's annual salary (unless his previous 12 months' gross earnings were greater than his base salary, in which case the higher figure was used). Payment for alternative holidays was said to be based on Mr McPherson's relevant daily pay (as provided for under the Holidays Act).

[19] The defendant says that the cash-up payment was correctly calculated, and reflected an application of ss 24 and 60(2)(b) of the Holidays Act. The plaintiff says that the provisions of the collective agreement provide the mechanism by which the relevant calculations are to be made. It is accordingly convenient to outline relevant provisions of the agreement at this point.

The agreement

[20] Both the Kinleith Mill Collective Agreement 2013 (the collective agreement) and letter of offer dated 26 May 2014 agreed to by Mr McPherson applied at the relevant time, as the defendant accepted.

[21] Clause 11 of the collective agreement sets out definitions of a number of terms used in the Agreement. These include:

Week: Seven consecutive days, unless the context requires otherwise.

Leave Week: A week's leave for an employee working 12-hour shifts shall be four rostered days and a week's leave for a day employee shall be five rostered days.

Salary: The annual salary specified in Schedule 1 – Remuneration.

Ordinary Pay: The weekly amount payable to an employee based on the sum of the applicable salary and public holiday payment in Schedule 1 – Remuneration.

...

Roster: A schedule showing in advance the days of the week and the times in

each day when an employee is due to work and be off work respectively...

Shift Roster: A roster for shift employees showing the shift that employees are required to work and the normal rostered hours to be

worked on each shift.

Shift Employee: An employee designated as such by the employer required to work on all or any part of a shift roster.

[22] Clause 12 provides that the Kinleith Mill operates 365 days per year, and that employees are obliged to ensure that they are available to meet the requirements of their roster and any extra hours (over and above their roster) which may be required.

[23] Clause 13 and Schedule 2 – Rosters provide for a four on, four off, 12-hour shift roster, with shift rosters being published in advance. That means that the roster provided for in Schedule 2 is based on an eight-day period.

[24] Clause 13.7 provides that:

... The salaries provided in Schedule 1 – Remuneration incorporate 175 extra unrostered hours (this is 8% of rostered hours). These hours may arise from but are not limited to; day shut start ups and any other start up or shut; unplanned absence from the workplace ...

[25] Clause 28 provides that remuneration for all employees is to be paid by way of a base salary payable weekly in accordance with the rates set out in Schedule 1.3

3 Refer cl 28, Collective Agreement.

[26] Clause 16 of the collective agreement provides:

16. ANNUAL HOLIDAYS

16.1 Basic Entitlement: Each employee is entitled to four weeks of annual holiday in accordance with the Holidays Act 2003 on completion of

12 months of service.

A week's leave for an employee working 12-hour shifts shall be four rostered days and a week's leave for a day employee shall be five rostered days.

16.2 Service Holiday: An employee who was a permanent employee of the company on 23rd May 2006, and who completes or has completed four or more years of continuous service with the employer shall be entitled to an additional week of annual holiday.

...

16.3 Shift Holiday: An employee who has worked on shift work for a complete year shall be entitled to an additional week of annual

holiday. An employee who has worked on shift work for part of the year only shall be entitled to a corresponding proportion of the

additional week where that proportion amounts to a full day.

...

[27] As I have said, Mr McPherson works on a four day on, four day off, 12-hour shift roster. His rostered days each calendar week fluctuate due to the eight day roster. Some calendar weeks he is rostered to work four 12-hour shifts and other calendar weeks he is rostered to work three 12-hour shifts.

[28] Mr McPherson submits that the following methodology should apply to working out the calculation of his entitled annual holiday pay: the total number of lieu days, accrued annual leave and entitled annual leave subject to the cash-up election was 91.4254 days. Those days should have been applied against each shift that the plaintiff would have been rostered to work under his roster calendar had he remained employed after the termination date, omitting public holidays. That would result in a total of 26 calendar weeks of work. The plaintiff should therefore receive a payment equivalent to his remuneration for 26 calendar weeks of work.

[29] This approach is said to be reinforced by the meaning of "week" applying under the collective agreement. "Week", it is submitted, is not to be understood as a calendar week. Rather it has a special meaning, namely an eight day roster week.

[30] The bundled up, future looking, approach advocated for on behalf of the plaintiff is, as Mrs Coats (counsel for the defendant) points out, at odds with the way in which the payment of entitled annual holiday pay, accrued annual holiday pay, and lieu days are dealt with under the Holidays Act. The Holidays Act provides for different formulae to apply to each type of leave which may be paid out on termination – s 24 (calculation of annual holiday pay based on ordinary weekly pay or average weekly earnings), s 25 (accrued annual entitlements; eight per cent of the employee's gross earnings since last anniversary) and s 60 (payment for alternative holidays based on relevant daily pay or average daily pay). As Mrs Coats observes, none of these provisions contemplate an approach whereby the days of the type of leave are projected against an employee's future roster to determine what should be paid. Section 40 ("Relationship between annual holidays and public holidays") is the exception, but it relates specifically to public holidays and says nothing (expressly or inferentially) about accrued or entitled holidays or lieu days.

[31] However, the defendant's arguments based on the Holidays Act only go so far. That is because if the employment agreement, correctly interpreted, provides for a different and enhanced entitlement, then it applies to the calculation of entitlements on termination.4

[32] The collective agreement contains provisions relating to the way in which leave entitlements for shift workers are to be arrived at.

These are based on the roster model (four on, four off with shifts of 12 hours). This is what cl 16 is directed at. The relevant context is the calculation of leave – not the payment for leave. The same point applies to the definitions contained within cl 11. Each of these relate to what constitutes a week, including for a shift worker. While it is clear that a week does not necessarily mean a seven day, calendar, week (otherwise there would be no need for the extended definition of "Week" or "Leave Week"), again this is directed at leave not pay entitlements. The agreement is notably silent on that issue. That means that the Holidays Act steps in to provide the answer to the value of the leave,

once it has been assessed under the agreement.

4 Holidays Act 2003, s 6.

[33] I accordingly reject the plaintiff's argument that the value of cashed-up leave entitlements on termination are to be calculated on the basis alleged. Rather, they are to be calculated by applying the Holidays Act.

[34] The defendant has accepted that two components of the payment made to Mr McPherson and others were at odds with two provisions of the Holidays Act, namely ss 25 and 40. I accept that that this reflected a genuine mistake, and misapprehension of the applicable law. That has since been clarified in a recent judgment of the Court (*Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union v Oji Fibre Solutions (NZ) Ltd* (the *PPIC* case)) which

the defendant accepts as an accurate statement of the law.5 It accepts that remedial

payments are due to those affected by the underpayments and is taking steps to do so, although the process is taking longer than anticipated, for reasons fully set out by Mr O'Brien (and which I accept).

[35] I understood the plaintiff to be taking issue with the application of the *PPIC* case both broadly (because of differences in the wording of the applicable collective agreements) and more narrowly (in the way in which the analysis of ss 25 and 40 proceeded).

[36] There are plainly differences in the wording of the collective agreement at issue in the *PPIC* case and in the present case. I do not however consider that the wording materially alters the analysis. As I have already said, the Act itself provides the guide to assessing the way in which the plaintiff's pay on termination ought to have been calculated. I deal with each of the relevant provisions of the Holidays Act in turn.

Accrued annual holiday pay – s 25

[37] Section 25(2) provides that the employer must pay the employee eight per

cent of the employee's gross earnings since the employee last became entitled to the

annual holiday, less any specified amounts. Gross earnings include any entitled

5 See *The Pulp and Paper Industry Council of the Manufacturing and Construction Workers*

Union v Oji Fibre Solutions (NZ) Ltd [2016] NZEmpC 113.

annual holiday pay (s 26). As is evident, s 25 is not forward looking. It applies at a particular point in time. That point in time for Mr McPherson was 1 December 2014 (termination date).

[38] As at termination date, Mr McPherson had 12.67 days of accrued annual leave. He elected to cash up all but one day. That left 11.67 days of accrued annual leave as the basis for the s 25 calculation. 11.67 days is equivalent to 92.11 per cent of accrued annual holiday pay. Mr McPherson's gross earnings as at termination date amounted to $111,456.50. 92.11 per cent of Mr McPherson's gross earnings as at termination date amounted to $102,659.62 gross. Applying the eight per cent figure provided for in s 25(2) to that figure results in an entitlement to a payment of

$8,212.77.

[39] Mr McPherson was paid $5,264.27 on termination for accrued annual leave. That was, as the defendant accepts following the *PPIC* case, an underpayment. The amount Mr McPherson is properly due of $8,212.77 minus $5,264.27 (the amount he was paid) equals $2,948.50 gross (the amount he is owed by way of accrued annual holiday pay under s 25).

Lieu days – s 60

[40] Section 56 of the Holidays Act provides that an employee is entitled to an alternative holiday (referred to by the parties as a "lieu day") instead of a public holiday if they work on any part of a public holiday that falls on a day which would otherwise be a working day for the employee. Section 60 provides that an employer must pay an employee "not less that the employee's relevant daily pay or average daily pay for the day which is taken as the alternative holiday". If the alternative holiday is not taken before employment ends, s 60(2)(b) provides that the employer must pay the employee for the alternative holiday on termination, either "at the rate of the employee's relevant daily pay or average daily pay for his or her last day of employment" and "in the pay that relates to the employee's final period of employment".

[41] The collective agreement provides that an employee required to work on a public holiday is entitled to an alternative holiday which shall be taken in accordance with the Holidays Act (cl 15.1(v)). Again, there is nothing in the collective agreement which deals with payment issues. That means that reference must be made to the Holidays Act provisions.

[42] Mr McPherson was entitled to be paid for any accrued lieu days, calculated in terms of value as at the date of termination. The Act does not prescribe the way in which relevant daily pay is to be assessed. That is not surprising as it is an intensely fact-specific inquiry.6 What is clear is that the relevant daily pay is to be assessed having regard to what the employee would have received, not pay that would have been earned.

[43] In this case, the parties had agreed to remuneration calculated as an annual salary based on an average of 42 hours of work per week regardless of how many hours were actually worked (given that the agreement made provision for shift workers to work up to 175 additional hours per year, so just over 14 additional shifts). In this sense the present case is analogous to *New Zealand Airline Pilots' Assoc Inc v Mt Cook Airlines Ltd* where the Court of Appeal upheld the Employment Court's finding that relevant daily pay in relation to pilots who were paid a salary and rostered to work up to a maximum of 206 hours per year (based on a varying fortnightly roster) could be assessed on the basis of 1/365 of their salary. I accept the defendant's argument that it was appropriate, having regard to the employment environment and the particular factual circumstances applying, to adopt a relevant daily rate derived from the applicable annual salary.

[44] An argument that the payment ought to have been assessed on average daily pay did not feature in the plaintiff's pleadings or opening submissions. In any event it is unclear what divisor would have been applied, and I am satisfied, based on the evidence before the Court, that it was both possible and practicable to apply a

relevant daily pay approach.

6 See *New Zealand Airline Pilots' Assoc Inc v Mt Cook Airlines Ltd* [2013] NZCA 174 at [15] to

[20].

Fair Trading Act – s 12

[45] The plaintiff alleges that the defendant breached s 12 of the Fair Trading Act in its letter of offer, and by failing to explain the methodology that would be applied to working out the cash-up sums. This failure meant that the plaintiff accepted an offer which was ultimately worth less in financial terms than had he transferred along with his accrued entitlements under the Holidays Act.

[46] Section 12 of the Fair Trading Act provides that:

No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.

[47] The defendant argues that s 12 is not engaged because the allegation of misleading and deceptive conduct relates to the financial value of the offer made to Mr McPherson by the defendant to cash out his leave as at the end of his employment with it, and did *not* relate to his new employment by Oji. Accordingly the nexus required by s 12 between the person engaging in misleading and deceptive conduct and the employment referred to in the provision is fatally absent.

[48] Mr Yukich (advocate for the plaintiff) makes the point that the letter of offer was a three-way communication signed by both the defendant and the prospective employer. Section 12 refers to "any other person" (regardless of whether they are the employer). The letter, it is said, was very clear that the plaintiff was being offered employment on exactly the same terms and conditions, and was expressed as a conditional offer by CHHPPL (namely that accrued benefits were transferred unless cashed-up). In these circumstances it is submitted that s 12 of the Fair Trading Act is clearly engaged.

[49] I do not accept that s 12 is engaged in the circumstances of this case. That is because the provision is directed at prospective employment.7 That means

employment with Oji. The issues which the plaintiff has identified with the

7 *Cammish v Parliamentary Service* [1996] 1 ERNZ 404 (EmpC) at 425.

defendant's alleged misleading and deceptive actions and omissions relate to the plaintiff's employment with it. They do not relate, in anything other than a tangential way, to the employment he was being offered. The threshold contained within s 12 has not been met and the claim of misleading and deceptive conduct must accordingly fail.

[50] Even if s 12 was engaged I would not have found in the plaintiff's favour on this aspect of his claim. It is common ground that the applicable test under s 12 is a two stage one. First, an assessment of whether there has been misleading and deceptive conduct. Second, if so, was that conduct an effective cause of any loss

suffered.8

[51] The letter of offer made it clear that the choice as to which option the plaintiff decided to go with was a matter entirely for him, and one he was encouraged to take advice on. Relevantly, the letter said nothing about the dollar figure value which would attach to any option selected. Nor could it, as there were too many variables at play. A series of meetings took place between CHH management and union delegates. As Mr Pilkington explained, the different consequences of taking up various options, including cashing-up some but not all leave, were traversed. He also explained, and I accept, that the agreement was that the union delegates would disseminate information arising from such meetings out to their members. This was in the context of a workplace that was fully unionised.

[52] The crux of the plaintiff's claim is that the defendant ought to have explained the methodology it was proposing to adopt (which it

did not do), and which would (it is said) have enabled the plaintiff to make an informed assessment of his position under various scenarios. While the plaintiff gave evidence that he would not have accepted the cash-up offer had he known what he knows now based on dollar value, there is no evidence that he took steps to obtain details of the financial consequences attaching to various scenarios as they applied to his particular situation in circumstances where the letter of offer and the information that was being made

available said nothing about financial value. Nor am I persuaded that the defendant

8 Refer *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, 2 NZLR 492; *Hutton v*

Provencocadmus Ltd (in rec) [2012] NZEmpC 207, [2012] ERNZ 566 at [120]- [147].

was under a duty, in the particular circumstances, to proactively explain the financial consequences attaching to the range of options that were available for the plaintiff to pick up, or discard. Decisions made as to cashing-up or carrying-over involved a range of factors, including of a personal, non-financial, nature.

[53] There is a further difficulty for the plaintiff. As Mrs Coats points out, the hypothetical calculation of what the plaintiff would have been paid had he taken all of his days of leave from 1 December 2014 assumes that this is what he would have done. Had the plaintiff elected to transfer all of his leave, the value of that leave would depend on when it was taken and the plaintiff's pay/earnings during the relevant period. There was a paucity of evidence on these points. Nor, in any event, was a claim for relief in respect of an alleged breach of s 12 advanced in the plaintiff's pleadings.

[54] For completeness, although not the central focus of the argument advanced on behalf of the plaintiff, I do not accept that the defendant breached its obligation of good faith under s 4 of the Employment Relations Act 2000 in respect of its communications about the options available to the plaintiff. The defendant adequately informed the plaintiff of his available options in the circumstances, and provided sufficient information to enable him to inform himself further before making a decision. The plaintiff was advised of his right to seek further information and that he may wish to obtain independent advice. Dollar values could not be spelt out because of the variables which applied in each case. The correspondence arose against the backdrop of an agreement between the company and the unions as to the way in which information would be imparted. It is clear that the plaintiff had a level of understanding as to the impact of his election as he decided not to carry over one day of leave, thereby keeping his anniversary date intact.

[55] Finally, a claim for redundancy compensation was raised for the first time during closing submissions, however no application for leave to amend the pleadings was advanced and I did not understand the plaintiff to be wishing to pursue the point.

Conclusion

[56] Both the plaintiff's challenge, and the removed claim, are dismissed.

Costs

[57] Costs are reserved at the request of the parties. If they cannot otherwise be agreed I will receive memoranda, with the defendant filing and serving any application and supporting material within 20 working days of the date of this judgment and the plaintiff filing and serving any response, together with any supporting material, within a further 10 working days. Anything strictly in reply within a further five working days.

Christina Inglis

Chief Judge

Judgment signed at 4.30 pm on 22 August 2017