

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 301
3121372

BETWEEN NEW ZEALAND MERCHANT
SERVICE GUILD INDUSTRIAL
UNION OF WORKERS and
AVIATION & MARINE
ENGINEERS ASSOCIATION
INCORPORATED
Joint Applicants

AND HOLCIM (NEW ZEALAND)
LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Paul McBride, counsel for the Applicants
Michael Gould, counsel for the Respondent

Investigation Meeting: 15 April 2021

Submissions Received: 15 April 2021 from the Applicant
15 April 2021 from the Respondent

Date of Determination: 15 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The parties are in dispute regarding the interpretation of the collective employment agreement between the New Zealand Merchant Service Guild Industrial Union of Workers (the Union) and Aviation & Marine Engineers Association Incorporated (the Association), and Holcim (New Zealand) Limited (Holcim) respectively. The issue is how clause 15.1 of the agreement operates in conjunction with clause 22 of the agreement, when an officer contracts

an illness or is injured or has an accident which is not covered by ACC and is then “invalided” off a vessel during rostered time on.

[2] The Union and the Association are of the view that in such circumstances an officer invalided off is entitled to paid sick leave for the duration of sickness which commenced during the time they were rostered on the vessel and for any sick leave continuing on into rostered time off (provided they had sufficient accrued sick leave). Holcim takes a different view of how the contractual provisions operate, saying any days taken as sick leave whilst in the service of the vessel are not counted as days on the vessel and do not attract a subsequent paid off day, therefore sick leave does not extend past the end of the rostered time on, notwithstanding the officer still may be sick and have accrued sick leave.

Background

[3] Holcim operates a ship carrying cement to ports around New Zealand. Daniel Newland was employed by Holcim as a third engineering officer. On 29 January 2020 he began a scheduled shift aboard the ship known as an on swing. This on swing was scheduled to run through to 25 February 2020. Mr Newland became ill and on 5 February 2020 he was invalided ashore. That is, he was taken off the ship to recover.

[4] From the Union’s and Association’s perspective, the issue is not so much about Mr Newland, but is more about the operation of swing shifts and how the sick leave provisions in the collective agreement is to be interpreted.

[5] Holcim’s officers operating under the collective agreement typically work 28 days on a vessel. Each day on accrues an off day. The officer’s annual salary is earned by them working on the vessel and is paid to officers on a continuous monthly basis. The effect of this is that both on days and off days are paid. Thus an officer would typically work 28 days on a vessel and is then paid for the 28 days off the vessel.

[6] When Mr Newland became unwell and left the vessel, he was paid sick leave to the end of his on swing that is to 25 February 2020. The Union and Association hold the view that Mr Newland was underpaid because he was not credited with sick leave during the off swing. He only received paid sick leave for the time he would have spent on the vessel if he had not been sick.

[7] In responding to Mr Newland's query regarding non-payment of his wages, he was advised on 29 May 2020:

You have been paid sick leave as per your collective agreement (which includes reference to the Holidays Act). You can only be paid for a working day, which in your case is each day served on a vessel. When you are off the vessel, this is not a working day, therefore sick [sic: leave] doesn't apply.

[8] The Union and Association believe that this is an incorrect interpretation of the collective agreement. The current collective agreement has been in force since 1 January 2020 and expires on 31 December 2022.

[9] The relevant provisions of this collective agreement provide as follows:

3.2 The ordinary hours for maintenance and operational duties shall be eight in any one day. Each day served on a vessel including public holidays and weekends shall be a working day.

15.

15.1 In all vessels time off shall be earned and liquidated in the manner described below:

- (a) Time off shall accrue at the rate of one day for each complete day worked in the vessel and for the purposes of computing time off due, the day of joining and leaving the vessel should be recorded as a worked day, notwithstanding any work or travel required to be carried out on either day. The maximum number of leaving days recorded as a worked day, shall be limited to six, per employee, per calendar year. For changeovers in excess of six, per calendar year, the leaving day shall be recorded as a time off day.
- (b) Time off periods taken shall be calculated by counting the day from the day of leaving the vessel to the day prior to rejoining the vessel inclusive of both days.
- (c) The length of time off period shall as far as practicable, equate with the time accrued on the vessel. However, as the voyage schedules will not always equate with the leave expiry dates, the changeover will be arranged to fit in with the respective debit/credit as regards time off for each individual officer.
- (d) Each officer shall furnish a regular return to the company certified by the master showing the periods of time taken off and earned and the company will maintain a continuous record of each officer's time off.
- (e) At the first joining date following 1st May annually each officer's time off balance shall be determined and where a debit exists that debit shall be reduced to 14 days. This may be varied by written

agreement of employee and employer where the normal roster is changed.

- (f) Where an officer is sent to join a vessel at a port due to disrupted transport services, or the vessel not being alongside, he/she is unable to join the vessel at the due time, then the period of duty in the vessel shall commence from the day the officer was due to join.
- (g) Where an officer is proceeding on time off from a port which is not his/her home port and through disruption of transport services is delayed from reaching the home port that day, then time off shall not be deducted for the day he/she was relieved from the vessel or for any subsequent full days spent waiting in such port.

22.

- 22.1 Where an employee contracts an illness or is injured or has an accident (which is not covered by ACC) in the service of the vessel, at any time after joining the vessel in or beyond New Zealand, and is invalided ashore, he/she shall be entitled to "sick leave" in accordance with the company's policy as stated below.
- 22.2 The policy provides for employees to have an entitlement to five days sick leave per annum in accordance with the Holidays Act 2023. For the purposes of this agreement, this may accumulate up to 60 days sick leave by carrying forward unused entitlements from year to year.
- 22.3 If the employee contracts an illness or is injured or has an accident (which is not covered by ACC) and needs to leave the vessel, the company may require the employee to provide at his/her expense a medical certificate, issued by a registered Medical Practitioner who has examined the employee, as proof of sickness after a minimum of three days absence for sick leave. Where the employee has exhausted sick leave, a medical certificate may be required at any time.
- 22.4 Notwithstanding the provisions above, the employer may require the employee to prove to the employer that he/she is fit to work, having regard to any health and safety reasons, and the employer may request the employee attends a medical practitioner nominated by the employer for an assessment which shall be made available to the employer. In this instance, the employer shall meet the costs associated with the medical certificate.
- 22.5 This clause shall not apply to cases of venereal disease or illness or accident due to the employee's own wilful act or default or to his/her own misbehaviour.
- 22.6 A bank of 60 days accumulated sick leave, for use only as sick leave, for both work and non-work related accidents as noted above and point 8 below, shall be credited to all employees employed as at 1 January 2008, from 1 January 2008.
- 22.7 Unused sick leave is not payable on termination of employment.

- 22.8 Where the employee suffers an accident and is invalidated ashore, and that accident is covered by ACC provisions, the employee entitlements shall be in accordance with ACC provisions. In such instances however, the employee may use the accumulated sick leave to top up the ACC payments to 100% of their ordinary weekly pay, regardless of whether the accident was work or non-work related, and have deducted from their sick leave entitlement, one day's sick leave for each working week that the employee is absent on ACC.

[10] In the case before the Authority, it is accepted by the parties that Mr Newland had accumulated a sufficient bank of sick leave in excess of what he needed to take as a result of his illness.

[11] To reiterate therefore, the issue between the parties is the interpretation of the collective employment agreement insofar as it relates to the use and effect of an employee of Holcim taking sick leave whilst on a swing.

Witnesses

[12] The Authority heard from a number of witnesses, namely John McLeod and Helen McAra for the applicants, Karen Thompson, Annabel Young and Paul Coleman for Holcim.

Mr McLeod

[13] Mr McLeod lives in Tauranga and because of health issues was not able to attend the investigation meeting in person. His evidence was affirmed and taken over the telephone. Prior to his retirement at the end of 2002, Mr McLeod had been the General Secretary of the Union. Since 1974 he had been the Assistant Secretary of the Union. Following his retirement from the Union, he worked for the London based International Transport Workers Federation as an auditor of its affiliates based in the United Kingdom. He has previously been recognised by the Employment Court as an ILO maritime convention expert.

[14] Mr McLeod gave evidence regarding the practice, history and reasons for what he called the longstanding maritime industry's time on and time off conditions. In doing so he made it plain that he did not agree with the accounts given regarding the practice, history or reasons, espoused by Holcim's witnesses. He stated that since the 70s, the New Zealand coastal, foreign going and off-shore sea going awards and collective agreements or contracts contain standard provisions for an equal time on and off roster. For every one working day on a vessel, an employee earned one day off the vessel. He explained a tour of duty, that is the working period on a vessel, was termed a swing. Holcim was operating a 28 day swing. He

explained that in the maritime industry a 12 hour working day was the norm. Employees are captive on the vessels during their non-working or watch keeping hours, so the equal time on and off still only gives ships' crew members about two-thirds of the rest and recreation time an ordinary Monday to Friday worker is entitled to. He explained that equal time off is sacrosanct in the industry. It is not annual holidays or public holidays, but a separate entitlement on its own.

[15] Mr McLeod noted that under the Maritime Labour Convention, the minimum amount of sick leave was 16 weeks. He said the underlying principle was that a member who was injured or became sick while working on board and was invalided ashore, would continue to receive normal wages until fit for duty for up to six months. He noted that if someone became sick during their rostered time off, it was just tough luck. The opinion that if a member was prevented by illness from completing their swing, they would through no fault of their own also lose the ability to earn their usual time off. The continuation of wages for a member invalided ashore was on the basis that those paid shore days were treated as dead days. That is to say that the roster for that person was effectively suspended.

[16] Mr McLeod's evidence was that he was surprised at hearing of Holcim's claimed practice of ceasing sick leave immediately on the notional end of a swing. He said that did not reflect what occurred in reality on the rare occasions when the issue had actually arisen.

Ms McAra

[17] Ms McAra is the General Secretary of the Union. Her evidence was that the contractual provisions could not mean that an employee such as Mr Newland would be obliged to use his own time to recuperate when he became sick whilst in the service of the vessel, in other words during his on swing shift. Her view was that earned time off is separate and distinct from other leave entitlements and that in essence for each day an officer was physically on board the vessel, there were two working days, namely the day on the vessel and the equivalent day off the vessel. She stated that in her experience she recalled two cases where an officer became sick whilst at sea. She stated that in both cases the officers were put on to paid sick leave from the day they became ill and invalided off the vessel, until the day they were sufficiently recovered to return to work. She stated in both those cases, the officers' absences spanned otherwise rostered time on and off periods.

Ms Thompson

[18] Ms Thompson gave evidence that Mr Newland had to use what was termed his off swing balance to cover his time off sick once his on swing period had expired.

[19] Ms Thompson confirmed she had no direct knowledge of sick leave practice but had gone through all of Holcim's current and previous time off records. She noted there had only been five instances when an officer had taken sick leave but said in all of those examples the officer only received sick leave during a period that reflected their swing. She felt the records indicated that officers did not accrue off days whilst on sick leave.

Ms Young

[20] Ms Young was the Executive Director of the New Zealand Shipping Federation and has held that role for five years. Although she gave evidence favouring Holcim's interpretation, she prefaced that by saying all the information she had received was based on what she had been told by members, both in terms of practice and what was in their collective agreements.

Mr Coleman

[21] Mr Coleman was the Shipping and Engineering Manager for Holcim. He gave evidence regarding his involvement in negotiations for Holcim's collective employment agreements over the last eight years. He confirmed the need to invalid an employee such as Mr Newland to shore did not happen often, maybe once a year. He confirmed that the interpretation Holcim placed on the collective agreement could disadvantage an employee in the sense that their paid rostered days off, if they were to resign, would be paid out. However, if these days were lessened because they were used to cover sick leave, then in effect an employee was paying for their own time off due to sickness.

Analysis

[22] The difference between the parties' interpretation does make a difference to an employee. During the investigation, the example was given as to what might happen to rostered time off in respect of an employee who resigns. That employee would be entitled to payment of any unpaid rostered days. Accordingly, following Holcim's interpretation of the collective employment agreements, an employee such as Mr Newland would have a deduction made to the paid rostered days off because the sick leave extended past the on swing shift on the vessel.

It can't be right that an employee such as Mr Newland would be paying his own sick leave entitlement, at least in part.

[23] Holcim's argument seems to be based on the premise that a working day must be construed as a day when the employee is on the vessel. It does not accept that an employee can earn an off day whilst sick.

[24] I am persuaded by the Union and Association's argument regarding the unique context of the maritime industry and do not accept Holcim's view that the sick leave provision means that sick leave can only be paid whilst on the vessel and therefore cannot continue past the end of the on swing shift. Where sickness occurs on the vessel, and an employee is assessed as an invalid, and sent ashore, the plain reading of the provision means that sick leave must continue.

[25] Almost directly on point is the Employment Court's decision in *Udoenko v Offshore Marine Services (NZ) Limited*.¹ This case related to an incident where an employee, Mr Udoenko, was suspended during an on swing shift. The suspension period was to be on full pay. However, Mr Udoenko argued that in essence his employer was using money already owed to him to fund the period of suspension. The suspension meant that Mr Udoenko was required to leave the vessel he had been rostered on to. The Court commented on the industry practice whereby sea-going employees have a period away from the vessel equivalent to the period of time they were on board the vessel working. In other words, the Court was looking at exactly the same practice as is in issue in this present case. The Court noted that in the industry in New Zealand, the common practice was for the employer to pay the amount earned by the employee for working on board a vessel, across both the off shore and equivalent on shore swings. Indeed, that is the approach adopted by Holcim. The Court noted that context is a key ingredient in contractual interpretation and decided:

The way in which the off-shore industry operates in practice provides relevant background context in the present case. Mr McLeod, who has extensive experience in the industry both within New Zealand and overseas as a consultant to the ITF Seafarers' Trust and as a former General Secretary of the New Zealand Merchant Service Guild, gave evidence (which I accept) that equal time on – equal time off roster arrangements within the industry are long-standing, are regarded as "sacrosanct" and are widely understood to comprise a separate entitlement in their own right. They are not to be used, for example, for annual leave or public holidays. He gave evidence that during his involvement with the off-shore industry there has never been any suggestion that equal time off could be used for any purpose other than as paid time off the

¹ [2013] NZEmpC 242

vessel, in its own right. It followed that the use of equal time off for purposes such as suspension would be contrary to long-standing industry practice.²

[26] In finding in favour of Mr Udovenko, the Court commented that it was not open to the defendant in that case to apply the plaintiff's entitlement for its own purposes. In the present case, Mr Newland clearly believed that his on-shore leave period would be frozen and that Holcim would continue to pay him in the intervening period until he was well. In discussing Mr Udovenko's period on suspension, the Court noted that such an assumption was an entirely reasonable assumption for Mr Udovenko to make. It must be the same for Mr Newland. His sick leave was meant to be on full pay. Not to continue the sick leave on pay during Mr Newland's sickness which continued in the off swing period, would be to Holcim's favour in that it potentially is reducing a liability. This was exactly the same position in *Udovenko*.

Conclusion

[27] Holcim is not entitled to use on-shore leave payments to fund a sick leave period which commenced during an on swing shift. The applicant's interpretation of the collective employment agreement insofar as it relates to sick leave is correct. Accordingly I find the following:

An employee who is covered by the applicable employment agreement, who was invalidated off a vessel during rostered time on is entitled to be paid accrued sick leave for the duration of sickness, including any rostered time off period.

[28] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority

² At paragraph [25]