IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 73
5627307

	BETWEEN	HOLCIM (NEW ZEALAND) LIMITED Applicant
	AND	NZ MERCHANT SERVICE GUILD INDUSTRIAL UNION OF WORKERS INCOPRORATED First Respondent
	AND	AVIATION AND MARINE ENGINEERS ASSOCIATION Second Respondent

Member of Authority:	Vicki Campbell
Representatives:	Tim Cleary for Applicant Helen McAra for First Respondent Jim Roberts for Second Respondent
Investigation Meeting:	27 June 2016
Determination:	28 June 2016

DETERMINATION OF THE AUTHORITY

A. The dispute over the operation, application and interpretation of the collective agreement has been determined in favour of Holcim.

B. Costs are reserved.

Employment relationship problem

[1] This is a dispute over the operation, application and interpretation of a collective agreement.

[2] As permitted by section 174E of the Employment Relations Act ("the Act") this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specific orders made as a result.

Background

[3] Holcim (New Zealand) Limited (Holcim) and the NZ Merchant Service Guild Industrial Union of Workers Incorporated (the Guild) and Aviation and Marine Engineers Association (AMEA), collectively referred to as the Unions, are parties to the Holcim (New Zealand) Limited Masters and Officers Integrated Ships Collective Agreement dated April 2013 to March 2016.

[4] In August 2013 Holcim announced it would be building an import terminal and related infrastructure to import and distribute bulk cement. At that time Holcim indicated to the Unions that subject to the final import terminal location, there may be a reduction from two Holcim ships to one.

[5] In June 2014 Holcim confirmed it would be building two terminals, one in Timaru and the other in Auckland. Holcim also confirmed that it was its intention to operate with one ship in the future.

[6] The current ships used by Holcim are 28 and 39 years old. The mvWestport is the older of the vessels and is to be decommissioned during 2016. On 3 December 2015 Holcim confirmed its previous advice to the Unions that it was intending to operate with one ship.

[7] The parties met on 15 February 2016 at which time Holcim updated the Unions on the situation regarding the ships. Holcim confirmed that the mvWestport would not be replaced and it would operate with only one ship, which itself was due for replacement. Holcim was still unclear about the timing of moving from two to one ship but it would coincide with the Auckland Terminal becoming fully operational and the run-out of cement from Westport, being completed. Possible timing was July 2016.

[8] Holcim confirmed that it would call for applications for voluntary redundancies in March 2016 and that the process would apply to all employees operating on both vessels.

[9] The parties met again on 5 April 2016 to discuss the proposed list of employees who had volunteered for redundancy and those that would face possible compulsory redundancy. It was during this discussion that this dispute over the interpretation of the collective agreement arose.

[10] The collective agreement deals with redundancy in the following terms:

> **32 REDUNDANCY**
>
> 32.1 Objectives
>
> The objectives of this Clause are as follows:
>
> (a) To ensure that, where possible, and in accordance with the procedures and criteria in clauses 32.2 and 32.3, staff reductions are achieved by voluntary redundancies.
>
> (b) To provide an agreed formula for the compensation of any employee who accepts voluntary redundancy.
>
> (c) To provide a mechanism that ensures retention of appropriate and suitable manning of the company's vessels by members of the union during the currency of this agreement.
>
> 32.2 Procedure
>
> (a) The company shall advise the union of any impending redundancy situation.
>
> (b) "Redundancy situation" means a situation where a worker's employment is terminated by the company. 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 company.
>
> (c) The company and the union shall enter into discussions relating to the redundancy situation identified.
>
> (d) The company shall call for volunteers for redundancy.
>
> (e) Where there are more voluntary redundancy applications than required, acceptance shall be on a first on first off basis.
>
> (f) Where there are insufficient volunteers, compulsory redundancy will be applied on the basis of last on first off.
>
> …

Issues

[11] The issue for determination is whether the redundancy provisions should apply on the basis of an employee's position. During the investigation into this dispute the words "rank" and "position" were used interchangeably to denote the roles undertaken

by employees. The collective agreement does not define either term and neither is either term used in any significant way in the collective agreement. I have referred to the roles undertaken by Holcim employees as "positions" as that is the word used by the parties in their definition of redundancy at clause 32.2(b).

The Law

[12] Both parties have referred me to the Supreme Court decision of *Vector Gas Limited v Bay of Plenty Energy Limited*[1] (*Vector Gas*) where the Supreme Court considered the principles to be applied to contractual interpretation. Since that decision the Court of Appeal in *Air New Zealand v New Zealand Airline Pilots Association Incorporated*[2] 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 New Zealand 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 where both courts emphasised that central to the interpretation task is the natural and ordinary meaning of the words in question.[3]

[13] The Court of Appeal referred to the speech of Lord Neuberger in *Arnold v Britton* who stated:[4]

> 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.

[14] 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.

[15] In relation to context, the Court of Appeal referred to the following statement from *Zurich Australian Insurance*:[5]

> 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

[1] [2010] NZSC 5, [2010] 2 NZLR 444.
[2] [2016] NZCA 131.
[3] 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.
[4] Supra n 2 at [40].
[5] Above n 2 at [34].

> 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.

The restructuring

[16] The reduction in operating two ships to operating with one ship will see the number of required manning levels reduced from 22 to 12 positions. I have set out below the old and the new manning levels:

Position	Current establishment	New establishment
Master	4	2
1st Mate	4	2
2nd Mate	4	2
Chief Engineer	4	2
2nd Engineer	4	2
3rd Engineer	2	2

[17] Six of the necessary ten employees have volunteered for redundancy which overall has resulted in an undersubscription. If the acceptance of voluntary redundancy is, as contented by the Unions, split between the engineering staff and deck officers, five engineers have volunteered of a necessary four resulting in an oversubscription. Of the deck officers, only one employee has volunteered which has resulted in an undersubscription.

[18] In the context of this determination "oversubscription" and "undersubscription" refer to situations where more or less employees volunteer for redundancy.

Discussion

[19] There is no dispute that clause 32 requires Holcim to call for volunteers for redundancy in the first instance. Holcim says once it has the list of those seeking voluntary redundancy it is then able to select employees based on the position currently held by them to determine if they should be selected for redundancy. Holcim says that where there is an oversubscription for voluntary redundancy within a

position Holcim has the right not to select employees if it needs to retain those employees holding a particular position to meet future needs.

[20] The Unions say that once the names of those who wish to take voluntary redundancy have been identified, irrespective of their current rank and position, those to be made redundant will be determined on the basis of first on, first off.

[21] The parties have defined the term "redundancy" as meaning the termination of employment 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 company."*

[22] This definition is consistent with the definition of redundancy contained in the Labour Relations Act 1987.[6] This definition was held by the Court of Appeal in *GN Hale & Sons Ltd v Wellington etc Caretakers IUW*[7] as accurately conveying the ordinary understanding of redundancy. The agreed definition has been included in collective instruments between the parties since at least 1988.

[23] Also since 1988 the parties have agreed on the objectives to be achieved when implementing redundancy under the terms of the collective. The stated objectives are set out in clause 32.1. The objectives include ensuring that where possible and in accordance with the procedures and criteria set out in clauses 32.2 and 32.3 staff reductions in staff numbers are achieved by voluntary redundancies.

[24] A second objective is to provide a mechanism that ensures the retention of appropriate and suitable manning of the company's vessels.

[25] This means that when implementing the procedures and criteria set out in clause 3.2 the company, where possible will reduce numbers of staff through voluntary redundancies while ensuring the retention of appropriate and suitable manning of the company vessels.

[26] The clause 32.2 procedure requires the company to call for volunteers for redundancy and where there are more voluntary redundancy applications than required, acceptance shall be on a first on first off basis. In a situation of undersubscription selection will be based on a last on first off basis.

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[6] Labour Relatons Act 1987, section 184(5).
[7] [1990] 1 NZLR 151 (CA).

[27] I pause here to note that the clause as it is currently written was changed between 1988 and 1991. Under the redundancy provisions in the 1988 instrument the objectives for the redundancy procedure did not include the current clause 32.1 (c) relating to ensuring the retention of appropriate and suitable manning of the company's vessels. Instead the application of the first on first off criteria was subject to the employer's need to retain necessary skills, knowledge and experience.

[28] In a situation of undersubscription for voluntary redundancy the 1988 instrument provided for the employees to be selected on the basis of last on first off "…*all things being equal*…". This was also changed in 1991 with the words "all things being equal" being removed from the clause.

[29] The application of the criteria of last on first off, and first on first off set out in clause 32.2 must be read in relation to the objectives set out in clause 32.1 including that appropriate and suitable manning of the company vessels is to be ensured.

[30] The unions have urged me to consider the interpretation of clause 32 of the collective agreement in light of custom and practice. The Unions say that it has been customary in the industry to simply take all volunteers and "roll-up" employees where necessary. "Roll up" refers to a system where an employee filling a position below a position that becomes vacant due to an employee taking voluntary redundancy is rolled up into the vacant position. This is a promotion for the rolled up employee.

[31] The Unions say that where there is an undersubscription of volunteers the custom and practice is to "roll back" employees into lower positions and that employees with less service and who hold those lower positions will then be redundant.

[32] The Union's argue that this mechanism allows the company to meet the objective of clause 32 to ensure appropriate and suitable manning of the company's vessels is maintained.

[33] Holcim says that when it determines which of the employees it will retain, it is entitled to take into account the skills and experience of the employees who have volunteered for redundancy as a way to ensure it retains appropriate and suitable manning of the company's vessels.

[34] The Guild has referred the Authority to the case of *New Zealand Railways Corporation v New Zealand Merchant Service Guild IUOW*[8] to support its contention that this roll up and roll back custom and practice has been upheld and recognised by the Arbitration Court. In that case the Court stated:

> The Guild says that there is in the maritime field an established custom and practice that a master who, by reason of a surplus, has to take a post as chief officer continues to retain their pay, status and conditions of a master notwithstanding his reduction in effective duty. We are satisfied that in a small number of instances, for reasons peculiar to those employers' circumstances, such has been the case. We do not, however, find it established as a binding and recognised practice from which this Court should not lightly depart.

[35] Despite this finding the Arbitration Court made a binding settlement on the parties which included a reduction in status (roll-back) of the three Masters to chief officer and ordered that they retain their current salary for three years.

[36] This decision was made in light of the fact that NZ Railways Corporation had not sought to terminate the employment of any employees and sought to retain experienced officers and had made a proposals to keep the three Masters as chief officers (mates). Further, NZ Railways Corporation had undertaken that no officers in the junior ranks would be dismissed to accommodate the three Masters and that in the event of vacancies occurring as Masters the three employees would be promoted in order of seniority.

[37] Other than this case, only one other instance of Masters being reduced in position was given by the Guild. I am not satisfied the Guild has established to my satisfaction that a binding custom and practice exists in rolling up or rolling back employees to accommodate voluntary redundancies. Notwithstanding that, as the Employment Court made clear in *Gallagher v Watercare Services Limited*[9] custom and practice cannot override the express words of an agreement.

[38] While the parties were debating the application of clause 32 the Guild provided Holcim with copies of two roll back clauses used in two other collective agreements. There is no provision in the Holcim collective agreement dealing with roll back and roll up situations around redundancy.

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[8] [1986] A.C.J. 440.
[9] [1994] 1 ERNZ 511 at 532.

[39] The Unions have submitted that the decision on who should be selected for voluntary redundancy must be done over all positions and not with regard to individual positions held by each employee with the exception that there should be a split between engineering and other officers.

[40] Clause 32.2 does not make that differentiation. If I were to interpret the clause strictly, then I would have to find that overall there are insufficient volunteers for the number of employees to be made redundant. There is to be a reduction of 10 employees. Only six employees have volunteered. In that case it is arguable that clause 32.2(f) would apply which means the selection for redundancy would be last on first off with no consideration of those with longer service volunteering for redundancy.

[41] However, that interpretation would not achieve the objects of the redundancy clause which includes that where possible reductions are achieved by voluntary redundancy.

[42] Grouping the employees into two groups also does not take into account the parties definition of redundancy which is the termination of a position.

[43] In order to give the clause full effect the company is entitled to consider each position to be made redundant and where possible achieve its required reductions through corresponding voluntary redundancies while ensuring it has appropriate and suitable manning of its vessels.

[44] The decision is for the company to determine whether it has appropriate and suitable manning as long as it does so, where possible, through the application of voluntary redundancies.

Determination

[45] On the plain meaning of the words and in order to meet the stated objectives of clause 32 as well as the definition of redundancy agreed to by the parties it is the positions which will be disestablished.

[46] Holcim is entitled to accept volunteers for redundancy taking into account the need for appropriate and suitable manning of its vessels. This means that where four

Chief Engineers have volunteered for redundancy, two may not be selected where the company is of the view that it requires two of those volunteering to remain employed to ensure its manning is appropriate and suitable.

[47] Likewise where there is an undersubscription of volunteers in other positions, those employees employed last on, will be first off.

Costs

[48] Costs are reserved. As this involves a dispute I am of a mind to let costs lie where they fall. However, the parties are invited to resolve the matter. If they are unable to do so Holcim shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Unions 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.

Vicki Campbell
Member of the Employment Relations Authority