Employment Court of New Zealand

Ganley v PB Sea-Tow (NZ) Limited [2015] NZEmpC 199 (13 November 2015)

Last Updated: 23 November 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 199

EMPC 110/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANTHONY GANLEY Plaintiff
AND	PB SEA-TOW (NZ) LIMITED Defendant

Hearing:	31 August 2015 (Heard at Auckland)
Appearances:	H McAra, advocate for plaintiff P Swarbrick, counsel for defendant
Judgment:	13 November 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Ganley is a tug and barge master. He was employed by PB Sea-Tow (NZ) Ltd (the company) in the late 1990's. PB Sea-Tow (NZ) Ltd is a marine transport and logistics company which transports cargo and passengers throughout Australia, New Zealand, Asia and the South Pacific. The company is currently winding up its operations.

[2] Mr Ganley's employment was terminated for redundancy. He had initially received notice of redundancy in May 2013 but further work became available and it was not until June 2014 that his position was made redundant. There is no dispute that Mr Ganley was entitled to a redundancy payment on termination. The parties part company in terms of quantification. The defendant's calculation was based on

the rate set out in a schedule to an expired multi-union collective agreement (the

collective agreement). Mr Ganley contends that it ought to have been based on the rate of pay he was receiving immediately prior to being issued with notice of redundancy.

[3] It was common ground that resolution of the quantification issue hinges on the correct interpretation of relevant clauses in the collective agreement.

The collective agreement

[4] The collective agreement provided that:

COVERAGE OF AGREEMENT

This Agreement shall cover wage paid employees employed onboard vessels owned or operated by the Company and who are directly engaged in its maritime services, and who are, or become, a member of one of the Union parties. Without limiting the term “Maritime services” may include:

Tug and barge work Contract towing Anchor handling Offshore supply work Salvage

and similar maritime operations

...

If a permanent crew member otherwise employed under this agreement should agree with the Company to transfer to work for a period on another vessel outside this company under some contract or arrangement he shall, *for the period so engaged*, be entitled to be paid the conditions applying to the other vessel and as agreed. (emphasis added)

REMUNERATION AND OTHER BENEFITS

WAGES

The wages of each employee shall be calculated in accordance with this agreement and the Schedule of Wages (Appendix 1) ... Each employee shall be paid at the rank and relevant rate at which he/she is sailing at the time.

...

The wages, benefits and allowances are specified in Appendix 1. Wages shall be calculated and the net sum paid fortnightly.

[5] Under “Cessation of Employment” termination for redundancy is referred to:

In the event of redundancy of a permanent crew member employee, *redundancy/severance compensation is as provided for in the schedule attached*. (emphasis added)

[6] In what the parties agreed was the Schedule of Wages, Appendix 1 (although not entitled in any way in the agreement), it is stated that:

The Employee shall be paid at the rate of annual salaries specified in the tables of salaries below. The daily rate shall be the annual salary divided by

365. Except for the allowances appearing in this clause these rates shall cover all remuneration for work carried out under this agreement. All

monetary amounts are in $NZ. (emphasis added)

[7] The scheduled rate for a Master was $113,958 as at 1 May 2010, which was the most recent wage rate listed.

[8] The “Redundancy Schedule” set out a number of objectives, including to provide an “agreed formula” for redundancy compensation. Clause 2.8 provided that “compensatory payments shall be made to employees affected as below”. Clause 2.9 provided that:

Redundancy Compensation Formula:

One calendar month calculated at *the relevant daily wage rate* shall be paid in lieu of notice (if such notice was not given).

Three weeks for each year of service based on *the relevant daily wage rate*. Part of a year of service will be counted on a pro rata basis.

The maximum all inclusive payment for employees employed at the 1 May

2001 shall be 60 weeks. (emphasis added)

Background facts

[9] The company’s sea-faring staff often worked overseas on specific projects for the company or other companies. Mr Dawe, the Operations Superintendent at the company, gave evidence that where the rates of pay or other conditions were higher on the particular project than provided for in the collective agreement, the company’s seafarers would receive those enhanced pay and conditions but only for the duration of their time on the project. The seafarer would return to the applicable base salary, as provided for in the collective agreement, when they were not engaged in such

project work. Mr Dawe’s evidence was largely unchallenged and was consistent with the coverage clause in the collective agreement, which provided that:

If a permanent crew member otherwise employed under this agreement should agree with the Company to transfer to work for a period on another vessel outside this company under some contract or arrangement he shall, *for the period so engaged*, be entitled to be paid the conditions applying to the other vessel and as agreed. (emphasis added)

[10] Mr Dawe’s evidence was also consistent with email correspondence to a

number of employees, including Mr Ganley, of 11 May 2010. The email stated that:

You will be aware the majority of our current work has been around Australia with all its various connotations and challenges. As a result *we have recently reviewed the salaries of sea staff whilst working in Australia and will introduce the following pay rates in addition to the provisions of our current Collective Employment Agreement viz:*

"On a without prejudice basis PB Sea-Tow will pay New Zealand Employees the following rates of pay *when performing work on PB Sea-Tow vessels working in Australian Ports or on domestic voyages between Australian ports*: ..."

Note:

These rates do not apply for voyages deemed international or work outside

Australia. ...

The rates will commence during work periods after 1 May. When on Time Off the oldest accrued Time Off will be liquidated first, so there may be short term differences in pay rates. ... (emphasis added)

[11] In cross-examination Mr Ganley accepted that the rates of pay varied depending on which project he was working on at a particular time, and in which location.

[12] Mr Ganley regularly worked outside New Zealand. Indeed it appears that he was consistently engaged in such work from 2010 through to the termination of his employment. One project was the "Gladstone project" in Australia, which ran from January 2011 to June 2013. The contract was operated by PB Sea-Tow Australia in accordance with an Australian Enterprise Bargaining Agreement, to which no New Zealand unions were party. Local Australians were employed on the project, supplemented by the company's New Zealand engineers and tug masters, of which Mr Ganley was one.

[13] In March 2013 the company was given notice that its services on the Gladstone project would not be required from 30 June 2013. The company notified the unions and potentially affected employees on 12 March 2013. On 31 May 2013

Mr Ganley was advised that his employment would be terminated on one month's notice. As it transpired, further work became available. Mr Dawe wrote to Mr Ganley on 12 June 2013 confirming that his employment would end on 11 July 2013 unless the work situation changed. The correspondence of 12 June attached an estimate of Mr Ganley's assessed redundancy entitlement. This was based on the amounts listed for his position in the collective agreement, equating to $312.21 NZD per day.

[14] During the notice period the company was required to use the *Katea* (which Mr Ganley was Master of) to transport a barge to Singapore. The *Katea* crew were offered, and accepted, this delivery work. Mr Dawe confirmed in writing that the previously advised 11 July 2013 termination date no longer applied and advised that the situation would be reviewed again. He said that if redundancy was to occur, a full month's notice would be given. Further work became available once the *Katea* had arrived in Singapore. Mr Ganley was offered, and accepted, work supervising modifications to the vessel. Once the modifications had been completed, Mr Ganley delivered the *Katea* back to Australia (arriving on 11 December 2013) for its next project (the Bing Bong project).

[15] Mr Ganley was offered work on the Bing Bong project, which he declined. During the course of evidence Mr Ganley raised some concerns about the circumstances surrounding this offer, saying that the company tried to force him to accept the work so that it could avoid its redundancy liabilities. I address this issue later.

[16] Mr Ganley accepted that when he worked on the Gladstone project he was paid at the rates applicable to the project. When the project came to an end he went off the Gladstone rates and onto what was called the Australian rate, as he confirmed in cross-examination. The applicable exchange rate was applied for each pay period in question. The conversion from Australian to New Zealand dollars led to variations in the amount paid for each pay period.

[17] Pay records before the Court support Mr Dawe's evidence that when Mr Ganley was not undertaking overseas work, which he was not doing immediately prior to the Gladstone project, he was paid consistently with the rate set out in the collective agreement.

[18] While at sea, seafarers such as Mr Ganley accrue time off. Accrued time off is taken when the employee is back on land. Accrued time off is paid at the rate at which it is earned. By the time the Singapore project had come to an end, and the *Katea* had been returned to Australia, Mr Ganley had accumulated a significant amount of accrued time off (approximately 180 days). He started "liquidating" it. It was liquidated at the rate of pay Mr Ganley had been receiving at the time he had accrued it.

[19] Once Mr Ganley's accrued time off was used up he was returned to the rate of pay contained in the schedule to the collective agreement. Mr Dawe then wrote to Mr Ganley confirming that there was no ongoing work for him and no prospect of the company acquiring work in the near future. Accordingly Mr Dawe gave Mr Ganley notice that his employment would be terminated for reasons of redundancy, effective from 5 June 2014. A calculation of the applicable redundancy payment was set out. The calculation was again based on the rate contained within the collective agreement.

[20] Mr Ganley was concerned about the calculation contained within Mr Dawe's correspondence. As he said in evidence, he believed that the calculation should have been based on his most recent rate of pay. Mr Ganley spoke to his union and asked it to raise an objection with the company. The union subsequently wrote to the company by way of letter dated 3 June 2014, raising issues with the consultation process which had been followed (a matter that was not pursued on Mr Ganley's behalf) and the calculation of his entitlements. Mr Ganley also raised his concerns with Mr Dawe**.** It is apparent that the communications were all focussed on the calculation issue. Mr Dawe responded to an email from the Union advising that the company was obliged to pay redundancy at the employee's relevant daily pay as follows:

Your email confirms the position we have taken. Tony Ganley has been on various terms and conditions over the past few years. As these contracts have been completed he has changed to another one etc. but recently there have been no new contracts secured. He returned to his "base" contract which is the Sea-Tow NZ CEA on the premise that he would work under that CEA or if another contract was secured in Australia for instance he would then move into such a contract under whatever terms and conditions prevailed. Unfortunately no such contract has surfaced and with regret the decision has been made to make Tony redundant. As he was on the NZ CEA at the time of redundancy those terms apply both in the rate at which redundancy is paid and the no. of weeks redundancy he is entitled to due to the length of time he has been employed under his "base" contract.

[21] Ms Dench, for the Union, replied:

As we have previously advised, the collective agreement provides for all employees to be paid at their current rate of pay at the time of redundancy. We don't believe paying anything other than their current relevant daily pay is a correct application of their entitlement, and we seek your urgent confirmation that [Mr Ganley] and others already paid will receive the shortfall asap.

[22] Mr Dawe responded by advising that:

As you point out all redundancies are paid at the relevant daily wage rate based on their entitlement under the base NZ CEA.

In the case of Tony Ganley his total PB Sea-Tow service was 16.50 years but his time working on the Gladstone project is deducted as there was a separate contract with built in redundancy terms. This brings his service period back by 2.42 years to 14.08 years. His entitlement is 3 weeks per year of service pro rata at NZ daily rate which was his current rate at the time of redundancy.

There is no shortfall.

[23] The parties were unable to resolve matters and proceedings were filed.

Approach to interpretation

[24] The interpretative exercise is directed at establishing the meaning the parties to the collective agreement intended the words in dispute to bear.1 Evidence relating to what the parties subjectively intended or understood their words to mean, or what

their negotiating position was at any particular time, is irrelevant.

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

[25] The starting point is an assessment of the natural and ordinary meaning of the words. Even if the words are plain and unambiguous, a cross-check will be undertaken against the contractual context.2 If the words are ambiguous the inquiry will similarly move to an assessment of relevant facts and circumstance. This part of the process is directed at ascertaining the meaning of the words when read contextually.

[26] The second stage of the process may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to them when aware of the circumstances in which the agreement

was made.3 It follows that dislodgment of apparently plain and ordinary meaning

may occur when giving the words such a meaning as would lead to a non-sensical result, commercially or otherwise.4 Exceptionally, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.5

[27] The process is objective. That impacts on the evidence that may be called. Evidence of facts, circumstance and conduct relating to the negotiations which shows objectively the meaning the parties intended their words to convey is relevant to the contextual inquiry, including the circumstances in which the agreement was entered into.6 Evidence of post-contractual conduct may be relevant if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning

both parties intended their words to bear.7

2 *Pyne Gould Guinness Ltd v Montgomery Wilson (NZ) Ltd* [2002] NZEmpC 79; [2001] NZAR 789 (CA) at [29]; *Vector Gas* at [22]; *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317 at [13]- [14], [36].

3 *Vector Gas* at [4], (citing the five principles set out by Lord Hoffman in *Investors Compensation*

Scheme Ltd v West Bromwich Building Society [1997] UKHL 28; [1998] 1 WLR 896 [HL] at 912-913), [11], [22].

4 *Pyne Gould* at [18], [29].

5 *Vector Gas* at [25], [34] per Tipping J.

6 At [27].

7 At [31].

Analysis

[28] The collective agreement expired on 30 April 2011 and has not been renewed. Pursuant to s 53 of the Employment Relations Act 2000 (the Act) the agreement continued to have effect for 12 months. Thereafter Mr Ganley was on an individual employment agreement based on the collective agreement (s 61(2)(a)). It was argued on Mr Ganley's behalf that he was also subject to an additional term,8 being a new rate of pay for the work he undertook prior to termination of his employment, and which (it was submitted) was unilaterally varied by the company just after his time off was liquidated. Ms Swarbrick submitted that the "new" rate of pay could not constitute an additional term for the purposes of s 61 because there

was no evidence that the company and the union had agreed to it. I took this submission to be focussed on Mr Dawe's evidence that it arose outside the collective agreement. It is convenient to deal with the additional term point at this juncture.

[29] An additional term to an expired collective agreement must be "mutually agreed to by the employee and the employer ..." (s 61(1)(a)). It is clear that union involvement is not required. Mr Ganley could have agreed with the company for the inclusion of an additional term provided it was not inconsistent with the terms and conditions of the expired collective agreement.

[30] While it was submitted that Mr Ganley had given evidence that there was specific agreement to a higher rate of pay in July 2013, I have been unable to locate it. The company's email of 11 May 2010 referred to higher rates of pay; however it simply asserted that a specified rate of pay would be paid by the company for particular purposes. It did not purport to extend to all work performed under the collective agreement. Rather, it was expressly stated to apply in limited circumstances, namely for the duration of particular types of overseas work. There is nothing to suggest that the parties intended the rate reflected in the 11 May 2010 email to comprise the "relevant daily wage rate" for the purposes of the redundancy

calculation provisions in the collective agreement. More fundamentally, even

8 Employment Relations Act 2000, s 61(1)(a).

accepting that the enhanced rate of pay comprised an additional term, the reality is that Mr Ganley was no longer engaged on work which attracted it at the time his employment was terminated for redundancy.

[31] I turn to consider the collective agreement. Ms McAra submitted that the fact that the parties had stated an objective of providing an agreed formula for the purposes of calculating redundancy payments supported an argument that the calculation was not necessarily limited to the rates contained within the remuneration schedule. She also submitted that implicit in the phrase "relevant daily wage rate" was the possibility that employees may be working on other rates at the time of redundancy.

[32] Read sequentially, the agreement provides for the circumstances in which a permanent employee may be given notice of termination for redundancy and the process that must be followed. On redundancy an employee is entitled to a payment, the amount of which is "as provided for in the schedule attached",9 calculated according to the relevant daily wage rate. That term is not defined within the agreement. However the introductory wording to Appendix 1 makes it plain that the

daily wage rate is based on the applicable annual salary for the position as set out in the table, divided by 365. "Relevant" accordingly relates to the particular position held by an employee, rather than the time at which redundancy arises. The annual salary for Mr Ganley's position of Master as set out in the collective agreement was

$113,958. That figure, divided by 365, amounts to $312.21 per day. The relevant daily wage rate is then applied to the formula set out in clause 2.9 to arrive at the appropriate redundancy payment figure.

[33] As Ms Swarbrick observed, the way in which the calculation provision is couched is telling. It would have been a simple matter for the parties to provide that the calculation was to be based on actual earnings over the course of a year. They did not do so. Rather they chose to refer to the applicable annual salary, linking that back to the table of rates in the agreement for different positions. There is a notable

absence of any reference to any other rate, such as a rate payable under a project.

9 Refer 5th bullet point "Cessation of Employment".

[34] In my view it would make little sense for the parties to agree to different rates of redundancy compensation for an individual employee, depending on whether they happened to be working overseas (on work attracting a higher rate of pay) or in New Zealand (on work attracting the base rate of pay) at the relevant time. It would give rise to obvious inequities that could not have been intended.

[35] I conclude that, on a natural and ordinary reading of the agreement, the relevant daily wage rate for the purposes of calculating the appropriate payment for redundancy under the collective agreement was the rate specified in the Schedule for Mr Ganley's position, namely $312.21. I do not consider that the natural and ordinary meaning is displaced by a consideration of the relevant context.

[36] It is plain that Mr Ganley was paid at a higher rate during his time working on projects for a lengthy period of time prior to his termination. However, as the evidence makes clear, those higher rates only applied in specified limited circumstances and were linked to the particular type of work Mr Ganley was engaged in.

[37] It follows that I do not accept the further submission advanced on behalf of the plaintiff that the notice of redundancy (dated 12 June 2013) remained in effect and that the (enhanced) rate of pay Mr Ganley was receiving at that time is the relevant rate of pay for the purposes of calculating his redundancy entitlement. In any event, while the agreement is silent as to the time at which a redundancy payment is to be calculated, it is clear that the date for such purposes is the date on which redundancy takes effect. That is

because the entitlement to a redundancy payment is triggered by a redundancy. Mr Ganley's position ultimately became redundant on 5 June 2014, after having been deferred a number of times because of an upswing in available work. It is that date which is relevant to the payment formula contained within the agreement, rather than the date on which notice of

redundancy was given.10 It follows that even if the enhanced rate would otherwise

have applied to the redundancy calculation under the collective agreement, it makes no material difference because Mr Ganley had come off that rate by the time

redundancy took effect.

10 *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 at 418.

[38] I do not accept that the company approached the calculation of Mr Ganley's

redundancy payment on an erroneous basis, as submitted.

Alleged personal grievances

[39] It was further submitted on Mr Ganley's behalf that he had been unjustifiably dismissed and disadvantaged by the company and was entitled to relief as a result, namely compensation of $25,000 under s 123(1)(c)(i) of the Act. This aspect of the plaintiff's claim was problematic.

[40] The second amended statement of claim did not plead unjustified dismissal and made no reference to it. As I have already said, the central focus of the plaintiff's evidence related to the manner in which his redundancy pay had been calculated. While it was submitted at hearing that Mr Ganley had been unjustifiably dismissed, the basis on which this was alleged was not articulated. Nor was there any suggestion, at least as far as I understood the pleadings and the evidence, that the redundancy was not genuine or that the process (other than a complaint about the company's "silence" about redundancy pending liquidation of Mr Ganley's time off) was inadequate.

[41] The purpose of pleadings is to put the other side on notice of the case it has to answer. While the plaintiff has pursued a challenge on a de novo basis, and the Authority dealt with (and dismissed) a claim that Mr Ganley had been unjustifiably dismissed and disadvantaged in that forum, it does not follow that a party can omit reference to such claims in their statement of claim and belatedly seek to resuscitate them during the course of submissions. No application was advanced, either before, during or after the hearing, to amend the statement of claim to incorporate a claim of unjustified dismissal. The pleadings present an insurmountable hurdle to a claim that Mr Ganley was unjustifiably dismissed and has a personal grievance in that regard.

[42] Reference is made in the plaintiff's statement of claim to the timing of the notice of redundancy, after Mr Ganley's accrued time off had been liquidated. It is said that this amounted to an unlawful attempt to avoid the company's full

redundancy liabilities and that the company's actions were unjustifiable. Ms Swarbrick took issue with this aspect of the plaintiff's claim, submitting that the timing issue had never been raised as a grievance and no consent has been given by the company to it being raised out of time.

[43] It is apparent that the issue of the extent to which a grievance had been raised within the statutory 90-day timeframe was argued before the Authority.11 However, it appears that this was directed at whether the union's letter of 3 June 2014 amounted to the raising of a grievance, rather than the timing issue which the plaintiff now seeks to pursue.12 While expressing some reservations about whether a grievance had been raised by the correspondence, the Authority Member went on to consider (and reject) the claims of unjustified dismissal and disadvantage in any event.13

[44] I have already referred to the 3 June 2014 letter. It made reference to an alleged failure to follow the prescribed consultation procedures (although this concern was not raised in express reference to Mr Ganley and was not pursued). The letter went on to state:

That issue [the consultation issue] aside for the time being, we have been contacted by our member Tony Ganley, who advises that the company is offering him a redundancy package based on a daily rate below his relevant daily pay. This is incorrect and we seek you urgent confirmation that ... the company will apply the correct pay rate in the calculation of their compensation entitlements, ie. the employee's current relevant daily pay.

[45] The letter made no mention of the timing issue (nor did it make any mention of the other concerns Mr Ganley referred to in his evidence before the Court).

[46] It is apparent that Mr Ganley had a conversation with Mr Dawe on 8 May

2013 but (as he accepted in cross-examination) that conversation had been focussed on the calculation issue also. Mr Dawe's evidence was to similar effect.

[47] Section 114(2) of the Act requires an employee to have made, or have taken reasonable steps to make, the employer aware that they allege a personal grievance

11 *Ganley v PB Sea-Tow (NZ) Ltd* [2015] NZERA Auckland 76 at [70].

12 Refer [76].

13 At [77].

which they want the employer to address. It is not necessary to follow any particular form of wording or to raise a grievance in writing. The employee must, however, provide sufficient information at the time to enable the employer to respond to the grievance on its merits with a view to resolving it in a timely manner and informally.14 Neither the letter nor the conversation on 8 May 2013 met the threshold requirements of s 114(2).

[48] Even accepting that a personal grievance was properly before the Court, I would not have found that it had been made out. It was submitted that if the relevant daily rate was held to be the last rate applying at the time notice of redundancy was given, the company, in waiting until Mr Ganley's entitlements had been liquidated before confirming his redundancy, failed to act appropriately. I took this submission to be a suggestion that the company had failed to act as a fair and reasonable employer in allegedly delaying notice of redundancy until Mr Ganley came off liquidated leave and had reverted to his rate of pay under the collective agreement.

[49] Even were I to assume the proposition that a fair and reasonable employer could not seek to limit its financial exposure in the circumstances, I accept Mr Dawe's evidence as to why the notice was timed as it was. There was no work available and no prospect of the company acquiring work in the near future. He had, as he said, delayed as long as he could in the hope that further work might eventuate (as it had previously) but it did not. He was firm that the timing was not motivated by a desire to restrict the company's liabilities or avoid a more significant payment to Mr Ganley and his evidence on this point was not seriously challenged.

[50] There was another dimension to this aspect of the plaintiff's evidence (although not the pleadings), namely that he had felt pressurized to join the Bing Bong project by the company. As I understood Mr Ganley's evidence, he believed that this was to enable the company to avoid its redundancy liabilities altogether. The union had written to Mr Dawe on 23 December 2013 (so around the time that the Bing Bong project was in contemplation) raising a concern that union members (although not identifying Mr Ganley) were being put under pressure to apply for

vacancies and to resign from the company if they were accepted.

14 *Creedy v Commissioner of Police* [2006] NZEmpC 43; [2006] ERNZ 517 at [36], [37].

[51] Mr Dawe's evidence was that this correspondence misapprehended the position and that even if Mr Ganley had worked on the project, it would have been on the same basis as other project work, namely returning to the rate of pay under the agreement once it came to an end. He rejected the suggestion that any pressure had been applied to Mr Ganley. In any event, as Mr Ganley declined to take on work on the Bing Bong project, it remained unclear as to how this aspect of his evidence materially advanced his claim.

Breach of contract

[52] I accept Ms McAra's submission that a failure to pay an entitlement owing under an employment agreement may give rise to a breach of contract claim. I have already found that the company's calculation was correct. Accordingly the claim of breach of contract must fail.

[53] The plaintiff seeks a declaration that the company breached (unspecified) terms of his employment agreement in its handling of his redundancy. That generalised claim must also fail for the reasons set out above.

Recourse to equity and good conscience?

[54] Ms McAra advanced what I took to be an overarching submission that the

Court ought to have recourse to its equity and good conscience jurisdiction under s

189(1) to address any procedural infelicities and to ensure that the plaintiff received a redundancy payment at the rate at which he was being paid prior to receiving notice of redundancy, particularly given that he had not been on the rate specified in the collective agreement for a considerable period of time.

[55] I do not accept that the principles of equity and good conscience are as elastic, or remedial, as to enable the Court to apply a higher rate than provided under the agreement or to address the procedural issues I have identified. It is hardly equitable to expect opposing parties to guess the nature and extent of the claim they are facing and to impose liability when they fail to do so accurately. Nor do I accept that it is consistent with principles of equity and good conscience to effectively

rewrite the parties' agreement, and it would cut across the statutory prohibition on such a step in any event. It would also undermine the well established principle that the Court has no power to improve a contract, however desirable the improvement might be seen to be.15

Conclusion

[56] The plaintiff's challenge to the Authority's determination is dismissed.

[57] The parties are encouraged to agree costs. If that does not prove possible the defendant may file and serve memoranda and any supporting material within 30 days of the date of this judgment with the plaintiff filing and serving anything in response within a further 20 days. Anything strictly in reply from the defendant may be filed and served within a further 10 days.

Christina Inglis

Judge

15 *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [19].
