IN THE EMPLOYMENT COURT
AUCKLAND

AC 53/07
ARC 21/07

IN THE MATTER OF	point of law or fact challenge to determination
BETWEEN	HANSELLS (NZ) LIMITED Plaintiff
AND	LILI MA Defendant

Hearing: Thursday, 6 September 2007
(Heard at Auckland)

Appearances: Rob Towner, counsel for plaintiff
Simon Mitchell and Timothy Oldfield, counsel for defendant

Judgment: 14 September 2007

JUDGMENT OF JUDGE B S TRAVIS

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[1] This is a dispute as to whether there is an entitlement to both a severance payment and redundancy compensation under the provisions of a collective agreement. The argument for the plaintiff included a contention that a comma in the operative clause was an error and should be ignored, and the defendant argued that the word "*above*" should be read as "*below*".

[2] The plaintiff challenged part of a determination of the Employment Relations Authority which determined an employment relationship problem, in the nature of a dispute under s129 of the Employment Relations Act 2000, by finding that the defendant was entitled to "*4 weeks*" severance pay in addition to redundancy compensation when she was dismissed for redundancy.

[3] The defendant was dismissed on 27 January 2006. At the time of her redundancy she was employed by the plaintiff in its Aztec plant and warehouse, mainly as a process worker. She was covered by the Krispa Foods and Aztec Mexican Foods Collective Employment Agreement (the "2006 CA") entered into between the plaintiff and the Service and Food Workers Union Inc ("the Union").

[4] There were two issues between the parties at the Authority. The first was how a "*weeks pay*" should have been calculated for the purposes of the redundancy compensation payable under the 2006 CA. The defendant had been absent on accident compensation for an extended period during which the plaintiff had implemented redundancies as a result of the closure of two factories. That issue was resolved by the Authority's determination and there has been no challenge to that aspect. The second issue is dealt with in this challenge.

[5] The clauses which are central to the issues in this case are as follows:

> ***CLAUSE 29 REDUNDANCY.***
>
> *29.1 Redundancy is a condition in which an employer has staff surplus to requirements brought about by a change in operations. Both parties recognise the serious consequences that a loss of permanent employment can have on the individual employee and on the workforce as a whole and propose to minimise these consequences.*
>
> *29.2 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. Redundancy shall be defined as a situation which occurs where employment is terminated by the employer, the termination attributable wholly or mainly, to the fact that the position filled by the employee is, or will become, superfluous to the needs of the employer.*
>
> *Should the redundancy occur as a result of the employer restructuring the business so that the work is to be performed for a new employer, before the sale and purchase agreement is concluded, the company shall negotiate with the new employer regarding affected employees, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment as outlined in this employment agreement.*
>
> *Should the employee not transfer to the new employer, the provisions relating to redundancy compensation above shall apply, provided that where the employee declines to accept suitable alternative employment on substantially similar terms and conditions of employment which is offered by the new employer, and declines to*

transfer to the new employment, the employee shall not be entitled to redundancy compensation or notice as provided for above.

29.3 (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 twelve 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 of service.

29.4 Where, as an alternative to redundancy, work in an alternative position or on an alternative shift has been offered by the company but declined, no redundancy compensation will be paid.

Evidence advanced by the plaintiff to aid in the interpretation of the clause

[6] The plaintiff lead the evidence of Stuart Walker, the managing director of the plaintiff between October 1999 and December 2006, when the company was sold. Mr Mitchell submitted a formal objection to this evidence as being irrelevant and inadmissible as an aid to the interpretation of the clause on the principles which I will shortly discuss. He accepted, however, that the evidence could be led subject to that objection which would be dealt with in the final submissions.

[7] Mr Walker explained that the plaintiff had previously been the owner of the Aztec and Krispa food brands, the former being purchased in 1996 and the latter in 1997. Both of these businesses were fully absorbed into the plaintiff's business by 2000 and, although the operational sites remained separate, the two business units were operated as the snack food division of the plaintiff until the businesses were sold to Bluebird Foods Ltd in 2006.

[8] At the time of the termination of the defendant's employment she was covered by the terms of the 2006 CA but previously had been under the Aztec Mexican Foods Ltd Collective Employment Agreement (term 1 May 2001 until 30 April 2002, the "2002 CA") and the Krispa Foods and Aztec Mexican Foods Collective Employment Agreement (term 1 May 2003 until 30 April 2005, the "2005

CA"). Mr Walker personally negotiated and signed off on behalf of the plaintiff both the 2005 and the 2006 CAs.

[9] In May 2005 Mr Walker received a log of the Union's claim from the Union's advocate, Lane Sanger, in relation to the bargaining for the 2006 CA. This claimed in paragraph 12:

> 12. ***Clause 29. Redundancy.*** *Delete 29.2 (a, b) and replace with 29.2 The employee will be given an* [sic] *minimum of 4 weeks notice of termination of employment. Redundancy compensation will be calculated on the basis of 4 weeks for the first year and an additional 4 weeks for each subsequent year.*

[10] Particular and specific objection was taken by Mr Mitchell to the admission of the log of claims although it was included in the agreed bundle of documents. I shall deal with that objection later.

[11] On 20 September 2005 Mr Walker issued an internal announcement to staff advising them the plaintiff had entered into negotiations to sell its snack food business to Bluebird Foods Ltd. On 21 October the sale was confirmed and approved by the Commerce Commission. It was intended that the plaintiff would continue to manufacture at the Aztec plant until 24 February 2006. Notices were issued stating all factory staff would be offered a "*full redundancy package*" in accordance with the Union agreement or their individual employment agreements.

[12] Prior to Mr Walker meeting with the staff he had telephoned Mr Sanger to inform him about the proposed sale. Mr Sanger was kept informed of the progress of the sale although Mr Walker dealt regularly, both formally and informally, with the on site Union organisers, Kofi Obeng, Fa Mele, and Philippa Toehunga. There were also monthly update meetings with the staff. Both the staff and the Union were provided by the plaintiff with two sets of questions and answers in which there are no references to severance payments. The entitlement to redundancy compensation was dealt with in the question and answers. At no stage, Mr Walker claims, did anyone from the management of the plaintiff refer to a "*severance payment*". He also claims that neither the Union nor any employee raised any issue about severance or an entitlement to a severance payment.

[13] The staff employed at the Krispa site were given formal notice of their redundancy in writing on 20 December 2005. Mr Walker wrote to the defendant on that day advising her of her redundancy, giving her five weeks notice and stating:

> *You will be entitled to a redundancy payment in accordance with the Krispa/Aztec Union Agreement given you are a member of the Food & Service Workers Union, or as per your individual Employment Agreement. This payment along with any other adjustments to final pay will be made on the 27th January 2006.*

[14] Mr Walker states that this was a standard letter sent to some 40 employees and none of the letters mentioned any severance payment. Attached to the formal advice of the redundancy on 24 February 2006 was a calculation of the redundancy compensation for the staff and their projected final pay. None of the calculations showed any amount payable as a severance payment.

[15] After the letters were sent out to the staff, including the defendant, Mr Walker received a telephone call from the defendant enquiring about the calculation of her redundancy compensation which was only just over $3,000 because she had been off work for a considerable period on accident compensation. This matter was also raised on the defendant's behalf by the Union delegate, Mr Obeng. At no time during the discussions, with either the defendant or Mr Obeng, did either of them raise with Mr Walker the issue of an entitlement to a severance payment.

[16] On 14 March 2006 Mr Walker received an email from Sam Cuddon, the new Union organiser. It stated the Union was pursuing on behalf of the defendant "*a more equitable redundancy payment for this member*". No mention was made of a claim for a severance payment. Mr Walker responded explaining the way in which the redundancy compensation had been calculated. All of the employees who were members of the Union received redundancy compensation calculated according to clause 29 of the 2006 CA. None received an additional severance payment. None raised the question of an entitlement to be paid severance pay in addition to redundancy compensation.

[17] On 12 July 2006 the Union's solicitor wrote to the plaintiff's advocate, notifying a dispute over the collective agreement and seeking payment of

redundancy compensation on behalf of the defendant. This related only to the way in which the weekly pay had been calculated and the claim made no mention of any entitlement to a severance payment.

[18] Another issue discussed with Union delegates at the time of the sale of the Krispa and Aztec sites was the situation of a group of employees who had less than 12 months service and therefore did not qualify for any redundancy compensation under the 2006 CA. Mr Walker had several informal discussions with the delegates and agreed that the plaintiff would pay two weeks redundancy compensation to the members of the Union if they had at least six months service at the time of the closure of the plant. At no time during any of these discussions did the Union delegates refer to that group's entitlement to severance payments, regardless of whether or not they qualified for redundancy compensation.

[19] There were also discussions about the possible transfer of employees to other factories associated with the plaintiff. During those discussions it was never claimed by any of the Union delegates that, if employees agreed to transfer, they would nevertheless receive severance payments. One of those considering redeployment was Mr Obeng, who interviewed for a team leader position. He was told by Mr Walker that if he accepted that position he would not receive the redundancy compensation, but his existing service related benefits would transfer across. Mr Obeng did not raise the issue of his entitlement to a severance payment if he was redeployed. In the end Mr Obeng decided not to transfer and took redundancy. I was not told whether he was paid redundancy compensation.

[20] It was not until the defendant filed and served her statement of problem, dated 24 August 2006, raising a dispute under s129, that a claim for a severance payment was made.

[21] Mr Walker, in additional oral evidence, confirmed that in all other respects the redundancies had proceeded smoothly with the plaintiff providing a full range of services to its staff to assist them through the difficult times.

The defendant's evidence

[22] The defendant was formally excused from the hearing, with the consent of the plaintiff's counsel, but her evidence was taken as read although it had not been produced by her under oath or affirmation. It deals in detail with her being on accident compensation at the time of the redundancy. This is not relevant to the present dispute. She does, however, state that the first time she found out she was entitled to a severance payment was when the Union's lawyer, Tim Oldfield, told her before the proceedings were filed in the Authority. She had not read the 2006 CA at any time before then and at that point her concern was that she had not been paid enough redundancy compensation. She had not been involved in any of the consultations surrounding the redundancy or in the negotiation of the various collective agreements.

Principles of interpretation

[23] It is the duty of the Court in construing contractual documents to discover and give effect to the real intention of the parties, ascertained from the factual matrix, the background, the object and purpose of the contract, viewed in an objective way: *A-G v Dreux Holdings Limited* (1996) 7 TCLR 617 (CA). The interpretation of an agreement is not to be narrowly literal but must accord with business commonsense. If the words are clear and could have only one possible meaning that may be determinative: *Association of Staff in Tertiary Inc: ASTE Te Hau Takitini o Aotearoa v Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491.

[24] It is accepted by counsel that the words must be given their ordinary and grammatical meaning unless this would lead to an absurd or irrational result: *Sword v Telecom New Zealand Ltd* [1998] 3 ERNZ 1228, 1235.

[25] There was no issue between counsel that the Court may, in appropriate cases, have regard to prior collective agreements to ascertain history of the clause under consideration, to obtain some guide to industry practice and to assist in the interpretation of the current collective agreement: *Association of Staff in Tertiary Education v John Webster, CEO Unitec Institute of Technology* unreported,

Judge Couch, 1 March 2006, AC 8/06. Further, in *New Zealand Merchant Service Guild IUOW Inc v Interisland Line a Division of Tranz Rail Ltd* [2003] 1 ERNZ 510 Judge Shaw stated:

> *[19] To these general rules of contract interpretation is added the recognition that employment agreements are often the product of a history of instruments of varying sorts by which the parties have attempted to define their relationship. The result may be a document which is a mix of new provisions designed to meet changing statutory or industrial requirements grafted onto existing and long standing provisions. The agreement in this case is such a document.*

[26] Mr Towner submitted, and I did not understand Mr Mitchell to disagree, that the whole collective agreement, and in this case the whole of clause 29, is to be considered in endeavouring to ascertain the intention of the parties in relation to their meaning of the first sentence of clause 29.2: Beale (ed) *Chitty on Contracts* (29 ed, 2004) at [12-0063].

[27] Matters became a little more controversial when Mr Towner cited from *Chitty on Contracts* at [12-080]:

> *Errors of syntax are a particularly frequent source of disputes in relation to written contracts. However plain the syntax of a sentence may be, if it is clear from the content of the instrument and the admissible background that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning prevails, in spite of the syntax of such particular sentence.*

[28] Mr Towner relied on the decision of the majority of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 which is cited in support of the proposition in *Chitty*. In that case a clause was construed in a way that required the moving of the original brackets. The clause as drafted read: "*Any claim (whether sounding in rescission for undue influence or otherwise)*".

[29] The majority held that when the sentence was construed against the background circumstances and the terms of related non-contractual documents it

should read: "*Any claim sounding in rescission (whether for undue influence or otherwise)*".

[30] Lord Hoffman delivering a speech with which the majority concurred stated:

> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particular in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.* [p115]

[31] Mr Towner also relied on the view expressed in *Chitty* at [12-055] following this statement from Lord Hoffman that:

> *… the rule that the words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity or would create some inconsistency with the rest of the instrument. It may also not be applied where, if the words were construed in their ordinary sense, they would lead to a very unreasonable result or impose upon the contractor a responsibility which it could not reasonably be supposed he meant to assume. In* Wickman Machine Tools Sales Ltd v L.G. Schuler AG [[1974] AC 235 at 251] *Lord Reid said: "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make their intention abundantly clear".*

[32] Mr Towner then moved further into areas of controversy by submitting that the position has clearly been reached in New Zealand that it is appropriate to look at the conduct of the parties towards one another subsequent to the making of the contract when interpreting it. He cited as authority, *Verissimo v Walker* [2006] 1 NZLR 760 at para [40] (CA) but accepted that this was a case which dealt with the issue of the formation of a contract in which evidence of the negotiations and subsequent conduct will always be admissible.

[33] Finally, and even more controversially, Mr Towner's submitted that evidence of pre-contractual negotiations is admissible in an appropriate case, citing Burrows, Finn & Todd *Law of Contract in New Zealand* (3 ed, 2007) at pp 166-167 and the authorities there cited. The learned authors suggest that what was said in negotiations may be relevant to show that the parties proceeded on a common assumption, as distinct from showing their subjective intentions, citing: *Air New Zealand v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 at 224. The learned authors also suggest it is possible to find authority where a Court has allowed extrinsic evidence to show the parties had affirmatively agreed that a certain phrase in the contract was to bear a certain meaning, thus giving their own private dictionary meaning to it. The judgment of Thomas J in *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 at 541-546 and *Brownsons Holdings (1999) Ltd v The Plaza Pakuranga Ltd* HC AK CIV-2004-404-2113 30 May 2006) are cited in support.

[34] Mr Mitchell submitted that evidence of pre-contractual negotiations, including the claims made by the parties, is inadmissible in a dispute over the interpretation of an employment agreement, citing the *Hampton* case. He contended, based on that authority, that the final written agreement supersedes the negotiations and that the positions of the parties may well have changed in the course of those negotiations as a result of compromises made. The log of claims relied on by the plaintiff in the present case was not accepted in its totality in the final document. Mr Mitchell submitted that no inference could be drawn from that document that no claim at any stage was made by the Union for a severance payment. There was no other evidence to suggest where that provision had come from as it is not contained in the earlier collective agreements.

[35] I accept Mr Mitchell's submissions that the point has not yet been reached where pre-contractual negotiations can be called on in aid of interpretation, unless they constitute an agreed meaning or a common assumption about a clause which finally appears in the written contract. The approach suggested by Thomas J in *Yoshimoto* may have to be reconsidered in light of the Privy Council's decision in *Yoshimoto v Canterbury Golf International Ltd* [2004] 1 NZLR 1. Their Lordships observed (at paragraph [25]) that this was not a suitable occasion for re-examining

the normal rule, authoritatively stated by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 which excludes evidence of pre-contractual negotiations.

[36] For these reasons I shall have no regard to the log of claims or the other evidence of pre-contractual negotiations in considering the meaning of clause 29.

[37] Mr Towner was on stronger grounds when he contended that the evidence of subsequent conduct could assist the Court in the interpretation of a clause. In *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* unreported, 10 August 2006, AC 44/06, Judge Perkins quoted from Judge Colgan's judgment in *Hampton* as follows:

> *[22] There has also been movement in the area of subsequent conduct of the parties after the contract came into existence. This was once regarded as irrelevant for the purposes of interpreting it. That was because all that was said to matter was the intention of the parties at the time of entry into the contract and not later. There are now a number of dicta, including of the Court of Appeal, indicating that change to this former rule is close:* A-G v Dreux Holdings Ltd *(1996) 7 TCLR 617 (CA) and* Raptorial Holdings Ltd (in Rec) v Elders Pastoral Holdings Ltd *[2001] 1 NZLR 178; (2001) 7 NZBLC 103,219 (CA).*

[38] In the *Spotless* case Judge Perkins did not find it insignificant that the parties had operated on the same basis for many years prior to the new agreement and, for some considerable time after it came into force, had continued to act on the same basis, to support his decision that the old basis provided the correct interpretation of the clauses in question. There appears to be growing acceptance that subsequent conduct at least may provide a reassurance for a Judge if that conduct is consistent with the interpretation the Court is adopting. I shall therefore return to the subsequent conduct to see if it can provide any assistance in the present case.

The plaintiff's argument

[39] Mr Towner submitted that, considering clause 29 as a whole, the comma in the first sentence in clause 29.2, following the word "*requirement*", was a grammatical error and should be ignored in the proper interpretation of the sentence. The reference to "*4 weeks*" in the sentence, he submitted, refers to the period of the employees' contractual notice requirement. It was not therefore, intended by the parties to provide employees with additional redundancy compensation to that

already provided in clause 29.3 and on a different basis to the way in which such compensation was to be calculated. On Mr Towner's submission the first sentence should be read as follows:

> *Where the employees' employment is terminated by reason of redundancy, the employer shall make a severance payment to that employee, in addition to the employees contractual notice requirement* [comma omitted] *of 4 weeks.*

[40] This interpretation effectively means that "*severance payment*" is synonymous with "*redundancy compensation*". He supported that interpretation by reference to the following words contained in the third paragraph of clause 29.2, which deals with the situation when the employee does not transfer to a new employer: "…*the provisions relating to redundancy compensation above shall apply*..." and "… *the employee shall not be entitled to redundancy compensation or notice as provided for above*" (emphasis added). Mr Towner submitted that the only "*redundancy compensation above*" in clause 29.2 was the "*severance payment*" in the first sentence of the first paragraph. Mr Towner could not point to any authority distinguishing severance from redundancy. He cited *Wellington etc Local Body Officers IUOW v Westland Catchment and Regional Water Board* [1989] 3 NZILR 385 at 394, which referred to a "*severance/redundancy setting*" and appeared to regard a basic severance payment as a component of the redundancy package and not as something completely different.

[41] Mr Towner supported this position by reference to the clause as a whole. He submitted that the "*severance payment*" sought by the defendant was a new entitlement to which she had not been entitled under either 2002 or 2005 CAs. He observed that clause 29 of the 2005 CA contained three sub-clauses, the equivalent of clauses 29.1, 29.3 and 29.4 of the 2006 CA, except that the minimum period of notice of termination for employees at the Aztec site was increased from two to four weeks in line with the previous entitlement for employees at the Krispa site.

[42] He submitted that the second and third paragraphs of clause 29.2 were in the nature of an employee protection provision dealing with continuity of employment

under part 6A of the Employment Relations Act 2000. He submitted that as the 2005 CA had come into force on 1 May 2003, prior to the 2004 Amendment to the Employment Relations Act it had not been required to contain such provisions. The 2006 CA, which commenced on 1 June 2005, by inference, must have been intended to comply with part 6A, and in particular ss69M and 69N which require collective agreements to contain employee protection provisions. These, he submitted, are now to be found in the new parts of clause 29.2. Sections 69M and N required the parties to insert such protection into collective agreements made after the amendment came into force.

[43] Mr Towner submitted that the interpretation contended for by the plaintiff allowed the whole of clause 29 to fit together. It provided the definition of redundancy, outlined the employer's obligation to provide notice and redundancy compensation and also provided a substantial measure of employee protection.

[44] Mr Towner submitted that it was reasonable to deduce that what became clause 29.2 of the 2006 CA may have been borrowed from another different employment agreement, which is why it provides another definition of redundancy and the references to four weeks notice of termination, in addition to a requirement to pay redundancy compensation, which was already dealt with in clauses 29.1 and 29.2 of the 2005 CA. He submitted therefore there was no intention disclosed in the 2006 CA to create a second entitlement to redundancy compensation and that the amount of redundancy compensation was not four weeks, as a severance payment, but was to be quantified pursuant to clause 29.3. He submitted that any other result would be unreasonable and would be giving the defendant a significant new entitlement.

[45] Mr Towner relied on the conduct of the parties subsequent to the making of the 2006 CA, referring to the announcements to staff, the discussions with the Union, the written questions and answers, the claims made initially on behalf of the defendant and the payments made to all of the staff, including Union delegates, who had never raised a claim to an entitlement to a severance payment. He submitted that at some point either the defendant or the Union delegate would have raised this issue, if that was their understanding of clause 29.2.

[46] Mr Towner submitted again that the second comma in the first sentence was an error and should not have been included. If it was omitted the defendant would have little to rely on in support of her claim for a severance payment because the ordinary natural meaning of the sentence could only be that the reference to a "*severance payment*" was the same as "*redundancy compensation*". There would be no other basis for quantifying the amount of the severance payment, other than by reference to the formulae in clause 29.3. He submitted that if the comma is omitted the references to "*redundancy compensation above*" would then be unambiguous.

[47] Mr Towner also supported his submissions by reference to the substantial number of errors of syntax, including the misuse of apostrophes, in the first page of the 2006 CA. He submitted clause 29, like the first page of the 2006 CA, was poorly drafted.

The defendant's argument

[48] Mr Mitchell accepted that the words "*severance*" appear for the first time in the 2006 CA and submitted that, viewed objectively, the parties therefore intended to change clause 29 from the way that it appeared in the earlier CA's. He submitted that the words "*redundancy compensation*" appear six times in clause 29 and the parties would have used those words in the first sentence of clause 29.2 instead of "*severance payment*" if they had intended "*severance payment*" to mean "*redundancy compensation*", as the plaintiff has claimed.

[49] Mr Mitchell submitted that the plain English meaning of the words "*severance payment*" denote something different to "*redundancy compensation*" and the fact that different words have been used indicate that they have different meanings. He contended that the placement of the comma after the phrase "*in addition to that employee's contractual notice requirement*" indicates that the "*4 weeks*" relate to the severance payment and not to the notice period. The defendant's argument is simply that the words between the two commas are to be regarded as in effect in parentheses or brackets and can be removed without changing the meaning of the sentence so that it reads "*Where the employee's*

employment is terminated by reason of redundancy, the employer shall make a severance payment to that employee of 4 weeks".

[50] Mr Mitchell submitted that because the sentence can have only one plain and ordinary meaning, the Court does not need to look at extrinsic evidence to determine the matter. He submitted that the Authority correctly concluded that the wording was too clear to warrant looking at additional evidence in its attempt to construe it. He contended the Authority had correctly concluded that for the clause to be capable of bearing the meaning the plaintiff contends for, the comma has to disappear.

[51] Should the Court decide to look at extrinsic evidence Mr Mitchell submitted the evidence of subsequent conduct was not compelling and the present case was distinguishable from other cases where subsequent conduct has assisted in the determination of a dispute. He submitted it would be natural that, on occasion, Union members, delegates and organisers would not be aware of their rights under the CA until they sought legal advice. He submitted that the *Spotless* case was clearly distinguishable because the former agreements had been construed in the same way for some 20 years.

[52] Mr Mitchell submitted that the words "*severance payment*" cannot mean "*redundancy compensation*" as the payment associated with those words is only "*4 weeks*" and this would create an inconsistency with clause 29.3 where the two separate formulae are provided. He relied on the Authority's conclusion that there was no unreasonable or absurd result, which could not have been the parties intention, identifiable from the words used in clause 29.2. It was not absurd or unreasonable to pay a modest severance payment to redundant employees, especially in circumstances where those employees who had worked for less than 12 months would not be entitled to any other redundancy compensation. He submitted that the plaintiff's argument effectively was requiring extrinsic evidence to be looked at in an attempt to create an absurdity or an ambiguity which was not otherwise there.

[53] Mr Mitchell conceded the 2006 CA was not "*the most beautifully crafted*" document and that it has typographical and syntax errors in the first page. He submitted that both parties have responsibility for this. He also accepted there were

some difficulties with the repetition of concepts such as the four weeks notice in clause 29 and the two definitions of redundancy.

[54] He confessed to some difficulties with the use of the word "*above*" twice in the third paragraph of 29.2. He contended as he did there was no "*redundancy compensation*" referred to above, but it was referred to below, in clause 29.3. He was therefore driven to accept that in the circumstances "*above*" where it appeared in the third paragraph, was meant to mean "*below*". To read "*above*" as meaning "*below*" would, he submitted, do less damage to the clause than the removal of the last comma in the first sentence of 29.2. He maintained that the plain intention of the parties was to provide for an additional payment to the redundancy compensation in clause 29.3.

Conclusion

[55] I accept Mr Mitchell's submission that the plain meaning of the first sentence of clause 29.2, with the commas in place, clearly contemplates a severance payment of "*4 weeks*".

[56] The words between the commas are to be regarded, in normal grammatical terms, as being in parentheses or brackets and can be removed without changing the meaning of the sentence. As the Authority noted, there was no need to add the word "*pay*" after the "*4 weeks*" because the context of there being a requirement to "*make a severance payment*", clearly implied that it was one of "*4 weeks*" pay. Assistance for that interpretation is also to be obtained from the second sentence, which states that in the case of redundancy the period of notice shall in no case be less than "*four weeks*". This again lends support for the view that the "*4 weeks*" in the first sentence relates not to the contractual notice requirement, but to the severance payment. If the clause had stopped there the plaintiff would fail in its challenge.

[57] Unfortunately for the defendant the clause does not stop there. The next sentence provides a second definition of redundancy linked to the position being filled by the employee being superfluous to the needs of the employer. That is in sharp contrast to the earlier definition of redundancy, in clause 29.1, which does not relate to the position of the employee but to an overall staff surplus. The

inconsistency between those two clauses may be illustrated by the two decisions of the Court of Appeal in *McKechnie Pacific (NZ) Ltd v Clemow* [1998] 3 ERNZ 245 and *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739. In *Clemow* it was said that if there was another position suitable for him that he could not be regarded as surplus to requirements and there would not be a situation of redundancy. This was criticised in *Thwaites* as relating redundancy to the person rather than a position and did not reflect the established law stated in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601.

[58] After having used the expression "*4 weeks*" in the first sentence and "*four weeks*" in the second, the requirement of "*four weeks notice*" is repeated again in both 29.3(a) and 29.3(b). Little guidance can therefore be derived from this needless repetition as to whether or not it was meant to link the "*4 weeks*" to a severance payment or to the employee's contractual notice requirement in the first sentence.

[59] The greatest difficulty facing the defendant's interpretation are the words "*redundancy compensation above*" where they appear twice in the third paragraph. These words denote a clear intention to refer to what has gone above, because the last line refers also to notice as provided for above. The only redundancy compensation referred to above can be the words "*severance payment*".

[60] I have examined the dictionary definitions to see if there is a difference between a "*severance payment*" and "*redundancy compensation*". The *Concise Oxford Dictionary* (8 ed, 1990) defines "*severance pay*" as an amount paid to an employee on the early termination of a contract. That termination is not linked in that definition to redundancy which can, of course, be one reason for the early termination of the contract, but not the only reason. "*Redundancy of a person*" is defined as being no longer needed at work and therefore unemployed.

[61] The sentence, however, makes it clear that it is a severance payment that is to be made to the employee only when that person's employment is terminated by reason of redundancy. It is not payable in any other circumstance where the employment has been severed. This makes the terms "*severance payment*" and

"*redundancy compensation*" synonymous. The severance payment is for redundancy. That is the same as saying redundancy compensation.

[62] Whilst I accept Mr Mitchell's submission that the bulk of the document appears to have been correctly grammatically expressed, that is not true of the first page which is in somewhat different terms to the previous collective agreements. So is clause 29. An examination of the first page of the 2006 CA, as Mr Towner pointed out, contains a number of syntax and grammatical errors which need to be ignored in order to extract the true meaning of the clause. The last comma in the first sentence of clause 29.2 must be treated in the same way for the clause as a whole to be able to be given a consistent and plain meaning.

[63] The clause therefore must be read, as Mr Towner, submitted as meaning that there will be a severance payment by reason of redundancy, in addition to the employee's contractual notice requirement of four weeks. I am satisfied that does less violence to the clause than requiring the word "*above*" to be read "*below*". That I consider to be the plain meaning of the words used in the clause as a whole, disregarding the effect of the last comma in the first sentence.

[64] In reaching this conclusion I have accepted the guidance to be obtained from *Chitty* in the passages cited by Mr Towner. *Chitty* at [14-056]also suggests, on the authority of *Mitsui Construction Co Ltd v A-G of Hong Kong* (1986) 33 Build LR1, 14 (PC) that the poorer the quality of the drafting of a contract, the less willing any Court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention.

[65] I am also fortified in this view because it is consistent with the subsequent conduct of the parties from the point of time that the redundancies were announced right through until the filing of the statement of problem. If the employees and their Union representatives had considered that they were entitled to an additional severance payment it is highly probable that they would have made such a claim. Instead they accepted the redundancy compensation payments made by the plaintiff and raised no objection.

[66] The interpretation contended for by the Union on behalf of the defendant would also have provided those employees of less than twelve months service with four weeks severance pay. That was apparently not sought by the Union on behalf of that group and instead the plaintiff agreed to pay them two weeks compensation if they had more than six months service. The Union's acquiesce in that course is inconsistent with its interpretation of clause 29.2.

[67] The conclusion I have reached is at variance with that of the Authority. However the Authority's determination does not deal with the last paragraph of clause 29.2 which, in my view, has created an ambiguity in the use of the last comma in the first sentence of the first paragraph. As I have previously indicated, if the clause had stopped at the end of the second sentence of clause 29.2, I would have agreed with the Authority's conclusion.

[68] The challenge has been successful and the defendant is not entitled to a "*severance payment of 4 weeks*" under the 2006 CA. The Authority's award of $2,284.60 severance pay is therefore set aside.

[69] Costs are reserved and, if they cannot be agreed, may be addressed by an exchange of memoranda, the first of which is to be filed and served within 30 days from the date of this judgment. A memorandum in reply may be filed within a further 21 days.

B S Travis
Judge

Judgment signed at 4.15pm on 14 September 2007