

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 250
5416246

BETWEEN

PHILLIP ANGUS
Applicant

A N D

PORTS OF AUCKLAND
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: S Mitchell, Counsel for Applicant
R McIlraith/O Marlowe, Counsel for Respondent

Investigation Meeting: 8 May 2013 at Auckland

Date of Determination: 13 June 2013

DETERMINATION OF THE AUTHORITY

A. A determination Mr Angus was employed as a stevedore undertaking rail work covered by the Axis Rail and Axis Shuttle Stevedoring Schedule to the Collective Agreement, not generally as a stevedore.

B. A teleconference is to be set down for the member for purposes of timetabling the substantive matters to hearing. Costs are reserved.

Employment relationship problem

[1] Philip Angus has been employed at the Port at Auckland since 1985 and is now employed by the Ports of Auckland Limited (PoA). He was a stevedore, working in the rail section for the last 18 years. He currently undertakes work covered by the Axis Rail and Axis Shuttle Stevedoring Schedule (Rail Schedule) to the Collective Agreement between Ports of Auckland Limited and The Maritime Union of New Zealand – Local 13 dated 1 July 2009 to 30 September 2011 (collective agreement).

[2] PoA has undergone restructuring and the rail work positions covered by the Rail Schedule are redundant. Mr Angus submits he was employed as and continues to

be a general stevedore. Redundancy of the rail work positions means removal of one of the duties he did as a stevedore. It does not mean his position was redundant. PoA disagrees. It says he was not a general stevedore, but is a stevedore undertaking rail work covered by the Rail Schedule and is redundant.

[3] If Mr Angus is employed as a general stevedore, there is work available for him. If he is employed as a stevedore undertaking rail work covered by the Axis Rail and Axis Shuttle Stevedoring Schedule, his position is redundant.

Issues

[4] There is a single issue for preliminary determination namely:

Was Mr Angus employed by Ports of Auckland in the position of a general stevedore or a stevedore undertaking rail work?

Determination

[5] Mr Angus submits he is a general stevedore because his work is not limited to the Rail Schedule and he may be required to work elsewhere (clause 7). The width of the coverage clause in the collective agreement (clause 2) indicates the variety of work he may be assigned to, some of which is still available.

[6] PoA disagrees. It says the vast majority of employees are described as “stevedores” but are not employed to perform all roles under the collective agreement. Mr Angus was employed as a stevedore undertaking rail work covered by the Rail Schedule.

[7] This dispute is about the interpretation and application of the collective agreement. The necessary inquiry is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. To be properly informed the Authority must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties’ minds. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.¹

¹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

[8] The starting point is the collective agreement. Clause 1 of the collective agreement infers the work an employee may be engaged in under the collective agreement is defined by schedule:

Where an employee is engaged from time to time on work which is covered by a different schedule than that which normally applies, then the schedule under which that work is performed shall prevail whilst so engaged. Provided that when an employee is engaged temporarily in a lower position his/her wage shall not be reduced.

[9] There are eight schedules to the collective agreement setting out work defined by category of employee and/or geographical location. Some of the schedules do not apply to Mr Angus at all.²

[10] The Rail Schedule governed rail work in Axis Rail and Axis Shuttle area of the Port. It sets out a definition of the rail work positions under the heading “stevedore” as “[an] employee who is employed predominantly on cargo related work.” (Clause 2.1) and “Foreperson stevedore” as “[an] employee designated by the company to carry out supervisory duties in addition to the duties of a Stevedore and such other duties as required.”(Clause 2.2). The Schedule limits the work to a category of employee and area of Port.

[11] Under clause 7 Rail Schedule, the PoA “may require an employee to perform any work for which they have the necessary skills and to undertake work at any location.” This clause grants PoA the discretion to require employees to perform work under other Schedules. If the discretion is exercised by PoA, Clause 1 collective agreement applies and the Schedule the work is performed under “shall prevail whilst so engaged”. When they are no longer engaged in that work, it is inferred the employee shall move back to work covered by the Rail Schedule.

[12] Clause 9.3 Rail Schedule specifically names and provides for Mr Angus’ redundancy. This clause is not replicated within any of the other schedules or the collective agreement. It seems unusual to include a specific clause relating to Mr Angus under the Rail Schedule if he was employed as a general stevedore able to do work under other Schedules. He would lose his redundancy entitlements set out

² For example Grandparented Leading Hands Schedule 1 July 2009 to 30 September 2011 (limited to named employees in clause 2)

therein, if he was moved to another Schedule and the rail work positions made redundant.

[13] If Mr Angus' was a general stevedore, clause 9.3.2 would become 'redundant' and have no effect. This is because Mr Angus could almost never be made redundant, but shifted to work covered by another Schedule as a general stevedore. The only possible way redundancy could occur would be if the PoA ceased trading, which is highly unlikely.

[14] Mr Angus submitted his redundancy clause could apply across all schedules irrespective and did not pose any limitation upon his work. If clause 9.3 Rail Schedule was meant to be of general application across all schedules, it should have been included within the body of the collective agreement, but was not.

[15] Where the contractual intention is clear from the words used, the Authority must give effect to it.³ The work is allocated by Schedule which defines the applicable category of employee and area of Port. Mr Angus' work was covered by the Rail Schedule. He could not undertake duties under the other Schedules unless and until the discretion under clause 7 is exercised. Even if it was exercised, when no longer engaged in that work, he would move back to work covered by the Rail Schedule (clause 1). Clause 9.3 supports the interpretation that Mr Angus' work was covered by the Rail Schedule only.

[16] Given the above, the Authority determines a reasonable and properly informed third party would consider the parties intended the words of their contract to mean Mr Angus was employed as a stevedore undertaking rail work covered by the Rail Schedule, not generally as a stevedore.

[17] A teleconference is to be set down for purposes of timetabling the substantive matters to hearing. Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

³ *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) at 566.