IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 242
WRC 2/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ARTHUR UDOVENKO Plaintiff
AND	OFFSHORE MARINE SERVICES (NZ) LIMITED Defendant

Hearing:	23-25 September 2013 (Heard at Wellington)
Appearances:	Guido Ballara, counsel for plaintiff Susan Hornsby-Geluk and Blair Scotland, counsel for defendant
Judgment:	16 December 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The issue that arises for the Court's determination is a narrow one, although it is said to have potentially broad implications. The proceedings relate to the plaintiff's entitlement to pay during two brief periods of his employment.

[2] Mr Udovenko alleges that the defendant company, Offshore Marine Services (NZ) Limited (OMS), has effectively used money already owed to him to fund a period of suspension contrary to the terms of his employment agreement, and that he is owed two additional days' pay. OMS takes a different view of what its obligations were during the periods in question.

The facts

[3] The facts can be stated reasonably briefly. The plaintiff is a seafarer. He was employed pursuant to the New Zealand Offshore Oil/Gas Operations Multi Employer Collective Employment Agreement (the agreement) for a fixed term period[1] to work as Chief Mate on board the Polarcus Alima (the Polarcus). He joined the vessel on 14 November 2011. It was intended that he would work a four week cycle (27 days) on the vessel, to be followed by four weeks (27 days) of corresponding time off the vessel.

[4] Issues arose between Mr Udovenko and the Master of the Polarcus, John Roberts. Master Roberts made a complaint to OMS that Mr Udovenko had failed to follow his instructions. Mr Park, the General Manager of OMS's Australasian operations, became involved. He had a meeting with Mr Udovenko on board the Polarcus on 9 December 2011. Mr Udovenko was given a letter which set out the concerns that had been raised and was advised that further detail would be provided "in due course". A meeting was held the next day. During that meeting Mr Park told Mr Udovenko that the Polarcus would be sailing out of Wellington without him and that he was to be suspended while the investigative process was on foot. In doing so he advised, and later reiterated, that the plaintiff's suspension would be "on full pay" pending completion of the company's investigation. Mr Udovenko left the Polarcus on 10 December 2011, 27 days after he had arrived on it.

[5] Mr Udovenko had, by this stage, raised with Mr Park concerns of his own in relation to a number of issues to do with his employment, including allegations about Master Roberts' behaviour towards him. Mr Park made it clear that he intended to investigate both sets of allegations and would be seeking Mr Udovenko's response in relation to each.

[6] A period of communication and meetings followed. Mr Udovenko continued to receive fortnightly payments from his employer during his period of suspension. While suspended he spent some time (the quantum of which was in dispute) responding to the concerns identified by the defendant, engaging in the defendant's

[1] On or about 16 November 2011 and expiring on or about 1 July 2012.

investigative process and in providing further information – as sought by the defendant – in relation to the plaintiff's concerns.

[7] On 29 March 2012 Mr Park wrote to Mr Udovenko advising him that OMS had decided to discontinue its investigation and would not be making any findings in relation to the allegations that had been made. He went on to advise that the Polarcus would be leaving New Zealand waters on or about 15 April 2012 and that all OMS employees engaged on the project were being given notice of termination of their employment. A letter terminating the plaintiff's employment was enclosed. Mr Udovenko was advised that his last day of employment would be "on or about" 15 April and that "you will be paid up to and including that date, in the same way as other OMS employees". In the event, Mr Udovenko was paid on the basis that his termination date would be 17 April 2012. Pending termination the plaintiff was placed on special leave.

[8] It is common ground that there is an industry practice whereby sea-going employees enjoy a period of time away from the vessel equivalent to the period of time they are on-board the vessel working. This practice is colloquially known as 'equal time on - equal time off'. The practice reflects the fact that while at sea employees are effectively working a minimum of 12 hours per day, seven days a week, for up to six weeks at a time.[2] The underlying purpose of the equal time on - equal time off system is to ensure that employees have an equivalent time off to rest and recover from the demands of working at sea. The periods off the vessel are known as 'swings'.

[9] Two methods of payment exist within the industry in relation to equal time on - equal time off. The first method is for employees to be paid an agreed rate for the period when they are on board the vessel, but to receive no ongoing payments during their on-shore swing. Mr Davis, the Deputy Regional Secretary (Asia/Pacific

[2] The realities of working at sea are reflected in cl 5(b) of the agreement ("Hours of Work"), which provides: "It is recognised that the offshore industry operates on the basis of a normal 12 hour work day 7 days per week including statutory holidays and weekends and these are the normal working hours subject only to any statutory entitlement for working on public holidays". Those in senior management positions, such as the plaintiff, have special responsibilities in relation to safety, navigation, rescues and health and safety.

region) of the International Transport Workers' Federation (ITF), gave evidence (which I accept) that this methodology is rarely used and, when it is, the missing paid equal time off is generally incorporated into the employee's pay, resulting in a doubling of the daily pay rate. This first method of payment is not favoured by employees or unions as it has the potential to increase pressure to forego rest periods between demanding off-shore swings, thereby compromising health and safety.

[10] The other method of payment is for the employer to pay the amount earned by the employee for working on board the vessel across both the off-shore and equivalent on-shore swings. This approach is prevalent in New Zealand, is the one that is utilised by the defendant company and is the one that applied in relation to the plaintiff. It is reflected in cl 16(a) of the agreement ("Time off, and holidays"), which states that:

> The salaries specified in this agreement provide for a leave system of equal time on and equal time off based on a working system of four weeks on and four weeks off …

[11] This second method is favoured by most employees as they enjoy a regular stream of money which enables them to more easily manage their financial affairs. For employees at least the system is one of convenience. While the payments extend over the on-shore periods, the money that is paid out (and the time) has itself already been earned. As Mr Neville, General Manager of another employer party to the agreement and a witness for the defendant, said:

> A ship's officer is paid for working on board a ship, not for having time off. … [I]n New Zealand the preference tends to be to spread payment across the period on-board and onshore.

[12] Mr Park gave evidence that:

> Either way, the employees are not earning their pay when they are ashore and not working for the employer – the difference is the timing of when and how the employer pays the employee for the time they've already worked.

[13] There is no dispute that under the agreement the plaintiff was entitled to be paid the sum of $504.07 for each day he worked on the vessel and that he accrued an additional sum of $504.07 per day as equal time off. This meant that by the time he left the Polarcus after 27 days he was entitled to $504.07 (for each day on the vessel)

times two (by way of equal time off the vessel) times 27 (days). Ordinarily the amount due would be paid to the plaintiff in equal fortnightly instalments over the time on and off the vessel. However, he contends that because he was on suspension his time off ought to have been frozen and not reactivated until the investigative process had concluded.

[14] There are two aspects to the plaintiff's claim, which relate to two distinct time periods. First, the basis on which he was paid during the 27 days following his suspension from the vessel. Secondly, whether he was correctly paid for the period 17 to 19 April 2012.

[15] The plaintiff pursued a personal grievance in the Employment Relations Authority (the Authority) in relation to these two issues and more generally. The Authority determined that the plaintiff had been paid correctly by the defendant.[3] Residual issues in respect of the justifiability of the plaintiff's suspension and subsequent dismissal have not yet been determined and can be put to one side for the purposes of the current challenge.

Outline of submissions

[16] The plaintiff submits that he was not provided with equal time off, as that concept is understood within the industry, because he was required to engage with the defendant's investigative process. In essence it is contended that the defendant effectively expended his pre-existing contractual entitlement to 27 days' equal time off (or, to put it another way, the plaintiff's own money) in order to pay him while he was suspended from his employment. The plaintiff submits that under the agreement equal time off is earned and accrues via working equal time on; the plaintiff's pay for each day of work is payable in two halves, namely for the day worked and for equal time off; and that the plaintiff's equal time off was a valuable contractual entitlement in its own right which had accrued at the point of suspension, and which was not available for the defendant's use. The plaintiff claims that his equal time off ought to have been "frozen" at the point of suspension and reactivated at the end of that period.

[3] [2013] NZERA Wellington 8.

[17] The New Zealand Merchant Service Guild IUOW Inc (the Guild) applied for, and was granted by consent, leave to intervene in these proceedings. The Guild supports the position advanced by the plaintiff. It expressed grave concerns about the erosion of the longstanding industry practice of equal time on – equal time off that, it says, flows from the defendant's approach to the plaintiff's suspension.

[18] The defendant's central argument is that the plaintiff was paid his full contractual salary for the period of his employment and there is nothing express or implied in the agreement providing for an "additional" payment to be made in the event of a suspension. Nor is there any express or implied provision for the ring-fencing of certain payments. It follows that cl 8 (which provides that the salaries specified in the agreement constitute full consideration for all work performed and no additional payments will be payable in any other circumstances except as expressly provided for[4]) prohibits the payments sought by the plaintiff. It is further submitted that while the plaintiff participated in the investigative process during his rostered time off, that is no different from a Monday to Friday worker who is required to invest their own time in maintaining the employment relationship and that, in any event, most of the work that the plaintiff did was self-generated and unhelpful.

Analysis

[19] Clause 16(a) of the agreement ("Time off, and holidays") expressly recognises the equal time on – equal time off system that operates within the industry and on which salaries are based.

[20] Clause 8 ("Remuneration") sets out the salary scales for certain employees. Clause 8(b) provides that:

> Except as specifically provided in this agreement, the above remuneration covers all work in connection with the operation, and recognises the following:
>
> i. There will be no additional payment in respect of anchor handling, ROV, diver support or drilling work.

[4] By way of reference to cl 8(b) and (d).

ii. There will be no additional payments in respect to previous service in this or other vessels.

iii. There will be no additional payments in respect of manning level considerations.

iv. There will be no additional payments in recognition of any circumstances arising from work in the industry.

v. There will be no additional payments in respect to hours worked in excess of those prescribed in Clause 5.

[21] Clause 8(d) states that:

> 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. It includes payment for travelling days, anchor handling payments, ROV allowance, drilling allowance, in port taxi allowance, medical insurance for employee and family and the previous additional loading allowance… No additional payment shall apply unless specified elsewhere in this agreement.

[22] The agreement is silent in relation to what will occur when suspension takes place. The thrust of the defendant's submission is that cl 8 specifically excludes any additional payment being made, other than as expressly provided for elsewhere in the agreement, and accordingly there was no entitlement to the additional payment sought by the plaintiff in respect of the 27 days of his suspension that are in issue. This proposition was put to Mr Davis and the following exchange with counsel unfolded in cross examination:

Q. And pursuant to clause 8 the employees get paid their salary pursuant to this agreement and nothing further, isn't that true?

A. No. Well for example there's other entitlements under this agreement such as superannuation. There's other elements to the remuneration package.

Q. But those are specified within this agreement though aren't they? Clause 8 makes it clear that if it's not specified in the agreement you don't get payment for it. Isn't that a fair assessment?

A. *It's a fair assessment for one that hasn't been involved in the industry and is not familiar with the concept of working equal time on a ship and getting paid for that and then getting paid for the equal amount of time off.*

Q. But it's a fair assessment based on the plain words that are used in this agreement though isn't it?

A. *You could say that it is a fair assessment from the point of view of a landlubber.*

(emphasis added)

[23] It is axiomatic that context is a key ingredient in contractual interpretation. What is the meaning that would be conveyed to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the circumstances at the time of the contract?[5] The Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meatworkers and Related Trade Unions Inc*[6] endorsed a contextualised approach to the interpretation of collective agreements, accepting that it is appropriate to consider prior instruments between the parties to a collective agreement or their predecessors.[7] There, the Court applied the analysis of the Supreme Court in relation to the construction of commercial agreements in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[8] and, in particular, McGrath J's summary of the 'five principles of interpretation' as established by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:[9]

> ... interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[24] Also relevant, in the Court of Appeal's view, was the analysis of Tipping J in *Vector Gas*, where it was said that:[10]

> ... generally speaking, issues of contractual interpretation arise in three circumstances: mistake; ambiguity; and special meaning. ... A special meaning exists when the words used, even after the contractual context is brought to account, are linguistically still capable of only one meaning or are wholly obscure; but it is nevertheless evident from the objective context that the parties, by custom, usage or agreement, meant their words to bear a

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[5] See, for example, the discussion in *Progressive Meats Ltd v Pohio* [2012] NZEmpC 103 at [29].
[6] [2010] ERNZ 317 (CA).
[7] At [35].
[8] [2010] NZSC 5, [2010] NZLR 444.
[9] At [61].
[10] At [33].

> meaning which is linguistically impossible (for example, black means white), or represents a specialised and generally unfamiliar usage.

[25] The way in which the off-shore industry operates in practice provides relevant background context in the present case. Mr McLeod, who has extensive experience in the industry both within New Zealand and overseas as a consultant to the ITF Seafarers' Trust and as a former General Secretary of the New Zealand Merchant Service Guild, gave evidence (which I accept) that equal time on – equal time off roster arrangements within the industry are long-standing, are regarded as "sacrosanct" and are widely understood to comprise a separate entitlement in their own right. They are not to be used, for example, for annual leave or public holidays. He gave evidence that during his involvement with the off-shore industry there has never been any suggestion that equal time off could be used for any purpose other than as paid time off the vessel, in its own right. It followed that the use of equal time off for purposes such as suspension would be contrary to long-standing industry practice.

[26] Mr McLeod rejected the suggestion that the agreement did not reflect his understanding of what the provisions, in particular cls 8 and 16, were designed to achieve:

> Q. I'm asking you whether you think the wording in the agreement is clear. It says –
>
> A. It doesn't really matter what I think. *It's the way it's either interpreted traditionally in the industry or we have some "come latelys" who put a different interpretation on it.*
>
> Q. Within the – you have reviewed the collective employment agreement in its entirety correct?
>
> A. Yes.
>
> Q. And there is no mention made in the agreement about extra payments by reason of being suspended is there?
>
> A. No there is not but *traditionally an employer would ring up the representative of the worker and say no debit no credit. Everything would be frozen.* You can't expect a worker to pay for his own suspension while an investigation goes on.
>
> (emphasis added)

[27] While Mr McLeod had not been involved in negotiations for the current version of the agreement at issue in these proceedings, he was involved in negotiations for its predecessor. It is evident that the relevant clauses have not materially changed over time and that the original intention was for a day's pay (equal time on) and a day's time off on pay (equal time off) as a separate entitlement in its own right.[11] He confirmed that this remains the position.

[28] Mr McLeod's evidence in relation to the background to the provision of equal time on – equal time off was supported by what Mr Davis had to say. Mr Davis has had extensive experience in drafting awards and collective agreements in the maritime industry and gave evidence that, since the 1980s, the New Zealand coastal, foreign-going and off-shore awards, and collective agreements or contracts have contained fairly standard provisions for an equal time on and off roster. He reiterated Mr McLeod's evidence that the equal time on – equal time off system is "sacrosanct" and that paid time off is regarded within the industry as an element of the remuneration package that is distinct from salary. His evidence was that in certain circumstances, such as when a seafarer is called back to the vessel or is required to undergo on-shore training, the seafarer's time off days are frozen and kept in what was referred to as his/her "time-off bank", to be taken at a later date.

[29] I pause to note that the defendant advanced an argument that because there are negotiations on foot to expressly deal with the issue now before the Court, this supported an inference that the position was less clear cut than the plaintiff's witnesses suggest. I do not accept this. I am satisfied on the evidence before the Court that the 'freezing' practice is well established. In the circumstances, the fact that the parties are in discussions as to how this practice might be expressly incorporated or otherwise within the agreement is beside the point, particularly having regard to the without prejudice nature of the discussions.

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[11] In *New Zealand Merchant Service Guild IUOW Inc v Interisland Line (a division of Tranz Rail Ltd)* [2003] 1 ERNZ 510 the Court observed that: "Employment agreements are often the product of a history of instruments of varying sorts by which the parties have attempted to define their relationship. The result may be a document which is a mix of new provisions designed to meet changing statutory or industrial requirements grafted onto existing and long-standing provisions."

[30] Mr Davis gave evidence about the background to cl 8. He was involved in the negotiations at the time, although the negotiations in which he was involved related to an earlier version of the agreement. However, the clause itself remained unchanged, despite amendments to other provisions. Mr Davis gave the following evidence in cross-examination, emphasising that the intention of the clause was to prevent claims for allowances in addition to salary:

> Q. But the wording of this particular collective agreement it says that well the salary that you get paid under this agreement constitutes complete consideration for the work performed in all the circumstances doesn't it?
>
> A. Yeah but that's because that set of negotiations where all of the allowances were rolled into the remuneration package, there was a certain amount of uneasiness on the part of the employers that there might be subsequent claims or arguments for additional payments that had already been wrapped into the salary. I think this was probably around 1994 when that negotiation happened and we put all of the allowances into the salary. So all that's doing is saying "You're not going to be able to get way with any other claims" or "You're not going to be able to resurrect past allowances that we used to have".

[31] Mr Davis agreed that cls 8 and 16, when read in isolation, may support the interpretation advanced by the defendant but said that they could not be so interpreted when read in context and with an understanding of the way in which the industry operates.

[32] It is clear that the equal time on – equal time off system involves an accruing balance of equal time off, in terms of both time and money. This is reinforced by various provisions in the agreement (both within cl 16 and more generally), which make reference to equal time off being "accrued", "credited", "debited", "deducted" and "forfeited".

[33] The industry practice of freezing equal time off, and the sanctity of such time,[12] receives contractual recognition in a number of provisions of the agreement. By way of example, cl 15(f) prevents the loss of equal time off where events arise that are outside the employee's control:

> Where an employee cannot reach his/her home until after midnight on the normal travelling day or subsequent travelling days the employer shall

[12] Which was reinforced by other witnesses for the defendant.

> provide a day's pay for each day so delayed. There will be no deduction of time off or accrual of time for such days.

[34] In addition, cl 16(e) states that equal time off cannot be used where a new employee is unable to join a vessel at a given time, and cl 16(f) preserves the right to accrue equal time off as an entitlement in its own right where an employee is prevented from rejoining the vessel. Nor can an employee's accrued equal time off be used while they attend training. In this regard, cl 20 ("Training") states:

> Where an employer requires an employee to attend a training course other than a course for a superior certificate, reasonable costs of attending the course will be reimbursed. *Time off will not be forfeited or accrued for time so spent.*
>
> (emphasis added)

[35] The defendant submits that the existence of an express ability to freeze equal time off for periods of training undertaken at the behest of the employer suggests that the parties turned their minds to a 'no debit, no credit' situation (or freezing of equal time off) and elected not to apply it in respect of suspensions. However, it is clear from the evidence that the parties did not turn their minds to the prospect of suspension and, accordingly, the inferences that might otherwise be drawn from the inclusion of cl 20 do not arise.[13]

[36] Suspension will ordinarily be on pay unless there is a contractual provision for suspension without pay. In the present case the agreement is completely silent on the issue of suspension. That is because the parties did not turn their minds to it. The parties did, however, turn their minds to what cl 8 was designed to achieve. It was designed to prevent claims for allowances in addition to salary, as is apparent from the evidence of Mr Davis and can be seen from the nature of the examples set out in that provision, all of which comprise some form of allowance.

[37] While the defendant submitted that the analysis begins and ends with the express terms of the agreement in that it effectively constitutes a code, that cannot be correct, as other provisions in the agreement reveal. As Mr Ballara (counsel for the plaintiff) pointed out, the agreement itself contains a number of references to

[13] Including in relation to industry practice.

external instruments, such as standing orders, guidelines and other agreements. In these circumstances it cannot, and does not purport to, function as a stand-alone code. And Mr Neville effectively accepted that cl 8 had no application in terms of how a suspension would be dealt with.

[38] I accept that, when read in context, it is clear that cl 8 was not intended to have the all-encompassing exclusionary reach contended for by the defendant. It does not have application as to how suspensions are dealt with and paid for. The interpretation advanced on behalf of the defendant would cut across long-standing industry practice. Accrued time off comprises a separate entitlement and is directly linked to time actually worked. The plaintiff's entitlement accrued as he worked on the vessel and gave rise to a liability for the company at that time. As the defendant's witnesses accepted, if the plaintiff had died or resigned at any stage during his off-shore swing he would have been immediately entitled to payment for any days worked times two. This is reinforced by the defendant's pay records, which draw a distinction between "offshore" and "onshore" balances.[14] While this may, as the defendant says, reflect a convenient means of accounting for what an employee had been paid, it also suggests that it is viewed as a separate, accruing entitlement, with a monetary value.

[39] I accept the plaintiff's submission that it is not open to the defendant to apply the plaintiff's entitlement for its own purposes, such as payment for a period of suspension, and in the absence of any express contractual entitlement to do so. His equal time off entitlement ought to have been frozen, in a manner consistent with well-established practice in circumstances involving attendances at the employer's behest during on-shore swing periods and reflecting the sanctity of the entitlement. Such an approach must have been intended and, contrary to the position advanced on behalf of the defendant, sits comfortably with the other express contractual terms, for the reasons set out above.

[40] The reality is that the plaintiff was unilaterally suspended by his employer without consultation. Counsel for the defendant submitted that the plaintiff was, and could only ever have been, suspended during the period he was required to work by

[14] And previously its wage records recorded the number of "duty" and "leave" days.

the defendant, namely during his on-board swings, and that he was not suspended in respect of the periods he was on-shore. On this analysis the plaintiff was not on suspension during the 27 day period at issue. Such an approach is, however, inconsistent with the evidence of the defendant's witnesses. It is clear that Mr Park understood the plaintiff to be immediately suspended following the meeting on 10 December and the plaintiff was expressly advised that he was suspended pending completion of the investigation (which took place during the 27 day period), which Mr Park wished to conclude without delay. Mr Udovenko was expected to engage in, and be available for, the employer's investigation throughout this period. All of this occurred during his accrued equal time off. In contrast to others on the on-shore swing, he was not, and could not in the circumstances have been, "off the radar". The plaintiff's suspension had the effect of removing him from the roster. It is artificial to suggest otherwise.

[41] Counsel for the defendant sought to draw an analogy between the situation that the plaintiff found himself in and that of a nine to five, Monday to Friday employee facing a disciplinary process. However, Mr Udovenko's working arrangements were peculiar to the industry he worked in. In any event, it would be most unusual, if not unprecedented, for an employer to require a Monday to Friday worker to attend a disciplinary meeting on a Saturday or Sunday (the days usually designated for rest and relaxation). While an employee might reasonably expect to spend some of their own time reflecting on issues of concern raised by their employer I am not immediately drawn to Mr Park's broadly crafted suggestion that it is part of the mutual obligations owed by employers and employees that they will put time and effort into the relationship outside normal working hours, and certainly not to the extent that the plaintiff was required to do.

[42] The plaintiff believed that his on-shore leave period would be frozen and that the defendant would continue to pay him in the intervening period. That was an entirely reasonable assumption to make in the circumstances, having regard to common industry practice, other provisions of the agreement (such as the approach adopted to attending training during on-shore periods) and the defendant's failure to make clear that it had in mind another arrangement. The plaintiff was given repeated assurances that his suspension would be "on pay" or "on full pay". That could not

logically mean that the plaintiff would continue to get paid out of the money that he already had owing to him by the defendant. Such an interpretation would lead to the plaintiff effectively funding his own suspension, rendering Mr Park's assurances nonsensical. OMS had agreed to pay the plaintiff while he was suspended, his entitlements had already accrued in relation to his 27 days on board the Polarcus and those entitlements could not be eroded by the employer retrospectively. Simply put, the plaintiff's accrued entitlement could not be used for a dual or ulterior purpose.

[43] Ms Hornsby-Geluk, counsel for the defendant, submitted that if the plaintiff's argument succeeded he would be placed in a better position than other workers who had continued on the roster over the period of his suspension and that it would be contrary to the principles of equity and good conscience for him to receive a "windfall". This proposition was put to Mr Udovenko in the following terms:

> Q. How do you say it's just and equitable that you end up being paid more in total than the guys who continued to work hard on the vessel throughout the period that you were sitting at home?
>
> A. ... If you and me were two second officers on Polarcus Alima, we spent our Saturdays and we have Saturdays off. You're going home but Alex [Park] decided to send me to training courses to Malaysia for two weeks. Yeah. And he sent me for two weeks for training courses. My time off will be frozen and in the end I will get more than you. Paradox.
>
> Q. But you weren't on training courses, you were suspended.
>
> A. Yes I was suspended, what's the difference they still engage me for their purposes.

[44] There are two additional difficulties with the defendant's "windfall" proposition. First, the time period in question, and which is the focus of the plaintiff's claim, is the 27 days immediately following his 27 days on the vessel. During this period he was told he was on paid suspension. That could, as I have already observed, only reasonably have meant suspension at the employer's expense. Accordingly no question of a windfall for the plaintiff arises. Rather, it constitutes the preservation of an existing contractual entitlement and cannot be viewed as objectionable on this basis. Secondly, and as Mr Davis pointed out, to liquidate the employee's equal time off entitlements during a period of suspension is to take the opportunity to reduce a liability and therefore becomes a "windfall" for the employer.

[45] The defendant submitted that most of the time spent by the plaintiff in the context of the disciplinary process was self-generated and of his own making. While I accept that the plaintiff raised a number of issues which had only a tenuous connection to the original concerns identified by the defendant, I do not accept that the time required to engage in the process by him was minimal or ought reasonably to have been. A number of allegations had been raised against him which, as Mr Park accepted, the plaintiff was entitled to treat seriously. He had, after all, been advised that his employment was in jeopardy and the unusual step had been taken of suspending him. I accept that this period was stressful and that Mr Udovenko spent a considerable amount of time considering the concerns that had been raised, the context in which they had arisen, taking advice, seeking and considering information, and providing responses (although not all of his activity was of direct relevance to the investigation).

[46] Counsel for the defendant also raised a subsidiary concern that adopting the argument advanced by the plaintiff would give rise to a perverse incentive to workers on suspension to spin out any investigative process. But this is an issue that would arise, theoretically if not in practice, in the context of every employment investigation involving an employee suspended on pay. It cannot provide a defensible basis for reading down the plaintiff's entitlements. Conversely, if the defendant's approach was accepted it would lead to employees having to expend their on-shore swings, which are specifically designed to counter-balance the rigours of off-shore work, engaged in disciplinary processes initiated by their employer.

17 to 19 April

[47] The plaintiff says that he was short-paid for two days during April 2012, and that from 29 March 2012 until the Polarcus left New Zealand waters on 19 April 2012 (which equates to a 22 day period) he was only paid 20 days' equal time off.

[48] I accept the defendant's evidence that the Polarcus in fact left New Zealand waters at midnight on 18 April 2012 and that at this time the crew that were on board were re-employed by a new Australian employer. The defendant's witnesses gave evidence that the plaintiff would not have been eligible to work in Australia because

he did not have the requisite visa and could not, accordingly, have travelled to Australia with the remaining crew. However it is apparent that the rationale for taking 17 April 2012 as a finish date for the plaintiff has changed over time. When the plaintiff was given notice of termination he was told that he would be paid "in the same way as other OMS employees". One employee left the vessel in New Zealand on 17 April 2012 for non-visa related reasons. I am satisfied that if Mr Udovenko was to be treated in the same way as other OMS employees his last day would otherwise have been 18 April 2012.

[49] The plaintiff was paid for the period of his suspension and during the subsequent period of special leave, together with a 'wash-up' payment equivalent to 20 days. The defendant submitted that if the plaintiff was to be paid at a "daily rate" during his suspension that should logically continue to apply to the latter period of special leave. However, it is apparent that the two periods (of suspension and special leave) were distinct from one another and were intended to be treated differently. It was made clear that, while on special leave, the plaintiff would be paid in the same way as other employees, the implication being that he would be paid as if he was in the roster. An analysis of the documentation reflects that the period of special leave generated a 20 day shortfall (in terms of the notional on-shore/off-shore days during this period). That shortfall was addressed by way of the 20 day 'wash-up' payment. Accordingly no issues of set-off arise.

Conclusion

[50] The defendant was not entitled to use up the plaintiff's on-shore leave payments (and time) to fund his suspension on pay during the 27 day period in issue. The plaintiff's period of on-shore leave ought to have been frozen and he ought to have been paid the ordinary rate of pay during this time. In addition, the plaintiff's last day was 18 April 2012, not 17 April 2012. The Authority's determination is accordingly set aside.

[51] Because of my findings I do not need to go on to consider and determine the plaintiff's alternative cause of action.

[52] Costs are reserved at the request of both parties. If they cannot otherwise be agreed they may be the subject of an exchange of memoranda, with the plaintiff filing and serving any memoranda and material in support within 30 days of the date of this judgment and the defendant within a further 20 days.

Christina Inglis
Judge

Judgment signed at 9.45 am on 16 December 2013