IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 76
5498404

	BETWEEN	ANTHONY GANLEY Applicant
	A N D	PB SEA-TOW (NZ) LIMITED Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Helen McAra, Counsel for the Applicant Penny Swarbrick, Counsel for the Respondent	
Investigation Meeting:	24 February 2015 at Auckland	
Submissions Received:	24 February 2015 from the Applicant 24 February 2015 from the Respondent	
Date of Determination:	16 March 2015	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Anthony Ganley, is claiming that he has not received his full contractual entitlement to redundancy compensation from the Respondent, PB Sea-Tow (NZ) Limited (PB Sea-Tow).

[2] In the alternative Mr Ganley claims that he has a personal grievance in that PB Sea-Tow acted unjustifiably in its handling of his redundancy, causing him disadvantage and leading to his unjustifiable dismissal.

[3] In the alternative Mr Ganley claims that PB Sea-Tow's actions comprised a breach of contract.

[4] PB Sea-Tow denies that Mr Ganley did not receive his full contractual entitlement to redundancy compensation. It claims that Mr Ganley was paid redundancy compensation in accordance with the provisions of his employment agreement.

[5] PB Sea-Tow claims that Mr Ganley has not raised a personal grievance for either unjustifiable disadvantage or unjustifiable dismissal, further that it has not breached his employment agreement.

Issues

[6] The issues for determination are:

- Whether or not Mr Ganley has received his full entitlement to redundancy compensation pursuant to his employment agreement

In the alternative

- Whether or not Mr Ganley has a personal grievance on the basis that PB Sea-Tow did not act properly, justifiably and lawfully in its dealings with Mr Ganley in regards to his redundancy entitlements

In the alternative

- Whether or not PB Sea-Tow's actions towards Mr Ganley comprised a breach of contract.

Background facts

[7] PB Sea-Tow is a marine transport and logistics company which has owned and operated tugs and barges. It transports cargoes and passengers throughout Australia, New Zealand, Asia and the South Pacific.

[8] PB Sea-Tow has operated in New Zealand for approximately 6½ years. The business has, however, existed for about 60 years originally being called Parry Brothers Limited, it became PB Sea-Tow Limited in the early 1980s when Mr Ganley's father bought it, and in 2008 it became PB Sea-Tow Limited following its purchase by Pacific Basin. The current situation is that PB Sea-Tow is winding-up its operations due to a lack of ongoing contracts.

[9] Mr Ganley started working for PB Sea-Tow in about 1997 and was promoted to the position of Master in 2006. Mr Ganley said he had a good working relationship with the company directors and that he felt a strong loyalty and commitment to the company.

[10] During the period of his employment, Mr Ganley was a member of the NZ Merchant Service Guild IUOW Inc (the Guild) and his employment was covered by the PB Sea-Tow (NZ) Maritime Crew Collective Agreement 2008-2011, the parties to which were PB Sea-

Tow, the Maritime Union of New Zealand (Inc), the Aviation and Marine Engineers' Association Inc, and the Guild (the MUCA).

[11] The MUCA expired in 2011 but Mr Robin Dawe, Operations Superintendent of PB Sea-Tow, said that the expired MUCA has continued to be used as the employment agreement for PB Sea-Tow's employees who are members of the party unions. The Schedule of Wages attached to the MUCA specifies that:

> *The Employee shall be paid at the rate of annual salary specified in the tables of salaries below. The daily rate shall be the annual salary divided by 365. Except for the allowances appearing in this clause these rates shall cover all remuneration for work carried out under this agreement. All monetary amounts are in $NZ.*

[12] The MUCA set out that the rate of annual salary for the position of Master as at 1 May 2010 was $113,958. The daily rate calculated as the annual salary divided by 365 was $312.21.

[13] The Schedule of Wages also specified a number of allowances which were payable and taxable. These included public holidays, superannuation, multiple tow, and deckhand allowances. In relation to public holidays the Schedule of Wages stated:

> ***Public Holidays*** *– for time worked on a public holiday, the employee shall be paid an additional sum calculated as 50% of the Daily rate (the "relevant daily rate").*

[14] The Redundancy Schedule attached to the MUCA stated at clause 2.9:

> *Redundancy compensation formula:*
>
> *One calendar month calculated at the relevant daily wage rate shall be paid in lieu of notice (if such notice was not given).*

[15] Mr Dawe said that initially PB Sea-Tow had employment for its employees in New Zealand, however that work had reduced and been replaced by work on the Australian coast, such that it was common practice for the employees to be required to work overseas on specific projects for PB Sea-Tow or other companies from time to time.

[16] When this occurred, the exact employment arrangements were arranged on a project-by-project basis, but the overriding principle was that where the rates of pay or other conditions were higher on the particular project than provided for in the MUCA, the employees would receive those enhanced pay and conditions for the duration of their time working on that project.

[17] This was set out in an email dated 11 May 2010 which Mr Dawes sent to employees. The email stated:

> *Gentlemen,*
>
> *You will be aware the majority of our current work has been around Australia with all its various connotations and challenges. As a result we have recently reviewed the salaries of sea staff whilst working in Australia and will now introduce the following pay rates in addition to the provisions of our current collective agreement viz;*
>
> *On a without prejudice basis PB Sea-Tow will pay New Zealand Employees the following rates of pay when performing work on PB Sea-Tow vessels working in Australian Ports or on domestic voyages between Australian ports: ....*
>
> *Note:*
>
> *These rates do not apply for voyages deemed international or work outside Australia. ...*
>
> *These rates will commence during work periods after 1 May. When on Time Off the oldest accrued Time Off will be liquated first, so there may be short term differences in pay rates. ..*

[18] The arrangements included reference to liquidating time off and specified that the oldest accrued time off would be liquidated first, leading to a possible short term difference in pay rates. Mr Dawe explained this was a reference to the arrangement whereby seafarers who were working on projects would accrue time off, which could not be taken at the time because they were at sea on the vessels. The accrued time off therefore had to be taken when the employees were back on land, and was paid at the rate at which it was earned.

[19] In the period 2009 to 2010, Mr Ganley worked on various PB Sea-Tow contracts in Australia and Indonesia. Mr Dawe said that Mr Ganley, as did the other PB Sea-Tow employees, reverted to the rates of pay contained in the MUCA when he was not assigned to overseas projects and contracts. During March, June and November 2009 Mr Ganley worked in New Zealand and received the pay rate as set out in the MUCA. During February, March and November 2010 he also worked in New Zealand and received the pay rate as set out in the MUCA

The Gladstone Project

[20] During the period from January 2011 to June 2013, Mr Ganley worked on contract at Gladstone, Australia on the vessel *Karori* and latterly the vessel *Katea*. During this time, Mr Ganley said his pay rate was increased.

[21] Mr Dawe said that Gladstone was a contract operated by PB Sea-Tow Australia (the Gladstone project). It operated in accordance with an Australian EBA (Enterprise Bargaining Agreement) to which no New Zealand unions were party. It employed local Australians but was supplemented by PB Sea-Tow Masters and Engineers. These employees were paid by PB Sea-Tow but this was at the higher rate associated with the Gladstone project.

[22] The EBA had its own contract redundancy clause to be paid out on completion of the project which Sea-Tow paid. Accordingly when the Gladstone contract terminated in March 2013 this explained why time served on the Gladstone contract was subsequently deducted from the redundancy calculations for those PB Sea-Tow employees affected by the downturn of work when that contract was finished.

[23] Bechtel, the client company for the Gladstone project, gave PB Sea-Tow preliminary notice on or about 12 March 2013 that its services and equipment for that project would not be required with effect from 30 June 2013. On 12 March 2013 Mr Tyrone Paul, Operations, wrote to PB Sea-Tow employees by email. In the email, Mr Paul stated:

> *Good afternoon*
>
> *Further clause 25 of the EBA, we would advise as follow:*
>
> *PB Sea-Tow has received Preliminary Notice of Completion from Bechtel regarding the POE 2305 barge and associated tugs/equipment.*
>
> *Bechtel advise that the date of completion for this spread is the 31st May 2013.*
>
> *We expect to receive a final termination notice from Bechtel (60 days) on 2 April 2013.*
>
> *Unless this position changes and/or alternative employment can be found, this is likely to result in PB Sea-Tow retrenching employees on 31 May 2013.*
>
> *The number and category of employees likely to be affected are:*
>
> *Masters 8*
> *Chief Engineers 8*
> *Barge Mates 8*
> *Deckhands 16. …*

> *Before any final decisions are made, PB Sea-Tow will be consulting with unions and employees - including in relation to measures to avert or mitigate the proposed retrenchments, measures to mitigate the adverse effects of the proposed retrenchments and the selection of employees for retrenchment.*
>
> *Nikki Carter and myself will be in Gladstone 25th and 26th March got meetings with the delegates and unions.*
>
> *We will also be notifying the employees who may be affected.*

[24] Mr Dawe said on 31 May 2013 PB Sea-Tow advised Mr Ganley and a number of other PB Sea-Tow employees on the Gladstone project that their employment would be terminated.

[25] They were provided with one month's notice and redundancy entitlements. Subsequently the termination date was extended to 11 July 2013 and on 12 June 2013, Mr Dawe wrote to Mr Ganley confirming that his employment would end on 11 July 2013 unless the work situation changed.

[26] During Mr Ganley's notice period, PB Sea-Tow had a need to return the chartered barge from Gladstone to Singapore using *Katea*, the vessel of which Mr Ganley was Master, and any of her available crew members. Mr Ganley said that on 25 June 2013 he had accepted the work which was offered together with an extension to his termination date.

[27] Mr Dawe wrote to Mr Ganley and the *Katea* crew on 10 July 2013 advising:

> *Gentlemen,*
>
> *Further to my letter of 12 June 2013 advising of the redundancy situation I need to confirm that termination date of 11 July 2013 no longer applies given the delivery voyage of Katea.*
>
> *You will recall the set date for termination was subject to the work situation changing.*
>
> *Our intention is therefore to review the situation again and to confirm for you that if redundancy is to occur we will re issue a full month's notice which will be to your advantage.*
>
> *In the meantime I wish you safe and successful voyaging.*

[28] Following the delivery of the barge to Singapore, Mr Ganley was offered and accepted further work for a three month period supervising in the position of Docking

Superintendent a 10 year annual survey, refit and conversion to the *Katea* before it was deployed on an Australian contract.

[29] Once the modifications to the *Katea* were completed, Mr Ganley delivered it and a barge to Gove, Australia. The voyage completed on 11 December 2013.

[30] On 11 December 2013, Mr Ganley was entitled to liquidate the time off he had accrued, approximately 180 days. He said that during the period when he was on the accrued paid time off he had heard nothing further from PB Sea-Tow about the termination of his employment.

[31] Mr Dawe said that throughout the period Mr Ganley had been on accrued time off, he had continued to be paid at the Australian rates which had applied during the period the accrued leave had been earned. After Mr Ganley's leave was completely liquidated on 7 May 2014, he reverted to the PB Sea-Tow MUCA rates thereafter.

[32] As there was no ongoing work for him at that time, and no prospects of PB Sea-Tow acquiring work in the near future, Mr Dawe wrote to Mr Ganley on 8 May 2014 to confirm that his employment would be terminated for reasons of redundancy on 8 May 2014, attaching a calculation of redundancy compensation in line with the redundancy schedule in the MUCA. The Redundancy Entitlement Schedule stated:

> 1. *Qualifying Service: 13 years 1 month*
>
> *"Three weeks for each year of service based on the relevant daily wage rate. Part of a year of service will be counted on a pro-rata basis.*
>
> *The maximum all inclusive payment for employees employed at the 1 May 2001 shall be 60 Weeks. …*
>
> *The daily rate shall be the annual salary divided by 365:*
>
> 2. *274.68 days @ $312.21 85,757.84*

[33] Mr Ganley said that following receipt of the letter, he had spoken to Mr Dawe objecting to the idea of his pay for redundancy being reduced by reference to a pay rate agreed in 2010, which he had not received since that time, and that he thought PB Sea-Tow's actions in that regard were deliberate and wrong.

[34] Mr Ganley said he also contacted his union, the NZ Merchant Service Guild (the Guild) and asked it to raise an objection with PB Sea-Tow about the proposed redundancy calculations.

[35] On 3 June 2014, PB Sea-Tow received a letter from the Guild asserting that it had not correctly calculated Mr Ganley's redundancy pay. In the letter dated 3 June 2014, the Guild stated:

> *… We have been contacted by our member Tony Ganley, who advises that the company is offering him a redundancy package based on a daily rate below his relevant daily pay. This is incorrect and we seek your urgent confirmation that for any of our members who are redundant from PB Sea-Tow, the company will apply the correct pay rate in the calculation of their compensation entitlements, i.e. the employee's current relevant daily pay.*

[36] There was a subsequent exchange of views between the Guild and PB Sea-Tow. On 15 June 2014, Ms Sarah Dench, Organiser, on behalf of the Guild, emailed Mr Dunlop and Mr Dawe stating:

> *As the General Secretary clearly pointed out to you, the issue is one of the company's legal obligations to pay redundancy at the employee's current relevant daily pay, and a reminder that this obligation extends to all redundant employees. Please take the necessary action to fulfil the company's obligations to our members.*

[37] In response, Mr Dunlop emailed on that same date stating:

> *Your email confirms the position we have taken. Tony Ganley has been on various terms and conditions over the past few years. As these contracts have been completed he has changed to another one etc but recently there have been no new contracts secured. He returned to "base" contract which is the PB Sea-Tow NZ CEA on the premise that he would work under that CEA or if another contract was secured in Australia for instance he would then move into such a contract under whatever terms and conditions prevailed. Unfortunately no such contract has surfaced and with regret the decision has been made to make Tony redundant. As he was on the NZ CEA at the time of redundancy those terms applied both in the rate at which redundancy is paid and the no. of weeks' redundancy he is entitled to due to the length of time he has been employed by us under his "base" contract.*

[38] On 24 June, Ms McAra on behalf of the Guild, responded:

> *Thanks for your message which Sarah has passed to me. As we have previously advised, the collective agreement provides for all employees to be paid at their current rate of pay at the time of redundancy. We don't believe paying anything other than their current relevant daily pay is a correct application of their entitlement, and we seek your urgent confirmation that Tony and others already*

> *paid will receive the shortfall ASAP. In the absence of such confirmation appropriate steps will be taken to recover the amounts due.*

[39] Mr Dunlop responded to the letter from the Guild on 26 June 2014 stating:

> *As you point out all redundancies are paid at the relevant daily rate based on their entitlement under the base NZ CEA. In the case of Tony Ganley his total PB Sea-Tow service was 16.50 years but his time working on the Gladstone project was deducted as that was a separate contract with built in redundancy terms. This brings his service period back by 2.42 years to 14.0 years. His entitlement is three weeks per year of service pro rata at NZ daily rate which was his current rate at the time of redundancy. There is no shortfall.*

[40] The matter was not resolved between the parties and on 4 August 2014, Mr Ganley filed a Statement of Problem with the Authority.

Determination

Did Mr Ganley receive his full contractual entitlement to redundancy compensation?

[41] Mr Ganley was a member of the Guild and as such his terms and conditions of employment were those set out in the MUCA.

Interpretation of collective agreements

[42] A summary of the law regarding the interpretation of collective agreements and contractual interpretation was set out by Judge Ford in the case of *NZ Amalgamated Engineering, Printing and Manufacturing Union* v *Amcor Packaging (New Zealand) Limited*[1] in which he stated:[2]

> *The leading authority on contract interpretation in this country is the decision of the Supreme Court in Vector Gas Ltd v Bay of Plenty Energy Ltd*[3] *That decision related to the construction of a commercial contract but the Court of Appeal in Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*[4] *made it clear that the principles of interpretation prescribed in Vector had equal application to employment agreements.*[5] *The court is required to apply a principled approach to the interpretation of employment agreements and disputes as to meanings must be determined objectively. Vector highlighted the significance of the awareness of context as a necessary ingredient in ascertaining the meaning of contractual words emphasising commercial substance and purpose over semantics and the syntactical analysis of words.*

[1] [2011] NZEmpC 135
[2] Ibid at para 12]
[3] [2010] NZSC 5, [2010] 2 NZLR 444
[4] [2010] NZCA 317
[5] See [36]-[37]

[43] In *NZ Meat Workers & Related Trades Union Incorporated v Silver Fern Farms Ltd (formerly PPCS Ltd)*[6]*("Silver Fern Farms")* Judge Shaw referred to the principles of construction in interpreting collective agreements as having been summarised by the Employment Court in *New Zealand Tramways and Public Transport Union Inc v Transportation Auckland Corporation Ltd*[7]. The Employment Court in that case had observed that:[8]

> *The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction …*

[44] In *Silver Fern Farms* Judge Shaw had also referred to the Court of Appeal decision in *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd*[9] in which the Court of Appeal had referred to the use of the surrounding circumstances to ensure the correctness of the natural meaning of the words as 'cross-checking'.

[45] Judge Shaw had further approved of the view of Judge Colgan (as he then was) expressed in *ASTE v Chief Executive of Bay of Plenty Polytechnic*[10] that the interpretation of a collective agreement should not be narrowly literal but should accord with business common sense, stating at para [23] that:

> *The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Even if the drafting is inept, the Court should be able to give effect to the underlying intent. Moreover, if a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find a more liberal interpretation which satisfies business common sense and fulfils the parties' purpose.*

[46] I further refer to the principle that the words of a contract should not be construed as having a meaning that was not intended by the parties as described in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[11]at paragraph [22] as: "…. *an important control on the raising of implausible interpretation arguments".*

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[6] [2009] ERNZ 149
[7] [2006] ERNZ 1005
[8] Ibid at para [16]
[9] [2001] NZAR 789 (CA)
[10] [2002] 1 ERNZ 491 at 500
[11] [2010] NZSC 5, [2010] 2 NZLR 444

Relevant Daily Pay

[47] The starting pointing for determining whether or not Mr Ganley received his full entitlement to redundancy payment I find to be the determination of what constituted: *"the relevant daily wage rate"* upon which Mr Ganley's redundancy payment was based.

[48] The wording "*relevant daily rate*" is to be found in the MUCA on the Schedule of Wages. This refers to a "*daily rate*" which is defined on page 31 of the Schedule of Wages as: "*This daily rate shall be the annual salary divided by 365".* The word '*relevant'* means the annual salary as specified by the position description in the table of salaries set out in the Schedule of Wages.

[49] Under the section entitled: ***ALLOWANCES PAYABLE – TAXABLE*"** the Schedule of Wages defines the additional sum to be paid to the employee for public holidays as being 50% of the daily rate: (*the* '*relevant daily rate").*

[50] I find that these words are clear and unambiguous and conclude that the *"daily rate"* and *"the relevant daily rate"* are used interchangeably to mean the same rate, which is defined as being the rate of annual salary specified in the table of salaries (set out on page 31 of the MUCA, the Schedule of Wages) divided by 365.

[51] I further find that the reference to the : "*relevant daily wage rate"* without further definition in the Redundancy Entitlement Schedule in the MUCA to be the *"daily rate"* and *"the relevant daily rate"* referred to in the preceding Schedule of Wages since that accords with the whole of the contract and with business common sense.

[52] I determine that the: "*relevant daily wage rate"* referred to in the Redundancy Entitlement Schedule equates to the employee's annual salary divided by 365.

The pay rate to which Mr Ganley was entitled at the date of termination

[53] It is clear that Mr Ganley was paid an increased rate from time to time during the course of his employment. This was an amount paid by PB Sea-Tow which was additional to the MUCA pay rates and applied only in certain circumstances as set out in the email dated 11 May 2010 sent by Mr Dawes which stated:

> *…PB Sea-Tow will pay New Zealand Employees the following rates of pay when performing work on PB Sea-Tow vessels working in Australian Ports or on domestic voyages between Australian ports …*

> *These rates do not apply for voyages deemed international or work outside Australia …*

[54] During 2010 when not working in Australia or on domestic voyages between Australian ports Mr Ganley's pay had reverted to the pay rate set out in the MUCA.

[55] During the period 2011 -2013 Mr Ganley had been continuously employed on the Gladstone project, and received the enhanced rate of pay, that is the MUCA rate with the additional payment from PB Sea-Tow.

[56] Mr Ganley was also receiving the enhanced rate of pay when he delivered *Katea,* and the barge from Australia to Singapore, when working overseeing the 10 year annual survey, refit and conversion of the *Katea,* and when subsequently delivering *Katea,* and the barge to Gove.

[57] Following that time he proceeded to liquidate his accrued time off, which in accordance with the email dated 11 May 2010, was paid at the rate at which it had been earned.

[58] When the period of Mr Ganley's liquidated leave came to an end, there was no further Australian project work or work on domestic voyages between Australian ports available, and I find that Mr Ganley was not therefore entitled to receive the additional payment from PB Sea-Tow which was payable only in those defined circumstances as set out in the email dated 11 May 2010.

Status of expired MUCA

[59] The MUCA had expired in 2011 and had not been renewed since that date despite the parties having met a number of times with a view to concluding a new MUCA.

[60] In accordance with s 53 of the Employment Relations Act 2000 (the Act) I find that the MUCA continued in effect for a period of 12 months.

[61] Ms McAra submits that thereafter Mr Ganley was employed on an employment agreement comprising the terms of the expired MUCA and any additional terms and conditions of employment pursuant to s 61 (2) of the Act which states:

> *If the applicable collective agreement expires or the employee resigns from the union that is bound by the agreement, -*

(a) The employee is employed on an individual collective agreement based on the collective agreement and any additional terms and conditions agreed under sub-section (1);

[62] Section 61 (1) of the Act states:

> *The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions of employment that are –*
>
> *(a) Mutually agreed to by the employee and the employer … and*
>
> *(b) Not inconsistent with the terms and conditions in the collective agreement.*

[63] I do not find that the higher pay rate which applied when Mr Ganley worked on Australian projects or on domestic voyages between Australian ports, whilst accepted by Mr Ganley, was an additional term that was mutually agreed between the parties. Rather I find that the email from Mr Dawes dated 11 May 2010 was a unilateral notification of rates of pay which PB Sea-Tow would pay only in defined circumstances.

[64] Of more significance is the fact that the increased rates applied only in the defined circumstances which were stated to be: "*when performing work on PB Sea-Tow vessels working in Australian Ports or on domestic voyages between Australian ports".* Even were I to accept that Mr Ganley had mutually agreed a higher rate of pay, I find that he had no entitlement to receive the increased rates unless he was to be working in those defined circumstances.

[65] Ms Swarbrick submits that the proper time for calculating redundancy compensation is at the time the redundancy takes effect, not at the time of giving notice. In this particular case, I find that there is no difference to the calculation because the MUCA pay rate applied at the time of the notice, 8 May 2014, and the date of termination, 5 June 2014.

[66] On 8 May 2014 Mr Ganley was not: "*… performing work on PB Sea-Tow vessels working in Australian Ports or on domestic voyages between Australian ports".* He was not therefore entitled to receive the enhanced rate of pay which I find applied only in those defined circumstances.

[67] I find therefore that the pay rate applicable to Mr Ganley at the date when accrued leave entitlement was liquidated was that contained in the MUCA i.e. the Master's pay rate as at 1 May 2010 of $113,958.00, and the redundancy payment, in accordance with the

Redundancy Schedule to be calculated at the "*relevant daily wage rate"* of $113,958.00 divided by 365, being $312.20.

[68] I determine that the redundancy payment made to Mr Ganley by PB Sea-Tow of $92,289.28 was his full contractual entitlement to redundancy compensation.

[69] **Has Mr Ganley a personal grievance on the basis that PB Sea-Tow did not act properly, justifiably and lawfully in its dealings towards him in regards to his redundancy entitlements?**

[70] Mr Ganley is claiming that the manner in which PB Sea-Tow acted in its handling of his redundancy caused him disadvantage and lead to his unjustifiable dismissal. PB Sea-Tow claims that Mr Ganley did not raise a personal grievance with it within the statutory 90 day period, nor did it consent to a personal grievance being raised outside the statutory 90 day time frame.

[71] Section 114 of the Act states:

> *(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*
>
> *(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*
>
> *(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period,*

[72] It must be a personal grievance as categorised in s.103 of the Act which is raised with the employer and not some other action.

[73] Mr Ganley must raise the personal grievance within the statutory 90 day period set out in s. 114(1) of the Act unless PB Sea-Tow agreed to his raising a personal grievance outside of the statutory 90 day period.

[74] Mr Ganley stated that he had raised a personal grievance with PB Sea-Tow on 29 May 2014 by contacting the Guild and asking it to raise an objection to the manner in which his redundancy pay was calculated.

[75] On 3 June 2014 Ms McAra on behalf of the Guild contacted PB Sea-Tow by letter in which she noted concerns she had about the process followed by PB Sea-Tow in relation to its redundancy programme, and the MUCA, and in which she referred to Mr Ganley's objection:

> *... we have been contacted by our member Tony Ganley, who advises us that the company is offering him a redundancy package based on a daily rate below his relevant daily pay. That is incorrect ...*

[76] The letter from Ms McAra makes reference to her concerns about the redundancy calculation made by PB Sea-Tow, and to the MUCA which contained a process for the raising of a personal grievance.

[77] I accept that Mr Ganley believed he had raised a personal grievance with PB Sea-Tow and that that related to the manner in which his redundancy payment was calculated. I further accept that the Guild raised that particular concern with PB Sea-Tow and although I have reservations that it constitutes the raising a personal grievance, I shall proceed to examine the stated grounds of unjustifiable dismissal or unjustifiable disadvantage in turn.

Unjustifiable dismissal

[78] Mr Ganley did not resign; he was dismissed by reason of redundancy. Mr Ganley is not challenging the genuineness of the redundancy situation, and accepts that his position with PB Sea-Tow had become surplus to requirements following a lack of available work.

[79] I determine that Mr Ganley was not unjustifiably dismissed by PB Sea-Tow and does not have a personal grievance founded upon unjustifiable dismissal.

Unjustifiable disadvantage

[80] Mr Ganley is claiming unjustifiable disadvantage resulting from the manner in which PB Sea-Tow acted in its handling of his redundancy

[81] Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

> *That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[82] The elements of s103 (1) (b) are twofold:

a. An unjustifiable action by the employer, which

b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[83] Mr Ganley must therefore establish that there was some unjustifiable action by PB Sea-Tow which affected his terms and conditions of employment to his disadvantage.

[84] It was incumbent on PB Sea-Tow to follow a fair and reasonable process when making Mr Ganley redundant. The Redundancy Schedule in the MUCA set out the procedure to be followed by PB Sea-Tow in the event of redundancies. Clause 2.1 of the Redundancy Schedule mandated that PB Sea-Tow consult the appropriate union, and clause 2.3 that: "*The Company and the Union shall enter into discussions …"*

[85] There is no claim that this procedure was not followed. Indeed by email dated 12 March 2013 entitled: "*Work Place Change Consultation/Company Duty to Notify/ Company Duty to Discuss Change",* Mr Paul advises Mr Ganley and other affected employees that the client Bechtel has advised of the date of completion of the project on which Mr Ganley was employed as being expected to finally terminate on 2 April 2013, and a 'retrenching exercise' to take place on 31 May 2013. In the email Mr Paul advises that: "*However, before any final decisions are made, PB Sea Tow will be consulting with unions and employees- …"*

[86] Mr Ganley was first advised on 31 May 2013 that his employment would terminate by reason of redundancy, but his employment was extended as a result of the work situation having altered. I find this to be the action of a fair and reasonable employer.

[87] Mr Ganley was moreover kept advised of developments in the redundancy situation as and when they occurred by means of communications from PB Sea-Tow on 12 June 2013, 10 July 2013 and 8 May 2014.

[88] I determine that Mr Ganley was not disadvantaged as a result of the procedure adopted by PB Sea-Tow in relation to his redundancy.

[89] As regards the calculation of Mr Ganley's redundancy pay, I have already addressed this issue and find no disadvantage arising from the manner in which his redundancy pay was calculated by PB Sea-Tow

Did PB Sea-Tow's actions towards Mr Ganley comprise a breach of contract?

[90] As I have found that PB Sea-Tow correctly calculated Mr Ganley's redundancy pay, I determine that there has been no breach of contract.

Costs

[91] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority