Determination Number: AA 48/05
File Number: AEA 905/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	David Parnell, Donald Espie & Philip Archer (Applicants)
AND	Fletcher Building Products Limited (Respondent)
REPRESENTATIVES	David Parnell for applicants Michael O'Brien, counsel for respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
CONSIDERATION OF PAPERS	10 February 2005
DATE OF DETERMINATION	11 February 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants, Mr David Parnell, Mr Donald Espie and Mr Philip Archer, were employed by the respondent Fletcher Building Products Ltd and its predecessors for varying numbers of years until mid 2003 when they were made redundant. The problem they have brought to the Authority in relation to their employment is about the calculation of payments each was entitled to receive at termination. About $58,000 is claimed by the three applicants as the total shortfall in payment.

[2] An attempt has been made to resolve the employment relationship problem with the assistance of mediation, but settlement was not able to be reached. The parties' representatives subsequently agreed that an investigation meeting was not necessary and that the Authority would arrive at its determination after considering the material in the formal statements lodged by them and in the written submissions they later supplied to me. Additional information requested by me has also been considered.

[3] A large part of the claims common to each of the three applicants is based on their contention that contributions made by the employer for their benefit each pay period into a superannuation fund, should have been treated as part of their "salary" when the agreed formula was being applied to calculate the redundancy payment.

[4] A smaller part of the claims for all three applicants arises in respect of untaken annual leave and long service leave and is based on their contention that the employers superannuation contributions were a part of their "salary" or "gross earnings" for the purposes of calculating payment due for the untaken leave.

[5] Another large claim but one made only by Mr Archer, is based on his contention that the private use he was entitled to of a company car had a monetary value which should also have been

included as part of his "salary" for the purposes of his notice period and also calculating the redundancy compensation and pay for untaken annual leave and long service leave.

[6] The employer has rejected all of the claims, contending that the redundancy payment and other amounts it paid to the applicants were correctly calculated in accordance with the express terms of the applicants employment agreements and also the relevant provisions of the Holidays Act 1981.

Terms of employment

[7] The applicants each accepted employment on terms offered to them by letters dated 26 and 28 July 1999. Although the offers were made by a company called Amatek (NZ) Ltd there is no dispute that the terms set out in the letters bound the respondent Fletcher Building Products Ltd at the time redundancy was effected in 2003. Materially, those terms included the following;

> ***Position/salary***
>
> *Your position and salary shall remain as they are at present.*
>
> ……
>
> ***Superannuation***
>
> *You will be offered the opportunity to become a member of New Zealand Retirement Trust. Amatek will pay 10.5% of your salary to New Zealand Retirement Trust for you.*
>
> ……
>
> ***Redundancy***
>
> *Employees terminated due to redundancy will be paid a redundancy payment calculated on the basis of three months salary plus 0.7 months salary per year of completed service, pro-rata to completed days service. Provided that the redundancy payment will not exceed two years salary.*
>
> (my underlining)

Whether superannuation was part of "salary"

[8] A payment regularly made by an employer for the benefit of an employee into a superannuation fund is clearly to be regarded as part of total remuneration, because it has a monetary value to the employee. It does not follow of necessity that the payment must be in the nature of salary, as that is not always the only component of remuneration. Perquisites such as the use of a company car, provision of a car park, and payment of medical insurance, are a separate part of remuneration distinct from salary.

[9] I accept that in theory parties to an employment agreement could express an intention that superannuation contributions to be made by the employer were to be considered a part of the employees salary. Parties can agree to define "salary" in that way for the purposes of their own particular employment agreement.

[10] In this case I find that the intention of the parties is best shown in the offer of employment letter of 26 July 1999. The isolation of separate terms covering salary and superannuation strongly implies that the latter benefit was not regarded as a part of the former. When the applicants were employed by Formica before they had accepted the terms offered in the letters of 26 and 28 July, they were already entitled to have 10.5% of salary paid by their employer into their superannuation fund. If it was part of salary then there was no need to make separate provision for this benefit in the letter of offer, which would have needed only to say, … "your salary shall remain as it is at present".

[11] Furthemore, the 10.5% payment offered by the employer was on top of or in addition to the salary rather than being deducted from it. The reference to salary was made not to define the nature of the 10.5% payment but to provide a means of quantifying that payment. A purpose of the wording of the provision is to make it clear that the payment was not a fixed sum but would vary from time to time with any fluctuations in salary.

[12] There is nothing in this case to suggest that the employer intended to take an unusual approach and factor membership of the superannuation scheme into the redundancy payment. It can be inferred that the redundancy payment was intended to fulfil its usual purpose of compensating for loss of office or position, whereas loss of membership of a superannuation scheme is a different thing, both in nature and extent. A redundant position is completely lost whereas benefits under a superannuation scheme are not lost but will either be realised at termination of employment or, depending on the scheme, may even continue to accrue.

[13] Accordingly I uphold the position taken by the employer with regard to this part of the employees claims. No further payment is required to be made by the respondent to them on this account.

Whether superannuation was part of "gross earnings" for purposes of leave entitlements

[14] There is no dispute that any annual leave or long service leave untaken by the applicants at termination of their employment was to be paid out to them. There is also no dispute that the payment was to be calculated by applying a factor to the employees "gross earnings", as that term was defined in s.3 of the Holidays Act 1981 (since repealed by the Holidays Act 2003, which came into force on 1 April 2004).

[15] Under the Holidays Act "gross earnings" means the total amount of the remuneration payable to an employee, ……*by way of salary, wages, allowance or commissions*.

[16] I have determined above that the superannuation contributions paid by the employer were not salary. Although paid regularly, the contributions were not part of disposable income paid into the hands of the employee. For the same reasons they were not wages either, and they were not of course commissions, but were they an allowance?

[17] The nature of allowances was considered in *Stagg v Inland Revenue Commissioner* [1959] NZLR 1252, (referred to in the *Cavalier Bremworth Ltd* case cited by Mr O'Brien). Four criteria in respect of allowances in an employment context were identified as follows. Allowances are;

> In relation to an employment or service,
>
> Payable as a term of employment and not as a gratuity,

Paid in money,

Paid periodically.

[18] The superannuation payments in this case satisfy the above criteria in my view. I do not consider it would be straining the language to regard the employers superannuation contributions as an "allowance" paid to the applicants. They were not allowances of a reimbursing non-taxable kind, which are expressly excluded by s.6 from forming part of an employees remuneration. Neither were they one-off, lump sum, special payments which, the courts have decided, are also excluded. Had the leave actually been taken the applicants would have received salary as well as the superannuation payments for the period, so they should not be disadvantaged financially because of circumstances beyond their control that prevented them from taking the leave.

[19] I therefore find that the superannuation payments are to be regarded as an allowance paid for that purpose and as such they were part of the applicants' gross earnings. Accordingly they were to be taken into account when calculating payment due for untaken leave. I find that the applicants have been underpaid the following amounts as claimed by them;

Mr Parnell - $1,380.96

Mr Espie - $2,236.77

Mr Archer - $1,195.73

[20] The respondent company is therefore ordered to pay the above sums to the applicants.

Private use of company car as part of "salary"

[21] This claim is for Mr Archer only, as he had a company car which he was allowed to use privately. I accept that this private use added the equivalent value of $15,000 to his total remuneration. However that does not turn the goods or chattels he used into money paid to him by way of salary or wages or allowances.

[22] As Mr Archer received notice of termination and continued to have full private use of the vehicle during that time, there can be no claim with regard to the notice period. His redundancy payment was calculated with reference to "salary", which the car use was not. He has no claim in this regard. As to untaken leave, the private use of the car was not part of "gross remuneration" as that term was defined in the Holidays Act 1981. That particular claim must therefore fail as well.

[23] Accordingly I find that upon termination of Mr Archers employment the respondent company discharged its obligations to him with regard to private use of its car.

Determination

[24] The three applicants succeed in their claims to the extent dealt with above in relation to untaken annual and long service leave. The respondent employer is ordered to pay them the sums specified in paragraph [19].

Interest

[25] Interest is also to be paid on those sums at 8%, to be calculated from the date of termination in 2003 to the date of payment.

Penalty

[26] I do not consider a penalty is warranted in circumstances where the breach of the employment agreement was not in respect of a written term and was certainly not a blatant or even a deliberate breach.

Costs

[27] These are reserved to allow the parties a chance to resolve the question themselves. The applicants did not apparently incur legal expense in relation to the steps they have taken in the Authority to resolve their problem and, arguably, given the outcome of the case, costs should lie where they have fallen in any event. However they should be entitled to recover at least their share of the $70 lodgement fee.

A Dumbleton
Member of Employment Relations Authority