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Employers can be obliged to pay redundancy as advised in an estimate

A recent New South Wales Supreme Court decision has found that an employer can be bound by a miscalculated redundancy offer even where the offer is far greater than the employee's award entitlement.

Justice White held in *Tooheys Pty Ltd v Blinkhorn* [2008] NSWSC 499 that letters sent by Tooheys to its employees constituted binding obligations even though an error in the calculations meant employees would receive up to $163,000 more than their award entitlement.

Tooheys had indicated in the letters that the calculations were made on the basis of the award and that the actual figures were 'estimates only' which could change in certain circumstances. But Justice White found that Tooheys had intended to make a contractually binding offer and that it was reasonable for the employees to look to the actual figures rather than the formula on which the calculations were based.

Background

When Tooheys decided to automate part of its brewing process, it offered the employees, who were brewing technicians in its main brewery, the choice of taking a redundancy package or transferring to another department at a lower wage.

An industrial award, which was binding on Tooheys and the relevant unions, governed the employees' employment conditions, including their redundancy entitlements. Under the award, the employees were entitled to three weeks payment for each of their first 15 years of service and four weeks payment for each subsequent year of service, plus five weeks ex gratia payment.

A series of letters setting out the employees' options culminated in a letter in which Tooheys asked the employees to indicate whether or not they wished to accept 'a redundancy package as outlined in the attached calculation'. The formula stated for calculating the payments was in accordance with the award, but the actual figures exceeded the employees' entitlements under the award by $64,000, $56,000, $150,000, $147,000, $163,000 and $60,000. The mistake was a result of an Excel spreadsheet which calculated each employee's entitlement on the basis of 32.68 years of service.

When Tooheys realised its mistake it purported to revoke the letters, but six of the employees had already returned the signed letters by this time. Two of the employees had not returned the letters because they were pursuing further negotiations with Tooheys, and one employee never received the letter of offer.

Tooheys said it did not consider itself to be bound by the letters and issued what it called a 'corrected redundancy estimate'. This was an accurate calculation of the redundancy payment to which the employees were entitled under the award.

Were the letters offers capable of giving rise to a binding contract?

Tooheys submitted on the basis of *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 326 per Mahoney JA that there was no consensus capable of forming a binding contract. Tooheys submitted that the parties had not intended that there be a binding contract because:

- the calculations were estimates only
- Tooheys was under no obligation to pay more than the award
- Tooheys' offer was to pay an amount calculated in accordance with a formula, not the amount set out in the calculations.

Final offer or estimate only?

Justice White found that the plaintiffs intended to be bound by the letters, despite the statement on each of the calculations that 'this redundancy calculation is an estimate only—advise [sic] of Final Dates and Calculations will be at Lion Nathan's discretion'.

The letters stated that the calculations were accurate at the time of processing but that changes to the employees' contracts or taking of leave would affect the final amount payable. Tooheys submitted that the agreement was therefore incomplete because the plaintiff has reserved a discretion as to whether it would pay the amount set out in the calculation.

Construing the document as a whole, Justice White held that these statements indicated the redundancy calculations were a final offer that would be varied in the circumstances specified. As to Tooheys' discretion, Justice White pointed out that, on Tooheys' case, Tooheys intended to pay the employees according to the award and therefore the statements could only indicate a discretion to offer more but not less than the award.

Payment more than the award

Justice White found that, although Tooheys was under no obligation to pay more than the award, there was no reason why Tooheys could not agree to pay more to encourage the employees to take redundancy. Justice White noted that:

> … the offer of a 'redundancy package' rather suggests the plaintiff was offering something more than that to which the employees would in any event be entitled if they chose not to take up the alternative employment.

This was strengthened by the circumstance that there was no express statement in the letters to the effect that, if the employees took redundancy, they would only be paid their entitlement under the award.

Figures or formula?

The letters contained no express offer to pay a particular amount. Instead the letters stated a formula for calculating the amount, being three weeks salary for the first 15 years and four weeks per year thereafter.

Justice White held that the letters bound Tooheys to the figures set out in the attached calculations, not the formula on which those figures were said to be calculated. It was implicit in Tooheys' invitation to the employees to indicate their acceptance of the 'redundancy package as outlined in the attached calculation' that Tooheys was offering to pay the amount of the 'redundancy package as outlined in the attached calculation'.

Justice White said that 'it would be reasonable to expect the employees to look at the "bottom line" of what they would be paid in deciding whether to take redundancy or accept alternative employment'.

Outcome

Justice White concluded that, in the case of the employees who returned their signed acceptance of the redundancy offer, the employer was contractually bound to pay the redundancy set out in the calculations attached to the offer.

Implications for public sector

Redundancy entitlements for public sector employees are commonly set out in an industrial instrument, such as a certified or collective agreement, under the *Workplace Relations Act 1996*. Such employees are generally entitled to a redundancy payment which is calculated in accordance with a formula set out in the industrial instrument, like the award in *Tooheys Pty Ltd v Blinkhorn*.

An industrial instrument will not necessarily preclude an employer from agreeing to payment of a higher redundancy than required by the industrial instrument. Public sector employers therefore should consider taking steps to avoid being obliged to pay redundancies higher than the entitlements under the industrial instrument.

When providing an employee with a redundancy offer including a redundancy estimate, the employer should be able to avoid liability in contract if the employer clearly explains that:

(a) the offer is to pay a redundancy amount to which the employee is entitled in accordance with the relevant industrial instrument (or any other relevant document)

(b) the estimate is an estimate only of the redundancy entitlement payable under the industrial instrument (or other relevant document). (As a matter of abundant caution it could also be stated that the estimate can be subject to variation in any respect.)

If employers take such steps they should also avoid potential liability in negligence for any damages suffered by an employee as a result of reliance on incorrect and negligent advice about the benefits which would be payable on a redundancy.

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