IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 423
5331428

	BETWEEN	KENNETH WILSON
	AND	PACIFICA SHIPPING LIMITED

Member of Authority:	Yvonne Oldfield
Representatives:	Helen McAra for applicant Gary Blair for respondent
Investigation meeting	8 June 2011
Submissions:	Submissions in reply from applicant, 13 June 2011
Determination:	27 September 2011

DETERMINATION OF THE AUTHORITY ON AN APPLICATION FOR COMPLIANCE AND PENALTY AND COUNTERCLAIM FOR PENALTY

Employment Relationship Problem

[1] The applicant, Mr Wilson, was employed by the respondent as a ship's officer, on a casual basis, from December 2008 until October 2009 when he left to take up permanent employment elsewhere. Mr Wilson has come to the Authority seeking an order for compliance with terms of settlement agreed by the parties in mediation on 27 September 2010. The term in question is clause 2 (i) which provides:

> *"2. The Employer will, within 7 days of today, pay-*
>
> > *i. superannuation contributions of $7070.30 as provided for in the relevant Collective Agreement to the appropriate account for the use of the Employee…"*

[2] The relevant provision of the Collective Agreement provides:

> *"25. SUPERANNUATION*

> *25.1 Superannuation schemes agreed to between the employer and the Parties/Union shall be deemed to be part of this agreement. The employer reserves the right to make membership of any such scheme a pre-requisite to joining the company's service.*
>
> *25.2 The company shall offer all Masters, Chief Engineers, Deck and Engineer Officers & Seafarers the benefits of a superannuation scheme agreed between the parties.*
>
> *The company's level of contribution at the commencement of the agreement is 11% and the employee's contribution is 5.5% of gross taxable earnings."*

[3] Mr Wilson also claims interest on the outstanding amount and a penalty for non-compliance.

[4] The respondent does not dispute that it has not paid superannuation contributions of $7070.30 into the appropriate account. It says rather that it is not obliged to do so unless Mr Wilson pays in the corresponding amount of employee contributions. The basis for this assertion is said to be found in the words "*as provided for in the relevant Collective Agreement*."

[5] The respondent also counterclaims a penalty of $10,000.00 on the assertion that it was misled into entering into the mediated terms of settlement. General Manager Steve Chapman says that he was given to understand that Mr Wilson was a member of an approved scheme during his employment with the respondent. In fact when Mr Wilson first went to work for the respondent he was returning to sea after being ashore for over 20 years and was not a member of an approved scheme. Mr Wilson joined an approved superannuation scheme[1] (backdated to October 2009) when he took up permanent employment after leaving the respondent.

[6] The respondent therefore claims a penalty for breach of good faith relating to Mr Wilson's alleged failure to disclose that he had not been a member of an approved scheme during his employment.

Issues

[7] Both parties felt it necessary to put forward evidence about the employment relationship problem that was the subject of mediation. I accepted that it was helpful

[1] New Zealand Maritime Officers Superannuation Fund

background for me to hear some of this however it remains that the matters for determination here are not those which were the subject of the original dispute.

[8] The first issue for determination here relates to Mr Wilson's application. That requires the Authority to determine how the mediated terms of settlement are to be applied and specifically, whether the terms of settlement require Mr Wilson to pay employee contributions to the relevant scheme as a precondition of the employer making its contribution.

[9] If not, then the question of remedies will fall to be determined.

[10] The second issue is whether the employer was misled into entering the terms of settlement by Mr Wilson's failure to disclose that he was not a member of a scheme during his employment. Mr Blair and Mr Chapman have confirmed that the remedy sought is a penalty, but that the respondent does not seek to have the terms of settlement set aside.

[11] Ms McAra initially challenged the appropriateness of this claim being brought as a counterclaim and suggested that separate proceedings should have been lodged. Mr Blair then took some time to consider whether it might be more appropriate for a different member of the Authority to hear the counterclaim. In the end, both were satisfied that the claim and the counterclaim could be determined on the evidence that had already been put before me. I therefore proceed to determine both matters here. Because it provides a more logical sequence to the determination I begin with the counterclaim.

Was the employer misled into entering into the mediated terms of settlement?

[12] Mr Chapman told the Authority:

> *"In April 2010, amongst other matters, a detailed claim was made by the NZ Merchant Service Guild Inc. identifying sums in arrears alleging that the company had failed to contribute to the applicant's super during the employment as required by the terms of the (expired) collective agreement…*

> *When this issue was raised in April 2010 the company it [sic] was advised that the Applicant had membership in the NZMOSF*[2] *scheme and was entitled to the employer contribution during his whole employment. The company had no reason to query or doubt his tenure of membership…*
>
> *There was ample opportunity for the Union to disclose the true facts about his non-membership especially considering they were emphatically demanding payment of full super contributions that can only arise through holding membership. Very belatedly, in January 2011, the truth finally came out…"*

[13] Mr Chapman did not provide evidence that he was expressly told, in April 2010, that Mr Wilson was a member of a scheme. It appeared that he inferred this from statements (by the union) that Mr Wilson was entitled to arrears of employer contributions.

[14] Mr Wilson says that he wished to be enrolled in the applicable superannuation scheme from the outset of his employment and expected the respondent to arrange this (as is customary, he says, in the industry.) He says the fact that he was not a member during his employment was not only known to the employer, but was a result of the employer's inaction in following up Mr Wilson's requests to be joined up to a scheme. Mr Wilson claims to have repeatedly asked his ships' masters to pursue this issue for him.

[15] On 21 August 2009 Mr Wilson applied for permanent employment with the respondent. The accompanying "*Employee Register Form*" contained a space marked "*Super scheme*" in Mr Wilson recorded "*TBA*." He says this indicates that he was not a member of a scheme because if he had been, he would have given the name of the scheme.

[16] On 15 July 2010, some time before mediation, union organiser Sarah Dench wrote to Mr Chapman saying:

> *"Superannuation is an entitlement under the collective agreement….Mr Wilson advised at induction that* [he] *wished to be enrolled in the superannuation scheme and these requests (repeated many times by Mr Wilson) were never actioned.*

[17] On 16 July 2010 in further correspondence on the issue Ms Dench noted:

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[2] New Zealand Maritime Officers Superannuation Fund

> *"Our members'*[3] *claims for superannuation therefore stand, and the fact that the company did not complete arrangements for them to join a scheme should not disadvantage them."*

Determination

[18] In July 2010 Ms Dench stated unequivocally that Mr Wilson had wanted to join a scheme during his employment and expected the respondent to facilitate this. The clear implication was that he was not already a member of one. Whatever Mr Chapman's understanding had been prior to that point Ms Dench's July 2010 communications should have alerted him to the fact that Mr Wilson had not been a member of a scheme during his employment.

[19] If he did not construe her words in that way, I do not consider that to be her fault. His inability to understand what I take to be the plain meaning of her words, and failure to seek clarification if he needed it, are things for which he must take responsibility.

[20] I am not satisfied, in short, that there is anything to indicate that the union (which represented Mr Wilson at all times from April 2010 onwards) misled Mr Chapman about Mr Wilson's membership of a scheme. By July 2010 at the latest (that is, well before mediation) the respondent knew or should have known that Mr Wilson was not a member of the scheme during his employment.

[21] The counterclaim fails.

Do the terms of settlement require Mr Wilson to pay employee contributions to the relevant scheme as a precondition of the employer making its contribution?

[22] The respondent says that there is no basis for saying that the obligations to pay superannuation contributions are not mutual. It also says that no obligation to pay arises in circumstances where the employee is not a member of a scheme during the employment.

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[3] A similar claim, for another union member, was being pursued by Ms Dench in tandem with that of Mr Wilson.

[23] Mr Blair submits that the inclusion of the words "*as provided for in the relevant collective agreement"* mean that the parties must "*stick with the actual entitlements*" under that agreement with the effect that the Authority can only award Mr Wilson what he was entitled to under the agreement. He says the Authority should "*go behind the terms of settlement*" to ask just what those entitlements were. (He also argues that the effect of the final sentence of clause 25.2 of the collective agreement is that contributions cannot be made as set out there unless a scheme has been joined and can be paid into. This is accepted however the current situation is indeed that a scheme has been joined and can be paid into.)

[24] It is argued for the applicant that there is no wording in the terms of settlement itself which requires an employee contribution: the respondent is effectively asking the Authority to write an additional condition into those terms, which it cannot do. Ms McAra submitted for Mr Wilson that the words "*as provided for in the relevant CA*" simply mean that the respondent was obliged to pay him as if he had been a member at the time of his employment (as he says he would have been if the respondent had done what he believes it should have and actively offered him the *"benefits of a superannuation scheme agreed between the parties.")*

[25] On Mr Wilson's behalf the union tabled a copy of the Trust Deed of the New Zealand Maritime Officers Superannuation Fund and drew my attention to the following provision:

> *"B1.1 Contributions by Members*
>
> *A Member shall not be required to make Contributions to the Fund."*

[26] It was also noted that the figure agreed upon in the settlement was not the amount claimed-in other words a compromise was negotiated, distinct in its terms from the contractual entitlements.

Determination

[27] There will be circumstances where it would be open to an employer to argue that no obligation to pay arises because the employee is not a member of a scheme:

the most obvious would be if a current employee were to seek employer contributions whilst refusing to join a scheme or pay employee contributions.

[28] However, I have already accepted that by the time of mediation the respondent knew or should have known that Mr Wilson was not a member of the scheme during his employment. Questions arising out of that fact may have gone to the merits of the substantive matters between the parties, but as noted at the start of this determination, it is not my task to determine the merits of the original employment relationship problem. Instead I am tasked with giving effect to the terms of a compromise arrived at in settlement of the original dispute.

[29] The inclusion of the words "*as provided for in the relevant CA*" cannot open up for determination all of the relevant entitlements under the collective agreement. If it did the terms of settlement would have settled nothing. The union is, I find, correct in its submission that that the respondent is effectively asking the Authority to write an additional condition into those terms. The Authority cannot do so. The words of the settlement must be construed on their face.

[30] Clause 2 imposes obligations on the employer party. It is silent on the employee's obligations. If the parties had agreed on any obligation to be performed by the employee, the agreement would contain a term to reflect that. I am not persuaded that the words *"as provided for in the relevant collective agreement"* do anything more than require the employer to pay into a scheme which has been agreed in the manner set out in clause 25.

[31] The Authority has a discretion to make an order for compliance where it has been established that the party against whom the order is sought has failed to comply with mediated terms of settlement. The Authority's discretion must be exercised according to principle however the party affected by non-compliance (in this case, Mr. Wilson) is entitled to an order for compliance unless there is good reason for the Authority to refuse it. Pacifica Shipping Limited has failed to comply with the terms of settlement. I have no evidence to suggest that there is any other good reason to refuse an order for compliance. In the circumstances it is an appropriate exercise of the Authority's discretion to order the respondent to comply with the terms of settlement.

Order for Compliance

[32] **I order that the respondent, Pacifica Shipping Limited, comply with clause 2 of the mediated terms of settlement by paying superannuation contributions of $7070.30 to Mr. Wilson's NZMOSF account within seven days of the date of this determination.**

Interest

[33] The recently amended Clause 11 of Schedule 2 of the Employment Relations Act 2000 provides as follows:

> *"**Power to award interest***
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> *(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority."*

[34] The Authority thus has a discretion to order interest on the damages recovered at the rate prescribed under section 87 (3) of the Judicature Act 1908 (8.4% per annum.) I am satisfied that this is an appropriate case to order interest since Mr. Wilson has lost the benefit of interest that would have accrued had this money been in his superannuation account since the due date of payment (4 October 2010.)

[35] **The respondent is therefore ordered to pay interest on the monies owed from 4 October 2010 until the date of payment.**

Costs

[36] Any claim for costs must be made within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority