

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 335  
5623778

BETWEEN                      AWA MINHINNICK  
Applicant

AND                              NEW ZEALAND STEEL  
LIMITED  
Respondent

Member of Authority:      Vicki Campbell

Representatives:            Anne-Marie McNally for Applicant  
Phillip Skelton QC for Respondent

Investigation Meeting:      28 September 2016

Determination:              4 October 2016

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A.      One or more conditions of Mr Minhinnick's employment were affected to his disadvantage by an unjustified action by New Zealand Steel Limited.**
  
- B.      Mr Kaihau was an immediate relative of Mr Minhinnick's for the purposes of clause 34.2 of the collective agreement.**
  
- C.      The two days annual leave Mr Minhinnick used in January 2016 are to be reinstated.**
  
- D.      New Zealand Steel Limited is ordered to pay to Mr Minhinnick the sum of \$1,000 under section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

**E. Costs are reserved.**

**Employment relationship problem**

[1] Mr Minhinnick claims one or more conditions of his employment have been affected to his disadvantage by an unjustifiable action of New Zealand Steel Limited (NZ Steel) when it refused to recognise a sibling relationship between Mr Minhinnick and his whangai brother (Mr Arnold Kaihau). The claim has arisen as a result of NZ Steel's refusal to grant Mr Minhinnick three days bereavement leave to attend Mr Kaihau's funeral.

[2] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from Mr Minhinnick and NZ Steel but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

**Background**

[3] Mr Minhinnick's employment with NZ Steel is covered by the terms of the collective agreement between E Tu (the Union) and NZ Steel dated 1 June 2013 to 31 May 2016.

[4] The collective agreement provides for bereavement leave in the following terms:

**34. Bereavement Leave**

34.1 An employee, who suffers bereavement in the form of the death of the employee's spouse or child, or spouse's child, will be granted up to five (5) days paid leave on relevant daily pay including the day of the relative's funeral.

34.2 An employee who suffers bereavement in the form of the death of any other "immediate relative" will be granted up to three (3) days paid leave on relevant daily pay including the day of the relative's funeral. "Immediate relatives" are defined as the employee's parents, brother, sister, spouse's parents, grandparents and grandchildren.

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34.5 The bereavement leave provided under this clause is inclusive of, and not additional to the provisions of the Holidays Act 2003.

[5] The Holidays Act 2003 (the Holidays Act) provides for bereavement leave as follows:

## **69 Bereavement leave**

- (1) An employee may take bereavement leave in accordance with sections 63 and 70 if the employee suffers a bereavement.
- (2) An employee suffers a bereavement—
  - (a) on the death of the employee's—
    - (i) spouse or partner:
    - (ii) parent:
    - (iii) child:
    - (iv) brother or sister:
    - (v) grandparent:
    - (vi) grandchild:
    - (vii) spouse's or partner's parent; or
  - (b) on the death of any other person if the employer accepts, having regard to relevant factors such as those set out in subsection (3), that the employee has suffered a bereavement as a result of the death.
- (3) For the purposes of subsection (2)(b), relevant factors include—
  - (a) the closeness of the association between the employee and the deceased person:
  - (b) whether the employee has to take significant responsibility for all or any of the arrangements for the ceremonies relating to the death:
  - (c) any cultural responsibilities of the employee in relation to the death.

## **70 Duration of bereavement leave**

- (1) An employer must allow an employee to take—
  - (a) 3 days' bereavement leave for each type of bereavement described in section 69(2)(a); and
  - (b) 1 day's bereavement leave for a bereavement described in section 69(2)(b).
- (2) If an employee suffers more than 1 bereavement at the same time, he or she may take the amount of bereavement leave specified in subsection (1) in respect of each bereavement.

[6] Mr Kaihau came to live with Mr Minhinnick's family 5 years before Mr Minhinnick was born and was raised as a son and brother from that time. In his adult years Mr Kaihau remained a beloved family member, caring for his elders, living in the family home and having his name placed on their fathers' headstone, along with those of his brothers and sisters including Mr Minhinnick.

[7] Mr Kaihau passed away in early January 2016. Mr Minhinnick applied for three days bereavement leave. This application was declined by NZ Steel after receiving legal advice that Mr Kaihau was not, in law, Mr Minhinnick's brother.

[8] NZ Steel determined that Mr Kaihau did not meet the legal definition of “brother” for the purposes of section 69(2)(a) of the Holidays Act, or under clause 34.2 of the collective agreement and Mr Minhinnick was therefore, not entitled to three days bereavement leave.

[9] Mr Minhinnick took three days off work following Mr Kaihau’s death. NZ Steel treated one of those days as paid bereavement leave, and recorded the other two days as paid annual leave.

### **Issues**

[10] The issue for determination is whether one or more conditions of Mr Minhinnick’s employment has been affected to his disadvantage by NZ Steel’s refusal to accept Mr Minhinnick’s whangai brother as an immediate relative (in accordance with the collective agreement) and granting him only one day’s bereavement leave when he may have been entitled to three.

[11] Determining that issue will require a determination as to whether a whangai relationship qualifies as being an “*immediate relative*” as provided for in the collective agreement.

### **Whangai relationships**

[12] The collective agreement has defined “*immediate relative*” as including a “brother” or “sister”. The collective agreement incorporates the provisions of the Holiday Act. Neither the collective agreement nor the Holidays Act defines “brother” or “sister”. Mr Minhinnick is asking the Authority to include his whangai brother into the definition of immediate relative in the collective agreement.

[13] In *Sainsbury v Graham* the High Court set out the following description of the whangai adoption:<sup>1</sup>

For centuries Maori have had a practice known as whangai or atawhai, a recognised practice whereby a child is given to family members to raise. Although for the purposes of adoption law, whangai placements are not legally recognised, an informal system of “customary adoption” which corresponds with the traditional concept of whangai placements is still practised by Maori.

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<sup>1</sup> *Sainsbury v Graham*, High Court, Wanganui CIV-2008-483-68, 28 November 2008, Wild, J at [19].

[14] An important feature of a whangai is the blood connection with the adopting parents. In this case Mr Kaihau was the son of Mr Minhinnicks' uncle, his mothers' brother.

[15] NZ Steel has referred me to a number of authorities to support its contention that a whangai relationship falls outside the definition of "*immediate relative*" in the collective agreement. In particular NZ Steel has referred me to the Adoption Act 1955 (the Adoption Act) at section 19 which states "*no adoption in accordance with Maori custom shall be of any force or effect.*" The New Zealand Courts have given this provision a strict interpretation in determining whether a whangai has any legal standing in relation to his or her customary parent's estate under the Family Protection Act 1955 (FPA).

[16] The Court of Appeal in *Keelan v Peach* confirmed that section 19 creates an impregnable and absolute barrier to the argument that a whangai can be a "*child of the deceased*" for the purposes of a claim under the FPA.<sup>2</sup>

[17] In *Keelan* the Court of Appeal rejected submissions that the natural and ordinary meaning of "*children of the deceased*" must include whangai. The Court held that "*children of the deceased*" meant biological children and children adopted under the Adoption Act.<sup>3</sup>

[18] Neither the collective agreement nor the Holidays Act reference section 19 of the Adoption Act. This is in contrast to section 115 of the Te Ture Whenua Maori Act 1993 (TTWMA) which provides that courts (acting under the jurisdiction of the TTWMA) have the power to recognise a person as whangai of a deceased landowner, and to order that a whangai shall be entitled to succeed to the land to the same extent as a child of the deceased. The TTWMA defines whangai as "*a person adopted in accordance with tikanga Maori.*"<sup>4</sup>

[19] NZ Steel submitted that the law may recognise whangai adoptions in some circumstances, but in each case this recognition must be set out in the statute as an exception to section 19 of the Adoption Act. It was argued that in the absence of

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<sup>2</sup> *Keelan v Peach* [2003] 1 NZLR 589 (CA) at [32], following Thomas J in *Whittaker v Maori Land Court* [1997] NZFLR 707 (CA) at 710.

<sup>3</sup> *Ibid* at [28].

<sup>4</sup> Te Ture Whenua Maori Act 1993, section 4.

such a provision in the Holidays Act NZ Steel is not required to recognise Mr Minhinnicks whangai relationship with Mr Kaihua.

### **Interpretation of the collective agreement**

[20] NZ Steel has urged the Authority to take a technically legal approach to the interpretation of “*brother*” as it is used in the collective agreement and has referred me to a number of cases and commentary on the inclusion or otherwise of a whangai child.

[21] NZ Steel’s arguments are based on its interpretation of the Holidays Act which NZ Steel submits should also apply to the interpretation of the words contained in the collective agreement.

[22] In its decision of *Vector Gas Limited v Bay of Plenty Energy Limited*<sup>5</sup> (*Vector Gas*) the Supreme Court considered the principles to be applied to contractual interpretation.

[23] Since that decision the Court of Appeal in *Air New Zealand v New Zealand Airline Pilots Association Incorporated*<sup>6</sup> has considered the principles to be applied to the interpretation of collective agreements. In its decision the Court of Appeal referred to decisions of the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Limited (Zurich Australian Insurance)* and the United Kingdom Supreme Court in *Arnold v Britton* in which both courts emphasised that central to the interpretation task is the natural and ordinary meaning of the words in question.<sup>7</sup>

[24] The Court of Appeal referred to the speech of Lord Neuberger in *Arnold v Britton* who stated:<sup>8</sup>

The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is obviously to be gleaned from the language of the provision.

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<sup>5</sup> [2010] NZSC 5, [2010] 2 NZLR 444.

<sup>6</sup> [2016] NZCA 131.

<sup>7</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.

<sup>8</sup> *Supra* n 6 at [40].

[25] In *Vector Gas* the Supreme Court held that extrinsic evidence is admissible where there is a mistake, ambiguity, special meaning, the ordinary meaning makes no commercial sense or there is an estoppel by convention.

[26] In relation to context, the Court of Appeal referred to the following statement from *Zurich Australian Insurance*:<sup>9</sup>

While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[27] The Holidays Act is a minimum standard which provides for a limited number of specific relationships on the death of which an employee qualifies for 3 days bereavement leave. Included in the list is “*brother*” which is not defined.

[28] In contrast the collective agreement provides up to five days, rather than the three days provided for in the Holidays Act, with respect to the death of an employee’s spouse or child or spouse’s child. The collective agreement also provides for bereavement leave of up to three days on the death of an “*immediate relative*”. The term “*immediate relative*” is not used in the Holidays Act. The collective agreement defines “*immediate relative*” by listing specific relationships which includes “*brother*” but does not define “*brother*”.

[29] In addition to its collective agreement NZ Steel operates a policy on leave entitlements. Clause 3.4 of the policy further extends the relationships that qualify for bereavement leave from the definition contained at clause 32.4 of the collective agreement to include “*in-laws*” generally rather than just the parents of a spouse. Consistently with the wording contained in the policy a spreadsheet provided to the Authority which details bereavement leave taken by NZ Steel employees since 2013 shows at least two employees have been granted more than one day’s bereavement leave on the bereavement of a sister in-law and a brother in-law.

[30] Further the information contained in the spreadsheet demonstrates an inclination by NZ Steel to exercise its discretion to grant more than one day’s

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<sup>9</sup> Above n 6 at [34].

bereavement leave to relatives not included in the list at clause 34.2 or in the Leave Entitlement policy. By way of example employees have been granted bereavement leave for step parents and a niece. Step parents, unlike whangai relationships, are not related by blood but are, in most cases, just as important as a biological parent to those raised within a step parent relationship.

[31] Through the combination of the clause 32.4 in the collective agreement and the relationships described in its policy at clause 3.4 NZ Steel provides more than the minimum entitlements for bereavement leave than those provided for in the Holidays Act. For that reason, I have approached the interpretation of clause 32.4 by considering the natural and ordinary meaning of the words while taking into account the wider context of how the words in the collective agreement have been interpreted by NZ Steel in the past.

[32] In considering the natural and ordinary meaning of the words used in the collective agreement I have been assisted by the Oxford Reference dictionary which defines “*relative*” as being “*a person connected by blood or marriage*”.<sup>10</sup> Mr Kaihau was connected to Mr Minhinnick by blood. Mr Kaihau’s biological father was the biological brother of Mr Minhinnick’s mother.

[33] The collective agreement defines “*immediate relative*” with a list of relationships including “*brother*”. Mr Kaihau was, in eurocentric terms, Mr Minhinnick’s cousin, but under Maori customary practices Mr Minhinnick considered Mr Kaihau to be his “*brother*”.

[34] The Oxford Reference dictionary defines “*brother*” as “*a man or boy in relation to other sons and daughters of his parents*”.<sup>11</sup> I have no doubt that Mr Minhinnick parent’s considered Mr Kaihau to be their son. This is evidenced by the inclusion of Mr Kaihau’s name on Mr Minhinnick’s fathers’ headstone.

[35] In coming to my conclusions I am mindful that in *Keelan* the Court of Appeal rejected submissions that the natural and ordinary meaning of “*children of the deceased*” must include whangai.<sup>12</sup> I have distinguished *Keelan* on the basis that the

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<sup>10</sup> Oxford Dictionary of English (3 ed.), Oxford University Press, 2010.

<sup>11</sup> Ibid.

<sup>12</sup> Above n 6.

Court of Appeal was being asked to interpret a statutory provision which required a consideration of previous statutory provisions and parliamentary intentions.

[36] I am satisfied NZ Steel, itself, has interpreted the provisions of clause 32.4 of the collective agreement in a way that has encompassed a wide interpretation of “*immediate relative*”. This is consistent with an approach to bereavement leave that meets the objects of the Holidays Act which is to provide employees with a minimum entitlement to paid leave in the event of the death of certain persons.<sup>13</sup>

[37] Taking into account the context in which the collective agreement has been applied in the past and identifying through the eyes of a reasonable reader what the parties meant by the words used in the collective agreement, I am satisfied that the word “*brother*” should be interpreted in a way that recognises the relationship of a whangai brother. It follows that Mr Minhinnick was entitled to three days bereavement leave on the death of his brother in January 2016.

[38] The exercise by NZ Steel of its discretion to refuse Mr Minhinnick’s application for three days bereavement leave in January 2016 was not the action a fair and reasonable employer could take in all the circumstances.

[39] One or more conditions of Mr Minhinnick’s employment was affected to his disadvantage in January 2016 when he was required to take two days annual leave for the bereavement of his whangai brother. The disadvantage was caused by an unjustified action on the part of NZ Steel. Mr Minhinnick has established a personal grievance and is entitled to a consideration of remedies.

## **Remedies**

[40] Mr Minhinnick has asked the Authority to resolve his personal grievance by:

- a) Declaring that Mr Kaihau was an “*immediate relative*” for the purposes of clause 34.2 of the collective agreement and was therefore entitled to three days bereavement leave upon Mr Kaihau’s death.
  
- b) Declaring that any Maori employee of NZ Steel who has an “*immediate relative*” by virtue of a whangai adoption is entitled to the same

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<sup>13</sup> Holidays Act 2003, section 62.

bereavement leave as any pakeha employee of NZ Steel who suffers the loss of an “*immediate relative*”.

- c) Recommending under section 123(1)(ca) of the Employment Relations Act 2000 (the Act) that NZ Steel provide training by a specified date to all decision makers in order to ensure that tikanga Maori and values are respected and applied when making decisions regarding matters such as entitlements to bereavement leave, so as to preserve employees dignity and ensure fair treatment.
- d) Ordering NZ Steel to pay Mr Minhinnick three days bereavement leave and that any other leave deducted from his entitlements for that period be reinstated; and
- e) Ordering NZ Steel to pay Mr Minhinnick compensation of \$20,000 in acknowledgement of the harm he has suffered directly and in recognition that he has also taken on the suffering he has seen this unjustifiable action cause to his whanau and workmates.

[41] I have found Mr Kaihau was an immediate relative of Mr Minhinnick’s for the purposes of clause 34.2 of the collective agreement.

[42] I am unable to make the declaration sought by Mr Minhinnick with respect to other employees of NZ Steel. Each application for bereavement leave will be decided on its own merits and will require an assessment of the relationship and the child’s whakapapa.

[43] I have not identified any workplace conduct or practice for which training needs to be provided and have declined to make any recommendations under section 123(1)(ca) of the Act.

[44] Mr Minhinnick’s leave records should record that he took three days bereavement leave in January 2016 and the annual leave used at that time is to be reinstated.

### ***Compensation***

[45] Mr Minhinnick has given evidence of the injury to his feelings as a result of NZ Steel's actions in not recognising his relationship with Mr Kaihau for the purposes of bereavement leave.

[46] I am satisfied NZ Steel did not intentionally set out to disrespect Mr Minhinnick. NZ Steel had sought legal advice about its obligations under clause 32.4 and having received that legal advice it was not unreasonable to rely on it.

[47] Mr Minhinnick appears to be claiming compensation for alleged hurt and distress suffered by other members of his whanau and his workmates. Consequences of unjustified actions must relate to the employee personally.<sup>14</sup>

[48] Taking all of the evidence into account I consider an appropriate award to recognise Mr Minhinnick's distress in this matter is \$1,000. New Zealand Steel Limited is ordered to pay to Mr Minhinnick the sum of \$1,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

### **Costs**

[49] Costs are reserved. This case has essentially been about the interpretation and application of the collective agreement. I encourage the parties to resolve the matter of costs between them. If they are unable to do so Mr Minhinnick shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. NZ Steel shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[50] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>14</sup> *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159 (CA) at 169.