IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 354
3027972

	BETWEEN	JIM MOBBS Applicant
	AND	KIWIRAIL LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Peter Cranney for Applicant Michelle Cheeseman for Respondent
Investigation Meeting:	10 June 2019 by telephone
Additional Information Received:	12 June 2019
Submissions Received:	26 October 2018 from Applicant 9 November 2018 from Respondent
Determination:	17 June 2019

DETERMINATION OF THE AUTHORITY

A. KiwiRail is ordered to comply with clause 37.2 of the 2016-2018 collective agreement.

B. Costs are reserved.

Employment relationship problem

[1] Mr Mobbs is a member of the Maritime Union of New Zealand Incorporated (the Union). The terms and conditions of his employment are set out in a collective agreement between KiwiRail Limited and the Union. Mr Mobbs claims

KiwiRail has breached the terms of the collective agreement and seeks a compliance order. KiwiRail denies the claims.

Issue

[2] In order to resolve Mr Mobbs' employment relationship problem I must determine whether he is entitled to retirement leave as set out in the collective agreement at clause 37.. If the answer to that issue is positive then I must determine whether a compliance order should be issued.

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

[4] In December 2018 the Authority was advised that the parties were attempting to resolve matters between themselves and so the matter was adjourned to allow those discussions to take place. The matter has not been able to be resolved and the parties have now requested the Authority determine the matter.

[5] By consent of the parties this matter was to have been dealt with on the papers before the Authority. However, during my assessment of Mr Mobb's claim I found it necessary to seek further evidence. For that reason a short investigation meeting was convened by telephone to allow me to interview witnesses for both parties.

Relevant terms of the collective agreement

[6] The current collective agreement is dated 2016 to 2018. Until 2011 KiwiRail operated separate ship specific collective agreements.

[7] Mr Mobbs was employed on the Arahura and until 2011 that collective agreement provided for retirement leave in the following terms:

> 21.3 On reaching retirement age and retiring, or retiring on medical grounds and leaving their employment, or if redundant, employees, other than employees engaged after 21 July 1994, will be entitled to retirement leave on the following scale:
>
> | | | |
> |---|---|---|
> | Under 10 years' service | NIL | |
> | 10 years and under | 15 | 42 days |
> | 15 | 20 | 56 days |

20	40	91 to 183 days

This clause also applies to employees engaged after 21 July 1994 via an industry transfer agreement with recognised service before that date.

[my emphasis]

[8] A second ship specific collective agreement dated 2008 to 2011 covering the Aratere and Kaitaki contained a similar provision dealing with retirement leave which states:

23.1 This clause applies to employees engaged before 21 July 1994 and to employees employed via an industry transfer agreement with recognised service before that date. An employee may apply to retire for other than medical reasons under Clause 14.8 and the employer may agree to treat any such application as a retirement where it is satisfied that it meets the criteria set down from time to time.

23.2 Where retirement is approved, or if redundant, leave shall be granted on the following scale:

Under 10 years' service	NIL	
10 years and under	15	42 days
15	20	56 days
20	40	91 to 183 days

[my emphasis]

The amalgamation of the two collective agreements

[9] Negotiations to merge both of the ship specific collective agreements into one company wide collective agreement started in 2010. The evidence from both parties was that the intention was to have a combined agreement and that the terms would be the same as those set out in the two ship specific collective agreements.

[10] A working party comprising union and management representatives was established to develop the structure and contents for the merged collective agreement although the completed document was drafted by KiwiRail.

[11] I have been provided with two documents recording the issues discussed during the working party meetings. Both documents set out the wording for the proposed retirement leave clause in identical terms:

On reaching retirement age and retiring, or retiring on This clause also applies to employees engaged before 21 July 1994 and to employees employed via an industry transfer agreement with recognized service before that date. An

> employee may apply to retire for other than medical reasons under clause X, and the employer may agree to treat any such application as a retirement where it is satisfied that it meets the criteria set down from time to time. [my emphasis]

[12] The wording used in the working group documents reflect the words used in the Aratere and Kaitaki collective agreement except the word "…also…" has been added and additional wording has been included at the beginning of the sentence which reflects some but not all of the wording used in the Arahura collective agreement.

[13] The words adopted in the 2011 merged collective agreement was altered from the words used in the working group papers by omitting the words "On reaching retirement age and retiring, or retiring on…". The clause states:

> 37.1 Retirement from the company, from 1 February 1999 will be based on the employee's ability to satisfactorily perform all of the duties of the position, taking account of such factors as health and actual job performance; or at a mutually agreed date.
>
> 37.2 This clause also applies to employees engaged before 21 July 1994 and to employees employed via an industry transfer agreement with recognised service before that date. An employee may apply to retire for other than medical reasons under clause 37.6, and the employer may agree to treat any such application as a retirement where it is satisfied that it meets the criteria set down from time to time.
>
> 37.3 Where retirement is approved, or if redundant, leave shall be granted on the following scale:
>
> | | |
> |---|---|
> | Under 10 years' service | NIL |
> | 10 but under 15 years | 42 days |
> | 15 but under 20 years | 56 days |
> | 10 but under 40 years | 91 to 183 days |
>
> 37.4 For retirement leave purposes a day's pay shall be annual salary under clause 11 divided by 365.
>
> 37.5 For the purposes of this clause, service shall mean current continuous service with the Interislander since 1 December 1988.

[14] This wording has been carried through successive agreements including the applicable 2016-2018 collective agreement.

Interpretation of the collective agreement

[15] The starting point when interpreting a clause in a collective agreement is to consider the natural and ordinary meaning of the language used by the parties. Even

if the words are plain and unambiguous, this does not preclude a consideration of the surrounding circumstances[1]. This acts as a cross-check as to whether some other or modified meaning was intended.

[16] Both of the ship specific collective agreements (2008-2011) are clear on the natural and ordinary meaning of the words that the retirement leave provisions do not apply to employees employed after 21 July 1994 unless they have an industry transfer agreement that recognises service before that date.

[17] Mr Mobbs commenced his current period of employment with KiwiRail on 16 April 1998 and does not have an industry transfer agreement. Under the 2009 ship specific collective agreement Mr Mobbs was not entitled to retirement leave.

[18] KiwiRail says that position did not change with the implementation of the company wide collective agreement. It submits Mr Mobbs is not entitled to the leave set out in clause 37.3 because he was employed after 21 July 1994.

[19] Mr Cranney submits that since 2011 clause 37.2 has extended the entitlement to retirement leave to include employees employed after 21 July 1994 because the clause does not exclude them but it does "also apply" to those employed before 21 July 1994.

[20] In its submissions KiwiRail indicated the inclusion of the word "…also…" in clause 37.2 was a mistake. KiwiRail declined an opportunity to make further submissions on this point.

[21] Through clause 4.3 of the collective agreement the parties have recognised the complexities involved in drafting the agreement. The parties have recorded their acknowledgment that errors or omissions may have altered the parties actual agreement. In those circumstances the parties have agreed to revert back to the original document in good faith in an effort to agree on a solution.

[22] I am not satisfied the inclusion of the word "also" is such an error. The word was included in all of the working group notes and has been consistently included in the collective agreements since 2011.

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[1] *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789; *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2015] NZEmpC 169

[23] There is nothing ambiguous in the wording used in the document. Mr King told me he understood the retirement leave provisions were being made available to everyone. This would explain the addition of the word "..also.." being included in the proposed wording at an early stage in the negotiations.

Conclusion

[24] On a plain meaning of the words used in clause 37 I find Mr Mobbs is entitled to be paid leave if he retires from KiwiRail.

[25] KiwiRail Limited is ordered to comply with clause 37.2 of the collective agreement.

Costs

[26] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Mobbs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. KiwiRail 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.

[27] 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 taking into account that this determination has been made on the papers before the Authority.

Vicki Campbell
Member of the Employment Relations Authority