IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 105
5339589

	BETWEEN	NZ AMALGAMATED ENGINEERING, PRINTING & MANUFACTURING UNION INC Applicant
	A N D	PIKE RIVER COAL LIMITED (IN RECEIVERSHIP) Respondent

Member of Authority:	Helen Doyle
Representatives:	Greg Lloyd, Counsel for Applicant Tim Clarke, Counsel for Respondent
Submissions Received:	17 June and 6 July 2011 from Applicant 27 June 2011 from Respondent
Date of Determination:	20 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute about clause 25 of the Pike River Coal Limited Collective Employment Agreement 2010-2011 ("the collective agreement") between NZ Amalgamated Engineering, Printing & Manufacturing Union Inc ("EPMU") and Pike River Coal Limited.

[2] On 13 December 2010 John Fisk, David Bridgman and Malcolm Hollis were each appointed joint and several receivers of Pike River Coal Limited under the terms of the General Security Deed dated 21 May 2010. The property in receivership comprises all of the assets, property and undertaking of Pike River Coal Limited.

[3] On 14 December 2010 the receivers gave notice of termination to all of the respondent's employees in accordance with s.32 (1) (b) of the Receiverships Act 1993.

[4] On 21 December 2010 the High Court made an order extending the period within which notice of the termination of the contract is required to be given under s.32 (1) (b) of the Receiverships Act 1993 to 31 January 2011.

[5] Section 30(2) of the Receiverships Act 1993 applies to the receivers in this matter and provides in what order consecutively the receivers must apply accounts receivable and inventory. After reimbursement of the receiver for expenses and remuneration and payment of claims of any person who has a perfected purchase money security interest or a perfected transfer of an account receivable for new value, the receiver is to pay preferential claims to the extent and in the order of priority specified in Schedule 7 of the Companies Act 1993. Schedule 7, clause 1(2) of the Companies Act 1993 sets out the priority for payment of preferential claims. Section 33 of the Receiverships Act 1993 refers to the application of Schedule 7 to reflect a receivership rather than a liquidation.

[6] The first class of preferential priority consists of eight claims and includes:

- All wages or salary of any employee in respect of services rendered to the company between four months before the date of appointment of the receiver and ending either 14 days after the appointment, or on the day during the first 14 days of the receivership on which the employment is lawfully terminated (clause 1(2)(a));

- Any compensation for redundancy owed to an employee that accrues before the expiry of 14 days after the appointment or because of termination by the receiver during that period (or any extension order by the Court).

[7] The receiver in calculating redundancy compensation and paying preferential entitlements to employees up to the statutory maximum of $18,700 did not include an amount for payment of salary in lieu of notice. The receiver does not accept that the amount in lieu of notice should be included in the calculation of the employees' preferential claims.

[8] EPMU says that the payment of salary in lieu of notice does form part of the affected employees' contractual redundancy entitlement under clause 25 of the Collective Agreement and should have been included in the calculations.

[9] It was agreed with counsel during the telephone conference with the Authority that the Authority would determine the matter on the papers and a timetable was set for submissions to be provided.

Background

The issue

[10] The issue for the Authority is one of contractual interpretation to determine whether payment of salary in lieu of notice is compensation for redundancy.

The principles of interpretation of employment agreements

[11] Both counsel in their respective submissions referred to the principles of contractual interpretation set out in the Employment Court judgment of *Chief Executive Officer of the Department of Corrections v. Corrections Association of NZ INC* [2005] ERNZ 984 as follows:

- Agreements are interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question.

- One considers, first, the words used – they must obviously be a starting point – and then the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.

- The Court is required to adopt an objective approach to interpretation: what matters is not what the parties say they intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean.

- Evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts.

- Evidence of relevant conduct of the parties after the contract came into existence may sometimes assist in interpreting it, at least in the case of employment agreements.

- Interpretation of an employment agreement should not be narrowly literal but should accord with business common sense: the *business* in this case is that of employment relations in prison. The interpretation should fulfil the purpose of the agreement and be based not simply on dictionary meanings or grammar. Even if the drafting is inept, the Court should attempt to give effect to the underlying intent. If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find an interpretation that satisfies business common sense and fulfils the parties' purpose.

- Nevertheless, if the words are clear and can only have one possible meaning that should generally determine the matter. The Court will need to be very sure of what business common sense requires when interpreting a contract if that does not accord with the clear words.

Clause 25 of the Collective Agreement

[12] Clause 25 provides:

> *REDUNDANCY*
>
> *25.1 Redundancy is a situation where their employment is terminated because their role is, or will become, superfluous to the Company's requirements.*
>
> *25.2 If employees are made redundant then, subject to clause 26, employees will be entitled to:*
> *25.2.1 Notice of termination, or payment of salary in lieu of notice;*
> *25.2.2 Reasonable time off to attend job interviews; and*
> *25.2.3 A certificate of service stating that their employment has been terminated as a result of redundancy.*
>
> *25.3 Employees will be entitled to payment of redundancy compensation calculated as follows:*
> *25.3.1 Payment equivalent to 4 weeks salary for their first complete year of service;*

> *And*
> *Two weeks for each completed year thereafter (or pro rata for a part year);*
> *PROVIDED that the maximum redundancy that may be payable is payment equivalent to 16 weeks' salary.*

Submissions

[13] Mr Lloyd accepted in his submission that nothing had been put before the Authority requiring consideration of anything other than the plain unambiguous meaning of the words themselves. He submits that if the Authority accepts that the definition of *redundancy compensation* in the collective agreement includes payment of salary in lieu of notice it follows that under Schedule 7 of the Companies Act it must be treated as a preferential claim and that the form compensation might take is wholly dependent on the wording of the applicable agreement. He submits that whilst some cases may have found payment in lieu of notice did not attract priority - application for directions in the High Court *Spencer Williams Bullen as receiver of Sew Hoy & Sons Limited* High Court of NZ Dunedin Registry C.P No 21/90 and, others referred to by Mr Clarke support that notice and compensation are separate and distinct concepts, this does not mean that payment in lieu of notice can never form part of redundancy compensation.

[14] He submits that compensation must, depending on the words of the collective agreement be given an equally broad meaning as its dictionary meaning supports. Mr Lloyd refers to the Concise Oxford Dictionary which defines compensation as, amongst other things: *Compensating or being compensated; thing given as recompense* …. He sets out that the dictionary defines recompense as: … *make amends (to person) or for another's loss, injury etc)* ….

[15] Mr Lloyd submits that under clause 25 an employee is receiving recompense for being made redundant of a payment equivalent to 4 weeks wages in addition to the monetary compensation calculated on the formula contained in clause 25.3.1 of the Collective Agreement. Mr Lloyd refers to the compensation for redundancy as being the *suite of entitlements* contained in the redundancy provisions of the Collective Agreement and that to limit the meaning of redundancy compensation would be unreasonable. Mr Lloyd says that the interpretation of clause 25 means that anything provided under that clause to recompense affected employees in the event of

redundancy including payment of salary in lieu of notice is compensation for redundancy.

[16] Mr Clarke in his submission states the words redundancy compensation and payment in lieu of notice in clause 25 should be interpreted in their grammatical and ordinary sense in the context of the clause. He submits that the layout and punctuation of clause 25 confirms that an amount in lieu of notice in clause 25.2.1 and payment of redundancy compensation in clause 25.3 are separate obligations and that there is no ambiguity in the meanings of the words. He submits that Mr Lloyd's submission that redundancy compensation includes an amount in notice would lead to an absurd result.

[17] Mr Clarke also submits that there is an important distinction between the concepts of notice and compensation for redundancy in that they are entirely different notions and their ordinary meanings are well understood at common law. Mr Clarke refers to *Re New Zealand Seafarers' Union Retirement and Welfare Plans* [1996] 1 ERNZ 259 (HC) per McGechan J at pg 270 where it was stated amongst other matters that in principle redundancy payments are compensation for the loss of a job through its disestablishment as superfluous and distinguishable from extra wages, superannuation and wages in lieu of contractual notice due.

[18] Mr Clarke refers to the Employment Court judgement of *Attorney- General in respect of DGSW v. Richardson* [1999] 2 ERNZ 866. In that case Judge Colgan, as Chief Judge Colgan was then, at p.876 described redundancy compensation and notice of termination of employment as two different things and stated *I do not accept the submission advanced for the appellant that redundancy compensation was intended to include elements of payment in lieu of notice. The fallacy of that argument is illustrated, for example, by the contract's provisions that notice may be given and worked out rather than paid for.* Mr Clarke also referred to the distinction between notice and payment in lieu thereof and a severance payment having been recognised in the Australian Industrial Relations Court case of *Fryar v System Services Pty Ltd* (1996) 137 ALR 321.

[19] Finally Mr Clarke submits that the effect of the receivers' lawful termination of the company's employees' employment was to put an end to the employment relationship, thereby converting any claim for an amount in lieu of notice into a claim

for damages and that such a damages claim is different from a claim for redundancy compensation.

Determination

[20] I accept Mr Lloyd's submission that the starting point to determine whether or not payment of salary in lieu of notice is redundancy compensation is the words used in the collective agreement. The starting point is not that a payment in lieu of notice will never form part of redundancy compensation.

[21] Clause 25.2 provides, amongst other matters, that employees are entitled to notice of termination or payment of salary in lieu of notice if they are made redundant subject to the employee protection provision in clause 26 of the Agreement. Clause 24 of the Collective Agreement provides that the period of notice of termination is one month.

[22] Clause 25.3 provides for an entitlement to payment of redundancy compensation and provides a formula for such calculation.

[23] I find, objectively considered, that the words used in clause 25.2 when read together with clause 25.3 and in the context of the clause as a whole are clear and unambiguous in that the payment of salary in lieu of notice in clause 25.2 is separate and additional to the entitlement to redundancy compensation in clause 25.3. That is I find what a reasonable person would take the words to mean. Although Mr Lloyd urges a wider interpretation based on dictionary meanings I find such a meaning is not supported by the words used and the clause read as a whole.

[24] Having found that the amount payable in lieu of notice on termination is separate from redundancy compensation on an objective interpretation of the collective agreement in accordance with the principles of contractual interpretation I do not need to consider the other arguments put forward by Mr Clarke.

[25] The dispute is answered in favour of the receivers.

Costs

[26] I reserve the issue of costs. Often where there is a dispute between the parties that requires the Authority's intervention to resolve it, costs are found to lie where they fall. I have however been asked to reserve the issue of costs. Mr Clarke has

until 10 August 2011 to lodge and serve submissions as to costs and Mr Lloyd has until 24 August to lodge and serve submissions in response.

Helen Doyle
Member of the Employment Relations Authority