IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 281
3028333

	BETWEEN	GREGORY MURPHY Applicant
	A N D	AUCKLAND COUNCIL Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Caroline Mayston, Counsel for Applicant André Lubbe, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	3 July and 31 July 2018 from Applicant 24 July 2018 from Respondent
Date of Determination:	4 September 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The redundancy provision contained in the collective agreement which covered Mr Gregory Murphy's position with Auckland Council applies.

B. Mr Murphy is entitled to 48 weeks redundancy compensation pursuant to clause 31.9 of the collective agreement.

C. Costs are reserved.

Employment Relationship Problem

[1] This matter involves a dispute arising from agreed facts. Mr Murphy says following the dis-establishment of his position by Auckland Council in September 2017, the redundancy provisions of the collective agreement apply to him.

[2] Auckland Council says the redundancy provision contained in the individual employment agreement between Mr Murphy and his former employer, Auckland Regional Council (ARC) carried across into his employment with Auckland Council and applies to him, not the redundancy provision contained in the collective agreement (CEA). Accordingly, Mr Murphy's entitlement to redundancy compensation is capped at 39 weeks salary.

[3] The parties seek a determination as to whether Mr Murphy's redundancy entitlements are in accordance with the CEA or pursuant to his former individual employment agreement with the ARC.

Agreed facts

Mr Murphy's employment by ARC

[4] Mr Murphy started employment on 27 April 1981 with a predecessor organisation of Auckland Council, namely the ARC.

[5] On 7 December 2005, Mr Murphy signed an individual employment agreement with the ARC. Clause 22 of that individual employment agreement stated:

> If employment is terminated for reason of redundancy, the compensation that will apply, exclusive of notice is 6 weeks salary for the first year of service and 2 weeks for the second and subsequent or part years of service. The maximum compensation is the equivalent of 39 weeks salary. For the purposes of this clause, all current continuous service shall apply.

Mr Murphy's employment by Auckland Council

[6] On 4 October 2010, Mr Murphy accepted an offer of employment with the newly formed Auckland Council (which amalgamated all the different local councils across the Auckland region as well as the Auckland Regional Council).

[7] The offer of employment took effect from 1 November 2010 and it was for a team leader position (water allocation).

[8] As at 1 November 2010, Mr Murphy was already a member of the New Zealand Public Service Association (PSA). The collective agreement that the Council had negotiated with the PSA at that time (collective agreement 1 November 2010 – 31 October 2012) (CEA) covered the work Mr Murphy would undertake with Auckland Council.

Relevant provisions of CEA

[9] The CEA applied to Mr Murphy's employment from 1 November 2010. **Clause 31** of that CEA refers to redundancy compensation and states:

> If it is necessary to terminate an employee's employment because the position is being disestablished and therefore deemed redundant, the employee will be given one month's notice of termination as described above and the employee will be paid the following compensation:
>
> (a) For the first year or part year of current continuous service with Council: 8 weeks' salary; and
> (b) For each subsequent completed year or part year of current continuous service: 2 weeks salary, provided that the maximum redundancy compensation payable for all the employee's years of service will not exceed 48 weeks' salary.

[10] **Clause 41** is a "complete agreement clause" which acknowledges that Auckland Council is released from "all obligations, conditions and benefits to which the employee is, or maybe entitled, arising from any previous Agreement of employment except for those terms and conditions which are contained within this agreement, attached appendices and the Savings Section".

[11] **Clause 42** in the savings section and appendices of the CEA. The clause also states that notwithstanding the savings clause, the remuneration provisions in the "CEA… replace any provisions of any existing employment agreement that relate to salary, wages or other direct financial payments in the nature of salary and wages such as bonus payment."

[12] The savings clause (clause 42) and the third schedule of the CEA contained a process for codifying and preserving certain terms of employment held prior to 1 November 2010 in a "personal to holder" letter. The intention of the savings clause was to ensure that terms not previously contained in any collective agreement would not be reduced and would be codified into the CEA in accordance with the schedule 3 process. Schedule 3 – process for codifying personal to holder provisions states:

> Personal to holder provisions are individual terms and conditions that only apply to individuals and that are either not recorded in the predecessor collective agreements on which the CEA is based or that are only broadly referred to as saved provisions.

[13] On 30 June 2011, Mr Murphy sent an email to Auckland Council's Senior Adviser, Ms Broome and asked that his long service leave and gratuity provisions that were already frozen prior to accepting employment with Auckland Council, be codified as a personal to holder letter to him.

[14] Mr Murphy's request was agreed to and confirmed by Ms Broome in a letter to him dated 11 May 2012.

[15] On 29 September 2017, Mr Murphy's role with the Auckland Council was terminated for reasons of redundancy. Mr Murphy's redundancy compensation was paid out as part of his final pay using the formula in clause 22 of the ARC individual employment agreement.

[16] Mr Murphy says that clause 31.9 of the CEA is the relevant redundancy provision that should apply. It caps his redundancy compensation at 48 weeks salary based on his service.

[17] Auckland Council says that clause 31.9 of the CEA provides for payment of redundancy compensation and states that the maximum redundancy compensation "will not exceed" 48 weeks' salary. Therefore in Auckland Council's view the phrase "will not exceed", leaves open the possibility that the parties might agree a lesser maximum. Auckland Council says this is what the parties did in this instance.

[18] Auckland Council says that the wording of clause 41 "which releases Auckland Council from all obligations, conditions and benefits to which the employee is, or may be entitled, arising from any previous agreement of employment" does not have the effect of extinguishing all previous entitlements except for those terms and conditions "which are contained within this agreement, attached appendices and the savings section".

[19] Mr Murphy requested that two specific items in his individual employment agreement be included as part of his ongoing employment with Auckland Council. Those specific terms were his long service leave and gratuity entitlements. Those items were agreed to by Auckland Council.

[20] Redundancy was not one of the terms that Mr Murphy requested be preserved. Therefore, Auckland Council says redundancy should be capped at 39 weeks salary.

Determination

[21] The fact situation in this case is very similar to that in *Lasham v Auckland Council*[1].

[22] In that determination, Member Larmer found that Mr Lasham's claim that his previous redundancy condition continued to apply failed because:

- It was not recorded in a personal to holder letter;
- It was not an entitlement covered by schedule 3 of the CA and so cannot be, and is not, codified under the CA;
- It was a direct financial benefit which under clause 41 of the CA was replaced by the remuneration provisions of the CA.

[23] On the same analysis, it is my view that Mr Murphy's redundancy entitlement under his individual employment agreement with ARC does not carry over into his employment with the Auckland Council under the CEA.

[24] Mr Murphy's IEA with ARC no longer applied once his employment with Auckland Council came within the coverage of the CEA on 1 November 2010. This was because clause 41 of the CEA acknowledges that Auckland Council is released from all obligations, conditions and benefits which an employee may be entitled to under any previous agreement except for terms and conditions in the savings section and appendices of the CEA.

[25] Mr Murphy did not seek to preserve his redundancy entitlement from his IEA with the ARC by way of a personal to holder letter. However, Mr Murphy did seek to preserve his IEA gratuity and long service leave entitlements.

[26] Clause 41 goes on to state that notwithstanding the savings clause, the remuneration provisions in the CEA "replace any provisions of any existing agreement that relate to salary, wages or other direct financial payments in the nature of salary and wages such as bonus payments."

[27] A redundancy payment is a direct financial payment. Clause 41 is not exhaustive, the statement "such as bonus payments" in my view is one example of a

---

1 [2013] NZERA Auckland 219

financial payment in an existing agreement which is replaced by the financial payments in the CEA.

Is the redundancy entitlement in the individual employment agreement with the ARC consistent with the CEA?

[28] Under s.61(1) of the Employment Relations Act 2000 ("the Act") Auckland Council and Mr Murphy may agree on terms additional to those in the CEA which are personal to him provided they are mutually agreed and are not inconsistent with the CEA. If I am incorrect in my finding that Mr Murphy's redundancy provision in his former IEA should not be carried over into his employment with the Auckland Council, then I must consider whether or not the provisions are inconsistent with the CEA.

[29] Whether the additional terms the parties agreed to are inconsistent with the CEA is to be objectively determined. The relevant provision must be examined to see if they can stand together in the CEA. There is usually not inconsistency where the additional terms are more favourable to the employee than the terms in the CEA. Where there is inconsistency then the terms in the CEA must prevail[2].

[30] The relevant provisions are inconsistent:

(a) The redundancy compensation formulae are different. The IEA formula allows for 6 weeks salary for the first year of service and 2 weeks salary for the second and subsequent years or part years of service. On the other hand the CEA formula allows for 8 weeks salary for the first year of service and 2 weeks salary for the subsequent years or part years of service.

(b) The IEA formula provides that the maximum compensation is the equivalent of 39 weeks salary. The CEA provides that the maximum redundancy compensation payable will not exceed 48 weeks salary. The IEA formula reduces the limit in the CEA, and allows a lesser entitlement. The additional IEA term is less favourable than that of the CEA. The redundancy compensation term of the CEA must therefore prevail.

---

2 *NZ EPMU v Energex* [2006] ERNZ 749

[31] I accept Mr Murphy's position that he is entitled to the additional 9 weeks redundancy compensation in accordance with the CEA.

Costs

[32] Costs are reserved. If the parties are not able to agree costs, Mr Murphy has 14 days in which to seek costs. Auckland Council has a further 14 days from receipt in which to reply.

Anna Fitzgibbon
Member of the Employment Relations Authority