IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 234
3132314

	BETWEEN	PENTAIR FLOW TECHNOLOGIES PACIFIC PTY LIMITED Applicant
	AND	MICHAEL VAN AMSTERDAM Respondent
Member of Authority:	Antoinette Baker	
Representatives:	Andrew Schirnack and Stephen Shaw, counsel for the Applicant Scott McKenna and Jessica Heinstman, counsel for the Respondent	
Investigation Meeting:	19 April 2022 at Christchurch and Auckland and Hamilton (via Zoom)	
Submissions received:	11 February 2022 from Applicant 28 January 2022 from Respondent	
Determination:	3 June 2022	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Pentair) and its predecessors employed the respondent (Mr van Amsterdam) for a continuous period of 41 years and 9 months until his redundancy on 30 October 2020.

[2] The parties ask the Authority for an interpretation of a redundancy clause which would determine whether Pentair correctly paid 66 weeks of redundancy payments to Mr van Amsterdam or whether a further payment of 24 weeks is to be paid. The agreed formula to quantify a week of payment is not in dispute.

The Authority's investigation

[3] For the Authority's investigation, written submissions were lodged from both parties before the investigation meeting held by Zoom. No witnesses appeared although Mr van Amsterdam was present. The general manager and a sales manager of Pentair's predecessor provided affidavit evidence. The representatives gave oral submissions at the investigation meeting.

[4] I have considered the submissions, the filed documentary evidence and the affidavit evidence. Pursuant to s174E of the Employment Relations Act 2000 (the Act), I make findings of fact and law and outline conclusions to resolve the disputed issue of contractual interpretation and the redundancy entitlement that follows.

Background

[5] The agreed applicable individual employment agreement between Pentair and Mr van Amsterdam was signed on 16 December 2003 and included that, 'In the event of redundancy, the employee shall be entitled to any additional payments due to cessation of employment in terms of the Employer's 1990 Redundancy Schedule.' The parties agree that this reference imports into the employment agreement the document called, 'Keystone New Zealand Limited Manufacturing Division Employees Redundancy Agreement' (the redundancy agreement). The redundancy agreement was registered with the Arbitration Commission of New Zealand on 30 August 1990 under s 84 of the Labour Relations Act 1987, now repealed.

[6] At clause 9.1 of the redundancy agreement (clause 9.1) a table records 30 rows of accruing weeks' worth of payments against consecutive years of continuous service. The table stops at '29 years but less than 30 years' providing for '66 weeks' of payment for redundancy.

[7] Clause 9.1 is set out below as it appears at page 3 of the redundancy agreement at the beginning of clause 9:

CLAUSE 9 – REDUNDANCY COMPENSATION

9.1 Subject to the provisions of Clause 3 of this agreement, workers made redundant shall be entitled to receive compensation payments according to the following scale:

Current Continuous Service with Keystone N.Z. Limited	No. of Weeks Pay
Less than 1 year	8 weeks
1 year but less than 2 years	10 weeks
2 years but less than 3 years	12 weeks
3 years but less than 4 years	14 weeks
4 years but less than 5 years	16 weeks
5 years but less than 6 years	18 weeks
6 years but less than 7 years	20 weeks
7 years but less than 8 years	22 weeks
8 years but less than 9 years	24 weeks
9 years but less than 10 years	26 weeks
10 years but less than 11 years	28 weeks
11 years but less than 12 years	30 weeks
12 years but less than 13 years	32 weeks
13 years but less than 14 years	34 weeks
14 years but less than 15 years	36 weeks
15 years but less than 16 years	38 weeks
16 years but less than 17 years	40 weeks
17 years but less than 18 years	42 weeks
18 years but less than 19 years	44 weeks
19 years but less than 20 years	46 weeks
20 years but less than 21 years	48 weeks
21 years but less than 22 years	50 weeks
22 years but less than 23 years	52 weeks
23 years but less than 24 years	54 weeks
24 years but less than 25 years	56 weeks
25 years but less than 26 years	58 weeks
26 years but less than 27 years	60 weeks
27 years but less than 28 years	62 weeks
28 years but less than 29 years	64 weeks
29 years but less than 30 years	66 weeks

[8] The remainder of clause 9 is not set out here because it provides how to quantify weekly payments, and this is not in dispute. The reference to 'clause 3' in the sentence above the 9.1 table relates to eligibility for redundancy compensation which is also not in dispute.

[9] Pentair says that clause 9.1 is silent in relation to entitlement for extra redundancy payments accruing beyond 30 years of continuous service. It says that 30 years is a 'cap'. Pentair says that if the Authority were to consider contextual material there is nothing that would safely enable the Authority to find that the parties agreed to further entitlement beyond the completion of 30 years of employee service.

[10] Mr van Amsterdam says that clause 9.1 is clear in its meaning because the table is a measuring tool for working out the entitlement against service years and that it was never the intention to cap the entitlement at 30 years of service. In the alternative Mr van Amsterdam says that if ambiguity is found in clause 9.1 this should be interpreted in his favour by applying the legal rule of *contra proferentum,* he not having negotiated or drafted the redundancy agreement.

Issues to be determined

[11] The issues for determination are:

i. Is clause 9.1 clear in its meaning, ambiguous or silent about entitlement to further accruing redundancy compensation beyond 30 years?
ii. If clause 9.1 is silent as to whether redundancy compensation continues to accrue beyond 30 years' service is there context that would support implying this was agreed to?
iii. If clause 9.1 is ambiguous in its meaning should the Authority exercise its discretion to apply the *contra proferentum* rule in favour of Mr van Amsterdam?

The law

[12] The Supreme Court has set out the objective approach to be used in contractual interpretation which involves as the 'ultimate objective' the establishment of what the parties intended their words to bear. Background material can be helpful as a 'cross check', even if the words used appear to be unambiguous.[1] The Employment Court has confirmed that background material must be reasonably relevant, objective and should not include a party's subjective intentions about what was meant.[2]

[13] If a contract is silent about a certain term or condition, then to imply the term later includes asking amongst other things whether a term is so obvious that the parties might be heard to say, "we didn't bother to say that; it is too clear." [3] An implied term is not a term that is added to a contract, but the implying is simply to recognise it should be there as a matter of construction.[4]

Is clause 9.1 clear in its meaning, ambiguous or silent about entitlement to further accruing redundancy compensation beyond 30 years?

[14] Mr van Amsterdam says that clause 9.1 is clear in its meaning because the dictionary definition of the word 'scale,' which is used at clause 9.1 to introduce the table with the words 'according to the following scale', supports an interpretation that the table is a measure. I am referred to the online Merriam Webster dictionary definition of 'scale' being either something used to measure with a 'series of marks or points' or 'a graduated series or scheme of rank or order.' Pentair says that to construe the word 'scale' by giving it a meaning that the table is a measuring tool is going further than what can be inferred from what is on the page. I agree with Pentair. I find that a plain reading of the word 'scale' in clause 9.1 is simply describing what follows, which on the face of it is a table that finishes with a row indicating 30 years of service with entitlement to 66 weeks of redundancy payments.

[15] Pentair says that clause 9.1 is not ambiguous due to the plain meaning on the page and that it is silent about the entitlement Mr van Amsterdam seeks. Pentair says that to be ambiguous

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[1] *Vector Gas v Bay of Plenty Energy Limited* [2010] 2 NZLR 444 (SC) at [4] and [19].
[2] *Kiwirail Limited v Mobbs* [2020] NZEmpC 139 at [19]
[3] *Relgate v Union Manufacturing Co (Ramsbottom)* (1918)1 KB 592 (PC), Scrutton LJ at 605.
[4] *Dysart Timbers Limited v Nielsen* [2009] NZSC 43, Tipping and Wilson JJ.

the words used would have to speak with two voices. Mr van Amsterdam's position appears to be that if I do not accept that the word 'scale' implies that the table is a measure, then the clause is ambiguous.

[16] The Supreme Court has described ambiguity as follows:

> 'Ambiguity arises when the language used is capable of more than one meaning, either on its face or in context and the Court must decide which of the possible meanings the parties intended their words to bear'. [5]

[17] I find that clause 9.1 is not reasonably capable of more than one meaning but rather there is one meaning on the page and it is missing any words (or in this case, also numbers) to show a potential alternative meaning. I accept Pentair's submission that clause 9.1 is silent about entitlements accruing for redundancy compensation beyond 30 years. I will now consider whether I should imply the entitlement sought into clause 9.1 due to this silence.

If clause 9.1 is silent as to whether it caps redundancy at 30 years is there context that would support implying this was the obvious intent?

[18] To imply a term I need to decide whether that term is in effect already there and just needs stating[6].

[19] Pentair suggests that redundancy entitlements now seen in employment agreements regularly appear as formulas and that the lack of a simply expressed formula supports that there was no intent to agree to entitlement beyond 30 years, particularly given the nature of the redundancy agreement which runs to several pages and otherwise appears to have been carefully drafted. I agree that a simply expressed formula, if one was intended, could have been used.

[20] Mr van Amsterdam provided affidavits from two prior managers of Pentair's predecessor: Mr Taylor and Mr Baird. Their respective evidence contains their recollections of

[5] *Vector Gas v Bay of Plenty Energy Limited* [2010] 2 NZLR 444 (SC) at 461, Tipping J.
[6] See fn. 4 above.

the context in which the redundancy agreement came to be and also what they believe would have been intended.

[21] Mr Taylor, a former General Manager of Pentair's predecessor and a signatory to the redundancy agreement says, 'to the best of my knowledge it was never the intention of the agreement to cap the payment at 30 years' and that because the employer entity at the time was 'extremely profitable' with a 'strong employee culture and loyalty,' 'I don't believe it would be a party to agreeing to a document that could be seen as disadvantaging long-term employees.' Mr Baird, a sales manager who was neither a negotiator nor signatory, says that 'as a participant in the [redundancy] scheme, I personally always regarded my years beyond 29 to have been part of the company redundancy obligation.' Pentair says this is evidence of subjective intentions and I agree. Both deponents provide their beliefs about what 'would' have been intended and little weight can properly be given to that evidence about the likely intention of those negotiating clause 9.1. However, I will now consider explanations from these two witnesses about how the redundancy agreement came into existence.

[22] Mr Taylor says that the redundancy agreement was an 'update of an earlier agreement' but that the table had changed from 6 to 8 weeks for up to the first year of service (showing in the first row of the table at clause 9.1).

[23] Mr Baird says he worked alongside Mr Taylor and recalls the agreement being 'negotiated, agreed and introduced by Keystone and its employees.' He says, 'I recall that staff meetings with both Sales and Manufacturing team members were held to outline the agreement's terms and conditions.'

[24] I find that both managers refer to a negotiated process. The redundancy agreement itself supports that three unions were signatories to the document that became registered. That at one stage the entitlement for the first year rose from 6 to 8 weeks at the very least shows that minds were turned to the table used at clause 9.1 albeit in what appears to be the earlier version to that agreed to in 1990. What seems likely not to have been considered was the entitlement to employees with tenures over thirty years. Mr Taylor refers to the 30-year cap being due to having no employees at the time who were close to that tenure. Mr Baird says, 'At no point was

it ever advised or inferred that this was a cap of limit to the company obligation.' Mr Baird also says (inconsistently with Mr Taylor) that there were many employees at the time with long tenures appearing to support the position that the table could never have meant to cap the entitlement.

[25] Whether or not there were in fact employees coming up to 30 years at any of the times that the redundancy agreement was used throughout Mr van Amsterdam's long service, Mr Taylor and Mr Baird both explain a situation that does not support the parties to the redundancy agreement turning their minds to whether the two-week accrual would continue for employees serving over 30 years. If nothing was discussed, or advised, or considered to be needed then I find that the parties cannot be reasonably be said to have reached an agreement. In these circumstances I do not find I can imply such an agreed term into clause 9.1.

Should the Authority exercise its discretion to apply the *contra proferentum* rule in favour of Mr van Amsterdam?

[26] The rule of *contra proferentum* may be applied in cases where there is ambiguity in a contractual clause. The clause may then be interpreted against the party that drafted the clause and has the benefit of the clause.

[27] It was agreed that the trigger for the *contra proferentum* rule is ambiguity. I have already made a finding that clause 9.1 is not ambiguous so I find that the rule has no application.

[28] I am told by both counsel that there are strong feelings about the outcome of this matter. While it may be an attractive notion to consider reward for Mr van Amsterdam's impressively long tenure as an employee, I find that I am not able to impose a bargain that was not likely agreed to by implying the additional entitlement sought into clause 9.1.

Conclusion

[29] Based on the above I find that clause 9.1 means that redundancy entitlements stop accruing at 30 years continuous service. I find I am unable to imply a term into clause 9.1 that the redundancy entitlements accrue extra entitlement for Mr van Amsterdam's service beyond 30 years. I find that the *contra proferentum* rule has no application to this dispute.

Summary

[30] The application by Pentair succeeds in that it is correct to have paid 66 weeks redundancy pursuant to clause 9.1 of the redundancy agreement applying to Mr van Amsterdam's employment.

[31] Mr van Amsterdam's request for an order that he be paid 24 extra redundancy weeks of entitlement with interest is dismissed.

Costs

[32] If the parties do not agree as to costs and need an Authority determination Pentair may lodge and serve, a memorandum on costs within 14 days of the date of issue of this written determination. From the date of service of that memorandum Mr van Amsterdam would then have 14 days to lodge and serve a reply. Costs will not be considered outside this timetable unless prior leave is sought and granted.

[33] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[7] The parties are referred to a recently published practice note on costs in the Authority dated 29 April 2022.[8]

Antoinette Baker
Member of the Employment Relations Authority

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[7] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[8] Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf