IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 194
3025714

	BETWEEN	ARRAN HUNTER Applicant
	AND	AMCOR FLEXIBLES (NEW ZEALAND) LIMITED Respondent
Member of Authority:	Helen Doyle	
Representatives:	Michael McDonald, Advocate for Applicant Richard Harrison, Counsel for Respondent	
Investigation Meeting:	28 August 2018 in Christchurch	
Submissions received:	Submissions on the day Further submissions from Applicant on 9 October 2018 Joint memorandum of the applicant and respondent on 3 October 2018	
Determination:	19 December 2018	

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. I have ordered payment by Amcor of the sum of $4000 without deduction to Mr Hunter as compensation for his unjustified dismissal.

B. I have ordered payment by Amcor of the sum of $7277.32 to Mr Hunter assessed on the basis of a loss of a chance to negotiate with and persuade Amcor in knowledge of the NZRT Scheme for employer contributions to the maximum of 10%.

C. I have reserved the issue of costs and set a timetable for an exchange of submissions.

Employment Relationship Problem

[1] Arran Hunter is a Chartered Accountant. He commenced employment with Amcor Flexibles (New Zealand) Limited (Amcor) on 15 October 2007. He was initially employed in the position of Accounting Manager for the Branston Street site in Christchurch. He was then promoted to Accounting Manager for both Christchurch sites and then became Commercial Manager of Christchurch which was his role at the material time.

[2] Mr Hunter was formally given notice of the termination of his employment on 20 September 2016 effective 4 November 2016 for reason of redundancy.

[3] The statement of problem lodged on behalf of Mr Hunter referred to five separate problems:

(a) Unjustified dismissal;

(b) Failure by Amcor to pay employer superannuation contributions in accordance with the scheme;

(c) Unjustified disadvantage because pro-rated long service leave was not paid in accordance with the long service leave policy;

(d) Final pay was not calculated correctly; and

(e) There was a failure to provide a copy of a pay review for signing and implementation.

[4] The claim about the pay review was not pursued by Mr Hunter.

[5] At the end of the Authority's investigation meeting Mr McDonald and Mr Harrison said that they wished to consider the claim of a failure to pay final pay correctly to see if resolution could be reached. The Authority agreed that would be sensible.

[6] A joint memorandum dated 3 October 2018 was received confirming that the parties had resolved the claim. They agreed that the issue of the calculation of Mr Hunter's final pay with respect to inclusion of statutory holidays and the application of s40 of the Holidays Act 2003 does not therefore require determination and can be withdrawn.

[7] That leaves three employment relationship problems as set out above at (a) (b) and (c). They are the subject of this determination.

[8] Amcor says in respect of the remaining employment relationship problems that the termination of Mr Hunter's employment by reason of redundancy was justified. Amcor says that there was no agreement to make superannuation contributions amounting to 13% of the applicant's annual earnings and the maximum employer contribution at all times was 10% of annual earnings. Further that the Authority does not have jurisdiction to consider the superannuation claim. Finally Amcor says that there is no entitlement to pro-rated long service leave.

The Issues

[9] The Authority in this case needs to determine the following issues:

(a) Was there a genuine business decision for disestablishment of Mr Hunter's position?

(b) Did Amcor follow a fair process and in particular:

(i) Was adequate information provided to Mr Hunter?

(ii) Was there reasonable consultation?

(iii) Was there unfairness with redeployment?

(c) If the Authority finds Mr Hunter was unjustifiably dismissed, then what remedies is he entitled to?

(d) Does the Authority have jurisdiction to deal with Mr Hunter's claim about Amcor's contributions to a superannuation scheme he paid into?

(e) If the Authority does have jurisdiction, then what did the Superannuation Deed provide with respect to employer contributions?

(f) Was Mr Hunter paid in accordance with the Superannuation Deed?

(g) If not on what basis should the Authority deal with any issues of reimbursement?

(h) Was Mr Hunter entitled to be paid pro-rated long service leave in accordance with the long service policy?

Was there a genuine business decision for disestablishment of Mr Hunter's position?

[10] The test that the Authority must apply in determining whether the decision to dismiss was justified is that in s103A of the Employment Relations Act 2000 (the Act). That requires the Authority to determine on an objective basis whether the employer's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances. The importance of addressing the genuineness of a redundancy was emphasised by the Court of Appeal in *Grace Team Accounting Limited v Judith Brake.*[1]

The employment agreement

[11] Mr Hunter was party to an individual employment agreement (the employment agreement) with Amcor, which provided as follows on page 4:

> You shall be regarded as redundant where the position held by you becomes surplus to the requirements of the Company or is otherwise disestablished as a result of the closing down of all or part of the Company's business or a reduction in work available or as a result of any other genuine business decision of the Company.

[12] In the event of redundancy, notice was one month and compensation was payable according to time served.

Why was Mr Hunter's position disestablished?

[13] In or about August 2016 Amcor initiated a restructuring of its finance divisions. There was a 12 page proposed organisational structure document called Project Unity provided to Mr Hunter and other affected employees. The document provided an overview, summary of proposed changes, current and proposed finance structure, a summary of the proposed commercial manager positions, permanent and transitional roles, benefit of proposed change, stages of change, indicative timeline and support available.

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1 *Grace Team v Brake* [2014] NZCA 541

[14] The five existing businesses were to join into one over a period of time *to ensure respective functions and positions aligning to deliver the five year strategic plan*. It was stated in the overview that the current Finance structure is not fit for future purpose based on its *simple information gathering and reporting up characteristics.* A new finance structure was proposed to be implemented with newly created positions and disestablishment of the existing site-base profit and loss focussed accounting teams. It was proposed that the new positions would be Auckland based.

[15] Those involved in the restructure at the material time for Amcor, the then Chief Financial Officer and Human Resources Manager, were no longer employed by Amcor at the time of the Authority investigation meeting. The Authority heard from Marc Fisk who is the National Human Resources Manager with Amcor. He was able to provide evidence based primarily on company records and inquiries.

[16] Mr Fisk explained that the nature of the proposal was not cost saving in nature but for business reasons. He said that it was considered that commercial advisers based in Auckland could provide advice to the General Managers of Amcor who are all Auckland based.

[17] A decision was made to base the new commercial management roles in Auckland. Mr Hunter did not express interest in one of the newly created Auckland based commercial manager roles. Objectively assessed the disestablishment of Mr Hunter's position in Christchurch was as a result of a genuine business decision that Amcor made to create new commercial manager positons in Auckland.

Did Amcor follow a fair process in making Mr Hunter redundant?

[18] The Employment Court in *Jinkinson v Oceana Gold (NZ) Limited* [2] stated:

> The relationship between s 4(1A)(c) and s103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply with s4(1A)(c) will not be justifiable.

[19] The emphasis for the Authority should not be on a pedantic scrutiny of the process but on substantial fairness and reasonableness.

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2 *Jinkinson v Oceana Gold* [2010] NZEmpC 102 at [42]

[20] The process commenced with the discussion document already referred to, Project Unity. There was an amended plan provided to Mr Hunter on 30 August 2016. Mr McDonald submits that the Project Unity document does not provide sufficient information for consultation purposes and criticises its lack of detail and what he refers to as *platitudes and hyperbole.*

[21] I find the discussion document is clear enough. It is sufficiently precise for a view about what is proposed. That is a centralised structure supporting a single business with a national approach to major financial processes. There is to be disestablishment of the existing site based profit and loss focused accounting teams. The newly created commercial manager positions are to be aligned with and supporting key internal functions. There is to be a movement away from data gathering and information.

[22] Mr McDonald poses some *why* questions in his submissions about the change. There was sufficient time in the process for questions to be asked and answered about matters that were not clear from the discussion document.

[23] There was consultation on 1 September 2016 by telephone during stage 1 of the process. There was to be a meeting in person with Mr Hunter but fog meant that the flight the Human Resources Manager and Chief Financial Officer were on could not land in Christchurch. Mr Hunter was comfortable to meet to understand the future plans of the finance structure by telephone in those circumstances although it was open to him to decline and request a further meeting in Christchurch. There is no evidence that further information was requested by Mr Hunter or feedback given by him of the nature set out by Mr McDonald.

[24] On 2 September 2016 advice was received by Mr Hunter that Amcor had elected to formally proceed with its plans to implement the new commercial management positions. The implication of that decision was that all existing roles reporting directly to the Chief Financial Officer were to be disestablished and from 5 September incumbents would be invited to submit their expressions of interest in the new positions. If an employee elected not to express an interest in a position, or did and was unsuccessful, and were not able to be deployed to an alternative position, then notice of termination by way of redundancy would be received.

[25] By email dated 9 September 2016 Mr Hunter confirmed that he would not be expressing an interest in any of the Airport Oaks (Auckland) based commercial management roles. The Human Resources Manager had asked him if he was interested and job descriptions of the new roles were available and there was an extension to the time for an expression of interest.

[26] On 12 September 2016 the Human Resource Manager asked if Mr Hunter wanted to consider one of the proposed positions elsewhere in the financial structure such as the commercial analyst position. Information was provided about the salary for that role and Mr Hunter advised that he would not be applying for that position. Mr McDonald was critical about the fact Mr Hunter had to express an interest in this position and apply despite the fact he was the only permanent employee in Christchurch who could do the role. I find in all likelihood that may have been because of broader issues about fairness to other employees. The need to compete for the commercial analyst role may have played a part in Mr Hunter declining to apply for the role. In his evidence Mr Hunter said that the main factor was the salary level.

[27] Mr Hunter was then provided with a calculation of his redundancy compensation and he raised issues about financial entitlements that have been the subject of employment relationship problems. He was provided with the notice period in his employment agreement. There was no evidence that he raised concerns about the roles he did not express an interest in before the relationship ended. Mr Hunter received a professional outplacement programme. He was able to obtain alternative employment on 28 November 2016 on a comparable if not better income than he had been receiving.

[28] The process overall one a fair and reasonable employer could be expected to carry out. There is only one aspect I pause about. Mr Hunter's evidence is that the only feedback he gave about the proposal was to enquire of the Chief Financial Officer why the location for the new roles needed to be in Airport Oaks Auckland. His evidence was that the response was that this was non-negotiable. Mr Hunter said that it was clear to him from the lack of information he had been given that the decision to restructure had already been made and the proposal document was simply to satisfy legal requirements.

[29] Mr Fisk was not aware of the discussions or feedback provided by Mr Hunter. From his general knowledge of the process he did not consider there was a closed mind or pre-determined approach to the restructuring including from the Chief Financial Officer.

[30] The difficulty for the Authority is that there was no evidence from the Chief Financial Officer about this exchange. Consultation requires amongst other matters that whilst an employer is entitled to have a working plan they must have an open mind and be ready to change - *Communication & Energy Workers Union Inc v Telecom New Zealand Limited.*[3] A *non-negotiable* response is not reflective of genuine consultation. It has the effect of shutting down any response or feedback to the proposal.

[31] Whilst I am conscious of the focus on substantial fairness and reasonableness if it was said that location of the new roles was *non-negotiable* then that would impact the fairness of the process and not in a minor way. Mr Hunter said for example that he considered he could have worked remotely. On the other hand and this was something Mr Fisk said in his evidence it was surprising that Mr Hunter did not raise this matter with the Human Resources Manager particularly during the telephone discussion on 1 September 2016. There is no evidence to assist me about that matter from Amcor. I only have the evidence from Mr Hunter which is essentially unchallenged. I have little choice but to conclude in those circumstances that whilst the process was fair in many respects it was not in that respect.

[32] In conclusion then the consultation, for the reasons set out above, was not genuine because an important aspect to Mr Hunter which was that of location of the new positions was said to be non-negotiable.

[33] The test for justification therefore is not met because of this, notwithstanding the redundancy was genuine and the process was otherwise fair and reasonable.

[34] Mr Hunter has a personal grievance that he was unjustifiably dismissed.

Remedies

[35] The only claim is for compensation which is appropriate where the redundancy is genuine and the finding is one of procedural unfairness. I cannot be satisfied that if this unfairness had not arisen Mr Hunter would have retained his position. There was a basis for

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3 *Communication & Energy Workers Union Inc v Telecom* [1993] 2 ERNZ 429

the Auckland location for commercial manager positions as set out earlier. I accept the Chief Financial Officer held in all likelihood a firm view about that. There was no blameworthy conduct by Mr Hunter that contributed to the situation that gave rise to his personal grievance.

[36] Any award of compensation must reflect that it is not for the loss of a job but for the aspect of unfairness found in the process. It must also balance that any restructuring process will almost inevitably be stressful. I accept that Mr Hunter lost a measure of faith in the process. He said that he was negatively impacted, angry, frustrated and felt unable to influence and have input into the proposal about where the new positions were to be located.

[37] In all the circumstances I am of the view that an appropriate award would be the sum of $4000 without deduction.

[38] I order Amcor Flexibles (New Zealand) Limited to pay to Arran Hunter the sum of $4000 without deduction being compensation under s 123(1)(c)(i) of the Act.

Superannuation claim

[39] Amcor operate a private superannuation scheme called New Zealand Retirement Trust (NZRT scheme).

[40] In 2010 Mr Hunter was offered the opportunity to join the NZRT scheme by his General Manager. He was advised at that time that Amcor would double his contributions up to 10%. He was not given a policy document or other information concerning the wording of the scheme.

[41] Mr Hunter filled out an application form and requested a five percent contribution rate to be deducted from his salary on the basis that this would maximise the employer contribution at ten percent. Mr Hunter was also enrolled in KiwiSaver.

[42] Mr Hunter says that he was then told that the Central Services Accountant had advised the payroll administrator the maximum employer contribution to NZRT and KiwiSaver combined was 10%, so any contributions Mr Hunter made over 4% would not be matched by Amcor. As a result of that Mr Hunter changed his initial contribution rate to 4%.

[43] After Mr Hunter was made redundant he needed to obtain details of the superannuation scheme so that he could cash it up and start again. He was able to obtain a copy of the member booklet from AMP and discovered the scheme contained clauses as set out below under a heading "How much do I pay?"[4]

> **Contributions**
>
> Until you leave your Employer you are required to make contributions at a rate of 2% of your annual earnings. These contributions will be credited to your Member Account.
>
> Your Employer matches your contributions two for one, paying a maximum of 10% of your annual earnings. These contributions will be credited to your Employer Account.
>
> With the agreement of your employer you may sacrifice some of your salary in return for your employer paying this amount as additional employer contributions to the Plan. These contributions (after withholding tax) will be credited to your Salary Sacrifice Account.
>
> If you join a KiwiSaver scheme you and your Employer may agree in writing to different contribution rates from those specified above.
> …

[44] Mr Hunter seeks the sum of $28,939.10 being the difference between what his employer contributed to the NZRT Scheme and the maximum over the period between 2010 and 2016. Recognising that he has not contributed 5% Mr Hunter says that he is not seeking interest.

Does the Authority have jurisdiction to consider this claim?

[45] Mr Harrison submits that the superannuation issues are not employment entitlements nor within the jurisdiction of the Authority.

[46] Mr McDonald submits that the Authority does have jurisdiction because the employer contribution to the scheme is part of the obligations under the employment agreement. He says that Amcor invited Mr Hunter to join the scheme. Further that there is an obligation on Amcor to make the appropriate contributions.

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[4] Page 72 of the bundle.

[47] I agree with Mr McDonald's submissions that the Authority has jurisdiction to consider this issue. It is a matter that arises from the employment relationship. Amcor makes the contributions toward the scheme and is obliged to do so.

What did the Superannuation Deed provide?

[48] Mr Hunter says that he was advised when he was offered the opportunity to join the scheme that Amcor could double his contributions up to 10%. That is consistent with the Superannuation Deed that provides for matching of employee contribution two for one paying up to a maximum of 10% annual earnings.

[49] He was then advised that the maximum employer contribution Amcor would make to KiwiSaver and NZRT was 10% across both schemes. That was not provided in the Superannuation Deed. There is mention in the scheme that there may be agreement in writing to a different contribution if a KiwiSaver scheme is joined but there was no agreement in writing with Mr Hunter.

Was Mr Hunter paid in accordance with the Superannuation Deed?

[50] Mr Hunter wanted Amcor to double his contribution to the maximum of 10% under the NZRT Scheme. He was told that the 10% maximum was over both KiwiSaver and NZRT. That was not what the Superannuation Deed provided. Mr Hunter was therefore not paid in accordance with the Deed. There was no written agreement to different contribution rates when Mr Hunter contributed to KiwiSaver as well.

How should any claim be assessed?

[51] The claim in my view is most suitably approached as a recovery of money payable under s 131 of the Act.

[52] Mr Hunter has claimed in full the difference in the employer contributions up to 10% from 2010 for the NZRT Scheme.

[53] There are two issues about that. The first is found in s142 of the Act. That section provides for a limitation period for actions other than personal grievances.

> No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[54] The statement of problem was lodged with the Authority on 14 March 2018. Six years prior to that date is March 2012. The claim is limited to that period.

[55] The second issue is that the loss of the employer contribution up to 10% for the NZRT scheme can only sensibly be assessed on the basis of a loss of a chance for Mr Hunter to bargain/negotiate and persuade for that in circumstances where he was also enrolled in KiwiSaver.

[56] There is a strong possibility that Amcor would have resisted paying up to the maximum of 10% for the NZRT Scheme where there was also a contribution towards KiwSaver for Mr Hunter. The Scheme did contemplate an agreement may be entered into in those circumstances. That could well have occurred. I would assess the probability in those circumstances that Mr Hunter had a chance of bargaining to have his contributions matched for the NZRT Scheme up to a maximum of 10% by Amcor at 30%.

[57] The difference in contributions made by Amcor from March 2012 to November 2016 based on Mr Hunter's figures is $24257.73. 30% of that sum is $7277.32.

[58] I order Amcor Flexibles (New Zealand) Limited to pay to Arran Hunter the sum of $7277.32 assessed on the loss of the chance for Mr Hunter to negotiate/bargain and persuade Amcor with knowledge of the superannuation deed to contribute up to the maximum of 10% for the NZRT Scheme.

Was Mr Hunter entitled to be paid pro-rated long service leave in accordance with the long service policy?

[59] Mr Hunter raised with the Human Resources Manager on 6 October 2016 that there should be a pro-rata payment of long service leave included in the event of redundancy. The Human Resources Manager looked into that and located a long service leave policy dated September 2010. It provided for a special paid holiday after a period of continuous service with the Company. The first period was after 10 years continuous service employees shall be entitled to a once only special holiday of 15 days.

[60] The policy provided under 2 (e):

> (e) The special holidays specified in (b) above may not be pro-rated should an employee terminate their employment prior to the completion of the qualifying period except on express approval of the Managing Director in certain circumstances such as redundancy.

[61] Mr Hunter had not completed 10 years continuous service. He was about a year short. Mr Harrison submits an interpretation of the clause is that it must be a situation where an employee seeks to terminate their employment during the course of a redundancy process before it is complete or within the notice period.

[62] I accept that on its plain words that limitation could be placed on the circumstances in which the special holiday could be pro-rated.

[63] In any event I have focussed on what the Managing Director found. He did not expressly approve the pro-rated payment. This was on the basis as advised by the Human Resources Manager in an email dated 17 October 2016 that he felt employees should serve at least 10 years before consideration should be given to paying a pro rate entitlement. It was stated that otherwise he would be agreeing to anyone who had served up to 10 years – an example of someone serving 3 years was given. I do not find that was inconsistent with the policy or unjustified.

[64] I am not satisfied that Mr Hunter was entitled in all the circumstances within the policy to a pro-rated special holiday payment.

Costs

[65] I reserve the issue of costs. With the holiday season approaching Mr McDonald has until 25 January 2019 to lodge and serve submission as to costs. Mr Harrison has a further two weeks until 8 February 2019 to lodge and serve submission in reply.

Orders Made

[66] I have ordered payment by Amcor of the sum of $4000 without deduction to Mr Hunter as compensation for his unjustified dismissal.

[67] I have ordered payment by Amcor of the sum of $7277.32 to Mr Hunter assessed on the basis of a loss of a chance to negotiate with Amcor in knowledge of the NZRT Scheme for employer contributions to the maximum of 10%.

[68] I have reserved the issue of costs and set a timetable for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority