

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 503  
3199359

BETWEEN                      AARON HOLROYD AND ORS  
Applicants

AND                              CHANNEL INFRASTRUCTURE  
NZ LIMITED  
Respondent

Member of Authority:        Jeremy Lynch

Representatives:             Peter Cranney and Grace Liu, counsel for the Applicants  
Gillian Service and Rob McStay, counsel for the  
Respondent

Investigation Meeting:      21 May 2024, in Auckland

Submissions Received:      31 May and 3 July 2024 from the Applicants  
14 June from the Respondent

Determination:                21 August 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] For nearly 60 years, Channel Infrastructure NZ Limited (Channel) operated New Zealand's only oil refinery, at Marsden Point.

[2] In August 2021, following a special meeting of its shareholders, Channel took the decision to cease its refining operations, and transition to become an import-only fuel terminal.

[3] Aaron Holroyd and the 120 other applicants listed in Appendix A (the applicants) had their employment terminated for redundancy as a result of Channel's conversion into a fuel import terminal.

[4] Channel, E tū and First Union were parties to a “co-joint” collective employment agreement dated 6 October 2021, and covering the period of 21 June 2021 to 21 December 2022 (the CEA). The applicants were members of either E tū, or First Union, and were covered by the CEA at the time of their redundancy.

[5] In November 2021, Channel offered the applicants the opportunity to exchange some of their accrued leave for cash (leave buyout). A cohort of the applicants accepted Channel’s leave buyout offer.

[6] The employment of all the applicants was terminated for redundancy as a result of the conversion to being an import-only terminal.

[7] The CEA provides for redundancy compensation. The applicants say that the redundancy compensation they were entitled to be paid by Channel upon termination has not been calculated in accordance with the provisions of the CEA. The applicants seek an order that Channel complies with the provisions of the CEA in respect of the calculation of their redundancy compensation, together with an order for costs.

[8] Channel says that it has complied with the provisions of the CEA, and consequently there has been no breach. Channel further says that should the Authority find that the applicants’ redundancy compensation has not been correctly calculated, compliance orders under s 137 of the Employment Relations Act 2000 (the Act) would be premature. Instead, Channel says it should be given a period within which to remedy any defect in its calculation methodology.

### **The Authority’s investigation**

[9] An investigation meeting was held on 21 May 2024.

[10] For the applicants, Aaron Holroyd and Jeffrey Cunningham lodged witness statements.

[11] For Channel, witness statements were lodged by Kylie Linton, Head of Performance, Planning and Operations Finance, Caroline Jackson, Channel’s former Chief People Officer, and Jack Stewart, Channel’s former GM Operations.

[12] Under oath or affirmation, all witnesses answered questions from the Authority, and from the parties’ representatives. The representatives made closing submissions at

the conclusion of the evidence. In addition, written submissions were lodged by the representatives following the investigation meeting.

[13] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made. It has not recorded all the evidence and submissions received.

### **The issues**

[14] The issue for investigation and determination are:

- (a) who are the correct applicant parties?
- (b) Were final leave payments required to be paid out upon termination, and therefore included as part of 'gross earnings' for the purposes of calculating redundancy compensation?
- (c) When calculating redundancy compensation, was Channel correct to exclude from 'gross earnings', all payments made under the leave buyout scheme?

### **The collective agreement**

[15] The following clauses of the parties' CEA are relevant.

#### *Redundancy compensation*

[16] Clause 18.3 of the CEA sets out the entitlement to redundancy compensation:

#### **Notice and compensation**

...

- (b) Redundancy compensation will be based on six weeks pay for the first year of service and two and a half weeks pay for each subsequent completed year of service with the Company to a maximum of 53.5 weeks, with a pro rata payment for part years.
- (c) The calculation of redundancy compensation shall be based on average weekly earnings as defined in the Holidays Act 2003.

[17] There is no dispute between the parties as to the number of weeks of redundancy compensation to which the applicants are entitled under cl 18.3(b). This employment relationship problem stems from the disputed interpretation as to what obligations and entitlements arise from cl 18.3(c).

#### *Entitlement to payment on termination*



2. 3.54 hours/week; then
3. 3.85 hours/week or
4. 4.30 hours/week

- Shiftworkers
1. 8.27 hours/week; then
  2. 9.04 hours/week

[23] Notably, this clause does not separate statutory annual holiday entitlements from additional leave entitlements.

#### *Variation clause*

[24] Clause 7 of the CEA contains a provision which sets out that the agreement may be varied, "... subject to the established ratification procedures, by the agreement in writing of the appropriate signatory parties to the contract".

[25] There is no evidence of the parties entering into a variation of the CEA to allow for a departure from the requirements of cls 12(b), and/or 18.3(c), and/or 22, and/or 23. Absent any such variation, the applicants are entitled to rely on these clauses.

#### **The relevance of the Holidays Act 2003**

[26] For the purposes of calculating redundancy compensation, cl 18.3(c) refers to "... average weekly earnings as defined in the Holidays Act 2003".

[27] The Holidays Act 2003 (Holidays Act) defines average weekly earnings as "1/52 of an employee's gross earnings".<sup>1</sup>

[28] "Gross earnings" is in turn defined at s 14 of the Holidays Act as:

#### **14 Meaning of gross earnings**

In this Act, unless the context otherwise requires, **gross earnings**, in relation to an employee for the period during which the earnings are being assessed, -

- (a) Means all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example –
  - (i) salary or wages;
  - (ii) allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment);

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<sup>1</sup> Holidays Act 2003 s 5.

- (iii) payment for an annual holiday, a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave taken by the employee during the period;
- (iv) productivity or incentive-based payments (including commission) ...

[29] The Holidays Act excludes from 'gross earnings' any payments the employer is not bound by the employment agreement to pay to the employee, for example, discretionary payments.<sup>2</sup>

### **The correct applicant parties**

[30] There were two applicants originally listed in Schedule A, who Channel says should not be party to these proceedings. By consent, the representatives have agreed that Stuart Taylor and Craig Linton be removed as applicants from this proceeding. Accordingly, these two names have been removed from Schedule A.

[31] In addition, although Pieter Skinner has been named as an applicant, he is now deceased. Notwithstanding this, Channel has confirmed that it agrees Mr Skinner should remain as an applicant party.

### **Were final leave payments required to be paid out upon termination?**

[32] The parties agree that the correct 52 week period for the purposes of calculating average weekly earnings under clause 18.3(b), is the 52 weeks ending at the time of the redundancy dismissal.

[33] Channel's submission that the CEA does not expressly provide for accrued leave entitlements to be paid out on termination of employment is correct. Channel submits that because of this, it was not required to pay out the applicants' additional leave entitlements, but the fact that it did make these payments upon termination was done at its discretion, and the payments are therefore expressly excluded from gross earnings under s 14(b)(i) of the Holidays Act.

[34] The fact that there is no express clause in the CEA which provides for the payment of additional leave entitlements upon termination, does not mean that the parties intended for only accrued statutory annual holiday entitlements to be paid out to a terminating employee.

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<sup>2</sup> Section 14(b).

### *Principles of interpretation*

[35] The principles of contractual interpretation are well established.<sup>3</sup>

### *Interpretation of collective employment agreements*

[36] In the recent decision *Television New Zealand Limited v E tū Incorporated*,<sup>4</sup> Chief Judge Inglis considered the approach to the interpretation of collective employment agreements, in light of the established principles of interpretation. At [11] Her Honour held:

The approach is objective. The aim is to ascertain the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the agreement. This objective meaning is taken to be that which the parties intended. While the meaning of a clause in an agreement may appear clear, meaning is informed by context. A provisional conclusion as to meaning is to be cross-checked against the context provided by the agreement as a whole, and any relevant background.

[37] In this setting, having been dismissed for redundancy with an unused accrued additional leave balance, an employee is no longer able to take paid time off work. The only method for addressing an employee's unused accrued leave balance is for Channel to pay the leave out in the employee's final pay.

[38] The applicants say this is an entitlement and therefore should be included as part of gross earnings. Channel says the payments of accrued additional leave were discretionary, and do not form part of gross earnings for the purposes of calculating redundancy compensation.

[39] In *Howell v MSG Investments Limited (formerly known as Zee Tags Limited)*,<sup>5</sup> The Court held at paragraph [37]:

Whether a payment is included in the employee's gross earnings does not therefore depend on *when* the payment was made and received. Instead, it turns on whether the employer was *required* to pay it to the employee under the agreement.

[40] For the reasons set out later in this determination, I find that a reasonably informed objective observer would conclude that the parties intended for accrued

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<sup>3</sup> *Bathurst Resources Limited v L & M Coal Holdings Limited* [2021] NZSC 85. Also see *Firm PI 1 Limited v Zurich Australian Insurance Limited* [2014] NZSC 147, as well as *New Zealand Airline Pilots' Association Inc. v Air New Zealand Limited* [2017] NZSC 111.

<sup>4</sup> *Television New Zealand Limited v E tū Incorporated* [2024] NZEmpC 93.

<sup>5</sup> *Howell v MSG Investments Limited (formerly known as Zee Tags Limited)* [2014] NZEmpC 68.

additional leave entitlements to be paid out upon termination. The additional leave entitlement arises under the CEA, and the payment of this leave upon termination was done by way of contractual requirement, and not under the exercise of a discretion.

[41] A number of factors point to the parties intending that the additional leave entitlements were required to be paid out upon termination.

[42] Given this, I conclude that the parties intended for the additional leave entitlements to be treated in the same manner as accrued annual holiday entitlements (that is, that they are entitlements under the CEA which Channel was required to pay out upon termination).

*Was Channel exercising a discretion?*

[43] There can be no dispute that an employer is required to pay all outstanding wages to an employee on termination. *Wages* includes salary, wages, bonus, and other special payments agreed to be paid to a worker for the performance of service.<sup>6</sup> Under the CEA, the additional leave entitlements accrue each week, and clearly relate to the performance of service. They are akin to wages, and are an entitlement not subject to Channel's discretion.

[44] The various categories of additional leave at clause 22.2 of the CEA are expressed as 'entitlements'. The various categories of additional leave are not described as discretionary. Rather, day workers and shift workers receive various categories of additional leave by way of an entitlement which arises under the CEA.

[45] Notably, the 'leave earning rates' clause does not separate statutory annual leave from the additional leave entitlements. Rather, the leave earning rates are expressed as an aggregate of both statutory and additional leave entitlements.

[46] Clause 23.3 provides that the balance of each type of leave remaining at the end of the leave year will be rolled over to the next year's leave balance.

[47] Clause 23.5 is headed "Holiday Pay". This is a term defined under the Holidays Act.<sup>7</sup> Clause 23.5(a) uses the term "...statutory annual holidays...". This can only be a

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<sup>6</sup> Wages Protection Act 1983, s 2

<sup>7</sup> Section 5(1).

reference to the term as defined under the Holidays Act. However, cl 23.5(b) is worth setting out in full:

Accrued Annual Leave and any unused Annual Leave not taken by terminating employees is paid as annual holiday pay in accordance with the provisions of the Holidays Act 2003, at the date of termination.

[48] Notably the term *annual leave* is used, which under this clause, gets paid as holiday pay on termination.

[49] The CEA clearly contemplates non-statutory leave entitlements (such as accrued additional leave entitlements) being treated in the same way as holiday pay, as that term is used under the Holidays Act

[50] In addition, there is no express provision in the CEA which provides that accrued additional leave entitlements do *not* get paid out upon termination. Rather, the approach under the CEA to the various types of leave (for example statutory annual holidays, and the additional leave entitlements) is generous and permissive. Unused leave (of any type) is able to be carried over, and the CEA expressly provides a weekly leave earning rate, at which an employee covered by the CEA accrues leave. This leave earning rate does not separate statutory annual leave from additional leave entitlements. For accrual purposes, the CEA treats them as the same.

[51] Sections 24 to 27 of the Holidays Act provide for a method of calculation of annual holiday pay upon termination under various scenarios. Channel cautions against 'reading in' to the CEA, these sections of the Holidays Act. However, these are statutory provisions. They already shape the parties' obligations and entitlements. Under the parties' bargain, the CEA aggregates leave entitlements. An employee is entitled to have all accrued leave (other than sick leave) paid out as holiday pay upon termination,<sup>8</sup> and ss 24 – 27 of the Holidays Act must apply.

[52] In considering the circumstances of this matter, there is no evidence that the parties had a common understanding that there was no entitlement under the CEA for accrued additional leave to be paid out. During the course of the redundancy process, additional leave entitlements were paid out to all employees. I have reviewed all the relevant information (including the evidence given as to what occurred during the bargaining). Nothing before the Authority indicates that the payment of accrued

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<sup>8</sup> Section 67 provides that there is no entitlement to have accrued sick leave paid out on termination.

additional leave entitlements to the applicants upon termination was expressed as being made under the exercise of a discretion.

[53] This conclusion is further supported by the fact that the additional leave payments were made uniformly to all applicants without exception, albeit at different times on election and subsequently.

**Was Channel correct to exclude payments under the leave buyout from ‘gross earnings’ when calculating redundancy compensation?**

*No objection to Channel’s methodology*

[54] Channel submits that there were five key occasions during the consultation and subsequent redundancy process during which the applicants and their unions could have raised concerns regarding Channel’s redundancy calculation methodology, but no such issues were raised. Channel says the fact that no issue was raised by the applicants at the time, demonstrates that the position the applicants now advance was not the position that the parties agreed to at the time of the redundancies.

[55] Despite no objection being raised during the redundancy consultation process, this does not mean that the applicants have accepted Channel’s methodology. Channel’s approach seeks to depart from the obligations under cl 18.3(c). This would require a formal variation (which under the CEA must be in writing, and subject to ratification). This did not occur. In addition, It was not a term of the CEA that the applicants’ acceptance of Channel’s leave buyout payments compromised any subsequent claim.

*The leave buyout offer*

[56] In November 2021 Channel made an offer to all employees:

The Company has decided to allow all employees to sell some of their leave in exchange for cash i.e. as a one-time offer ... you may sell all leave types for cash except for “annual leave” where you can only cash out five days in line with legislation.

[57] The type of leave that the applicants were able to exchange for cash under Channel’s offer included additional leave entitlements. Under the leave buyout offer, the applicants had to accept the offer in writing by emailing Channel’s assistant financial accountant. A number of the applicants accepted Channel’s leave buyout offer.

[58] Channel submits that the payments made under the leave buyout offer were excluded from ‘gross earnings’ when Channel calculated these applicants’ redundancy compensation, because Channel was not required to offer the leave buyout scheme to the applicants, and any payment made as a result of the leave buyout scheme was discretionary, and therefore Channel was correct to exclude this from gross earnings.

[59] In *Metropolitan Glass and Glazing Limited v Labour Inspector, Ministry of Business and Innovation and Employment*, the Court of Appeal noted “... the formal written employment agreement is never the entire contract of service. It is only one source (albeit often the main source) of contractually binding terms.”<sup>9</sup>

[60] It is correct that there was no contractual obligation on Channel to offer to buy out the applicants’ leave under the leave buyout scheme. However, it is not disputed that such an offer was made. Upon acceptance of Channel’s offer to buy out leave, Channel’s offer became an enforceable obligation, and all payments made to the applicants under this scheme were made arising from this obligation, as opposed to under the exercise of a discretion.

[61] The applicants submit that following the offer and acceptance of the leave buyout scheme, this became an enforceable term of the employment agreement. The applicants further submit that this concept can be tested by considering what could have happened if Channel had failed to pay the leave buyout sums to the applicants, or had paid the sums late. In such circumstances the applicants could have brought claims for compliance, as well as sought penalties and brought wage arrears actions against Channel.

[62] I accept this submission. Upon its acceptance, the leave buyout offer became part of the contract of service and as such, its terms became contractually binding.

[63] The applicants who accepted Channel’s leave buyout offer received the payment thereof in December 2021. The applicants were given notice of termination for redundancy on 24 November 2021, and their last day of employment was 31 May 2022. Some of the applicants (by agreement) had their leave buyout payments ‘reversed’. However, given both scenarios occurred within the applicants’ final 52

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<sup>9</sup> *Metropolitan Glass and Glazing Limited v Labour Inspector, Ministry of Business and Innovation and Employment* [2021] NZCEA 560 at [26].

weeks of employment, there is no material difference for the purposes of calculating redundancy compensation.

[64] For the above reasons, I find that the applicants who received leave buyout payments within 52 weeks of their last day of employment should have had such payments included as gross earnings for the purposes of calculating redundancy compensation.

### **Compliance order sought**

[65] A party to a collective agreement is entitled to expect that the provisions of it are complied with, and if not they can obtain orders from the Authority.

[66] The power to order compliance under s 137 of the Act is discretionary. Channel submits that before any compliance order is made, the appropriate path is for the Authority to first determine the correct interpretation of the CEA.

[67] Channel further submits that in the event that the Authority considers that it has not complied with the CEA (which, as it will be clear from the above, is the case) it ought to be given an opportunity to comply before such orders are granted. Given that one of the objects of the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment by reducing the need for judicial intervention,<sup>10</sup> I accept that Channel should be provided with an opportunity to comply with the provisions of the CEA (in light of the guidance as to interpretation set out under this determination) before any compliance order is made.

[68] I also accept Channel's evidence as to the level of complexity associated with the calculation of redundancy compensation. Channel's payroll software cannot fully calculate these payments. Compensation must be manually calculated, and the draft calculation must then be checked by another member of Channel's payroll team, before the final calculations are audited externally. I accept this is a complex and time-consuming process.

[69] For completeness, I record that I am satisfied that in the circumstances of this matter, the grounds for the discretionary remedy of a compliance order have been made out. Under s 137 of the Act, the Authority orders Channel to recalculate the applicants'

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<sup>10</sup> Section 3(a)(vi).

redundancy compensation entitlements under cl 18.3(c) of the CEA in light of the above findings. Specifically, Channel is to include as part of gross earnings, all final leave payments made to the applicants; and all payments made under the leave buyout scheme, made within the applicants' final 52 weeks of employment.

[70] However, in order that Channel comply with the provisions of the CEA without further intervention of the Authority, under s 138(5) of the Act, I consider it appropriate to allow for a period of 90 days from the date of this determination for Channel to remedy the defects in its calculation of the applicants' redundancy compensation.

[71] If the parties consider that further mediation would be of assistance, they may advise the Authority Officer and a direction may be made.

### **Costs**

[72] It is the Authority's usual practice to let the costs associated with resolving disputes about the application, interpretation, or operation of a collective employment agreement lie where they fall.<sup>11</sup> There is no order for costs.

Jeremy Lynch  
Member of the Employment Relations Authority

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<sup>11</sup> See <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf> at 5.

## Schedule A

1. Andrew Hau
2. Craig Clement
3. Keith Smith
4. Dieter Challenor
5. Mark Cathcart
6. Dave Shaw
7. Glenn Orford
8. Julian Duff
9. Jeffrey Balfour
10. Logan Suvalko
11. Brentyn Kidd
12. Clint Marris
13. Darren Sawford
14. Simon Heaps
15. Adam Tremain
16. Jeffrey Cunningham
17. Bradly Scott
18. Mathew Foster
19. Dale Foreman
20. Kaden Hunter
21. Russell Gavin
22. Daniel Johnson
23. Duncan Finlayson
24. Jonathan Hoori
25. James Hunt
26. Mark McQuinn
27. Amon Uffindell
28. Blair Goble
29. Michael Atienza
30. Craig Kelly
31. Sam Hodge
32. Rob Smith
33. Isaac O'Grady
34. Daniel Macinnes
35. Dwayne Kitchen
36. Benny Carlos
37. Jason Prowse
38. Mathew Haddon
39. Henry Reno
40. Kyle Reid
41. Peter Burrows
42. Ray Garmson
43. Angus Blacklaws
44. Todd Morgan
45. Grant Mccullum
46. Shane Hool
47. Fenton McKay
48. Jason Newman
49. Cliff Watson
50. Reggie Iyer
51. James Molloy
52. Paul Jones
53. Vance Whyte
54. Patrick O'Halloran
55. Wade Snowden
56. Clinton Drake
57. David Howard
58. James McRae
59. Shaun McMurchy
60. Chris Platt
61. Richard Beddis
62. Michael Churcher
63. Beau Roughton
64. Russell Windle
65. Aidan Jones
66. Adam Hall
67. Daniel Flood
68. Tom Heywood
69. Leon Watson Meyer
70. Melanie Megaw
71. Kay Boon
72. Craig Alison
73. Joe McNamara
74. Ralph Ludgate
75. Ken McBeth
76. Karl Diamond
77. Sean Brown
78. Kris McKay
79. Ian Jaques
80. Paul Newton
81. Timothy Aubrey
82. Paul Austin

83. Roy Bot
84. Aaron Butler
85. Hamish Lawrie
86. Bradley Fergus
87. Llewellyn Botha
88. Greg Ventnor
89. Thomas Delamore
90. Karl Morgan
91. Thomas Flood
92. Korey Taylor
93. Stuart McLeod
94. Rob Chalmers
95. Yuri Van Houton
96. Jim Tamboer
97. Lucaas Manihera
98. Sam Claris
99. Brad Nelson
100. John Goldsmith
101. Grant Harrington
102. Brian Weir
103. James Gurnick
104. Turi Fricker
105. Chris Westlake
106. Andy Hughes
107. Brad Gray
108. Joe Neho
109. Jason Rigger
110. Francois Odendaal
111. Vaughan Tait
112. Steve Little
113. Pieter Skinner
114. Colin Maunder
115. Peter Macmenigall
116. Robert Jones
117. Ben Fergus
118. Gavin Andrews
119. Kerry Guy
120. Zinzan Hodgson