IN THE EMPLOYMENT COURT
AUCKLAND

AC 19/07
ARC 20/06

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to file a second amended statement of claim
BETWEEN	GARY CUTTRISS Plaintiff
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing: 24 and 25 August 2006
(Heard at Rotorua)
26 October 2006
(Heard at Auckland)

Appearances: Mark Hammond and Prue Dawson, counsel for plaintiff
Peter Kiely and David France, counsel for defendant

Judgment: 27 April 2007

JUDGMENT OF JUDGE B S TRAVIS

Introduction

[1] This case was removed from the Employment Relations Authority to the Court for determination without the Authority investigating the matter. It started as a dispute over whether a retirement benefit, described as "KSP433", which provided for the payment of certain benefits on retirement, was a term of the plaintiff's employment which the defendant was unable to unilaterally delete. The defendant claims KSP433 was one of a number of policies contained in the Kinleith Site Policy Manual and that it was entitled to remove or alter these policies. It claims to have removed KSP433 and, in its stead, has conferred other retirement benefits on the plaintiff and other employees at its Kinleith Mill site. It appears to be common

ground that if KSP433 has been lawfully removed the plaintiff will not receive at least $54,000 which he otherwise would have received if he had reached the relevant retirement age.

The pleadings

[2] By amended pleadings the plaintiff sought a determination that he has been affected to his disadvantage by an unjustified action of the defendant, namely the unilateral deletion of the retirement policy. He sought an order that the policy either be reinstated or that he receive payment under the policy to a date the Court thinks fit. Compensation for hurt and humiliation in the amount of $15,000 was also sought.

[3] At the conclusion of the hearing on 25 August 2006 Mr Hammond, on behalf of the plaintiff, sought leave to further amend the pleadings to include a claim that the retiring benefit KSP433 could not be unilaterally deleted by the defendant. The plaintiff claimed he had a legitimate expectation that the benefit would be paid if he met the eligibility criteria. There was no objection to that amendment. There was however, an objection to a new third cause of action which alleged that the defendant was contractually required to consult with the plaintiff before it decided to delete the benefit and the defendant had not so consulted. The contested application for leave to further amend the statement of claim to include the third cause of action was heard at Auckland on 26 October 2006. It was agreed that the substantive judgment would deal with this issue which depended, in part, on the resolution of the key issues which the pleadings properly before the Court had raised. I shall return to these matters later in this judgment.

The facts

[4] The plaintiff has been employed by the defendant and its predecessors NZ Forest Products Ltd and Elders Resources NZ since 29 September 1970. At the time of the hearing the plaintiff was 60 years old, having had a birthday on 20 August 2006. During the plaintiff's employment the defendant and its predecessors had a retirement policy at the Kinleith Pulp and Paper Mill, "KSP432" which provided for normal retirement at the age of eligibility for National Superannuation or 65, which

ever came first. KSP433 provided when specified retirement benefits would be paid. It required no contributions from employees and was calculated on years of service. Employees could apply for permission to retire earlier and the employer had a discretion whether to make any payment in such circumstances.

[5] The plaintiff's letter of appointment, dated 21 August 1970, set out the applicable contractual terms of employment and contained no reference to any entitlement to a retirement benefit. The other letters of appointment, following promotions the plaintiff received in June 1986 and October 1987, do not provide a retiring benefit as a condition of employment.

[6] The plaintiff signed an employment contract in 1992 which did not refer to a retiring benefit entitlement. The 1992 contract contained the following relevant clause:

> ***1. NATURE OF CONTRACT***
>
> …
>
> *This contract shall be read in conjunction with the Company Policy Manual, a copy of which is held by the Personnel Department. Those policies that relate to salaried employment and which are not covered by this contract may be amended from time to time as a consequence of any change in Company policy. The Company undertakes to give due notice of any significant change to the Policy Manual relating to salaried employment so that an opportunity is available for any concerns raised to be considered.*
>
> …

[7] In July 1998 the plaintiff was offered a new employment contract which contained the following clause:

> ***Company Policies***
>
> *Some of your employment conditions are based on specific Company policies and this offer is framed in accordance with those policies as they exist at present; however Company policies may be changed from time to time to meet operational or changing circumstances as is customary in employment generally. Should any change be necessary which affects your own conditions of employment you will be notified in advance.*

[8] The plaintiff declined the offer and refused to sign the new contract. On 12 November he wrote to the defendant mentioning the specific conditions of the offer about which he was concerned and as one "*minor issue*" he wrote:

> *4 Company policies. I would have to make sure that this is not a blank cheque for the company to change any conditions.*

[9] Both KSP442 and KSP433 were later set out in the defendant's Kinleith Site Policy Manual, from whence the letters "*KSP*" are derived. The manual covered such diverse matters as the use of company cars, company housing, meals, air and land transport, stationery and printing, entertainment at company expense and interdepartmental transfers.

[10] On 12 September 2003, the defendant advised its employees at the Kinleith Mill, by an item in its in-house newsletter "*Vivid*", that 3 KSP policies, KSP442 "*Retirement on Medical Grounds*" (not relevant for present purposes), KSP432 "*Retirement Policy*" and KSP433, "*Retiring Benefit*" had been part of a full review of the defendant's Kinleith Site Policy Manual. It stated that they predated the defendant's new Employee Benefits Programme, which was now the defendant's vehicle for providing retirement and superannuation benefits and it had been determined that these 3 policies would be deleted in 14 days. It invited employees to advise the defendant in writing of any issues or concerns they might have. It appears that the new Employee Benefits Programme had already replaced the equivalent of KSP433 in the defendant's other work sites.

[11] The plaintiff immediately raised his concerns with his manager and then followed it up with an email on 17 September 2003 to Jason Tuck, then the Human Resources Manager at the Kinleith Mill. The plaintiff stated in the email that it seemed unusual for the defendant to casually delete this policy. He stated "*I cannot argue with your assertion that the CHH Employee Benefit Programme should take over this system but I thing* [sic] *it should be weaned off rather than just knocked on the head*". He noted that it could make a significant difference to him and claimed he was in effect being given a pay decrease of approximately 8.7 percent per year. He thought the decision should be reviewed. Mr Tuck acknowledged the email that day and said it was passed on for consideration.

[12] In November 2003 the plaintiff was offered a new employment agreement. It contained the following relevant clauses:

> …
>
> *Dear Gary,*
>
> *This letter sets out your terms and conditions of employment. You should read it carefully and clarify any issues with us. I encourage you to obtain independent advice before accepting the offer.*
>
> …
>
> ***CHH RETIREMENT PLAN***
>
> *Your participation in the Carter Holt Harvey Retirement Plan will be maintained on existing terms and conditions. Southern Cross Benefits will continue as currently provided.* [I observe this Plan is not the same as KSP433.]
>
> …
>
> ***16. COMPANY POLICIES***
>
> *The Company has policies, guidelines and procedures that form part of your terms of employment and you must comply with them at all times. The policies, guidelines and procedures are readily available on the Carter Holt Harvey Human Resources Intranet site and you should familiarise yourself with them.*
>
> *The Company's policies, guidelines and procedures may be changed from time to time to meet operational needs or changing circumstances but such changes cannot override the terms set out in this letter without your agreement.*
>
> ***17. COMPLETENESS***
>
> *This agreement represents a full record of the agreement entered into by you and Carter Holt Harvey. Any changes or additions to this agreement shall not be binding unless mutually agreed and recorded in writing.*
>
> …

[13] Before signing the agreement the plaintiff sent a memorandum to a person described as "*Dick Mace*" on 28 November 2003 stating that he had reviewed the agreement and had a number of comments and questions, one of which follows:

> *6. Company policies 16. I previously queried that this clause would not just become a blank cheque for the company to change any conditions. This appears to be happening in the case of the retirement benefit. Please add after cannot "disadvantage you or override the terms set out in this letter without your agreement".*

[14] The plaintiff signed the agreement and it contains the handwritten date of 28 November 2003. However the change in the wording he sought to clause 16 was not made. He claimed in evidence that he finally signed the agreement in December 2003 and he was confident that the defendant would, at least, freeze the entitlements to benefits under KSP433 at December 2003 and claims that he did not believe that by signing the agreement he was agreeing that the benefit could be taken away.

[15] On 18 December 2003 Mr Tuck advised the plaintiff by email that, after considering employee feedback, the three KSP's had been reviewed and a decision had been made to delete them, effective from the end of 2003. Mr Tuck's email stated:

> …
>
> *As you know, the origin of the Retirement Policy dated back to NZFP days. However, in 1995, Carter Holt Harvey introduced the Employee Benefits Plan which covers retirement, medical, death and disability insurance. The intention of the EB Plan was to replace all preceding plans, and this largely has been done. At Kinleith however the retirement policy was overlooked and some people have in fact received two payments upon retirement. This was never the intention, and now it is time to align Kinleith with the rest of CHH in this regard.*
>
> …

[16] This information was repeated in a newsletter issued in December 2003. On 25 March 2004, the plaintiff again raised the issue at a meeting and then by an email to Ian Whyte, the Operations Manager of the Kinleith Mill, on 13 May 2004 saying he intended to take the issue further. Mr Whyte responded on 15 May 2004 by email confirming the defendant's position that its employee benefits plan, introduced in the 1990's, was intended to deal with all aspects of retirement and as KSP433 was a "*double up*", it was removed through the Policy Review process.

[17] On 13 September 2004 the plaintiff replied and advised Mr Whyte that he was not happy with that explanation and wished to raise the issue again at one of the "*listening meetings*". They duly met to discuss the issue. Mr Whyte told the plaintiff that it remained for the plaintiff to decide whether to accept what had occurred or to seek resolution by means of the disputes procedure.

[18] On 8 March 2005 the plaintiff's solicitors wrote to the defendant referring to the decision to delete KSP433 under which it was said the plaintiff had accrued a

considerable entitlement and the new employee benefits plan did not adequately compensate him. The plaintiff claimed he had consequently suffered a disadvantage in his employment and the letter stated.

> …
> *This letter provides notice that Mr Cuttriss raises a personal grievance against Carter Holt Harvey, which he wishes Carter Holt Harvey to address.*
> …

[19] The defendant's human resources manager, Ann Worthington, replied on 16 March 2005 saying the matter was being considered. A full reply was sent on 4 April 2005 referring to the terms of the plaintiff's employment contract, the process of reviewing and deleting KSP433 and the new benefits in the current Employee Benefits Plan. The parties continued in correspondence but the issue was not resolved. A statement of problem was filed on 7 November 2005 and, by a determination of the Employment Relations Authority given on 10 March 2006, the problem was removed to the Court for hearing and determination.

[20] I accept the plaintiff's evidence that he was upset by the purported removal of KSP433 and that he made this clear to his employer. I am also satisfied that the existence of the policy, when he came to know about it some time after his initial employment by NZ Forest Products, was a material factor which influenced him in his dealings with the defendant's predecessors and was one of the reasons for his decision not to apply for voluntary redundancy, if that had been offered to him, which it was not. The plaintiff contends that he expected to receive the retirement benefit when he reached the age of eligibility and its payment was an important consideration in his decision to retain long term employment with the defendant.

[21] The evidence is also clear that while the defendant considered it was bound by the policy, it complied with it and duly paid retirement benefits to eligible retiring employees from its Kinleith Mill, even in the eight year period after the equivalent policies had been cancelled in all the other workplaces which the defendant operated.

[22] The plaintiff has remained in employment with the defendant and has received regular salary increases and his performance appraisals have been marked "*above target*". There is absolutely no evidence to support the plaintiff's claim that

he has been disadvantaged in any way in any other aspect of his employment because of his challenge to the defendant's attempt to delete KSP433. To the contrary, at the time of the hearing he remained a highly regarded employee of the defendant.

The issues

[23] The plaintiff alleges that he first raised his grievance with the defendant on 17 September 2003, and continued to raise it subsequently by various emails and discussions with the defendant. He claims that, by his solicitor's letter dated 8 March 2005, he notified the defendant that he intended to proceed with his personal grievance. On 15 September 2005 the parties unsuccessfully attended mediation.

[24] Whilst admitting that there was various email correspondence including responses to the letter of 8 March 2005, the defendant claims that the grievance was raised outside the 90 day time limit and is therefore barred. The defendant also positively asserts that its actions in deleting KSP433 were not unjustified and had not disadvantaged the plaintiff. The plaintiff in response claims that neither in reply to his solicitor's letter of 8 March 2005, or subsequently, has the defendant taken any issue with the 90 day time limit and therefore has expressly or impliedly consented to the raising of the grievance out of time. Alternatively he sought leave to raise it out of time, relying on s114(3) of the Employment Relations Act 2000.

[25] As to the merits of the matter, the plaintiff contends that "*fundamentally*" KSP433, being in the nature of a substantial financial benefit to the plaintiff, for which he had provided consideration by years of service and foregoing other employment opportunities, could not be unilaterally deleted. Additionally the plaintiff asserts, as a matter of law, the policy provided a benefit that was so fundamental, and such a substantial element of the plaintiff's remuneration package, that, on the facts of this case, it cannot lawfully be deleted unilaterally.

[26] The defendant submits it was entitled to unilaterally delete KSP433. Alternatively it pleads that in 1992 the plaintiff entered into the employment contract which included a term which contemplated changes being able to be made unilaterally by the defendant to its policy manual on giving due notice of any such change so that an opportunity was available for any concerns raised to be considered.

The defendant also claims that the 1992 employment contract did not include a retirement benefit entitlement provision and that therefore any entitlement under KSP433 was not a contractual term of the plaintiff's employment.

[27] The defendant also pleads that on or about 28 November 2003, after the defendant had clearly stated its position regarding the deletion of the retirement policies, the plaintiff signed the individual employment agreement which replaced the 1992 individual employment contract. The 2003 agreement included an express term allowing the defendant to change its policies from time to time to meet operational needs or changing circumstances. The defendant alleges that policies KSP432 and 433 do not now form part of the defendant's policies and are not included in the defendant's human resources intranet site. It also relies on clause 17 of the 2003 agreement, which states that it represents a full record of the agreement entered into between the plaintiff and the defendant and that any changes cannot be binding unless mutually agreed and recorded in writing. It contends that the 2003 agreement provides a complete and fixed record of the contractual terms of employment and does not include a retirement benefit entitlement provision.

Is KSP433 a contractual term?

[28] Mr Hammond submitted that fundamentally there are some terms of employment that are so critical and so essential to the relationship between employer and employee that no matter how they are expressed they cannot be unilaterally deleted or altered. Mr Hammond submitted that giving the benefit the name "*policy*" did not turn it into mere policy as it was a form of remuneration and was therefore in the nature of a binding contractual term. If the Court was to endorse the behaviour of the defendant in this case by allowing the unilateral deletion of substantial benefits to employees, he argued that employers could then lawfully attribute to a range of terms that would normally be contractual, the character of policy and delete them at will. He submitted that it became particularly unfair in this case because the plaintiff knew of the retirement benefit and had elected not to take redundancy, not that it was offered, and to work for a different employer, in the knowledge that this benefit would be available to him on retirement.

[29] Mr Hammond submitted that KSP433 was a form of remuneration and was of financial value rather than being functional in character. He submitted that an important remuneration element of an employment agreement such as salary could never be unilaterally deleted. He submitted that the requirement of an employer to pay an employees salary, if expressed as being a policy and placed in a policy manual, would still not allow the employer to lawfully treat it as a policy and unilaterally delete or alter it.

[30] He contended that, on the evidence, the plaintiff established a legitimate expectation of receiving a retirement benefit under KSP433 when he became eligible, which was of such value to him that it could not properly be treated as a policy item. He contended that there are numerous examples in practice where parties to an employment agreement can lawfully elevate items which would normally be policy to the status of contractual terms. He gave as an example the requirement to wear a uniform might be regarded as so important that it could be contractual. He contended that the converse did not apply and that some terms, fundamentally contractual in character, could not lawfully be expressed as policy. This was said to be because those terms were part of the consideration or bargain for the employee's services. They could include matters such as long service leave, the provision of a motor vehicle, extended holiday entitlements, sickness or bereavement leave or the payment of a non-discretionary bonus, if they are understood as being part of the bargain critical to the contract of service.

[31] Mr Hammond relied on *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v The Christchurch Press* [2005] 1 ERNZ 288. For some 30 years employees had been allowed by their employer to leave work when the printing and publishing of *The Press* newspaper was complete (a "*job and finish*" arrangement). This arrangement had been explained to employees during job interviews prior to their employment but was never referred to in collective instruments. The employer wanted to require nightshift printing and publishing staff to work a full 8 hour shift on publications other than *The Press*, but this change was resisted by the union. The current collective agreement included a clause stating that the full and entire understanding of the employer and the union would be contained in that document and any other arrangements formal or informal were to be regarded

as terminated. Chief Judge Goddard found that a work practice of 30 years standing could not be dismissed as merely being the operation of grace and favour but agreed it was not a term implied by the custom or practice of the industry generally. Chief Judge Goddard referred to the provisions of s61 of the Employment Relations Act 2000, which allows additional terms and conditions to be agreed by parties bound by a collective agreement proved they were not inconsistent. He found that the phrase "*terms and conditions of employment*" was well known to employment lawyers as connoting the totality of the employment environment, consisting of both the conditions articulated in an agreement and those terms which are understood and applied by the parties in practice, citing *Elston v State Services Commission (No 3)* [1979] 1 NZLR 218. He found the "*job and finish*" arrangement was a long-standing contractual arrangement with individual employees and, although the collective permitted the defendant to vary the hours of work, it could not increase them.

[32] As Mr Hammond accepted there were no cases directly on point on the facts of the present case, or in support of his proposition that the fundamental nature of KSP433 prevented the defendant unilaterally altering it. In the *The Press* case the Court held that the 30 year arrangement did amount to a contractual term because in pre-employment discussions employees were told of the "*job and finish*" nature of the work and that may have induced them to take the positions offered.

[33] Mr Hammond contended that because the plaintiff knew of and expected to receive the retiring benefit on reaching the age of eligibility and had elected not to take redundancy and work for a different employer in the knowledge that he had the benefit available on retirement, he thereby responded to the inducement implicit in KSP433 by remaining a long term and loyal employee.

[34] Even if I accepted the factual position as outlined by Mr Hammond, noting that the voluntary redundancy was never actually offered to him, the facts of *The Press* case are not analogous. KSP433 was never offered to the plaintiff and the existence of its predecessors was not even known to him for some years. It was therefore not part of the initial bargain and, as Mr Kiely submitted, none of the contractual documents include either KSP433 or its predecessors. The 1992 contract and the 2003 agreement both provide that the defendant's policy may be amended from time to time. The plaintiff was therefore on notice that his employer could

change its policy. The retirement policy was changed over the years although it is clear that whilst it was in operation it was not regarded as discretionary and the defendant made payments according to its terms. That however is consistent with the way the Courts over the years have viewed company policies, as being binding upon the employer but, in the absence of contractual provisions or incorporation into the contractual agreement, they are not binding upon the employee. They may however, form the basis of binding directions and affect the performance of the employment relationship.

[35] Both counsel cited *Carter Holt Harvey Ltd v Pawson* [1998] 2 ERNZ 1. This was a case "*about whether the employer is contractually entitled to insist that the employee terminates employment on a fixed and ascertainable date*". It was also said to be a case "*about the importance of employer policies or practices which, although not express contractual terms between employer and employee, may affect a fundamental way in which the employment contract is performed*". It was not brought as a personal grievance but as an interpretation of the employment contract and a declaration of the respective rights and obligations. The company had published a retirement policy which provided that in normal circumstances the retirement age would be 65 years. It later adopted a different retirement policy which, for the first time, provided for the retirement of employees at the earliest age when they became eligible for a Government pension. On this basis, if the company could insist on its policy applying, Mrs Pawson would have been required to retire at 63.5 years. The company then offered salaried employees, including Mrs Pawson, a form of employment contract that contained an express retirement age of 60 years but she declined to sign this. Mr Hammond cited the following two passages from the judgment of Judge Colgan:

> *A compulsory retirement age, that is in the nature of fixing the maximum term of the contract, is however too fundamental a consideration to be other than a term or condition of it and therefore a matter of agreement between the parties to the contract.* (Page 17)
>
> …
>
> *Retirement at a specified age is a term of the contract of employment. Whether express or implied, it must be one agreed to by the parties to that contract. It cannot be unilaterally imposed by one party upon the other in the same way that no contractual term can be. Unilateral imposition of terms*

> *and conditions of employment is inimical to a contracts-based system of industrial relations as now prevails in New Zealand.* (Page 16)
>
> …

[36] Judge Colgan also stated immediately before the first quotation relied on by Mr Hammond, "*Day-to-day detail of the operation in practice of employment contracts can be justifiably and lawfully governed by policy manuals unilaterally promulgated by the employer, so long as these and their notification are fair and reasonable*".

[37] Mr Kiely for the defendant submitted that KSP433 was a benefit which was not contractually binding, citing *Pawson*. He contended the issues closely resembled those determined in the *Pawson* case, though there the company was arguing that its retirement policy was contractually binding on the employee, although not a provision in the employment contract. He relied on the following passage from *Pawson*:

> *The appellant advances broad arguments of adherence to company policy and that this formed part of the terms and conditions of Mrs Pawson's employment. The company argued, through counsel, that Mrs Pawson adopted the changes to these policies by her conduct in the same way, for example, as she accepted the benefits of its retirement benefit policy, its transport allowance policy and its long service leave policy. The benefits of these other policies were not, however, contractual expectations or entitlements. Rather, they were policies, although ones conferring benefits on employees, that were variable, or even able to be discontinued, at the company's option, in other words discretionary gratuities made available by the appellant. There is and can, for Mrs Pawson, be no expectation of contractual entitlement to these. Although it argued that these policies have become terms and conditions of employment over time, I do not accept that categorisation of them. They are, for one example, too uncertain of definition to be terms and conditions. Is the term, for example in relation to the transport allowance policy, an entitlement the amount of which the company can vary at its discretion; which, alternatively, the company can only increase at its discretion (ie a discretionary ratchet arrangement), one that it can relinquish at will? The argument also leaves unanswered the rhetorical but important question that if these matters are terms and conditions of employment, why do they remain, for Mrs Pawson at least and probably for other employees, company policies and are not incorporated expressly as terms and conditions of contracts of employment.* (p10-11)

[38] Mr Kiely submitted that the Court in *Pawson* had found the benefits of the company's retiring policy, together with long service leave and transport allowances policies, were not providing entitlements but were discretionary gratuities made available by the employer and able to be altered or deleted by it from time to time.

[39] Mr Kiely submitted that as a general proposition, unless such policies are incorporated by reference in the applicable employment contract, they are not contractually binding. He cited *Rotorua District Council v Kameta* unreported, Travis J, 6 December 1994, AEC 73/94 and *ANZ National Bank Ltd v Doidge* [2005] 1 ERNZ 518. In the latter case Judge Colgan had to consider whether a mileage allowance not referred to in the employer's employment agreement was a contractual term. In holding the mileage allowance was not an express contractual term Judge Colgan stated:

> *[46] Not everything that an employer provides, or an employee expects to receive, during employment is either a term or a condition of the employment contract between the two. That said, not all terms and conditions of employment are expressed in a written form of agreement that must be entered into in all cases: implied terms are, by their nature, not in writing; nor, usually, are fixed or minimum statutory requirements of employment relationships.*

[40] I accept Mr Kiely's submissions on the nature of employment policies. As a general proposition, supported by the authorities to which I have referred, unless a policy document such as KSP433 and the other policies contained in the manual are incorporated by reference in the applicable employment agreement, they would not be expressly binding.

[41] Mr Hammond submitted that in *MacKintosh v Carter Holt Harvey Ltd* unreported, 11 July 2001, AC 2A/01, I had found that the company's superannuation benefits were contractual benefits. That judgment dealt with the award of remedies and one of the items claimed was for lost company superannuation contributions. This was based on what the company's contribution to the appellant's superannuation would have been if the appellant had remained in its employment. There was no issue between the parties that the company's superannuation plan formed part of the appellant's contract of employment and therefore the company's contributions were contractual benefits to which the appellant was entitled. The position was no doubt the same or substantially similar to the plaintiff's contractual entitlements in the present case where it is provided in the November 2003 agreement that the plaintiff's participation in the Carter Holt Harvey retirement plan was to be maintained on existing terms and conditions. The document was therefore expressly incorporated into the employment agreement, unlike KSP433.

[42] I also agree with Mr Kiely's contention that *Pawson* helps the defendant and not the plaintiff. In *Pawson* the company had argued that the express contents of the employee's current retirement policy constituted an implied term of Mrs Pawson's employment contract and that by her conduct she had accepted this term and the changes made to it by the employer. The Court held that the retirement policy was not contractually binding on Mrs Pawson in the absence of reference to it in the employment contract or by other express agreement. That retirement policy is substantially the same as KSP432 which appears alongside and must be read with KSP433. Certainly matters contained in policy manuals, which are fairly and reasonably promulgated, can form the basis of lawful and reasonable instructions and govern the practices of the workplace. They can also be determinative of the actions taken by the employer if those actions are inconsistent with the promulgated policy. That does not however, automatically raise them to the status of contractual terms, in the absence of agreement expressed or implied or by incorporation of the policies into the employment agreement. In the present case the policies are to form part of the terms of employment by clause 16 of the 2003 agreement, but the defendant has reserved to itself the right to change those policies to meet operational needs or changed circumstances, providing that does not override the terms expressly set out in the agreement. KSP433 was not one of such terms. Had the defendant accepted the change of the words requested by the plaintiff in his 28 November 2003 memorandum, the position would have been entirely different.

[43] I am not persuaded by the argument, which is unsupported by any authority, that, because KSP433 provided a financial benefit, it somehow formed part of the remuneration and was therefore so fundamental that it could not be unilaterally changed. Nor do I accept the argument that allowing the placement of retirement benefits into a policy manual will provide a licence for employers to place into non-binding policies core terms of the contract. As the *Christchurch Press* case demonstrates, these are likely to be found to be contractual in effect because they will have been held out to the employee as part of the offer of employment. Here the employment agreement expressly provides that those policies may be unilaterally varied by the employer. Until they are altered those policies will have contractual effect according to the agreement, but when deleted will have no further contractual consequences.

[44] The situation is analogous to the way the Court has treated staff travel concessions set out in an employer's manual which had been found not to be incorporated as a term under the workers employment contract, see for example *Leitman v Air NZ Limited and Airline Stewards and Hostesses of NZ IUOW* [1989] 3 NZILR 434. To similar effect a "*merit allowance scheme*" was held not to be part of the employment contract in *Alliance Freezing Company (Southland) Ltd v NZ Amalgamated Engineering etc IOUW* [1989] 3 NZILR 785; [1990] 1 NZLR 533; (1989) ERNZ Sel Cas 575 (CA).

[45] For all these reasons I find KSP433 was not an express term of the employment agreement.

Implied terms

[46] Mr Hammond submitted as an alternative, if KSP433 was not an express term of the agreement, that it was an implied term requiring the defendant to pay out the benefits under that policy and could not be deleted unilaterally.

[47] Mr Kiely addressed the Court of Appeal's tests for implication of terms in *Attorney-General v NZ Post Primary Teachers' Assn* [1992] 1 ERNZ 1163 which found such terms could be: implied by rules of law; implied from the express terms of the contract; implied by reference to custom; and implied in order to give business efficacy to the contract.

[48] He submitted that there was no rule of law requiring the retirement benefit to be a contractual term of employment and it could not be implied by interpreting the express provisions of the employment agreement. He submitted there was no relevant industry custom on the facts of the case and that payments pursuant to KSP433 were not made as a matter of custom but in accordance with the policy which the company regarded as binding on itself before it was deleted. He submitted that there was no need to imply such a term in order to give business efficacy to the agreement. He referred to the five criteria the Court of Appeal said must be met, namely: the term to be implied must be reasonable and equitable; be necessary to give business efficacy to the agreement and will not be implied if the agreement is effective without it; the term must be so obvious that it "*goes without saying*"; it must be capable of clear expression; and not contradict any express term of the

contract. I accept Mr Kiely's submissions that KSP433 does not meet all those requirements and in particular would be inconsistent with the express terms of the agreement which allows the company to vary or delete policies from time to time.

Legitimate expectation

[49] Mr Hammond submitted that, on the evidence, the plaintiff has established a legitimate expectation to the receipt of the retiring benefit on proving eligibility. This was based on the length of his service since he became aware of the retiring benefit and his evidence that it motivated him to remain in employment with the defendant.

[50] Mr Kiely submitted that in order to establish a legitimate expectation the plaintiff must first demonstrate that a retiring benefit was offered as part of his terms and conditions of employment, referring to *NZ (except Northern etc) Food Processing etc IUOW v ICI (NZ) Ltd* [1989] 3 NZILR 24 and *Alton-Lee v Victoria University of Wellington* [2000] 2 ERNZ 152.

[51] He observed, as noted in paragraph 48 of the *Alton Lee* case, that the burden of proving the representation, inducement or promise was on the plaintiff. He submitted that, on the evidence, the plaintiff was not aware of the retirement benefit when he commenced employment in 1970 and the additional letters of appointment in 1986 and 1987 also did not refer to the entitlement. The employment contract signed in 1992 did not refer to it but referred to the policy manual which could be amended by the defendant and the same situation prevailed under the 2003 employment agreement. Mr Kiely also submitted that any expectation of the plaintiff was merely a perception on his part and was in conflict with the contractual terms of his employment, including the 1992 employment contract and the 2003 employment agreement and was inconsistent with his own email of 17 September 2003. In that email the plaintiff took issue with the defendant's intention to delete the policy but said he could not argue with the assertion that the new employee Benefit Programme should take it over. He also protested the wording of clause 16 of the 2003 agreement yet went ahead and signed it. As Mr Kiely submitted, the plaintiff could have had no expectation of KSP433 continuing in view of the response he received. I accept Mr Kiely's submissions that in these circumstances

the plaintiff has failed to establish a legitimate expectation that the benefit would be retained.

[52] Although KSP433 is expressed in unequivocal terms, the 2003 employment agreement and its predecessor in 1992 made it clear that the defendant was only bound to honour its terms while it was still contractually binding and before it was varied or deleted. As a policy item it is so recognised in the employment agreement and, in accordance with the case law, would not otherwise be contractually binding.

The application to amend

[53] As I previously indicated the plaintiff sought leave to file a second amended statement of claim pleading a failure to consult in the following terms:

> *18. Subject to the plaintiff's assertion that the defendant could not unilaterally delete KSP433 the plaintiff asserts that the defendant was contractually required to consult with the plaintiff before it decided to delete KSP433.*
>
> ***Particulars***
>
> *(a) The employment agreements specifically provided that the defendant consult before a decision was made;*
>
> *(b) The defendant's witnesses confirmed that the defendant notified it's* [sic] *employees that it would consult before any decision to delete was made;*
>
> *19. The defendant did not consult with the plaintiff before the decision to delete KSP433 was made.*
>
> *20. The failure to consult before the decision was made to delete KSP433 renders the deletion of KSP433 in late December 2003 unlawful and a breach of the employment agreement and therefore KSP433 remains in force.*

[54] The draft amended statement of claim also alleges that any future attempt by the defendant to consult and then delete KSP433 would be tainted by the prior failure to consult and pre-determination. Therefore the plaintiff contends that either the defendant cannot delete KSP433 without his consent or that the defendant should

pay a penalty to him pursuant to sections 134 and 135 of the Employment Relations Act 2000 up to the maximum of $10,000 for its contractual breach.

[55] It was common ground that a claim for a penalty for breach of an employment contract must be commenced within 12 months after the cause of action has arisen (s135(5)). That remedy is therefore barred by the provisions of the Employment Relations Act 2000 and is unavailable to the plaintiff.

[56] Mr Hammond submitted the amendment arose naturally from the matters argued before the Court and there would be no prejudice to the defendant and that the amendments were required to ensure that all issues were properly before the Court in the interests of justice.

[57] Mr Hammond accepted that the failure to consult was subject to the plaintiff's assertion that the KSP433 could not be deleted. He submitted that the amendment arose directly from the evidence at trial and referred to the evidence of Bryce Landman, a witness for the defendant who confirmed that employees were advised that the employer would consult with them before any alterations were made to the KSPs. He contended that the employment agreements also so provided. He submitted that the issue was fully aired at trial and both parties took the opportunity to fully explore it. Therefore it should be dealt with as a distinct cause of action and there was no prejudice to the defendant. He submitted that if the amendment is granted in the end result, because of the failure to consult, KSP433 must now stand unamended.

[58] Mr France argued this matter for the defendant and contended that the proposed amendment did not naturally arise from the matters argued before the Court, it was being advanced after the hearing of all evidence had occurred and closing submissions, it had never been an issue during the long running dispute between the parties and would require further evidence from the defendant which would involve delays and additional costs. Mr France submitted the outcome of granting the amendment would not resolve the real controversy between the parties, namely whether KSP433 was a term and condition of the plaintiff's employment, which could not be unilaterally varied.

[59] He submitted the Employment Court should approach applications for leave to amend pleadings after the hearing on the same basis as the High Court, applying

regulation 6 of the Employment Court Regulations 2000. He relied on the principles set out in *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA): whether granting leave is necessary to determine the real controversy between the parties and does not result in injustice to other parties. These principles were applied in *Corrections Association of New Zealand Inc v Chief Executive in Respect of the Dept of Corrections* [2004] 2 ERNZ 277.

[60] Mr France took objection on behalf of the defendant to the plaintiff raising a personal grievance challenging the consultation process as being raised out of time. He contended that the proposed remedy in the draft second amended statement of claim that the defendant could not delete KSP433 without the plaintiff's consent, amounted to the imposition of a new term and condition of employment of the parties, and referred to the limitation on the ability of Authority or the Court to change or vary terms of an individual employment contract, contained in s190 of the Act. He submitted that the remedy for breach of a contractual term would be a compliance order, citing *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597, and the most that the plaintiff could get if he proved his case was an order that the defendant consult.

[61] Mr France also submitted that the defendant had consulted and referred to the various communications between the defendant and the plaintiff which are summarised earlier in this judgment. He noted that the plaintiff and other employees actively participated in the process by providing feedback and input and they questioned the discontinuance of KSP433. He contended that although the plaintiff did not agree with the decision to discontinue KSP433, he had been consulted. He submitted therefore, it was not in the interests of justice to allow the amendment at such a late stage. He also contended that there would be a significant prejudice to the defendant because the issue of consultation was not fully aired at trial and was not contained in the written briefs of evidence or in the transcript of cross-examination. It was only raised with the last witness of the defendant, Mr Landman, through an exchange between the Court and Mr Landman and that at no other time during the lengthy dispute had the plaintiff raised any such concerns. He referred to some witnesses having left the defendant and not being available and the general difficulties of redressing the issue at this stage.

[62] I accept Mr France's submissions. I find that even if the plaintiff was to succeed on the consultation point then the most that would be able to be given by way of a remedy is a compliance order. Further, after consultation, it is highly likely that the decision would be the same, because the deletion of KSP433 was part of a review of the whole retirement superannuation package across all the mills and the situation at the Kinleith Mill was something of an anomaly. No other affected employees appear to have brought claims, and, in view of the retirement benefit now available to the plaintiff, the end result does not appear to be unreasonable. It is therefore unlikely that consultation will produce any different results, especially in view of the submissions already made by the plaintiff to the defendant in support of his argument that the deletion should not occur. As Mr France has argued, to impose any absolute prohibition would be to vary a term of the employment agreement and I would be unlikely to be satisfied under s190 that such a change would be absolutely necessary. In view of the conclusions I have reached on the issues as to the nature of KSP433, I am not persuaded that allowing the amendment would do justice between the parties, nor is it necessary to deal with the key issue in controversy between them, which this judgment I believe has resolved. The amendment is therefore declined.

[63] My conclusion is that KSP433 could be unilaterally deleted by the defendant and even if this disadvantaged the plaintiff, the defendant's actions were justifiable in all the circumstances. The plaintiff's unjustified disadvantage grievance must therefore also fail. In view of this conclusion there is no need to deal with the issue of whether the disadvantage grievance was brought out of time, although I express the opinion that the failure on the part of the defendant to take this point prior to the trial of the matter, after having filed a statement in reply and attended mediation, may well have amounted to a waiver.

Costs

[64] Costs are reserved and if they cannot be agreed, may be the subject of

memoranda, the first of which is to be filed and served within 30 days of the date of this judgment.

B S Travis
Judge

Judgment signed at 3.30pm on Friday 27 April 2007