



new position and, as a consequence of his elevation, an additional payment was provided for, being the non-superable supplement of \$25,000. This payment was a further inducement to Mr Bell to take up the new seconded position, albeit on a fixed term basis, and was a payment analogous in my view to a higher duties allowance or an *acting up* payment. It is important to note, however, that the non-superable supplement was paid as a component of Mr Bell's new salary when he was acting up in the higher position. It is that fact which caused difficulty between the parties later on.

[4] As a consequence of difficulties arising in the workplace which need not concern us here, Mr Bell raised a personal grievance with the University and this was settled by way of a negotiated agreement effective 23 November 2007. That negotiated agreement, the terms of which have been made available to the Authority, makes provision for a number of payments by the University to Mr Bell. Mr Bell says that the University has failed to meet its obligations in terms of that agreement in one particular respect, namely the provision at para.5 of the agreement requiring payment of redundancy compensation *equivalent to 42 weeks salary*.

[5] Mr Bell says (and the University concedes), that the computation of salary for that 42 week redundancy payment is actually on the salary of his substantive position as Senior Lecturer, Marketing, and not on the directorship position to which he was seconded because the calculation excludes the \$25,000 non-superable supplement. Mr Bell's position is that that \$25,000 non-superable supplement ought to be included in the calculation and the University says that it ought not to be included.

[6] Mr Bell advances two principal arguments in support of his contention for the supplement to be included. The first is that the position that he was made redundant from was the directorship position to which he was seconded and not his underlying substantive position as Senior Lecturer, Marketing. Given that the supplement formed part of his salary as the Director of the MBA Programme and was built into the periodical payment of that salary as he fulfilled his obligations in that higher role, the redundancy calculation ought to include that payment and insofar as it does not, Mr Bell says he has been short-changed by the University.

[7] A further argument which Mr Bell advances is that there is a logical inconsistency in the University's position in that it includes the non-superable supplement payment for some of the calculations required by the settlement

agreement, but not others. In particular, Mr Bell draws attention to clauses 4 and 7 of the settlement agreement, both of which the University concede include the non-superable supplement as part of the calculation of entitlement.

[8] The Authority can derive no particular assistance from clause 7 which relates to holiday pay and *payment for time worked*. Holiday pay is calculated pursuant to the Holidays Act 2003 and the rules set out in that statute apply and may not be varied by agreement. Payment for time worked effectively refers back to clause 4 of the agreement which, as Mr Bell notes, and the University concedes, includes the non-superable supplement as part of the calculation.

[9] It follows then that the essence of this second argument of Mr Bell is that it is inconsistent of the University to apply the non-superable supplement to the calculation of his entitlement in respect of the payment of six months' salary in lieu of notice (which is what clause 4 of the agreement is concerned with), but to exclude the non-superable supplement from the redundancy compensation proper in the following clause of the agreement.

[10] A final argument which Mr Bell advanced in his oral evidence before the Authority was the contention that, if the matter was in any doubt, then one would have expected the University to have taken the trouble to define the term used in the settlement agreement and to be absolutely certain that there was no misunderstanding about the quantum involved, given that it was the University which had drafted the settlement agreement and indeed it was the University which had applied to the Mediation Service of the Department of Labour to have the matter dealt with by way of mediated settlement. In this regard, of course, Mr Bell is alluding to the *contra proferentum* rule the thrust of which is, where there is doubt, a document ought to be construed against its author.

[11] The University, for its part, says that its longstanding policy has been to exclude non-superable supplements from calculation of redundancy compensation in cases such as this. It also says that Mr Bell knew or ought to have known before the matter was concluded that this particular element of the calculation would be exclusive of the non-superable supplement. That last contention is made because it is common ground that Mr Bell inquired about the quantum prior to settlement and was given by electronic means a statement indicating his entitlement. There is no doubt that the statement was forwarded, but what happened next is disputed. Mr Bell says

that he received the statement, realised it was wrong, and sought further particulars from the Human Resources Department of the University which were never forthcoming.

[12] Mr Bell took no steps to follow the matter up and while the University concedes that it may not have fulfilled its obligations, as it ought to have done, nor did Mr Bell do the prudent thing and follow the matter up. He proceeded to settle the transaction and then, once matters were concluded, raised the issue again.

[13] In answer to a specific question, Mr Bell denied that he had then been told by either of the University's human resources managers involved, that the supplement was excluded from redundancy calculations. Having heard the University's human resources department personnel give their evidence, and having formed the view that both of them were honourable and honest in the evidence they gave, I think it more rather than less likely that Mr Bell is correct in his assertion that he was never told that there was no non-superable supplement in the calculation of redundancy calculation.

[14] However, as I have made clear above, it is equally apparent that at the time that the settlement was arrived at, Mr Bell knew that, in his terms, the settlement had a mistaken calculation in it. Indeed, Mr Bell in his oral evidence said as much before the Authority when he said: *at the time of settlement, I knew the University had made a mistake.*

### **Issues**

[15] It will be helpful to look at three matters specifically in coming to a determination of the question for the Authority. Those three issues are:

- (a) The meaning of the word *salary*;
- (b) The nature of the redundancy; and
- (c) The mechanics of the agreement.

### **Salary**

[16] Mr Bell contends that because he was paid the non-superable supplement as part of his periodical salary while he was fulfilling the directorship role, he ought to

expect that it would be included in the calculation of redundancy compensation which refers to a payment of 42 weeks' *salary*.

[17] He says that as a matter of fact and law, the supplement was in truth part of his salary for practical purposes, for tax purposes and indeed in every other respect. Were the payments somehow split off from his underlying salary, then he could understand the University's position but by reason of the fact that it was in effect subsumed within the overall salary component, he thinks the University's application of its policy is mistaken.

[18] For its part, the University says that Mr Bell's salary is his underlying entitlement as Senior Lecturer, Marketing and that the non-superable supplement is an add on which, even although it is treated as part of the salary for the purposes of payment and tax, is not in truth a salary component at all.

[19] I have reached the conclusion that, despite the obvious practical marrying of the supplement to the base salary, these are in truth two different kinds of emolument, the one genuinely a periodical payment of an agreed remuneration for work performed, and the other a particular allowance for a particular purpose which does not necessarily conform to all of the usual incidences of salary. In particular, it is plain on its face that the non-superable supplement has one significant characteristic which a salary does not, and that is its inability to be used for the purposes of calculating superannuation entitlement. In that respect alone, it is axiomatic that the supplement lacks a significant characteristic which a salary payment, by common usage, would always have.

[20] There can be no argument that the supplement does not attract superannuation in the usual way that a salary payment does; it is plain on the face of the description of the payment that it does not attract superannuation in the same way as salary payment does.

[21] It follows that I conclude that the non-superable supplement is not part and parcel of a salary payment and is in truth a separate and distinct kind of payment.

[22] I am reinforced in that conclusion by the terms of the applicable individual employment agreement which specifically refers to the supplement being "additional to the approved salary".

**Redundancy**

[23] I indicated to the parties at the investigation meeting that it seemed to me on the evidence before me that the parties had decided to treat Mr Bell as if he were in a redundant position in order to facilitate a dignified exit for Mr Bell which would attract certain obvious kinds of payment and generally facilitate the severing of the employment relationship. I expressed the provisional view that it seemed to me to some extent the redundancy structure was a device designed to meet those perfectly laudable aims. Mr Bell took exception to that view and argued that in fact he was genuinely redundant because, after his departure, the University sought to restructure the area in which he had previously been employed.

[24] Notwithstanding Mr Bell's view, I remain of the opinion that the redundancy structure was adopted partly to assist in providing a dignified and appropriate severing of the employment relationship and attracting certain obvious calculations in respect of compensation, and partly to enable the matter to be dealt with at an appropriate level within the University's own hierarchy, the Human Resources Department having certain delegations in respect of redundancy which did not exist in other categories of termination of employment. The documentary evidence tends to support my view that the redundancy was in truth a device designed to facilitate a common purpose.

[25] Of course, if Mr Bell could successfully argue that he was made redundant from the directorship position, then that assists his argument in terms of the additional payment which he is seeking. My view of the matter is that Mr Bell was seconded to a position for which he received what amounted to a higher duties allowance while he was doing that position and that in the event that he ceased to fulfil the requirements of that position, he had the opportunity to elect to return to his substantive position for which there is no evidence before the Authority that any questions of redundancy or restructuring arise.

[26] In fact, when the directorate position became untenable for Mr Bell for a variety of reasons, he elected to exit the University completely rather than return to that substantive position and, in those circumstances, the parties agreed to treat Mr Bell as if he were occupying a redundant position.

**Agreement**

[27] Mr Bell contended, it will be recalled, that the University was being disingenuous in including the non-superable supplement as part of a calculation for clause 4 of the settlement agreement, but not clause 5. It is true that there is a difference between the treatment of the calculation for those two clauses, but I do not accept Mr Bell's contention that there is any impropriety in respect of those calculations.

[28] Clause 4 concerns the payment of six months' salary *in lieu of notice*. There is, of course, no basis on which the University could not include the non-superable supplement in a payment of notice. Quite clearly, the notice period, were it to be worked, would attract the payment inclusive of the non-superable supplement so, where as in this circumstance, the notice period is not to be worked, then the same principle must apply.

[29] Conversely, with clause 5 of the agreement which simply provides for 42 weeks' salary as redundancy compensation for reasons which I have already identified, the salary payment, in my judgement, excludes the non-superable supplement because in truth the only salary that Mr Bell was in receipt of was the salary that applied to his underlying substantive position of Senior Lecturer, Marketing.

**Determination**

[30] Mr Bell asks me to resolve the issue of whether the University has behaved properly in refusing to include his non-superable supplement of \$25,000 in its calculation of his redundancy compensation. I reach the conclusion that the University has behaved perfectly properly and that it has rightly severed the non-superable supplement from the ordinary salary component in its calculation of redundancy compensation for Mr Bell.

[31] However, I do think the University might consider making the position free from doubt by ensuring that any similar situations like this which happen in the future be the subject of an explicit statement in the settlement agreement which identifies the principles involved. It may be that the University could also better publicise the difference between a salary payment and another emolument of this sort.

**Costs**

[32] I accept this decision will be cold comfort to Mr Bell. In the normal course of events, having been unsuccessful in the claim that he has brought, he could reasonably expect to be required to meet a portion of the University's costs. In the unusual circumstances of this particular case, I have reached the conclusion that the proper course is to direct that costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority