IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

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	BETWEEN	RON WILLIAMS, AARON THAIN, BENJIE GUTHRIE, SHAYNE ROWE, STEVE HEAVEN, BRYAN KOSKELA, RUSSELL WIGDAHL Applicants
	A N D	PACIFICA SHIPPING (1985) LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter Cranney, Counsel for Applicants Gary Blair, Advocate for Respondent
Investigation Meeting:	18 March 2010 at Christchurch
Determination:	13 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (the applicants) complain to the Authority about the correct calculation of their redundancy entitlements paid to them by the respondent employer (Pacifica) on the occasion of their redundancy. Pacifica says that it has calculated the redundancy payments correctly.

[2] The facts of this matter are not in dispute. The applicants were all made redundant by Pacifica around 29 May 2009. There is and was a collective agreement (the agreement) in place covering the terms and conditions of employment of the applicants by Pacifica.

[3] There are two clauses which are in dispute from the agreement which impact on the final redundancy payments made to the applicants. The first of those clauses is

clause 17.3.3 and it relates to pro rataing long service leave at the time of redundancy. The second clause in dispute is clause 17.3.2 which provides that a redundant worker shall receive three weeks' pay in lieu of notice.

The long service leave issue

[4] Clause 17.3.3 is as follows:

> *Waterfront Workers deemed redundant shall be entitled to pro rata Long Service Leave based on service at the time of redundancy.*

[5] In essence, what the applicants say this clause means is that Pacifica should pay the relevant pro rata portion of the long service leave entitlements to a redundant worker that would normally only be available after that worker had completed 10, 20 or 30 years' service. In other words, the applicants' position is that, by virtue of their redundancy, the effect of the clause is to require a pro rata calculation on long service leave entitlements which in effect overrides the usual provision that a worker must complete the period of long service first.

[6] Conversely, Pacifica says that unless and until a worker has completed the relevant period of service, there can be no entitlement to long service leave. Pacifica also contends that their interpretation of this provision has been absolutely consistent over the years and there has never been a previous dispute about the way the clause was interpreted. In that regard then, Pacifica calls in aid the existing *custom and practice* of the parties. But if "custom & practice" simply imposes a mistaken interpretation, it is of no assistance.

[7] The essence of the applicants' submission though, is simply that the relevant clause has no meaning if it is to be interpreted in the way that Pacifica has interpreted it and indeed, that the only way to give it meaning, applying the ordinary canons of interpretation, is to ascertain and apply its plain, ordinary meaning. It is submitted that the use of the words *pro rata* must be taken to have some meaning and the only logical meaning it can have is to amend the usual provision with respect to the entitlement for long service leave. Of course, that usual provision provides a fixed period of service after which each long service holiday applies. It is suggested that, properly construed, workers made redundant ought to receive a pro rata entitlement of long service leave based on whatever their service was at the time of the redundancy. In other words, this provision varies the otherwise strict requirement that a worker

must serve a period of years in order to receive that entitlement and the change is made because, in effect, the redundancy declaration cuts short the worker's service through no fault of his own.

[8] Pacifica says that the relevant clause has to be read subject to the rest of the agreement and, in particular, the entitlement to long service leave in clause 9. Its view is essentially that, until entitlement to long service leave *crystallises* (at say 10 years), there is no entitlement to pro rata that leave. Pacifica emphasises the point I made earlier that the general provision with respect to long service leave is what it calls a *point of time* provision. I accept that view in respect of the general provision for long service leave in clause 9 of the agreement. But applying that logic to clause 17.3.3 does not avail. Clause 17.3.3 means nothing on Pacifica's interpretation. If workers derive no additional entitlement to long service leave after being declared redundant, then what purpose does clause 17.3.3 serve? On Pacifica's argument, there must be the importation of an additional form of words to the clause to make it plain that there is no entitlement at all until 10 years' service has been completed. The problem with that conclusion is that it does violence to the usual rules of contract interpretation effectively requiring interpretation by implication of other provisions.

[9] On the other hand, the applicants' submission as to meaning is clear and able to be arrived at without the need to imply additional terms. Simply stated, it requires the employer to pay a pro rata entitlement to long service leave calculated on the service achieved up to the date of the redundancy. As I read the clause in question, its whole point is to provide a different regime for long service leave in respect of those workers who have lost their positions by redundancy. In my view, the use of the critical words *pro rata* must change the nature of the entitlement from the *point of time* provision that applies generally to this particular calculation for redundant workers. There is no pro rata provision in the ordinary clause in the agreement providing for long service leave. There, the position is that either a worker qualifies by service or does not. If a worker leaves the employment having qualified, then they are entitled to be paid out the special holiday on the termination of the employment. In my opinion, it does violence to the language of clause 17.3.3 to contend that the 10 year trigger must apply first and to effectively interpret the clause as meaning nothing more than the general provision in the agreement for long service leave. For those reasons then, I prefer the interpretation proposed by the applicants.

[10] I should have thought that the whole point of this provision is to provide a particular benefit for a worker who has lost his livelihood as a consequence of a restructure, and therefore through no fault of his own, and who, by that economic reality, has lost the ability to serve his employer for a period sufficient to qualify for long service leave, in the normal way.

Payment of notice

[11] Clause 17.3.2 states:

> *A Waterside Worker to be made redundant will receive three weeks pay in lieu of notice.*

[12] Pacifica invites me to read that provision subject to clause 17.3.4 which sets out the redundancy payment for a waterside worker based on years of service and then has the following relevant provision:

> *Payments made under this clause shall be on the basis of 44 hours at $12 per hour for each week of compensation.*

[13] Pacifica says that the use of the word *clause* in that second sentence of clause 17.3.4 I have referred to, must be taken to include a reference to clause 17.3.2 such that the calculation under that latter provision is driven by the final sentence in clause 17.3.4.

[14] I do not agree with that thesis. Clause 17.3.2 provides for notice in respect of workers being made redundant. Clause 17.3.4 provides for the calculation of redundancy compensation. These are different sorts of payment and they are made for different purposes. If the intention of the parties had been to require that the calculation of notice was to be the same as the calculation of redundancy compensation, then the agreement would have said so and I hold that it does not. It is true that the second sentence of clause 17.3.4 refers to *payments made under this clause*, but it then goes on to refer exclusively to questions of compensation in the following concluding phrase *for each week of compensation.*

[15] I am satisfied that the reference to the word *clause* in clause 17.3.4 is a reference to just that clause (17.3.4), strictly speaking a subclause, and is not a reference to the wider provision. Throughout the agreement, there are examples of subclauses being referred to as clauses (for example in clause 7.4.7 there is a reference to clause 7.4.1, and there is a similar provision in clause 9.3.1 and in clause

10.1.5 and in clause 7.3.2). Indeed, I think it fair to say that the usage in this particular agreement tends to refer to what are strictly speaking subclauses as clauses proper rather than to differentiate between the two as many agreements do. That supports my interpretation that the reference in clause 17.3.4 to *this clause* is more likely than not to refer simply to clause 17.3.4 and not to the wider clause.

[16] That interpretation is also supported by the final provision in the second sentence of clause 17.3.4 which qualifies the reference to *this clause* as referring to *each week of compensation*. Plainly then, the payments referred to in *this clause* relate to *compensation*. That is, they relate to the calculations to be made pursuant to clause 17.3.4. I am satisfied they do not refer to the earlier provision (17.3.2) which relates to notice. Notice and compensation are different. Notice is paid to workers to be made redundant as an additional emolument to recognise that the notice which would normally be required is abrogated and payment is made instead. The plain words of the provision ought to be applied according to their tenor and not linked to the particular calculation in clause 17.3.4 which I hold relates exclusively to the calculation of compensation. It follows that the entitlement of a worker under clause 17.3.2 is for three weeks' pay at the quantum that that worker would have normally received had they provided services to the employer.

Determination

[17] I am satisfied, for the reasons I have already advanced, that the applicants' view of both matters is to be preferred and accordingly I direct that:

(a) Pacifica is to calculate and pay to the applicants (or one or more of the applicants) each applicant's entitlement (if any) to a portion of the special holidays for long service calculated at the time of the worker's redundancy; and

(b) Pacifica is to pay to the applicants three weeks' notice of the redundancy calculated at the rate that that worker would have been paid, that is to say three weeks' ordinary pay, or the difference between that entitlement and the amount actually paid to the worker, whichever is appropriate; and

(c) There will be compliance orders in respect of s.137(1)(a)(i) of the Employment Relations Act 2000 and pursuant to subsection (3) of the

same section, I direct that Pacifica is to have 30 days from the date of this determination to effect implementation.

[18] Leave is reserved for the parties to revert to the Authority on issues of implementation, should that be necessary.

Costs

[19] Costs are reserved.

James Crichton
Member of the Employment Relations Authority