IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 47
3013455

	BETWEEN	RAY MURDOCH Applicant
	AND	HOLCIM (NEW ZEALAND) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Peter Elder, Advocate for the Respondent
Investigation Meeting:	On the papers
Written submissions:	3 October and 14 November 2017 from the Applicant and 26 October 2017 from the Respondent
Further information:	19 January 2018 from the Applicant and 24 January 2018 from the Respondent
Determination:	12 February 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ray Murdoch's employment by Holcim New Zealand Limited ended on the grounds of redundancy on 2 August 2016. His terms and conditions of employment were governed by a collective agreement between the Maritime Union of New Zealand and Holcim. A schedule in that agreement recorded Mr Murdoch's maritime industry service as having begun on 22 December 1982 and his start date with Holcim as being 23 February 1998. Since 1998 he had served as a crew member of Milburn Carrier II, one of two ships Holcim used for its operations.

[2] By early 2016 Holcim confirmed plans to change to a one ship operation. As a result some crew positions were surplus to its business needs. As required by the terms of its collective agreement Holcim first called for volunteers who would accept

severance of their employment due to the redundancy of those positions. Mr Murdoch volunteered.

[3] In April 2016 Holcim confirmed his employment would end on the grounds of redundancy. This triggered an entitlement to a redundancy compensation payment provided in the collective agreement.

[4] Mr Murdoch's application to the Authority disputed how Holcim had interpreted and applied the terms of the collective agreement about what he should be paid at the end of his employment. He said those payments should have included as amount paid as retirement leave, as well as the redundancy compensation he received. He also said the annual salary figure used to calculate the redundancy compensation due to him should have included the value of service increments, made annually on that salary, and the value of Holcim's contribution to his superannuation fund. The basE salary rate Holcim used to make its calculation had not included those amounts. If Mr Murdoch's interpretation was correct, he would be entitled to a payment of arrears and interest on that amount.

[5] Holcim did not accept Mr Murdoch's interpretation was correct. It said it had applied all the relevant terms correctly.

[6] Both parties agreed the dispute should be determined 'on the papers'. Those papers comprised written submissions they lodged as well as Mr Murdoch's statement of problem, Holcim's statement in reply and copies of relevant background documents they provided. In response to some written questions from the Authority they also provided further information about how service and superannuation provisions had operated.

[7] As the union and employment parties to a collective agreement must be notified of any interpretation dispute about that agreement, the Authority had the statement of problem and statement in reply sent to MUNZ.[1] The timetable directions made for Mr Murdoch and Holcim to lodge written submissions also included an option for MUNZ to make submissions. It did not exercise that option.

[1] Employment Relations Act 2000, s 129(2).

Issues

[8] The issues for determination were:

(i) Was the end of Mr Murdoch's employment, on electing an option for redundancy, also retirement from his employment?

(ii) If so, was he entitled to be paid retirement leave as well as redundancy compensation under the applicable collective agreement?

(iii) Should the salary amount on which Mr Murdoch's redundancy compensation was calculated have included the value of the service increments and the employer's contribution to superannuation he received while employed?

(iv) Depending on the interpretation given to the relevant terms of the collective agreement, are any orders required for Holcim to pay arrears to Mr Murdoch and, if so, should any interest be awarded on those arrears?

(v) Should either party contribute to the costs of representation of the other party.

Terms of the collective agreement

[9] The following excerpts from clauses of the collective agreement were relevant:

> **4. Definitions**
>
> …
>
> **Aggregate wage (or salary)** shall include all remuneration including overtime, unless otherwise specified in this agreement.
>
> **9. Remuneration**
>
> Employees shall be paid at the rate of annual salary specified in the table of salaries contained herein …
>
> Except where otherwise specified in this agreement, the salaries contained in this clause shall be deemed to include payment for all allowances, **subsidies**, overtime and conditions of work payments; and shall cover all remuneration payable for work carried out under this agreement.
>
> … *[annual salary rates for each role in crew then listed, including]*
>
> … Integrated Ratings $88,997 1/5/2015 to 30/4/2016
>
> …
>
> **11 Allowances and increments**

In addition to the salaries prescribed in clause 9 of this agreement, the following allowances are to be added, where applicable, to that salary:

(a) Service increment – an employee who has had continuous unbroken service with the same employer, shall receive service increments as follows:

… Integrated Ratings shall receive an increment of $730 per annum ($745 at 1/5/2014, $765 at 1/5/2015) commencing at the start of the second year increasing annually as per the increases above to the commencement of the fourteenth year of service.

…

25. Retirement Leave

A seafarer who has completed 15 years continuous unbroken service with the employer, and who resigns to take up retirement, shall be entitled to benefits according to the following scale; either as leave or as a lump sum equivalent to the amount of the salary for the leave period.

Qualifying years of service	Entitlement
Over 15 years and under 16 years	30 consecutive days
… *[intervening years omitted]* …	
Over 34 years and under 35 years	171 consecutive days
Over 35 years of service	180 consecutive days

Note 1. "Retirement" shall normally mean permanently ceasing all full time employment. The company reserves the right to consider applications from individuals who may wish to "retire" in some other manner.

Note 2. The parties to this agreement agree that "service" shall have the same meaning as that used in sub clause 38(e) for the calculation of redundancy compensation.

26. Superannuation

(a) The agreement superannuation fund will be the "Seafarers Retirement Fund".

(b) The employer acknowledges that the Union party to this agreement requires its members to join and contribute to the "Seafarers Retirement Fund".

(c) The employer agrees to subsidise the contributions of all members of the Maritime Union of New Zealand who are covered by this agreement. The employer's contribution is 12% and the employee's contribution is 6%.

…

38. Redundancy

(a) Objectives

The objectives of this clause are as follows:

(i) To provide a procedure for the reduction of staff numbers where a redundancy situation has been identified by the employer.
(ii) To ensure that, where possible, and in accordance with procedures and criteria in sub clauses (b) and (c), staff reductions are achieved by voluntary severance.
(iii) To provide an agreed formula for the compensation of any employee who accepts voluntary severance and who is declared redundant.

(b) Procedure

(i) The employer will advise the employees and their authorised representative of any impending redundancy situation.
(ii) "Redundancy situation" means a situation where a worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is or will become superfluous to the needs of the employer; but does not include a situation solely involving the completion of a fixed term contract or temporary relief employment.
(iii) At the time of giving notice to the employees and their authorised representative in (b)(i) above the employer shall provide in writing full details of the redundancy situation if has identified (including the positions involved).
(iv) The employer and the authorised representative shall forthwith enter into discussions relating to the redundancy situation identified.
(v) The employer shall call for volunteers for severance from the identified categories/positions.
(vi) Where there are more voluntary severance applications than required, acceptance shall be on a first on first off basis subject to the employer's need to retain necessary skills, knowledge and experience, and to take into consideration any extenuating circumstances that may be agreed between the employer and the authorised representative as may be appropriate.
(vii) …
(viii) If insufficient suitable volunteers for redundancy are available in accordance with the preceding paragraphs the employer may declare employees redundant on the basis of last on first off all things being equal principle (based on total continuous service with the employer).
(ix) Compensatory payments shall be made to affected seafarers as per sub clause (f) herein.

…

(e) Redundancy Compensation Payment

(i) Compensation shall be paid on the basis of three weeks for each year of continuous unbroken service, based on the annual salary rate of the employee. Part years of service are to be calculated on a pro-rata basis.
(ii) There shall be a minimum payment of twelve weeks all inclusive.
(iii) The maximum all inclusive payment shall be 60 weeks.

For the purposes of this clause "continuous unbroken service" shall have the following meaning.

(a) Employees employed by the company as at 1 May 1992

> For the period of employment up to 1 May 1992 continuous unbroken service shall mean continuous availability in the industry in New Zealand vessels subject to the following allowable exceptions
>
> [1] …
>
> [2] …
>
> [3] …
>
> [4] …
>
> [5] For the period of employment from 1 May 1992 onwards, continuous unbroken service shall have the same meaning as that applying to employees commencing employment with the employer after that date.
>
> [6] The names and details of employees who have qualifying continuous unbroken service, as at the date of this agreement coming into force shall have their names and service details recorded in a separate Schedule (a) attached to this agreement.

[10] Mr Murdoch was one of 15 employees listed in Schedule A to the agreement as having continuous unbroken service from before 1992. The effect of the agreement's definition of such service was that, although he was not actually employed by Holcim until 1998, he was deemed to have service with the company from 1982 because he had a record of continuous service with other employers in the maritime industry from that earlier date.

[11] The period from 1982 to 2016 amounted to 34 years and 29 days. Under clause 38(e)(iii) Mr Murdoch's redundancy compensation for that period was 'capped' at 60 weeks.

Interpretation of the collective agreement

[12] A collective agreement is interpreted by applying contractual principles.[2] Those principles aim to ascertain what the document would convey to a reasonable person having all the background knowledge reasonably available to the parties in the situation they were in at the time of making their agreement. This objective meaning is taken to be what the parties intended.

[2] *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135 at [38].

[13] The ordinary and natural meaning of the language at issue, construed in the context of the agreement as a whole, is a powerful, albeit not conclusive, indicator of what the parties meant. Because parties to agreements sometimes use words with specialised meanings in their industry or with a particular meaning simply to them, wider context may point to some interpretation other than the most obvious one.

[14] If a particular interpretation produces a commercially absurd result, an agreement may need to be read in a different way than the language used in it might suggest. However, an agreement should not be interpreted as meaning something different from what it seems to say simply because, if interpreted in the obvious way, the agreement would be unduly favourable to one party.

[15] Only the most obvious and extreme cases of a commercially absurd result would justify an interpretation of contractual language, viewed in the context of the whole agreement, different from its ordinary and natural meaning.[3]

Was the end of employment by redundancy also retirement?

[16] Mr Murdoch submitted that the Retirement clause was a form of long service leave and a benefit he had earned through the more than 34 years of service recorded in Schedule A of the agreement. He pointed to the definition of retirement given in clause 25 as fitting his circumstances because, on the termination of his employment for redundancy, he had also permanently ceased all full time employment. On his argument, as well as the 60 weeks' salary he was due as redundancy compensation, Mr Murdoch should have received a further 171 days of salary under the agreement's formula for retirement leave.

[17] Holcim submitted the collective agreement provisions relating to redundancy and retirement were "completely distinguishable". It said Mr Murdoch had elected to "take redundancy" so did not 'retire' from Holcim's employment.

[18] An analysis of the ordinary and natural meaning of the language used in the relevant clauses supported Holcim's submission. Both clauses provide for payments to be made at the end of the employment relationship but the crucial distinction

[3] *Firm PI 1 Limited v Zurich Australian Insurance Limited t/a Zurich New Zealand* [2014] NZSC 147 at [60] – [61], [63] – [64], [84], [89] and [93].

between the two clauses concerned which party had taken the initiative to bring that relationship to an end.

[19] The provisions of the retirement clause were triggered where a seafarer "resigns to take up retirement". The resignation is an action taken at the choice or 'say so' of the seafarer. It occurs whether or not the employer agrees or approves of the seafarer's decision to end the relationship.

[20] The provisions of the redundancy clause are triggered by the decision of the employer. As the wording at 38(a)(i) states, the clause applies where a redundancy situation has been identified by the employer. A redundancy situation is expressly defined as a situation where a worker's employment is terminated by the employer. Provided a position held by a worker has become superfluous to the employer's needs, the termination is an action taken by choice of the employer. It occurs whether or not the worker agrees with the end of the employment.

[21] It was not necessary, on that analysis, to consider whether or not Mr Murdoch's circumstances also met the agreement's definition of retirement (that is as permanently ceasing all full time employment). It was irrelevant because the retirement leave clause only applied to a seafarer who initiated the end of the relationship by taking the active step of resigning.

[22] This distinction was not negated by the fact Mr Murdoch volunteered for selection for redundancy. Holcim identified the number of positions that were no longer needed for its business, as crew for one ship instead of two. It then followed the steps set by the redundancy clause to select which seafarers would have their employment ended on that basis. Those steps required Holcim to call for volunteers for severance from the identified positions.

[23] If there were not enough suitable volunteers, the agreement entitled Holcim to declare employees redundant on the basis of what the relevant clause described as the "last on first off all things being equal principle". In that counterfactual scenario of 'compulsory' redundancy Mr Murdoch's relative length of service was such that other workers would have been selected ahead of him to achieve the necessary reduction of positions. However in the actual situation, as he described it in his written submissions, "[i]f I had not volunteered there would have been a forced redundancy of a colleague who had less service then myself". So, as Mr Murdoch explained in an

email to a senior Holcim manager, he volunteered for redundancy when given the option in March 2016 because "this appeared to be an opportune moment for me to exit the industry with a bit extra and to make room for someone younger". Mr Murdoch was aged 70 at the time he volunteered.

[24] Mr Murdoch's election to volunteer for selection did not change the nature of how his employment then ended. It was Holcim who initiated the end of the employment relationship, not Mr Murdoch. In those circumstances only the provisions of the redundancy clause applied, not the clause on retirement leave.

Are service increments and superannuation payments part of salary?

[25] Mr Murdoch's length of service meant he was entitled to be paid the maximum "all inclusive payment" of redundancy compensation required under clause 38(e) of the agreement. This entitlement comprised 60 weeks' pay "based on the annual salary rate of the employee". At issue was whether Holcim had applied a too narrow interpretation of what the phrase 'annual salary rate' meant. It used only the salary rate listed in clause 9. However, in Mr Murdoch's submission, the service increments and the subsidy Holcim paid to his superannuation fund were part of his total annual salary and that total should have been used in calculating the compensation due to him.

[26] Holcim submitted that the phrase 'annual salary rate' used in clause 38(e) had the same ordinary meaning as the phrase 'rate of annual salary' used in the clause 9 remuneration clause. On its argument only the annual salary amount stated in clause 9 need be used in calculating redundancy compensation. That was an overly narrow interpretation given the context and all the wording of clauses 9, 11 and 38(e).

[27] Clause 38(e) refers to the annual salary rate "of the employee". The use of this phrase contemplates some assessment of what amount each individual worker actually received, rather than assuming a rate identified solely by the crew position held.

[28] Clause 9 includes a statement that the salaries contained in that clause were deemed to include payment for all allowances and subsidies and cover all remuneration payable. However that statement starts with the proviso: "[e]xcept as otherwise specified in this agreement". The provision for service increments in clause

11 was one such specified exception. Those service increments were one of the allowances stated in the opening sentence of clause 11 to be "in addition to the salaries prescribed in clause 9" and "are to be added, where applicable, to that salary".

[29] The phrase "where applicable" refers to whether the criteria for those allowances, including the service increment, entitle each particular worker to such payments.

[30] The phrase "are to be added … to that salary" indicates the salary paid is increased by the required amount. The result in relation to the service increment, paid for each of the second and subsequent years of service up to a total of 14 years, is that the total salary paid to the worker increases by the amount of that increment each year. Using the example of the rates that applied from 1 May 2015, an integrated rating with continuous unbroken service during the year, had to be paid the $88,997 salary rate specified in clause 9 and the sum of $765 was "to be added … to that salary". Accordingly, in the subsequent year, the rating's salary would be $89,762. And, provided the rating then gave further continuous unbroken service in the following year, that salary amount would increase by the designated amount of the service increment for that following year. And so on, year after year, up to the 14 year maximum. In Mr Murdoch's case he had reached that maximum of annual service increments to be added to his salary.

[31] On the basis of this interpretation the annual salary rate used in the calculation of Mr Murdoch's redundancy compensation should have included the value of his service increments, rather than only the salary rate listed in clause 9.

[32] The same argument followed, partly but not completely, for the amounts Holcim paid to Mr Murdoch's superannuation fund as its 12 per cent contribution. In clause 26 of the agreement Holcim agreed to "subsidise" the contributions of union members covered by the agreement. This subsidy, being specified separately in the agreement, was subject to the exception stated in clause 9 so the amount of subsidy paid was not deemed to be *included* as part of the payments covered by the salary rate stated in that clause. It was extra. The question was whether the amount paid as that 12 per cent contribution then formed part of the "annual salary rate of the employee" referred to in the Redundancy Compensation Payment sub clause 38(e)?

[33] The wording of the superannuation clause did not help with the answer to that question. It said the employer's agreed contribution was to be "12%" but it did not say what comprised the 100 per cent of the amount on which that portion was to be calculated. As the wording of clause 9 made clear, the superannuation subsidy was not part of the salary rate referred to there as covering "all remuneration payable for work carried out under this agreement". And the definition of "aggregate wage (and salary)" given at clause 4 did not assist because that phrase is not used in any of the relevant clauses or, it appears from my reading of the collective agreement, anywhere else in it.

[34] No real assistance is given by considering whether the superannuation contribution was "remuneration", that is, in the ordinary sense of that word, part of the payment for services rendered or work done. It clearly was. In return for Mr Murdoch's work, Holcim agreed to match his personal superannuation contributions of up to 6 per cent by a factor of 2:1. Its 12 per cent subsidy was part of what he was paid for his work. However that did not answer the question of whether such payments were therefore part of his "annual salary rate" for the purposes of sub clause 38(e)(i).

[35] No guidance can be taken from Holcim's inherently subjective submission that it had not intended its superannuation contribution to be included as part of the annual salary rate referred to in clause 38(e)(i). Holcim's submissions said it had consulted union representatives through the redundancy process. As part of that consultation Holcim provided the representatives with a proposed schedule of payments to be made to redundant workers, including Mr Murdoch. Holcim said the union had not disputed its interpretation, method or the levels of payment set out in that schedule. If that were evidence of an apparent common intention of the parties, it nevertheless had to be subject to some objective assessment of whether this was the interpretation that a sufficiently informed and reasonable person would ascribe to the relevant terms.

[36] One factor that may assist such an assessment is what the post-contractual performance of the parties objectively demonstrated about how they applied the contractual words in practice. In this case the most instructive aspect of that conduct was how Holcim calculated its 12 per cent contribution for superannuation. As part of considering submissions from Mr Murdoch and Holcim I asked for further information on what payments the company included in calculating the required

amount of its subsidy. Holcim's answer advised that, in making the six per cent deduction and calculating its 12 per cent contribution, the company used the employee's gross earnings. This comprised both the salary paid under clause 9 and any service increments and allowances due under clause 11. The 12 per cent contribution from Holcim was therefore based on the gross sums paid under clause 9 and 11. This was a strong indicator that the annual salary for each employee was taken to be the total amount due under both clauses, not just clause 9.

[37] This conduct accorded with the interpretation reached earlier in this determination that the express wording in clause 11 contemplated the service increments being incorporated into the annual salary rate of the employee. It supported the conclusion that this figure, totalling payments under clause 9 and 11, should also be used for the calculations required by sub clause 38(e)(i).

[38] However it did not carry as far as supporting a conclusion that the payments made as the employer's superannuation contribution were, objectively, intended to be included as part of the annual salary rate for the purposes of that sub clause 38(e)(i) calculation. The absence of express words, similar to those used in clause 11 about adding the amount to the salary, meant such an interpretation could not objectively be reached.

[39] In summary, and answering the issues identified in paragraph [8] above, this interpretation meant Holcim should have included the value of Mr Murdoch's service increments in its redundancy compensation payment calculations but not the value of its superannuation contributions. As a result, there was a shortfall in the amount paid to Mr Murdoch as redundancy compensation. A re-calculation including the value of his personal service increments was required. He was also entitled to a payment of interest on the amount such a re-calculation showed was due to him, from 3 August 2016 to the date Holcim pays him that overdue amount.

[40] The Interest on Money Claims Act 2016 came into effect on 1 January 2018 and amended how the Authority may award interest under clause 11(1) of Schedule 2 of the Employment Relations Act 2000 for proceedings commenced after that date. However Mr Murdoch's proceedings began before that effective date so interest is

awarded under the Judicature Act 1908 and at the current prescribed rate of five per cent.[4]

[41] If the parties cannot agree on the calculation of the amount and interest due, they have leave to revert to the Authority for further orders.

Orders

[42] Holcim must include the value of Mr Murdoch's service increments in the annual salary rate used to calculate the redundancy compensation payment made to him. By no later than 28 days after the date of this determination, Holcim must pay Mr Murdoch the additional amount resulting from that calculation, along with interest at the annual rate of five per cent on that amount for the period from 3 August 2016 until the date payment is made.

Costs

[43] Mr Murdoch represented himself in bringing this matter to the Authority. There was no information suggesting he incurred any legal costs in doing so. The fact that the dispute over the interpretation and application of a collective agreement resolved in this determination may be of ongoing assistance to the parties and other individual covered by its terms, favoured exercise of the discretion in setting costs to allow that in this case, as Holcim submitted, costs should lie where they have fallen. There is no order for costs.

Robin Arthur
Member of the Employment Relations Authority

[4] Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), clause 4.