IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 78
3015655

	BETWEEN	E TU INCORPORATED Applicant
	A N D	TAHAROA IRONSANDS LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	G Pollak, for Applicant G Service, for Respondent
Investigation Meeting:	19 and 23 February 2018, at Wellington
Submissions Received:	23 February 2018 from Applicant 23 February 2018 from Respondent
Date of Determination:	5 March 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The integrated works allowance under clause 113.1 of the collective agreement is payable by Taharoa Ironsands Limited.

B. Costs are reserved.

Employment relationship problem

[1] E Tu Incorporated is a Union whose members comprise the majority of employees employed by Taharoa Ironsands Limited (TIL). The parties are bound by a collective agreement.[1]

[2] The Union alleges TIL has breached the collective agreement by non-payment of an integrated works allowance. TIL disagrees. It states since its acquisition of the business, the allowance is no longer payable.

---

[1] New Zealand Steel Collective Agreement 1 June 2016-31 May 2018.

Relevant Facts

[3] TIL operates an ironsands mining business located in Taharoa. The business operates upon land owned by a Māori Incorporation known as "The Proprietors of Taharoa C Block Incorporated" (Taharoa C Incorporation).

[4] TIL is owned by Taharoa Mining Investments Limited. Taharoa C Incorporation owns 60% of the shares in Taharoa Mining Investments Limited. The remaining 40% of shares are owned by Melrose Private Capital Limited. TIL managing director, Wayne Coffey and another own shares in Melrose on behalf of a family trust.

[5] The Union represents the majority of employees at TIL. At the time of the application the employee members numbered 81. These have since reduced to 79.

Taharoa C Incorporation

[6] There is a large body of historical research about Taharoa C Incorporation which details the relationships with the previous owner(s) of TIL. This information was compiled by the Waitangi Tribunal in the Rohe Potae District Enquiry (WAI 898 Report).[2] A brief summary is set out below.

[7] Taharoa C Incorporation is a Māori Incorporation comprising several parcels of land that were amalgamated in 1959. The current incorporation was formed in 1970 for the purposes of negotiating mining rights with New Zealand Steel Limited. At the time it represented 700 landowners.

[8] In order to carry out the Taharoa ironsands mining operation, New Zealand Steel Limited (NZS) set up a subsidiary company, New Zealand Steel Mining Limited (NZSML). Taharoa C Incorporation and NZSML reached an agreement that conferred upon the company mining rights for 70 years in return for royalty payments and other specific undertakings. A lease that set out the terms of the agreement was executed on 1 March 1971.

---

2 *WAI 891 Maori and the Forestry, Mining, Fishing, And Tourism Industries of the Rohe Potae Inquiry District, 1880-2000* at p246 ff https://forms.justice.govt.nz/search /Documents/WT/wt_DOC_806440/Wai%20898%2C%20A025.pdf.

[9] However Taharoa C Incorporation also reached agreements with NZS regarding the operation of the mining business. This included, amongst other things, employment of Incorporation shareholders:[3]

> The agreement between the Incorporation and New Zealand Steel also provided that all rates and taxes were to be paid by the company. It also included provisions concerning the protection of wahi tapu, the preservation of artefacts, fishing rights, and employment. In respect of employment it seems that it was agreed that the company would, as far as possible, draw on the local population for the labour force required to undertake the mining operations.

[10] At hearing there was evidence several TIL employees (including one witness) were shareholders in Taharoa C Incorporation. Several witnesses referred to the promise of employment for Incorporation shareholders.

New Zealand Steel Limited

[11] NZS is a former state owned enterprise. NZS was incorporated by the Government in 1965.[4] During a period of Government economic policy known as 'Think Big', NZS upgraded the steelworks at the Glenbrook Mill finishing in 1987. It was then sold to private owners, Equicorp. Subsequent owners renamed the company BHP New Zealand Steel Limited in 1992 until the name reverted back to NZS in 2002.[5] By November 2015 Bluescope Steel, an Australian based company, was recorded by the Companies Office as the ultimate holding company with control of NZS.[6]

[12] NZS also has an ironsand mine located at the mouth of the Waikato River known as the Waikato North Head mine.[7]

New Zealand Steel Mining Limited

[13] Prior to 2 May 2017 TIL was formerly known as NZSML. NZSML had also previously been known as BHP New Zealand Steel Mining Limited.[8] Bluescope Steel Limited was listed by the Companies office as the ultimate holding company with

---

3 See above n2 at p259.
4 See above n2 at p251.
5 "New Zealand Steel – History" online article https://web.archive.org/web/20120226090231/http://www.nzsteel.co.nz/about-new-zealand-steel/history
6 *Particulars of Ultimate Holding Company* 23 November 2015 Companies Office
7 "The Story of Steel" New Zealand Steel online article https://www.nzsteel.co.nz/new-zealand-steel/the-story-of-steel/the-mining-operations/waikato-north-head-mine-site/.
8 *Change of company name* 1 May 2002; 2 May 2017 Companies Office.

control of NZSML in 2015.[9] NZSML is now TIL and owned by others as noted above.

Integrated Works Allowance

[14] This dispute centres on an allowance known as the integrated works allowance (the allowance). The allowance has been paid in addition to the hourly base rate of pay:

113.1 **GENERAL ALLOWANCES: ALL EMPLOYEES**

113.1.1 **Integrated Works Allowance**

Description	**Pay code**	**1/06/16 to 31/05/17**	**1/06/17 to 31/05/18**
In recognition of the progressive impact of the Stage I and Stage II Expansion programme on present operations and personnel, and in particular the requirements of employees to maintain existing operations, modify existing plant and equipment and commission new plant and equipment and integrate new plant and equipment with existing operations, the specified Integrated Works Allowance shall be paid to all employees for all hours worked.	2904	$4.671	$4.718

Note: This allowance shall have no application to Security and Clerical Employees, as a per annum payment of Integrated Works Allowance has been included in the salary scales for these groups.

[15] It is accepted that Union employees at Taharoa have been receiving the allowance since 1985.

[16] The allowance has its origins in the awards system that existed pre-employment contracts. The Union filed agreements spanning a period of 33 years

[9] *Particulars of Ultimate Holding Company* 23 November 2015 Companies Office.

from 1985 to 2018 as well as two agreements prior to this period. It also produced various witnesses who attested to the allowances inclusion and purpose in the agreements.

History of Allowance

[17] The history of this allowance is relevant to the issue of whether payment of the allowance is related to New Zealand Steel Limited's Glenbrook integrated steel works (Glenbrook).

[18] In 1985 the allowance replaced an "ex-gratia" payment[10] all workers had previously received. Payment of the allowance was on the basis of reaching "milestones" that were specifically directed at the expansion occurring at Glenbrook:

> 20.1.7 **Integrated Works Allowance**
>
> In recognition of the progressive impact of the company's Stage I and Stage II Expansion programme on present operations and personnel, and in particular the requirements of workers covered by this agreement to maintain existing operations, modify existing plant and equipment, commission new plant and equipment and integrate new plant and equipment with existing operations, an integrated works allowance shall be paid to all workers covered by this agreement, for all hours worked, in accordance with the following schedule:

Step	**Milestone**	**Amount**
1	Effective date of agreement – WNH expanded operations commence	$1.20
2	Formal handover of first complete kiln production unit or first complete melter production unit, whichever comes first	$1.27 in lieu of $1.20
3	Formal handover of complete QBOP and new billet castor production units	$1.34 in lieu of $1.27
4	Formal handover of complete slab caster production unit	$1.41 in lieu of $1.34

[10] New Zealand Steel (Electrical Workers) Registered Agreement 1991-1992 Index of Collective Agreements with a contractual history of integrated works, applicant's bundle of collective agreements, tab 1.

Step	Milestone	Amount
5	Complete handover of completed cold rolling mill complex	$1.48 in lieu of $1.41
6	Formal handover of complete hot rolling mill complex	$1.55 in lieu of $1.48
7	Fully integrated works pipe, galvanised and colour steel produced from integrated works	$1.62 in lieu of $1.55
NOTES	1. This allowance includes and replaces the Ex Gratia Payment prescribed by Clause 20.l.7 of the Agreement dated 8 October 1982. 2. Nothing in this clause shall preclude the application of Site Special Conditions Payments 3. For the purposes of this clause, commissioning work of workers covered by this Agreement shall commence once new plant or equipment is formally handed over to New Zealand Steel Limited. 4. It is recognised that some components of the production units and complexes referred to in the above milestones will be formally handed over to New Zealand Steel and will be commissioned and/or used for training by workers covered by this Agreement prior to the formal handover of the complete production unit or complex, and prior to the payment associated with that complete production unit or complex coming into force[11].	

[19] Later agreements in 1985 for different trades (such as electrical workers) incorporated other wording into the clause such as the need for workers to "undertake on-the-job and classroom training."[12] This was consistent with the evidence from a former employee and Union delegate at that time, Lloyd Hepi regarding the clause paying for employees to learn new mining technology.

---

11 New Zealand Steel Limited Works Employees – Collective Agreement (Voluntary) dated 16/9/85 Index of Collective Agreements Tab 3.

12 New Zealand Steel Limited Electrical Workers – Collective Agreement (Voluntary) dated 1/11/85 Index of Collective Agreements Tab 4.

[20] However by 1987 the integrated works allowance changed substantially. The Glenbrook milestones were deleted, most likely because the steelworks expansion had been completed by 1987:[13]

> 4.9 Integrated Works Allowance
>
> In recognition of the progressive impact of the company Stage I and Stage II expansion programme on present operations and personnel, and in particular the requirements of workers covered by this Agreement to maintain existing operations, modify existing plant and equipment, commission new plant and equipment and integrate new plant and equipment with existing operations, an Integrated Works Allowance of $2 per hour shall be paid to all workers covered by this Agreement for all hours worked.

[21] From this point forward, the allowance was being paid without reference to any Glenbrook milestones at all.

[22] In 1991 the allowance remained the same other than to increase the amount paid to $2.32 ($2.34 with effect from 11 February 1992)[14].

[23] In 1992 the parties entered into a collective employment contract. The allowance increased to $2.363 per hour. Workers were now employees and agreements were now contracts. Two groups of employees negotiated the payment of the allowance as part of their salary:[15]

> **Integrated works allowance**
>
> In recognition of the progressive impact of the company Stage I and Stage II expansion programme on present operations and personnel, and in particular the requirements of employees covered by this contract to maintain existing operations, modify existing plant and equipment, commission new plant and equipment and integrate new plant and equipment with existing operations, an Integrated Works Allowance of $2.363 per hour shall be paid to all workers covered by this contract for all hours worked.
>
> This allowance shall have no application to Security and Clerical Employees as an Integrated Work Allowance of [?] per annum has been included in the salary scale specified in the relevant paragraphs of the Schedule.

[24] In 1994 the collective employment contract included specific conditions for Taharoa to be read in conjunction with the general terms and conditions. An integrated works allowance remained the same with the exception of a rise in 1994/95 to 248.3 cents per hour and a rise in 1995/96 254.5 cents per hour. The security and

---

13 New Zealand Steel Limited Works Employees – Collective Agreement (Voluntary) dated 27/7/87 Index of Collective Agreements Tab 5.

14 New Zealand Steel Works (Engineers) Employees Agreement registered 2/7/91 Index of Collective Agreements Tab 6.

15 Collective Employment Contract 1992-1994 BHP New Zealand Steel Index of Collective Agreements Tab 7.

clerical employees received an allowance of $4,841 ($4,962) per annum included with salary[16].

[25] From 1996 onwards the wording of the allowance has remained the same with the exception of the increased amount paid each year. Currently the allowance is $4.718.

Loss of integrated works allowance

[26] In June 2017 after the purchase of TIL, HR Manager, Maria Morgan undertook transition of the payroll system. This was not a simple task and involved the manual entry of the existing payroll into TIL's own systems. As a result Ms Morgan was able to undertake a payroll audit. Timesheet irregularities and the payment of allowances to ineligible workers were raised.

[27] Ms Moran identified the integrated works allowance when entering the payroll. She believed this allowance was not relevant to TIL because Taharoa was no longer integrated with NZS's Glenbrook steelworks. She sought further information from the previous owner's payroll team but they were unable to provide any additional information. She then raised this issue with Mr Coffey.

[28] Mr Coffey agreed with Ms Moran. After consulting others he authorised the below letter to be sent to TIL employees on 3 July 2017 from the Mine Manager Grant Huggins:

> 3 July 2017
>
> Collective Agreement – Integrated Works Allowance
>
> Following a recent payroll audit, it has come to the attention of Taharoa Ironsands Limited (Taharoa) that employees on the collective agreement have been receiving the integrated works allowance (the allowance).
>
> The purpose of the allowance is to recognise the impact of the stage I and stage II expansion programme on operations and personnel at Glenbrook. Therefore, employees at Taharoa should not have received the allowance.
>
> Since 1 June 2017 the allowance equated to $4.718 per hour. This letter is to inform you that from this week's pay, Taharoa will no longer be paying the allowance to employees.
>
> If you have any questions about this decision, please contact myself or Maria Moran (Human Resources) to discuss further.

---

16 BHP Collective Employment Contract 1994-1996 Index of Collective Agreements Tab 8.

[29] The Union did not agree with TIL's actions. The following day Tutunui King, Union delegate at TIL, emailed Ms Moran expressing unhappiness with non-payment of the allowance. He complained about the lack of consultation before the change occurred. He pointed out that all employees are entitled to the allowance, requested its reinstatement and payment of arrears.

[30] On 5 July Mr Coffey sent a further letter to employees. The letter did not propose reinstatement of the allowance. Instead it proposed an "investigation" taking the differing views into account. Once the investigation was complete he would report back on the investigation findings.

[31] However by 6 July the Union had instructed its lawyers. A letter was sent referring to the lack of consultation and referring to a breach of clause 59.2 of the collective agreement. It also required a written undertaking the allowance would be immediately reinstated and back paid by 10 July or proceedings would issue.

[32] On 10 July TIL's lawyers replied. TIL was prepared to temporarily reinstate the allowance for a period of two weeks to allow urgent mediation to take place. It sought confirmation the Union was prepared to enter into mediation.

[33] The Unions lawyers replied by email the same day stating:

> The position set out [in your] letter of today's date is not agreed.
>
> The allowance must be reinstated without precondition or other limitation, and the matter can then be dealt with in accordance with the collective agreement.
>
> The collective agreement at clause 59.2 contains provisions for the settlement of the dispute. Those must now be followed.

[34] TIL's lawyers replied stating it had arranged for back payment of the allowance but remained of the view it was not payable. The allowance continued to be paid throughout July.

[35] On 19 July 2017 the Union filed a statement of problem in the Authority. It did not seek an urgent hearing. As a consequence the parties were referred to mediation.

[36] On 1 August Mr Coffey wrote to TIL employees advising the payment of the allowance would cease. Instead the gross weekly amount of the allowance was to be held on interest bearing deposit until the Authority issued a determination or the parties reached an agreement, presumably in mediation.

[37] Mediation did not occur until September 2017. It was unsuccessful in resolving matters.

[38] On 7 November 2017 the Authority officer contacted the Union's lawyer asking about its intentions regarding the application. The Union lawyer sought a telephone conference but could not attend until after he returned from leave.

[39] The file was referred to me. Although the matter had not sought urgency, I noted an email from the Union alleging significant losses of wages each week by affected employees. I directed a telephone conference for 7 December 2018. The matter was unable to be set down until February 2018 due to Counsel's unavailability.

The issues

[40] At the above telephone conference[17] the parties agreed there were two issues for hearing, namely whether:

(a) The allowance under clause 113.1 of the collective agreement is still payable currently; and

(b) There has been a breach of clause 59.2 of the collective agreement.

[41] At hearing the Union advised the breach of clause 59.2 was no longer being pursued. Costs were reserved.

Is the integrated works allowance under clause 113.1 of the collective agreement still payable?

[42] This dispute is about the interpretation and application of a clause in a collective agreement. The law pertaining to the interpretation of employment contracts is well known.

[43] The interpretation of clauses within a collective agreement requires establishing the meaning the parties to the agreement intended the words in dispute to bear.[18]

[44] The starting point is the provision itself and an assessment of the ordinary and natural meaning of the language used.[19] A cross-check against the contractual context

---

17 Minute dated 7 December 2017.

18 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

is required.[20] If the words are ambiguous the inquiry will move to an assessment of relevant facts and circumstance.[21]

[45] The next stage of the interpretative exercise asks whether the meaning would lead to a nonsensical result - whether it defies commercial (or employment relations) common sense or otherwise.[22] In exceptional circumstances, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.[23]

[46] However, words can never be construed as having a meaning they cannot reasonably bear. The plainer the words used, the more improbable it is that the parties intended them to be understood in any other way than what they plainly say. The Authority will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to the clauses when aware of the circumstances in which the agreement was made.[24]

[47] The clause is entitled "Integrated Works Allowance". It is clear historically this referred to the Glenbrook steelworks expansion project that occurred up and until 1987. The allowance clause thereafter made no mention of milestones or other activity related to Glenbrook.

[48] Although the applicant's witnesses (and solicitor) referred to the allowance being a response to the 1980's Wage Freeze regulations (as opposed to Glenbrook) this is not evident from the clause itself. At best this was a submission not evidence given. However by 1987 both of the effects of the wage freeze regulations and the Glenbrook expansion had ceased. At that stage the purpose and meaning of the allowance changed.

---

19 *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131at [40].

20 *New Zealand Airline Pilots' Association Inc v Air New Zealand Limited* [2016] NZEmpC 161 at [33] citing *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [40].

21 See above n 5 citing *Vector Gas* at [59] per McGrath J.

22 See above n 5 citing *Pyne Gould Guinness Ltd v Montgomery Wilson (NZ) Ltd* [2001] NZAR 789 (CA) at [18], [29].

23 See above n 5 citing *Vector Gas* at [25], [34] per Tipping J.

24 See n 5 citing *Vector Gas* at [4], [22]; and at [61] citing the five principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [HL] at 912-913.

[49] A properly informed person would understand from its history that the parties intended to continue paying the allowance irrespective of the completion of Glenbrook. There was no evidence this was a mistake.

[50] There was evidence the parties did turn their minds to the wording of this clause post-Glenbrook. In 1987 the parties agreed to delete the Glenbrook milestones. In 1992 they agreed to the payment of the allowance as a part of the security and clerical employees' salaries. This may also explain why Union employees received offers of employment that set out their hourly rate of pay "plus Integrated Works Allowance".[25]

[51] It defies common sense to find the allowance is no longer payable, given the way these parties have been applying the clause.

[52] Therefore the integrated works allowance under clause 113.1 of the collective agreement is payable by Taharoa Ironsands Limited.

[53] Given this was a dispute regarding the interpretation of the agreement, the parties have advised they wish to discuss compliance without the need for orders to be made. I understand TIL remains willing and able to immediately pay funds out including accrued interest to the affected employees. I will adjourn the matter to allow the parties to confer and comply without the need for orders. They have leave to come back before me if further directions are required.

[54] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

---

[25] Applicants Witness Documents Tabs 8, 10 and 11.