

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 8
53388883

BETWEEN OFFSHORE MARINE
 SERVICES (NZ) LIMITED
 Applicant

AND ARTHUR UDOVENKO
 Respondent

Member of Authority: Michele Ryan

Representatives: Susan Hornsby-Geluk and Blair Scotland, for the
 Applicant
 Guido Ballera, for the Respondent

Investigation Meeting: On the papers

Submissions 10 and 24 October 2012 for the Applicant
 16 October and 14 November for the Respondent

Determination: 17 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] There is a dispute between Offshore Marine Services (NZ) Limited (OMS) and Mr Udoenko as to whether OMS correctly paid Mr Udoenko during a period in which he was suspended from his duties as First Mate and/or on special leave.

[2] OMS requests the Authority to make a declaration that it has correctly paid Mr Udoenko and that it does not have any further liability as regards his claims for arrears of wages.

[3] Mr Udovenko accepts he was paid by OMS for the duration of his suspension but says the remuneration paid to him during his suspension is separate to a contractual entitlement to paid time off¹. He says he is yet to be paid his entitlement.

[4] Mr Udovenko also claims he has also been underpaid the sum equal to two days' work for the period between 29 March and 19 April 2011.

The Authority's investigation

[5] OMS lodged a statement of problem with the Authority on 12 July 2012. It appears that its request for a declaration was, at least in part, in response to proceedings Mr Udovenko had filed two days earlier in the Admiralty division of the High Court against the ship on which he had worked, for damages relating to claims for unpaid wages. The owners of the ship are clients of OMS.

[6] Mr Udovenko responded to OMS's application on 3 August 2012 with an amended statement in reply. There are a number of counterclaims contained in his statement of reply including claims for breach of contract in circumstances where it is yet to be determined if he was employed by OMS at a time relevant to the claims alleged, and for personal grievances where it is not apparent if these were raised within 90 days of the alleged action occurring.

[7] It was agreed during a telephone conference held between the Authority and the parties' representatives on 1 October 2012 that the Authority would initially determine the matters claimed by OMS together with those of Mr Udovenko's counterclaims that relate exclusively to arrears of wages during the period in which both parties accept that Mr Udevenko was employed. The parties agreed that those claims would be decided on the papers.

[8] The Authority received affidavits from Alexander Park and Jane Snowden on behalf of OMS and statements of affirmation from Mr Udovenko, Mark Davis and Lewis Henderson. Counsel for both parties provided submissions.

[9] Mr Udovenko's other claims will be addressed in a separate investigation if he chooses to progress those matters.

¹ The entitlement to "time off" in this matter relates to the terms contained in the relevant collective employment agreement and is not associated with annual leave entitlements pursuant to the Holidays Act 2003 or contractually agreed holidays pursuant to Mr Udovenko's employment agreement.

Information relevant to the applicant's claim and the respondent's counterclaim

[10] OMS is a registered limited liability company based in New Plymouth. It is part of an international group of companies that engage personnel to work on externally owned vessels or platforms involved in the oil and gas industry.

[11] Mr Udovenko was employed by OMS to work as a Chief Mate on a fixed term project aboard the vessel *NV Polarcis Alima*² (the Alima) pursuant to terms contained in a collective employment agreement (the CEA) between OMS and the NZ Merchant Service Guild Industrial Union of Workers.

[12] The CEA provides for a system of work which comprises equal periods of time onboard a vessel and time onshore. These periods of time scheduled onboard and onshore are referred to as "swings". OMS employees usually work four weeks onboard then have a four week period onshore before placement back onto their allocated ship or platform. Time onboard and time onshore are paid equally. The swings may be extended or reduced within the terms of the CEA.

[13] Mr Udovenko was rostered the following swings:

- 14 November 2011 - 13 December 2011 Onboard swing (30 days)
- 14 December 2011 – 17 January 2012 Onshore swing (35 days)
- 18 January 2012 – 23 February 2012 Onboard swing (37 days)
- 24 February 2012 – 26 March 2012 Onshore swing (32 days)
- 27 March 2012 – 17 April 2012 Onboard swing (22 days)

[14] Mr Udovenko commenced his employment with OMS on 7 November 2011 by undertaking three days of training. On 14 November 2012 he was transported to the Alima to begin his first swing.

[15] Matters of dispute arose between Mr Udovenko and the Master and the Chief Officer of the Alima, and on 10 December 2011 Mr Udovenko was suspended from his duties pending a disciplinary investigation into the issues of concern.

² Owned by a company based in Dubai.

[16] Mr Udovenko remained suspended until 29 March 2012 when he was advised by OMS that the Alima would be leaving NZ waters on 15 April 2012 and that it would be unable to conclude its investigation before Mr Udovenko's fixed term employment would end. Pursuant to the terms of the CEA Mr Udovenko was given notice of termination, advised he would continue to receive pay until 15 April 2012 and all holiday and severance entitlements would be paid out.

[17] On 30 March 2012 Mr Udovenko asked OMS to place him back onto the Alima to work his onboard swing but was advised by OMS that the Alima did not want him to return.

[18] On 3 April 2012 by email Mr Udovenko raised an employment relationship problem with OMS. He sought payment for:

- a. the onshore swing period following his onboard swing (November and December 2011) on the Alima, and
- b. payment for the onshore swing he would receive post 15 April 2012 had he been allowed to work his onboard swing when the disciplinary investigation was abandoned.

[19] Mr Udovenko also advised OMS that if there was a problem with payment he would seek a maritime lien for unpaid wages which may result in an arrest of the vessel Alima and prevent it from leaving New Zealand waters.

[20] It is not in dispute that the Alima left NZ waters on 17 April 2012. OMS says that its employees would normally have come ashore on that date but crew were unable to be released and were paid up to 19 April 2012. OMS says that but for his placement on special leave on 29 March 2012 Mr Udovenko would have worked an onboard swing until 19 April 2012 along with the other crew and accordingly it paid Mr Udovenko until 19 April 2012 when his fixed term employment agreement ended.

[21] The parties attended mediation on 2 July 2012 but matters were not resolved.

[22] On 10 July 2012 Mr Udovenko filed papers in the Admiralty Division of the High Court against the Alima seeking damages for unpaid wages.

[23] As noted on 12 July 2012 OMS lodged its statement of problem with the Authority seeking a declaration that it had properly paid Mr Udovenko and that there were no outstanding wages to be paid.

The claims

[24] The parties have opposing perspectives as to the nature of Mr Udovenko's claims for wage arrears and each submitted a different methodology as to how Mr Udovenko's remuneration should be calculated and determined.

Mr Udovenko's approach

[25] There are two separate periods of time over which Mr Udovenko submits that he is owed arrears of wages.

[26] The first of these claims relates to the period immediately following his first swing onboard the Alima, during which he was on suspension and concurrently scheduled to take rostered onshore paid "time off". He says that every day he worked aboard the Alima he was entitled to an onshore paid day off for rest and recovery. He was scheduled to take his accrued onshore time off from 14 December until 17 January but he was suspended on 10 December.

[27] Mr Udovenko says that OMS unilaterally suspended him "on full pay" and that he was required to be available to respond to the allegations made against him and therefore was unable to use his accrued paid time off without interruption for onshore rest. Mr Udovenko accepts that he was paid during his suspension but considers the payment he received during this time is separate to his earned onshore paid time off. He says OMS effectively used his entitlement to onshore paid time off to remunerate him during this period of his suspension and that it was not entitled to do so. He says he worked on the Alima for 27 days and is entitled to 27 days' paid time off to use exclusively for rest.

[28] Mr Udovenko to say he is owed a further two days' pay on the basis that had he returned to the Alima on 29 March when his suspension was lifted, he would have worked 22 days on the vessel until it left NZ and would have accrued 22 paid onshore time off days. He appears to accept that OMS paid the sum equal to 20 days onshore paid time off and claims he is owed the sum equal to two additional days.

The approach taken by OMS

[29] OMS says it paid Mr Udovenko as if he had remained working from the time of his suspension until the termination of his employment agreement so he would not be disadvantaged in respect to his remuneration by the suspension. It says Mr

Udoenko is claiming for additional wages as a result of being suspended which are over and above what he would have received had he been working.

[30] OMS says Mr Udoenko was paid for three days of training from 7-9 November inclusive. Separate to payment for training OMS says that had Mr Udoenko not been suspended and had worked his rostered swing patterns he would have worked 89 days onboard the Alima and had 69 paid days onshore. Mr Udoenko's roster whilst employed equalled in total 158 days and he was paid for these.

[31] OMS also says that Mr Udoenko was paid an additional sum equal to a further 20 days so that in total he was paid the sum equal to 178 days. OMS explains that to reflect a pattern of work which equates to equal time on onboard against equal time onshore a further 20 days was credited to Mr Udoenko's onshore days. OMS says this is what it paid all other crew members who worked on the Alima.

[32] The wage and time records evidence that Mr Udoenko was paid wages equal to 178 days and Mr Udoenko does not dispute that he was paid according to those records.

Issues

[33] The Authority is required to determine whether Mr Udoenko has been paid all wages and entitlements owed to him pursuant to his employment agreement and if not, the quantity of the remuneration he is owed.

Discussion

[34] Both OMS and Mr Udoenko submit that that the issue is one of contract interpretation and referred the Authority to the Supreme Courts decision in *Vector Gas v Bay of Plenty Energy Ltd*³ which is the leading case on the interpretation of commercial contracts.

[35] The Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*⁴ held that the principles enunciated in *Vector* are

³ [2010] NZSC 5; [2010] NZLR 444

⁴ [2010] NZCA 317

relevant also to the interpretation of employment agreements. In summary the Supreme Court held:

- (i) the ultimate objective in a contract interpretation dispute is to determine the intention of the parties from the words used in the contract;
- (ii) the words used should be given their ordinary meaning in the context of the contract;
- (iii) the ordinary or plain meaning of the words and text should be the primary focus for interpretation however extrinsic material may be relevant in objectively demonstrating what the parties intended even if the words are not ambiguous;
- (iv) the context in which a contract is made is an important consideration⁵; a contract should be interpreted in accordance with commercial or business commonsense.
- (v) evidence of what was said during negotiations for the contract may help establish the circumstances in which the contract was made.

[36] On behalf of Mr Udovenko it was also submitted that the Authority take note of the Employment Court's decision *New Zealand Air Line Pilots' Association v Air Nelson Ltd*⁶

Addressing first, the principles of interpretation, I accept that it is no longer essential to find an ambiguity before proceeding to look at the background to a contract to assist in interpreting the language which has been used.

...Ambiguity may be circumvented also by interpreting the document in light of practicalities and by reference to the surrounding circumstances.

What was intended by the parties?

[37] Clause 8 of the CEA sets out annual remuneration scales apportioned to the different positions covered within the agreement. Clause 8(b) states "*Except as specifically provided in this agreement, the above remuneration covers all work in connection with the operation*" and lists a number of work activities.

[38] Clause 8(d) provides the following:

⁵ In *Silver Fern Farms* this aspect was noted as being particularly relevant to interpretation of industrial agreements

⁶ [2010] NZEmpC 130 at [13]-[14]

The above remuneration covers payments for all work in connection with the operation of the above ships and vessels as per the classifications in this clause...

No additional payment shall apply unless specified elsewhere in this agreement.

[39] As previously noted clause 16 of the CEA "Time Off, and Holidays" provides: *"The salaries specified in this agreement provide for a leave system of equal time on and equal time off..."*

[40] It is accepted by both OMS and Mr Udovenko that the CEA is silent on the issue of suspension or how an employee should be paid whilst suspended.

[41] On behalf of Mr Udovenko it is submitted that the provisions of the CEA support the premise that an employee's paid "time off" cannot be used to facilitate other remuneration payments. Mr Udovenko refers to sub-clause 16(e) which describes a situation where an employee is unable to join a vessel for reasons outside the employee's control that time off shall not be debited. He also refers to clause 20 "Training" which advises where an employee is required to attend a training course *"time off will not be forfeited or accrued for time so spent."*

[42] The statements of affirmation in support of Mr Udovenko each state that provisions for equal time on and off are to compensate employees for the inability to leave vessels even when not working. Further, that if the employee is required to perform work during the accrued paid time then accrued time off is frozen and remains extant. I understand that the inference Mr Udovenko wishes the Authority to draw is that the employer cannot require the employee to perform any tasks during his or her accrued time off and that this has always been the intention of the parties.

[43] Neither party provided examples of similar previous instances to evidence a particular methodology for payment of remuneration for employees on suspension.

[44] In contrast, OMS maintains that the CEA is clear that no additional payments over and above those specified in clause 8 are payable unless expressly set out elsewhere in the agreement. It says in these circumstances no additional payment can apply even if Mr Udovenko can argue that he did not receive adequate rest days – which OMS denies. It says it has already made appropriate payment for the requisite scheduled days off.

[45] I find that there are no provisions contained in the CEA that provide for an employee to be paid beyond those stipulated at clause 8 with the exception of an express agreement to do so. In circumstances where no provision exists which provides how an employee should be paid whilst on suspension I am also unwilling to find that there was an intention to pay suspended employees by some other methodology outside the express remuneration provisions. I consider that OMS did remunerate Mr Udovenko according to the provisions of the agreement and in the absence of an express provision as to remuneration during suspension I consider OMS acted as a fair and reasonable employer by continuing to remunerate Mr Udovenko as if he continued to work in accordance with his swings.

[46] I am also not persuaded that it was intended by the parties that provisions for equal time on and off requires time off to be entirely unimpeded no matter the reason, as is inferred by Mr Udovenko.

[47] The law requires an employer to give an employee a reasonable opportunity to respond where allegations of a disciplinary nature have been raised. I understand Mr Udovenko attended a meeting on 21 December 2011 to respond to the allegations against him and to provide detail to concerns he had raised. Correspondence was also exchanged between the parties as to their respective concerns. I was not provided with an account of time Mr Udovenko spent to respond to the allegations.

[48] I am unwilling to find on the evidence that Mr Udovenko's paid time off was obstructed by OMS's application of natural justice principles to an extent that he was unable to rest, or that a maritime employer precludes an employee from use of his paid time off by a request to respond to concerns such that it should further remunerate the employee. I accept OMS's submission that such a finding would result in payment beyond the contractual agreement and flouts business common sense.

Has OMS financially gained by its approach?

[49] Mr Udovenko says that OMS has made a financial gain from using his accrued entitlement to remunerate him during his suspension. I understand Mr Udovenko to say that OMS's unilateral decision suspend him "on full pay" created an obligation separate to his time off entitlement. He refers to the decisions of *Tawhiwhirangi v*

*Attorney General*⁷ and *NZ Airline Pilots' Association v Air Nelson*⁸ to support his view that OMS cannot use his entitlement to paid leave to fund another of the employer's obligations towards him.

[50] In *Tawhiwhirangi* the court found that payment of annual leave to a holidaying employee concurrently suspended in the context of strike action could not be expended as annual leave by the employer. In *Air Nelson* the Court determined that the employer was unable to use an employee's statutory entitlement to an alternative holiday to simultaneously satisfy other rostering obligations contained within its collective agreement.

[51] I accept OMS's submissions that the cases referred to are distinguishable from Mr Udovenko's circumstances. Each of those cases determined that the employer was not able to expend an employee's statutory prescribed minimum entitlement for another purpose which would disadvantage an employee. Mr Udovenko's case is not about his statutory entitlement to holidays but rather about the treatment of a contractual arrangement. I have already found that Mr Udovenko was not deprived of his contractual entitlement.

[52] I do not accept Mr Udovenko's contention that OMS used his time off to fund his suspension or that it has made a financial gain by its actions.

Mr Udovenko's claim for a further two days

[53] Mr Udovenko's claim for a further two days remuneration based on the proposition that but for his placement on special leave he would have worked 22 days on the *Alima* and therefore is owed equal time on shore seems incongruous to his primary argument that time off is an entitlement accrued by working aboard the vessel. As noted it is not disputed that OMS paid Mr Udovenko an additional 20 days to equalise his onshore rostered time with his rostered onboard time. I do not accept this aspect of his claim and decline to make an award associated with it.

Determination

[54] I conclude that in circumstances where there is no express provision as to how an employee should be paid during a period of suspension and/or special leave, that

⁷ Unreported WEC 8/98

⁸ Ibid at footnote 6

OMS paid Mr Udovenko according to the rate of pay the parties had contractually agreed as if Mr Udovenko had not been suspended.

[55] As regards Mr Udovenko's claims for arrears of wages between 10 December and 19 April inclusive, I find that OMS has no further liability towards Mr Udovenko.

Costs

[56] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority