

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 139
EMPC 222/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KIWIRAIL LIMITED Plaintiff
AND	JAMES MOBBS First Defendant
AND	MARITIME UNION OF NEW ZEALAND INCORPORATED Second Defendant

Hearing: 9, 10 and 23, 24 June 2020
(Heard at Wellington)

Appearances: P David QC and A Russell, counsel for the plaintiff
P Cranney, counsel for the first and second defendants

Judgment: 2 September 2020

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] At issue is the correct meaning of a retirement clause. Is its meaning plain, or is it such that it requires either corrective interpretation, or rectification?

[2] Mr James Mobbs is an employee who has worked on Interislander Ferry Services (Interislander) for many years, employed by KiwiRail Limited or its predecessors. In 2018 he applied for retirement leave, which was declined on the

grounds the clause did not cover him. He raised a relationship problem, saying he was entitled to a compliance order in respect of that right.

[3] In the Employment Relations Authority,¹ it was argued for Mr Mobbs that as a matter of interpretation, the clause clearly provided a general entitlement, so that he was entitled to apply for retirement leave.

[4] Before the Authority, KiwiRail's position was that correctly construed, the right to retirement leave was restricted to a limited class of persons who were employed by the company or its forebears prior to 21 July 1994, or who were employed via an industry transfer agreement with recognised service prior to that date.

[5] By agreement, the Authority's investigation proceeded on the papers. It concluded that on a plain meaning of the words used in the relevant clause Mr Mobbs was entitled to be paid leave on retirement. A compliance order was accordingly issued.

[6] KiwiRail brought a *de novo* challenge to the Authority's determination, primarily contending that on a proper reading of the clause, against the relevant background, it had limited application. Alternatively, if the clause was to be construed as had been contended for Mr Mobbs, the document contained an error which should be rectified.

[7] The Maritime Union of New Zealand Inc (MUNZ or the Union) was a party to the relevant CEAs. Accordingly, KiwiRail's challenge was brought not only against Mr Mobbs, but against the Union. In resisting the challenge, both those parties assert that the clause is quite clear. They contend that it provides Mr Mobbs with a retirement leave entitlement. On the alternative cause of action, it is argued that there is no jurisdiction in the Court to order rectification of a collective agreement; and that in any event, the threshold for such a decree could not be cleared.

¹ *Mobbs v KiwiRail Ltd* [2019] NZERA 354 (Member Campbell)

The applicable CEAs

[8] It is common ground that when Mr Mobbs applied for retirement leave in 2018, the applicable CEA was between KiwiRail and MUNZ 2016 – 2018. It related to employees of KiwiRail who worked on the Interislander ferries. The agreement covered work performed by permanent, fixed-term and casual employees in various positions on the Kaiarahi, Aratere, Kaitaki, and any new ships which may be introduced by Interislander.²

[9] Clause 37 was the operative clause as to retirement leave, and provided:

37 RETIREMENT

37.1 Retirement from the company, from 1 February 1999 will be based on the employee's ability to satisfactorily perform all of the duties of the position, taking account of such factors as health and actual job performance; or at a mutually agreed date.

37.2 This clause also applies to employees engaged before 21 July 1994 and to employees employed via an industry transfer agreement with recognized service before that date. An employee may apply to retire for other than medical reasons under clause 37.6, and the employer may agree to treat any such application as a retirement where it is satisfied that it meets the criteria set down from time to time.

37.3 Where retirement is approved, or if redundant, leave shall be granted on the following scale:

Under 10 years' service	Nil
10 but under 15 years	42 days
15 but under 20 years	56 days
20 but under 40 years	91 to 183 days

37.4 For retirement leave purposes a day's pay shall be annual salary under clause 11 divided by 365.

37.5 For the purposes of this clause, service shall mean current continuous service with Interislander since 1 December 1988.

37.6 Medical Retirement

37.6.1 In the event that an employee is declared permanently unfit in terms of any maritime regulations/rules, a payment shall be made in accordance with the following scale:

Years of service	Days' Pay
2 – 10	183
11 – 15	141

² Clause 5.2.1.

16 – 20	127
21 years and over	92

37.6.2 A day's pay for the purposes of payments under this clause shall be calculated as annual salary divided by 365.

37.6.3 The employer may at any time review the continuing employment of an employee where the extent of that employee's ill health or disability is such that a return to work is unlikely or absence is likely to be prolonged. A review under this sub-clause will take into account medical opinions from both the employee's doctor and a doctor nominated by the employer.

[10] Also relevant is cl 4.3, which stated:

Interislander and MUNZ recognise the complexity of drafting the new Collective Agreement. The final drafting of the document may have resulted in errors or omissions which, if not correct, may alter the parties' actual agreement. Where errors or omissions of this type are identified then, subject to the clause above, the parties agree to revert back to the original document in good faith in an effort to agree on a solution.

[11] Similar clauses were contained in the two previous CEAs for 2011 – 2013 and 2013 – 2016.

[12] It is common ground, and it is clear from all these documents, that the term "the new Collective Agreement" is one which was first used in cl 4.4 of the 2011 – 2013 CEA; it was a reference to the recently consolidated CEA which replaced two previous CEAs. The first of these had related to the Arahura; the second had related to the Aratere and the Kaitaki. Both expired on 30 January 2011.

[13] It is also common ground that the process which gave rise to the 2011 – 2013 document involved KiwiRail and MUNZ undertaking a collaborative process via a working party which had merged all the provisions of the two previous collective agreements. Once that had taken place, bargaining occurred.

[14] Under the collective agreement relating to the Arahura, the 2008 – 2011 provision relating to retirement stated:

22 RETIREMENT

- 22.1 Retirement from the company, from 1 February 1999 will be based on the employees ability to satisfactorily perform all of the duties of the position, taking account of such factors as health and actual job performance; or at a mutually agreed date.
- 22.2 In the event that an employee is declared medically unfit to continue his/her service with the employer, he/she will be entitled to severance payments in line with the following scale:

<i>Years of Service</i>	<i>Days Pay</i>
2 – 10	183
11 – 15	141
16 – 20	127
21 years and over	92

- 22.3 On reaching retirement age and retiring, or retiring on medical grounds and leaving their employment, or if redundant, employees, other than employees engaged after 21 July 1994, will be entitled to retirement leave on the following scale:

Under 10 years' service	Nil
10 years and under	15 42 days
15	20 56 days
20	40 91 to 183 days

This clause also applies to employees engaged after 21 July 1994 via an industry transfer agreement with recognised service before that date.

- 22.4 The employer may at any time review the continuing employment of an employee where the extent of that employee's ill health or disability is such that a return to work is unlikely or absence is likely to be prolonged. A review under this Subclause will take into account medical opinions from both the employee's doctor and a doctor nominated by the employer.
- 22.5 Employees may be required to submit to medical examinations in accordance with the New Zealand Shipping (Medical Examination of Seafarers) Regulations 1986.
- 22.6 For the purposes of this clause, service shall mean current continuous service with the employer since 1 December 1988.

[15] Under the collective agreement relating to the Aratere and Kaitaki, the 2008 – 2011 provision relating to retirement stated:

23. RETIREMENT

- 23.1 This clause applies to employees engaged before 21 July 1994 and to employees employed via an industry transfer agreement with recognised service before that date. An Employee may apply to retire for other than medical reasons under Clause 14.8, and the employer may agree to treat any such application as a retirement where it is satisfied that it meets the criteria set down from time to time.
- 23.2 Where retirement is approved, or if redundant, leave shall be granted on the following scale:

Under 10 years service	nil
10 but under 15 yrs	42 days
15 but under 20 yrs	56 days
20 but under 40 years	91 to 183 days

23.3 For retirement leave purposes a day's pay shall be annual salary under clause 4 divided by 365.

23.4 For the purposes of this clause, service shall mean continuous service with the employer since 1 December 1988.

[16] It is also common ground that up to the expiry of the two separate collectives, the persons entitled to retirement leave were restricted, as described in Arahura cl 22.3, and in Aratere/Kaitaki cl 23.1.

[17] The underlying point of this proceeding is whether the parties intended to carry over this restriction to the consolidated CEA; or whether they intended to enlarge the scope of persons entitled to apply for retirement leave.

Mr Mobbs' position

[18] Mr Mobbs commenced employment with Tranz Rail in 1990. He resigned in 1996. He commenced employment as a casual employee on the Interislander ferries on 16 April 1998, becoming a permanent employee in August 2006 working on the Aratere.³

[19] Mr Mobbs applied for retirement leave on 8 March 2018. He was advised on 29 March 2018 that he did not meet the criteria in cl 37.2 of the operative CEA since he had been engaged after 21 July 1994.

[20] Mr Mobbs said in his oral evidence that it was initially agreed he was entitled to leave, and that KiwiRail then changed its mind. This was a reference to a conversation between Mr Mobbs and Ms Michelle Cheeseman, a Senior Human Resources Business Partner. It was her evidence that Mr Mobbs had said he was looking to retire soon. She had told him in effect that it would be desirable for him to give a good amount of notice, and she could also check if he had retirement

³ In mid-2016, Mr Mobbs signed an employment agreement which supplemented the collective agreement applying at that time, which recorded that he had commenced employment with Interislander on 16 April 1998.

entitlements. Mr Mobbs accepted that she may have said this. I find Mr Mobbs was not told that he would in fact have an entitlement.

[21] Consequently, for Mr Mobbs to be entitled to retirement leave under cl 37 of the 2018 CEA, it must be understood as providing an entitlement which is not restricted solely to persons engaged before 21 July 1994.

The hearing

[22] A great deal of evidence was placed before the Court as to the genesis of cl 37 of the 2011 – 2013 CEA. In addition to some seven volumes of documentary evidence, I received evidence from seven witnesses called by KiwiRail, and three witnesses called by Mr Mobbs and MUNZ. That evidence focused both on the evidence relating to the processes that gave rise to the 2011 – 2013 CEA insofar as it related to retirement leave, as well as events which occurred thereafter.

[23] Before reviewing that evidence, it is necessary to summarise the applicable legal principles relating to interpretation of employment agreements on the one hand, and rectification on the other. These principles establish what evidence is admissible in each case.

Legal framework

Interpretation principles

[24] In *The Malthouse Ltd v Rangatira Ltd*,⁴ the Court of Appeal provided a convenient summary of the correct approach to contractual interpretation, as stated by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,⁵ and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.⁶ The Court stated:

[19] Briefly, these authorities confirm that New Zealand courts take an objective approach to contractual interpretation which does not limit the background material available to interpret the contract. *That material must*

⁴ *The Malthouse Ltd v Rangatira Ltd* [2018] NZCA 621.

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

⁶ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 [*Firm PI*].

*however be reasonably relevant, and it must be objective; evidence of a party's individual subjective intentions is inadmissible to interpret the contract.*⁷

[20] *Vector* established that there need not be any ambiguity in the meaning of a contract before regard can be had to extrinsic evidence to shed light on its meaning. That conclusion put to bed the need for counsel to prove that contracts had such ambiguities, and instead emphasised the need for courts to take a contextual approach that inquired into the meaning of contracts against the background information known to the parties.⁸

[21] As the Supreme Court later clarified in *Firm PI*, the text of the contract remains “centrally important”.⁹ The Court there noted that:

If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.

(Footnote omitted)

[22] The provisional meaning derived from the language of the contract is cross-checked against the contractual context.¹⁰ As Tipping J explained in *Vector*:

[24] In some recent cases it has been suggested that contractual context should be referred to as a “cross-check”. In practical terms that is likely to be what happens in most cases. Anyone reading a contractual document will naturally form at least a provisional view of what its words mean, simply by reading them. That view is, in a sense, then checked against the contractual context. This description of the process is valid, provided the initial view is provisional only and the reader is prepared to accept that the provisional meaning may be altered once context has been brought to account. The concept of cross-check is helpful in affirming the point made earlier that a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult of achievement ...

(Footnote omitted.)

[23] *It follows that, though there is in principle no limit to the amount of “red ink” a court can use in interpreting a contract (as Lord Hoffman famously said in Chartbrook Ltd v Persimmon Homes Ltd),¹¹ there is a practical need for the party seeking to rely on the red pen to point to clear evidence justifying its use.¹² As Tipping J explained in Vector, the exercise “is and remains one of interpretation”.¹³ There are limits to what the courts can do under the guise of interpretation, and words can only be construed with meanings that they can reasonably bear (subject, as Tipping J recognised, to*

⁷ *Vector*, above n 5, at [19]–[20] per Tipping J; and *Firm PI*, above n 6, at [60] per McGrath, Glazebrook and Arnold JJ.

⁸ *Vector*, above n 5, at [5]–[6] per Blanchard J, [22] per Tipping J and [56]–[57] per McGrath J.

⁹ *Firm PI*, above n 6, at [63].

¹⁰ *Vector*, above n 5, at [24].

¹¹ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 at [25].

¹² As Tipping J noted in *Vector*, above n 5, at [26], the parties could also contract such that, for them, “black means white”, but the likelihood of them doing so “will no doubt be a powerful factor when it comes to questions of proof”.

¹³ At [23].

*considerations of rectification, private dictionary use by the parties, and similar).*¹⁴

(Emphasis added in paras [19] and [23])

[25] A further explanation of the distinction mentioned in para [19] of *Malthouse* is encapsulated in the following statement of Tipping J in *Vector Gas*, when discussing admissibility of prior negotiations. He said:¹⁵

... Some of the difficulties in this area may derive from the concept of “prior negotiations” being employed in a more or less expansive way. Sometimes the concept seems to be used as if it encompassed all conduct and circumstances associated with negotiations towards the formation of a contract. *It is necessary, however, to distinguish between the subjective content of negotiations; that is, how the parties were thinking, their individual intentions and the stance they were taking at different stages of the negotiating process, on the one hand, and, on the other, evidence derived from negotiations which shows objectively the meaning the parties intended their words to convey. Such evidence includes the circumstances in which the contract was entered into, and any objectively apparent consensus as to meaning operating between the parties.*

(Emphasis added)

[26] The reference in para [23] of *Malthouse* to Lord Hoffman’s observations in *Chartbrook* should also be elaborated on. This judgment is sometimes referred to as a recent example of one which deals with the correct approach where there are errors of syntax or punctuation.¹⁶

[27] Although this is a problem of longstanding,¹⁷ the issue received some emphasis in the leading case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*, where the majority of the House of Lords agreed with Lord Hoffman that, in order to avoid a ridiculous commercial result which the parties to the document were quite unlikely to have intended, the wording of a standard assignment of claims by investors against third parties in favour of a statutory compensation fund should be reordered by removing three words from within a set of brackets and placing them

¹⁴ At [23].

¹⁵ *Vector*, above n 5, at [27].

¹⁶ David Hodge QC *Rectification – The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, Sweet & Maxwell, London, 2016) at [2-79].

¹⁷ See generally John McGhee and Steven Elliott *Snell’s Equity* (34th ed, Thomson Reuters, London, 2020) at [16-008]; and Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at [6.3.2] and [10.6.1].

immediately in front of the opening bracket.¹⁸ In the course of his well-known five propositions,¹⁹ Lord Hoffman observed in the fourth proposition that the admissible background “may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax”;²⁰ and (as part of his fifth proposition) that if one would “conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had”.²¹

[28] As noted in *Burrows, Finn and Todd on the Law of Contract in New Zealand*,²² this statement of the law was adopted by the New Zealand Court of Appeal in 1998 in *Boat Park Ltd v Hutchinson*,²³ and has been quoted in numerous interpretation cases since, including *Vector Gas*.²⁴

[29] In *Chartbrook*, Lord Hoffman emphasised again that when the language used in an instrument gives rise to difficulties of construction:²⁵

... the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. ...

However, he cautioned that a court should not readily accept that a party has made a mistake in a formal document.²⁶

¹⁸ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

¹⁹ At 912–913.

²⁰ At 913.

²¹ At 913.

²² Above n 17, at 187.

²³ *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) at 81–82.

²⁴ See in particular *Vector*, above n 5, per Tipping J.

²⁵ *Chartbrook*, above n 11, at [21].

²⁶ At [23].

[30] It was in that context that he said the use of “red ink or verbal rearrangement or correction” would be permitted, but that it should be clear something had gone wrong with the language, and it should be clear what a reasonable person would have understood the parties to have meant.²⁷

Rectification principles

[31] KiwiRail’s second claim is that if, via principles of interpretation, a meaning is not available to the effect that retirement leave is restricted, that would mean an error had occurred in the drafting of cl 37.4 which should be corrected by an order of rectification.

[32] The requirements for such an order were authoritatively stated by Tipping J in *Westland Savings Bank v Hancock* as follows:²⁸

- a) Whether there is an antecedent agreement or not, the parties must have formed or continued to hold a single corresponding intention on the important point in question.
- b) Such an intention must have continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
- c) While there need not be formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.
- d) The document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.

²⁷ At [25].

²⁸ *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 (HC) at 30.

[33] This statement was approved by the Court of Appeal in *Pimlico Properties Ltd v Driftwood Developments Ltd*²⁹ and in *Robb v James*.³⁰ I emphasise the third principle referred to by Tipping J: it means that in a rectification case, each party is permitted to provide evidence of their intentions from which the objective assessment can then be made.

The admissibility issue

[34] In light of the foregoing principles, a clear distinction is to be observed between evidence which is properly to be considered for the purposes of interpretation on the one hand, and rectification on the other. In the former case, any background material must be considered to be reasonably relevant, and objective. In the latter case, evidence of subjective intent may be considered.

First cause of action: interpretation

Submissions

[35] In essence, Mr David QC, counsel for KiwiRail, submitted as to the interpretation issue:

- a) A reasonable reader of cl 37 would know that between 2010 and 2011 the parties consolidated two earlier collectives; and that as acknowledged in the 2011 and subsequent CEAs, this was a difficult process and one which they knew could give rise to errors and omissions.
- b) Clause 37.1 would appear to such a reader to be a general provision stating how retirement would be assessed from a particular date, probably reflecting a legal requirement not to apply a particular age restriction for retirement, because to do so would constitute age discrimination.
- c) Clause 37.2 contained a restrictive provision in its first sentence; it limited the group of persons to whom cl 37 applies.

²⁹ *Pimlico Properties Ltd v Driftwood Developments Ltd* [2009] NZCA 523 at [27].

³⁰ *Robb v James* [2014] NZCA 42 at [21].

- d) Clause 37.3 provided for payment where retirement was approved, or where a person became redundant. This clause did not, as is asserted for the defendants, provide a general right to retirement entitlements. The subclause is linked to the previous one. If a general right had been intended under cl 37.3, it would have made no sense to have included the first sentence of subclause 37.2.
- e) By contrast the provisions of clause 37.6 relating to medical retirement contain no restriction.
- f) This reading is supported by relevant background, salient features of which are:
- The parties produced the 2011 collective agreement by means of an agreed process where two earlier agreements were consolidated.
 - The working party operated in commercial circumstances where both parties were aware that KiwiRail was under significant financial pressure.
 - The aim of that process was to produce a merged document which adjusted employment conditions which were in many instances different in the two agreements.
 - But with regard to retirement leave, the two earlier agreements contained the same conditions as to who was entitled to claim it. The parties intended that where the conditions were the same under the two earlier collectives, the consolidated agreement would merge the conditions and retain the limitations.
 - The parties did not negotiate when consolidating, or in the subsequent bargaining, an extension of the retirement leave payments to all employees. Given the obligations of good faith on

both parties, if they had intended to extend retirement rights, this issue would have been raised and discussed.

- At all material times before the signing of the 2011 collective, and thereafter, the parties continued to act on the basis that retirement leave was available to the same employees who qualified for it under the earlier collectives.
- g) A reasonable reader considering the interpretation of cl 37 in light of the background would conclude that in trying to amalgamate the wording of the two clauses, and in particular the restrictions on payment in the two collectives, the words had been changed around and misplaced. The parties had made just the kind of mistake which they had expressly recognised might occur in the process of merger. The word “also” was previously in a position in the restriction provision where it made sense; in the process of creating the new clause, the word had been placed in the general restriction where it did not make linguistic sense. Something had gone wrong with the drafting.
- h) If clarity was required, a reasonable reader would conclude that the word “also” belonged with the second part of the sentence or was simply surplus.

[36] In essence, Mr Cranney, counsel for Mr Mobbs and MUNZ, submitted on this issue:

- a) The employer party to the 2011 – 2013 collective agreement was not the plaintiff, but the New Zealand Railways Corporation.³¹ The employer party to the 2013 – 2016 collective agreement was not the plaintiff, but KiwiRail Holdings Ltd.³² Section 54(1)(b) of the Employment Relations Act 2000 (the Act) provides that a collective agreement is to have no

³¹ Clauses 2 and 5.1.1.

³² Clauses 2 and 5.1.1.

effect unless it is signed by the “employer that is a party to the agreement.”

- b) By contrast, KiwiRail Ltd, the plaintiff, is however the party to the 2016 – 2018 CEA, on which the interpretation claim is based.
- c) Turning to the text of cl 37, it dealt with two issues. One was leave granted on retirement (cl 37.3); and the other was cash payments paid on medical retirement (cl 37.6). This duality was reflected in cl 37.1, which provided for medical retirement related to ability (“health” and “actual job performance”). It also provided for ordinary retirement, referred to as “mutually agreed” retirement.
- d) Medical retirement was dealt with primarily in cl 37.6. Under cl 37.6.3, an employee could be “declared unfit” in terms of maritime regulations/rules and could be subject to mandatory employer review of health or disability status. Such a person, if medically retired, would receive a certain number of “days’ pay” based on years of service. This cash payment differed from the leave approach taken in cl 37.3. There was probably a pecuniary difference, as retirement would extend employment and have holiday pay implications.
- e) Ordinary retirement was dealt with in cls 37.3 and 37.4 and was touched on in the second sentence of cl 37.2.
- f) Under cl 37.3, paid retirement leave could be granted “where retirement is approved”. The approval requirement was consistent with the phrase “mutually agreed date” in cl 37.1, and also with the second sentence of cl 37.2.
- g) Under cl 37.3, leave was also granted to an employee “if redundant”; a right which was dealt with in cl 36.

- h) Clause 37.2 identified two distinct groups to which the clause “also” applied. The first was those engaged before 21 July 1994. The second was employees employed via an industry transfer agreement with recognised service before that date. There was nothing ambiguous about this. Clause 37.3 provided a general entitlement, and the first sentence of cl 37.2 made it clear that right also applied to the persons mentioned.
- i) Clause 37.5 then defined service as meaning continuous service with Interislander since 1 December 1988. This definition applied to both the payment required under cl 37.6 (for medical retirement) and the leave requirement under cl 37.3 (for mutually agreed retirement).
- j) These provisions are not difficult to construe and there is no ambiguity requiring reliance on material outside the contract to resolve a linguistic problem.
- k) In an interpretation dispute, it is irrelevant whether the language is ambiguous in the abstract. What matters is whether it is ambiguous as between (usually two) meanings advanced by the parties. If one of those meanings is outside the range of meanings that the language reasonably bears under the circumstances, a court properly holds that the contract term is ambiguous. It is not enough that a particular provision is ill-expressed, oddly worded, or unusual.
- l) Turning to the background material, a careful consideration of the evidence and documents as to the consolidation and bargaining processes makes it clear that:
 - There were two stages. The first related to the consolidating of two documents into one.
 - The employer wanted the first stage to be a cost neutral process. It nonetheless contemplated that cost or potential cost could arise, in which case it expected Mr Graeme Boomer, Industrial Relations

Manager for KiwiRail at the time, to seek permission from his manager to take certain positions, if they could potentially cost more. If Mr Boomer confirmed that if he did take a position on a certain issue, MUNZ could safely presume he had consent to advance it.

- At one point early in the process, a common position was reached on wording that did not refer to the grandparenting of the leave. This was reached without permission from Mr Boomer's superiors.
- The second stage commenced with a formal bargaining initiating notice served on 1 December 2010. The consequence of that notice was that all "existing agreements/understandings/offers reached over the last few months would not be secure".
- In any event, by that time there was no longer an interim or any consensus about the clause. The first stage involving an alleged "cut and paste" exercise had been commenced, but it had not been concluded. The attempt by KiwiRail witnesses to explain how the merger of the two clauses occurred was erroneous, and could not be relied on as indicating intent, common or otherwise.
- The second stage was the bargaining in which the parties engaged. At that point the retirement leave clause was drafted by the company. It was provided by KiwiRail repeatedly from 8 February 2011 onwards.
- Then the entire agreement was thoroughly checked by lawyers from both sides. This led to some changes, but none to the retirement leave clause.
- The document was provided to workers prior to ratification, then ratified, then signed by both parties on 11 May 2011. It survived a formal and agreed post-agreement check-up process.

- Subsequently, it was re-ratified and re-signed in its current form over a decade.
- m) Summarising the process, it was submitted there were in reality only three relevant drafts. The first was that of 21 October 2010, which contained no restriction; witnesses confirmed that it reflected the common position at the time. The second was considered in November 2010; it used confusing language which was repeated on two occasions. The third was the final version which was drafted and presented by the company in February 2011 during bargaining. It was this version that was ultimately considered, checked and ratified.
- n) In short, the background information shows there was an agreement to enlarge the scope of retirement leave because that is what the company offered on numerous occasions and that offer was accepted. The background does not indicate that the parties agreed the status quo would be continued, as is asserted for the plaintiff.

Preliminary issue

[37] I deal first with the preliminary issue raised by Mr Cranney. He correctly submitted that each of the 2011 and 2013 CEAs described the employer party as being an entity other than KiwiRail Ltd itself, in two early clauses. However, in each instance the document was signed “for and on behalf of KiwiRail Limited”. Since this endorsement was made by the signatory to the document, I am satisfied that the real party in each case was KiwiRail Ltd, the plaintiff.

[38] In any event, as Mr David submitted, the plaintiff’s claim proceeded on the basis that Mr Mobbs sought retirement leave under the 2016 collective, which was plainly between KiwiRail and MUNZ. The prior CEAs are relevant background to the correct interpretation of that document for the purposes of the challenge relating to that claim. Accordingly, the issue raised by the defendants is not an impediment to a consideration of the plaintiff’s challenge.

Analysis of the 2016 CEA

[39] I begin by considering the criteria for the granting of retirement leave. It is evident from the last phrase in cl 37.1,³³ the second sentence of cl 37.2,³⁴ and the first phrase of cl 37.3,³⁵ that an employee must apply for retirement leave.

[40] Clause 37.1 also refers to the relevant criteria for assessing such an application: the possibility of retirement leave being approved arises where it is necessary to consider the ability of the employee to satisfactorily perform all duties of the position, taking account of such factors as health and actual job performance, or alternatively, where the parties agree on a date of retirement. The relevance of the date of 1 February 1999 is not, on the face of it, obvious.

[41] Clause 37.2 appears to address the question of who may apply. The first sentence refers to two classes of employee: those who were engaged before 21 July 1994, and those who had recognised service before that date employed via an industry transfer agreement.

[42] The use of the word “also” at the start of that sentence raises a question as to the location of a primary right, to which this provision is additional. I shall return to that question shortly.

[43] The second sentence of cl 37.2 clarifies that an application can be made for reasons other than those which would qualify under cl 37.6 which relates to the situation where an applicant has not been declared permanently unfit under maritime regulations/rules. Then the sentence provides that the employer may agree to treat any such application as a retirement, if satisfied that the criteria set down from time to time are met.

³³ The last phrase of cl 37.1 reads “mutually agreed date.”

³⁴ The second sentence of cl 37.2 reads “An employee may apply to retire for other than medical reasons under clause 37.6, and the employer may agree to treat any such application as a retirement where it is satisfied that it meets the criteria set down from time to time.”

³⁵ The first phrase of cl 37.3 reads “Where retirement is approved”.

[44] Clause 37.3 confirms that where retirement is approved, or if the employee is redundant, leave may be granted under the scale provided for service up to 40 years.

[45] As noted, it is necessary to consider where the primary right lies, to which the opening phrase of cl 37.2 is additional, if the phrase is construed at face value as the defendants contend.

[46] There are three possibilities. The first is that since it is located after cl 37.1, it should be understood that cl 37.1 provides the primary entitlement, and that employees engaged before 21 July 1994 also have a relevant right.

[47] For two reasons, an objective third party would not consider this to be the case. As above, cl 37.1 dealt with qualifying criteria, not the right to claim. Further, such a reading would create the inherently unlikely result that, on its face, the general entitlement is restricted to persons retiring after 1 February 1999 as well as those who were engaged before 21 July 1994. Such a reading would be odd. A third party could not conclude this was the common intention of the parties.

[48] The second possibility, if the opening phrase of cl 37.2 is taken at face value, is that it should be regarded as being additional to the more general entitlement set out in the second sentence of the clause. But if that sentence were to be understood as bestowing a general right, there would be no need to refer to persons engaged prior to 21 July 1994. Again, it is inherently unlikely that this is what the parties intended.

[49] The third possibility is the option advanced for the defendants. Mr Cranney submitted the general entitlement was described in cl 37.3; and that for clarity the first phrase of cl 37.2 confirms that those relevantly engaged before 21 July 1994 could also apply. This interpretation is, from an objective standpoint, odd. Clause 37.3 provides the scale according to which leave may be allocated if approved. On its face, it does not obviously describe the class of persons who may apply for retirement leave. Even were it to be interpreted as providing a general right, it would not have been necessary to stipulate that persons engaged before 21 July 1994 could apply in cl 37.2; such a “clarification” is not needed. Considered objectively, this interpretation, too, must be regarded as inherently unlikely.

[50] Standing back, a third party would regard cl 37.2 as being difficult to understand principally because of the problems I have discussed concerning the correlation of the first sentence of cl 37.2 with the remainder of the clause; it is not at all clear which provision contains the primary right. The significance of the reference to 1 February 1999 in cl 37.1 is also, on its face, unclear.

Relevant background

Is ambiguity a necessary pre-requisite?

[51] I turn to consider the relevant background about which much evidence was given.

[52] As noted in the summary of legal principles set out earlier, the necessary enquiry about this material relates to what a reasonable and properly informed third party would consider the parties intended, and that “to be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties’ minds.”³⁶

[53] Mr Cranney placed emphasis on dicta of Wilson J in *Vector Gas*, when he discussed the circumstances where extrinsic evidence may be considered as an aid to interpretation in a case of ambiguity. I note that ambiguity was only one of three instances where the Judge considered it appropriate to consider background material.³⁷

[54] Moreover, Tipping J emphasised that it is not correct to say context is irrelevant unless there is a patent ambiguity; he said context is always a necessary ingredient in ascertaining meaning.³⁸ The dicta of Tipping J is to be relied on, since his summary of interpretation principles has long been regarded in subsequent judgments by the Court of Appeal and Supreme Court as explaining the correct approach to a consideration of background material.³⁹ I proceed accordingly.

³⁶ *Vector*, above n 5, at [19], per Tipping J.

³⁷ *Vector*, above n 5, at [120] per Wilson J.

³⁸ At [23].

³⁹ See the summary from *Malthouse*, set out at para [24] above.

Relevant history

[55] A retirement provision featured in collective contracts from 1992. In that year, a series of events occurred which were significant in the life of the Cook Strait ferries. Tranz Rail had been sold to an international consortium which then made a concerted attempt to restrain terms and conditions of employment, particularly on the Interislander. There was prolonged industrial action by the Unions and legal arguments in Court. The events of this period were later described as the “War of 1994”.

[56] A new collective employment contract emerged from this process with some changes to terms and conditions of employment was signed on 21 July 1994. The retirement provisions of the contract stipulated that employees covered by the contract would retire on attaining the age of 65; it also provided for both early retirement and extension of work by agreement. There was a leave entitlement calculated on a progressive scale depending on length of service. Medical severance was introduced. All employees covered by the terms of that collective, as at that date, were listed in a schedule.

[57] In 2001, two relevant CEAs were settled. One related to the Aratere and the Fast Ferry, which were, as far as the crew were concerned, “walk on, walk off” operations. The second related to the Arahura and Arahanga, which were principally “live on board” vessels where employees lived on for one week, then lived off for one week.

[58] In each of these CEAs, a grandfathered entitlement to retirement leave was included which made it clear that the right was restricted for those employees engaged on or before 21 July 1994, and to those employees who were subject to an industry transfer agreement with recognised service before that date. Obviously, those who had been engaged before 21 July 1994 were regarded as being in a special position.

[59] By 2008, there was a CEA for the Aratere and Kaitaki, containing a retirement clause as had applied previously to the Aratere/Fast Ferry; and a second CEA in respect of the Arahura.

[60] In 2009, two collective agreements were settled, each of which contained retirement leave and medical retirement provisions; the terms of both agreements spanned 2008–2011. At the conclusion of the bargaining round relating to these agreements, both parties agreed that throughout the terms of these CEAs, they would use their best endeavours to consolidate them into a single collective agreement, by way of a small working party.

[61] The process to achieve this objective commenced in mid-2010, at a facilitated meeting of the parties held on 15 June 2010. The records of the meeting stated that interest-based bargaining would be undertaken to achieve a new collective agreement, and would “deal with issues, money and developing one collective employment agreement”. A collaborative process was envisaged.

[62] On 13 July 2010 or thereabouts, there was a company presentation to members of MUNZ, which emphasised again the value of interest-based bargaining. This would be “the starting point [as to] how the parties [approached] the next negotiation of the collective agreement ... [which] expires early next year.” The aim was to “[develop] mutual gains ... using a fair method to determine outcomes” that were “[durable] and fair”. The parties would “[put] aside a traditional claims approach to bargaining” and “[work] together without calling for claims”. Agreements reached would be “implemented either through variations or through the renewal of the collective”. Both parties could “achieve gains”. It was intended that the parties would not seek a traditional “settlement” but rather a “solution”. They would “jointly document the best solution(s)”.

[63] Mr Boomer, who attended the meeting, said he also discussed the benefits of consolidation. He told Union representatives there was an administrative cost for KiwiRail in having two collectives, and that payroll wished to streamline them into one. There was also difficulty in MUNZ members being able to move easily between vessels given the different collectives that applied with regard to each. He said many MUNZ members wanted to have the ability to do so, without administrative difficulty. There is no evidence that these objectives were controversial.

[64] A meeting was held on 10 September 2010, where members of MUNZ said that the issues it may wish to raise regarding the new collective would be developed as a response to its normal process of calling for remits from its membership. These details would be available for discussion on 29 October 2010. It was also agreed to hold a regular series of meetings to advance the process of each party understanding the issues of the other.

[65] On 23 September 2010, Mr Boomer sent an email to Mr Mike Clark, Secretary of the Wellington Branch of MUNZ. In it, Mr Boomer referred to a financial point which he said would be discussed at an upcoming meeting of the parties. He stressed that the provision of financial information was not intended to be confrontational but would signal the issues Interislander was facing. He said:

Interislander is under pressure in relation to its labour costs. This has been [brought] about in the knowledge that in the time Strait Shipping Ltd has been operating it has had a very competitive cost structure particularly in terms of labour costs. Over the last few years Interislander labour costs have increased at rates well beyond those of Strait Shipping Ltd and other local shipping companies. Indicatively if Interislander paid Strait Shipping Ltd labour rates it would lower its cost structure.

[66] These points were developed with reference to the rates which currently applied elsewhere in the market.

[67] Also attached to the email was a comparative clause by clause analysis of the two existing CEAs; this included reference to the respective retirement leave and medical retirement provisions.

[68] Representatives of the parties met again the next day. They agreed to set up a small working party consisting of three persons for the company and three for MUNZ. It was recorded that both sides shared the goal of combining the existing two collectives into one, and that as part of this process decisions would need to be made as to how conditions that were different would be treated. Options included the use of different schedules, or bringing conditions into line with either a reduction or increase in entitlements. Where there was a reduction in entitlement, this would be grandparented to the individual holder of the condition. There would be a detailed

savings clause to deal with any omission or unintended consequence of combining the two collectives.

[69] There was also discussion about the financial information which had been provided by Mr Boomer; this was recorded as being largely uncontested.

The process of consolidation undertaken by the working party

[70] Regular meetings of the working party started from about late September 2010, with a more intensive period of meetings in November 2010; they continued to early February 2011.

[71] Ms Mary Cording,⁴⁰ the Human Resources Manager at the time, was a regular attendee at the meetings concerning consolidation, along with her manager, Mr Boomer. The main attendees for MUNZ were Mr Alan Windsor, a delegate who attended nearly all the meetings, and Mr Clark who was the contact person for MUNZ, though he did not always attend the meetings. Two other delegates participated, Mr John Eilbeck and Mr Jim King.

[72] On 21 October 2010, Ms Cording prepared a draft consolidated document which reflected what had been discussed and agreed to that point. In an email forwarding the draft, she said it was incomplete and that the finished document would “look quite different to this one.” The draft showed a lot of work had been undertaken on many clauses, but it was obviously a work in progress. In this draft, there were separate retirement and medical retirement clauses. The provision as to retirement contained no limitation on the class of employees who could apply for retirement leave.

[73] The second draft available to the Court is a document produced on 15 or 16 November 2010. By this time, the language relating to engagement before 21 July 1994 had been introduced. I will return to the details of this draft later.

⁴⁰ Then known as Ms Daniel.

[74] The drafts included an explanation of the colours to which the working party was charting, as follows:

- Yellow: Parked issues where someone is coming back with information.
- Purple: Clauses to be included but moved to another area of the document.
- Green: Parked issues that will be revisited at another date.
- Blue: A clause that is being suggested to be removed.

[75] The third draft produced to the Court on or about 18 November 2010 had the same language relating to the retirement leave as had the second draft; but the clause relating to retirement was shaded yellow, indicating that there were parked issues where someone was to revert with information.

[76] A facilitated meeting of the parties was to be held on 19 November 2010. On the previous day, Ms Cording sent an email to Mr Clark stating she would provide a “completed copy” prior to the meeting scheduled for the next day.

[77] It is unclear whether a further draft was in fact available before the next meeting because the note of the facilitated meeting of 19 November 2010 records that Ms Cording *subsequently* tabled a document of the work done to that point. I find that the third draft, already referred to, was the draft considered on 19 November 2010, and that a further draft, a fourth one, was generated subsequently by Ms Cording. I shall return to the status of this draft shortly.

[78] In the note of the meeting held on 19 November 2010, it was recorded that there were a number of issues to work through, but there was agreement that this would be completed and that overall the proposed single document was a step forward. The note also recorded that the parties were working together to reach a settlement as to wage increases and the term of the new collective.

[79] A detailed description of the way forward was set out. First, it was noted that the work of combining the two collective agreements had been undertaken on the basis there would be no loss of conditions for employees or concessions by MUNZ. The new agreement would contain some improvements for some employees. Secondly, a

framework for particular issues to be worked on needed to be confirmed. These unresolved issues were described; none were recorded in respect of retirement leave.

[80] A particular issue which was identified related to the parties' differing views as to the appropriate levels of wage increases. Three options for resolving these monetary issues were identified. The first was for MUNZ to accept the financial offer subject to ratification. The second was for formal bargaining to be initiated, although KiwiRail stated it would not commence formal bargaining before February 2011. Under this option, existing agreements, understandings and offers would not be secure, and their status would need to be discussed as part of a negotiation. If neither of these options achieved a settlement, a third option involved a dispute being raised where both parties would carry a risk.

[81] If the first option was preferred, the parties would meet on 10 December 2010 to confirm details of a package for settlement. If the second option was to be preferred, KiwiRail would assess its approach in response to the initiation of bargaining by MUNZ.

[82] The first option did not proceed, but the second option did. Bargaining was initiated by the Union on 1 December 2010. The pre-bargaining agreement which is before the Court contained arrangements for negotiation meetings, but the clause as to when such negotiations would commence did not stipulate a date for commencement of bargaining. It is evident the consolidation process would continue in the meantime.

[83] In an email sent by Mr Boomer to Mr Clark on 13 December 2010, it was noted that excellent progress in merging the two documents had been made, and that it was "about complete." Checking, however, was still being undertaken.

[84] It was envisaged that there should be a further meeting to review the consolidation process, which would involve Mr Boomer, Ms Cording, Mr Clark, and six or seven delegates from MUNZ; at this meeting, a summary of the consolidation process would be presented. It appears the meeting was difficult to organise. There were a series of emails in early January 2011 relating to the necessary arrangements, it being agreed the meeting should take place ahead of bargaining.

[85] On 25 January 2011, Ms Cording emailed Mr Clark and Mr King, confirming the meeting had now been arranged for 28 January 2011.⁴¹ It proceeded. Mr Boomer said that he and Ms Cording attended along with six or seven delegates who had been relieved from their rostered duties. A summary of the consolidation process was presented; the meeting continued for approximately four hours, from which I infer the parties took some time to work through the many issues arising from the consolidation process.

[86] By 1 February 2011, the parties were in discussions as to arrangements for a bargaining meeting on 8 February 2011. In anticipation of that event, on 7 February 2011, Mr Boomer sent a paper to the Interislander executive team which recorded the point which had been reached. In his update, Mr Boomer said that the steps involved in progressing a settlement for a new CEA would involve concluding the work of combining the two collective agreements, dealing with a number of stated issues (none of which related to retirement leave), and resolving monetary issues. He then proposed the components of an offer, in which he recorded no claims from Interislander except the grandparenting of medical retirement, and two other matters which are not relevant for present purposes.

[87] Prior to the bargaining meeting on 8 February 2011, Ms Cording sent Mr Clark a “draft copy of the combined document.” This contained cl 37 in the form which was eventually ratified and signed. Clause 37.6, relating to medical retirement, however, was shaded in blue, which reflected KiwiRail’s position that the clause in question should be removed or grandparented. Several other provisions were likewise shaded in blue, including a clause relating to service allowances.⁴²

[88] At the meeting which followed, KiwiRail referred to those provisions being grandparented, so that no new employees would receive these benefits. MUNZ was opposed to this. KiwiRail is recorded as stating that unless the right to medical retirement was grandparented, the company would be liable for a major cost. However, late in the meeting, Mr Boomer raised the possibility of KiwiRail dropping

⁴¹ Counsel both submitted this meeting was on 29 January 2011, but Ms Cording’s email of 25 January 2011 suggests it was on 28 January 2011.

⁴² Clause 12.1.

its grandparenting claims in relation to medical retirement and as to service allowances so that resolution could be reached on a no-claim basis, providing MUNZ adopted a similar approach. This concession was made in the context of an observation by Mr Clark that the parties had come further in one day than in the previous 30 years.

[89] By 14 March 2011, the grandparenting of medical retirement was no longer being claimed by KiwiRail, as evidenced by the formal offer it sent to Mr Clark on that date. Some corrections, not relevant for present purposes, were subsequently made to the agreement by Ms Cording, which resulted in a further version of the document being sent to Mr Clark on 11 May 2011.

[90] Mr Clark said that the document was then “thoroughly checked” by lawyers for both sides. No material changes were made thereafter; the agreement was ratified in late May 2011 and signed on 26 May 2011.

Evolution of clause 37

[91] The parties provided three layers of evidence to the Court, to which reference needs to be made in order to assess what an informed objective reader could conclude as to the intended interpretation of cl 37 of the 2016 CEA, in its context and background.

[92] The first relates to the sequence of documents starting from the 2008 collectives, the drafting materials of 2010 and 2011 including the analysis of the two CEAs summarising the many provisions which were to be consolidated, and the surrounding material such as emails, a PowerPoint presentation and meeting notes.

[93] A general observation is that some of the contemporaneous documentation is no longer available. For example, it is evident that there is at least one draft of the working party, the fourth draft as considered by it in late 2010 and early 2011, which is not now available.⁴³ Furthermore, Ms Cording said she made handwritten notes at their regular meetings of the working group in exercise books which are no longer

⁴³ See above at [77].

available; she thought these may have been lost in a transfer of office materials which occurred after she left KiwiRail.

[94] Coming to the oral evidence, witnesses did their best to recall salient aspects of the process, but, given the lapse of time recollections have in some instances faded; that evidence must be treated with caution.

[95] Company witnesses were clear on some issues but less clear on others, and as I shall explain shortly, the attempted reconstruction of the steps taken in compiling cl 37 was not completely correct.

[96] As for the Union's position, to some extent its understanding of the process is evident from the contemporaneous documents already referred to, particularly emails. However, if notes were taken on behalf of the Union, these have not been produced or are unavailable; and unfortunately a key participant from the Union's perspective, Mr Windsor, was not able to give evidence.

[97] However, from the range of evidence presented, the following conclusions are clearly available.

[98] There was a careful and collaborative process under the auspices of a working party, whose members conscientiously worked together to produce a single document from the two 2008 CEAs.

[99] This process began with a careful identification of the rights and obligations which applied under each of the two 2008 CEAs, and apparent issues which would then need to be discussed and resolved during the process of consolidation.

[100] It is evident that, as a minimum, where the conditions were the same under the two earlier collectives, the parties intended that the consolidated agreement would merge and retain those conditions. This did not rule out, however, the possibility of those terms and conditions being enhanced.

[101] Where there were issues, these were expressly identified, often by a colour-coding method which would lead to subsequent discussion of the identified

issues. At one stage, a yellow coding was introduced in respect of the retirement leave provisions, but no evidence as to the significance of this was given, or when the issue to which it related was resolved.

[102] The consolidation process continued over several months, from October 2010 to January 2011, and concluded with a four-hour meeting where representatives of the parties met to review the point which had been reached.

[103] Although notice of bargaining had been given in early December 2010, the parties agreed to conclude the consolidation process before undertaking negotiations for bargaining purposes. While reference had been made to the possibility of existing understandings not being secure in bargaining so that the status of any consolidated clauses would need to be discussed, in cl 37 the only topic which was raised for such discussion related to the grandparenting of medical retirement; no issues as to the balance of the clause fell for discussion at that stage.

[104] A salient matter of context related to the company's financial concerns. Following the GFC in late 2008, and a change of government later in that year, funding for its operations were challenging. This was the known context for the statements made by Mr Boomer from time to time both in the processes relating to consolidation and during bargaining. Although this context did not rule out the possibility of enhanced terms and conditions having fiscal implications being introduced, it is apparent the company would not agree to this lightly. As Mr Cranney put it, at the consolidation stage the employer wanted the process to be cost neutral.

[105] Finally, the salient terms of the 2011 CEA, which was the product of these processes, as recorded in cls 4 and 37, were repeated in the 2013 and 2016 CEAs.

[106] I will enlarge on these points where necessary below.

The steps taken in developing clause 37

[107] Ms Cording and Mr Boomer gave evidence as to what they said was the cut and paste exercise undertaken by the working party in developing cl 37. This evidence

was backed up by a PowerPoint demonstration which was intended to illustrate, step by step, the linguistic manoeuvring that was undertaken.

[108] It emerged that the evidence had been prepared by the KiwiRail witnesses with the assistance of the company's junior counsel and, as Mr Cranney was able to show, there were some inaccuracies in the reconstruction.

[109] I place this evidence to one side, partly because it is contentious, but mainly because a reasonable reader is able to form his or her own conclusion as to what occurred.

[110] The focus, of course, relates to the development of cl 37.2. For convenience I repeat the original clauses of the two 2008 CEAs, italicising the language on which there must be a focus.

[111] Arahura cl 22.3 stated:

On reaching retirement age and retiring, or retiring on medical grounds and leaving their employment, or if redundant, employees, other than employees engaged after 21 July 1994, will be entitled to retirement leave on the following scale:

Under 10 years' service	Nil	
10 years and under	15	42 days
15	20	56 days
20	40	91 to 183 days

This clause also applies to employees engaged after 21 July 1994 via an industry transfer agreement with recognised service before that date.

[112] Aratere/Kaitaki cl 23.1 stated:

This clause applies to employees engaged before 21 July 1994 and to employees employed via an industry transfer agreement with recognised service before that date. An Employee may apply to retire for other than medical reasons under Clause 14.8, and the employer may agree to treat any such application as a retirement where it is satisfied that it meets the criteria set down from time to time.

[113] As recorded earlier, the first working party draft contained no reference to either of the clauses just set out. I will return to the significance of this later.

[114] The second draft available to the Court containing reference to these provisions was that of 15/16 November 2010, which stated in cl 22.3:

On reaching retirement age and retiring, or retiring on This clause also applies to employees engaged before 21 July 1994 and to employees employed via an industry transfer agreement with recognized service before that date. An Employee may apply to retire for other than medical reasons under clause X, and the employer may agree to treat any such application as a retirement where it is satisfied that it meets the criteria set down from time to time.

[115] The syntax problem which confronted the drafters related to the two methods that had been adopted in each of Arahura cl 22.3 and Aratere/Kaitaki cl 23.1 to refer to employees who would qualify for the retirement entitlement. The effect of each clause was that the right was available to employees engaged *before* 21 July 1994, and also to employees engaged after that date, but via an industry transfer agreement with recognised service before that date. However, the two clauses expressed this limitation differently.

[116] Further complexity arose because:

- a) In the 2008 Aratere/Kaitaki collective, medical retirement was referred to in two separate clauses.⁴⁴ Clause 23.1 stated that an employee could retire for other than medical reasons under cl 14.8, and that the employee could agree to treat any such application as a retirement where it was satisfied criteria set down from time to time were met. Clause 14.8 described the scale of payments where the employee was declared permanently unfit. The right was restricted to persons engaged before 21 July 1994, and to employees employed via an industry transfer agreement with recognised service before that date.
- b) In the 2008 Arahura collective, retirement on medical grounds other than where an employee was also declared medically unfit was subject to the same restriction, but the reference to such an option was not expressed so expansively.

⁴⁴ Clauses 14.8 and 23.1.

[117] The differences in approach evidently posed a challenge for the drafters in determining how to deal with these concepts when creating what would become cl 37.2.

[118] In the third draft created on or about 18 November 2010, the first nine words were taken from the start of Arahura cl 22.3; these words were derived from the clause which related to retiring on medical grounds. The second sentence of Aratere/Kaitaki cl 23.1, which related to the same topic, was also adopted in the same clause.⁴⁵

[119] That left the two different references to the restrictions relating to persons engaged after 21 July 1994.

[120] It is apparent the drafters adopted the language of Aratere/Kaitaki cl 23.1 rather than the closing words of Arahura cl 22.3; however, the word “also” was transferred from the latter to the former.

[121] These steps suggest that a conscientious attempt was being made to maintain the status quo.

[122] However, the evidence also strongly suggests that a linguistic error arose in the process by the transfer of the word “also”. If the status quo was to be maintained, that word should have been placed so that it related to the second part of the first sentence of the subclause, and not the first part.

[123] Subsequently, the opening words “on reaching retirement age and retiring or retiring on...”, which were now obviously surplus, were removed.

[124] That a diligent approach to the consolidation of the provisions of the two original CEAs is evident from a consideration of the steps taken with regard to the balance of the terms and conditions.

⁴⁵ Above at [114].

[125] The significance of the reference to 1 February 1999 in cl 37.1 is also evident from the background material. Prior to that date, retirement leave entitlements arose on age 65 as noted earlier. But s 21(1)(i) of the Human Rights Act 1993 introduced age discrimination with effect from 1 February 1999. This statutory provision was recognised in the relevant collectives from then on.⁴⁶ As Mr David submitted, the date had historic significance only. But its inclusion is yet another example of the faithful transfer of language from the former documents to the consolidated one.

Evidence that parties intended to create a general right

[126] Mr Cranney’s submission, to the effect that the parties intended there would be a general right, must be considered against this background.

[127] Mr Cranney placed some reliance on the fact that the draft of 21 October 2010 contained no restrictive language. He referred to oral evidence given at the hearing from Ms Cording and Mr Boomer to the effect that particular draft represented the common position of the parties at the time. He argued that subsequent drafts before the Court were “confused” and therefore inconclusive; and that the final version, which was produced by the company; contained cl 37.2 in its final and intended form.⁴⁷ He said this was subsequently the subject of the company’s offer and that MUNZ accepted it. He submitted the document was then thoroughly checked by lawyers, ratified and settled. The effect of Mr Cranney’s submission is that in light of this evidence, it can be concluded the company deliberately decided to expand the right, and that this did not need any discussion because this volunteered benefit would have been acceptable to the Union, which is why there is no record of it.

[128] The first point to be made in respect of this submission is that, on the face of it, the contemporaneous documentation clearly suggests a linguistic error as already discussed.

⁴⁶ The first of these was a collective employment contract entered into between Tranz Rail Ltd and the New Zealand Seafarers Union 1998–2000, cl 18.

⁴⁷ Above at [87].

[129] Secondly, the contextual materials suggest it would have been inherently unlikely, given the fiscal constraints, that the company would have volunteered a general right which would significantly enhance the range of persons entitled to retirement leave and would create a significant financial liability, as evidence given by Ms Maryan Street, Employee Relations Manager, confirmed.

[130] This conclusion is reinforced by what occurred with regards to the issue concerning the question of whether there would be grandfathering of medical retirement. Initially the company took this point, but ultimately withdrew its claim in that regard for the sake of a settlement at a late stage. That the issue was expressly raised with regard to medical retirement, but not with regard to retirement leave, strongly suggests there was no intention on the part of the company to enlarge the scope of the right.

[131] Mr Cranney referred to the duality of circumstances dealt with in cl 37: that is, retirement leave on the one hand, and medical retirement payments on the other. I understood him to mean that any consideration of the circumstances relating to grandparenting of medical retirement was different and a separate matter from any issue of grandparenting of retirement leave.

[132] However, the parties saw fit to deal with both these circumstances in a single clause. An objective reader would notice that applications for medical leave were not subject to any limitation as to length of service, whilst the opening phrase of the provision relating to other forms of retirement was. The contrast tends to suggest that words of restrictions were used deliberately.

Subsequent conduct

[133] No evidence has been called from any Union participant to say that they understood at the time that an enlarged right had been offered and accepted. Mr Clark's evidence was that cl 37 in its final form was offered and agreed and should be enforced accordingly. He said that no comment about the enhancement was made by him to members at the time, because they could read the text of the agreement and see it for themselves. Mr James King, a delegate who also attended the working party meetings and who gave evidence, did not suggest that Union representatives

understood an enhanced right had been offered and agreed. There is no evidence that members of the Union believed a significant benefit had been obtained.

[134] Mr Clark also said the document was thoroughly checked by lawyers for both sides. For several reasons, I do not regard that evidence as assisting. There is no evidence that Mr Clark could have known what the company's lawyers did at the checking stage. Nor is there any evidence from a lawyer on either side as to what it was they checked and, in particular, whether they noticed the significance of the issue under review at present. This is not evidence which an objective observer would regard as supporting the proposition that a general right was deliberately offered, agreed, and accepted.

[135] Until Mr Mobbs made his application, there is no evidence of either party having proceeded on the basis that they understood a general right had been agreed and rolled over in subsequent collectives.

[136] If anything, the evidence goes the other way. In May 2014, Mr Clark sought early retirement for an employee instead of a medical discharge. The then HR Services Manager, Ms Carla Flynn, advised in declining the application that the retirement clause in the collective was for employees employed in 1994; the member who was seeking the entitlement had been employed in 2003. She also said she repeated this understanding on subsequent occasions. Mr Clark does not accept that those conversations occurred. However, the short point is that there is no reliable evidence that it was common ground the parties knew a general right had been agreed. That evidence tends to support a conclusion there had been no such agreement.

[137] This aspect of the background material, however, is secondary to the primary issues I have considered, which relate to the steps leading up to the signing of the 2011 collective.

Conclusion as to interpretation issue

[138] The background material as analysed strongly suggests that a linguistic error in cl 37.2 was inadvertently introduced and adopted.

[139] I find there has been an obvious mistake in the way in which the language has been expressed in cl 37.2; and it is clear what correction ought to be made in order to cure it. The word “also” should be positioned in the first sentence of cl 37.2 so that it applies to the second part and not the first part. This is the kind of error the parties agreed could arise in the course of the consolidation process, as recorded in cl 4.

[140] Such a reading, which is available to background and context, resolves the difficulties I referred to at the outset when analysing the text.⁴⁸

[141] Read in that way, cl 37.2 defines the class of persons who are entitled to apply for retirement leave. They are employees engaged before 21 July 1994, and also employees employed via industry transfer agreement, with recognised service before that date. There is no need to refer to any other language within cls 37.1 – 37.3 in order to understand who has the right to apply. The first sentence of cl 37.2 provides the answer to that question.

Second cause of action: rectification

[142] KiwiRail’s secondary claim is that if, via principles of interpretation, a meaning is not available to the effect that retirement leave is restricted, that would mean an error had occurred in the drafting of cl 37.2 which should be corrected by an order of rectification.

[143] I summarise the submissions made as to whether common law rectification of a collective agreement is available under the Act.⁴⁹

[144] A key issue discussed by counsel is whether there is jurisdiction under the Act to rectify a collective agreement, having regard to s 192 of the Act. It provides that a court may not, under s 162 as applied by s 190(1), make an order cancelling or varying a collective agreement or any term of it.⁵⁰

⁴⁸ Above at [39]–[50].

⁴⁹ These principles are contained, for example in *Westland Savings Bank v Hancock*, above n 29 – this judgment is often cited as describing the correct principles. See also the observations of the English Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] 2 WLR 429 at [51]–[55].

⁵⁰ A similar restriction exists in respect of the Employment Relations Authority under s 163 of the Employment Relations Act 2000.

[145] Mr Cranney submitted that the words “cancelling or varying” in s 192 should be construed as encompassing a potential rectification order in respect of a collective agreement. He said that in considering the language used in the subsection (and the legislative policy against judicial variation or cancellation), it is necessary to consider the nature of collective and employment agreements as defined in s 5 of the Act.⁵¹ Another important aspect, he said, was to have regard to the statutory processes and consequences of a collective employment agreement, including rules relating to ratification:⁵² the need for writing;⁵³ the thirty-day rule;⁵⁴ and the fact that the equitable remedy of rectification is a tool which can be used to remedy a document created at law, whilst a collective agreement is a creature of statute not amenable to cancellation or variation because a code in that regard is provided by s 192(2).

[146] For his part, Mr David submitted that an order of rectification has retrospective effect.⁵⁵ Thus, in making such an order, the Court would deem the document to have always been applied in its correct form; therefore, he said, such an order could not aptly be described as an order of variation or cancellation falling within s 192.⁵⁶

[147] Since these submissions obviously raise an important question of law, and the challenge has been resolved by the application of interpretation principles, it is preferable to resolve this legal issue in a case where it squarely arises.

Conclusion

[148] I declare that on a proper interpretation of the 2016 – 2018 CEA Mr Mobbs is not entitled to receive a payment for retirement leave.

⁵¹ As discussed by this Court in *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd* [2008] ERNZ 537 (EmpC) at [11]–[16].

⁵² Employment Relations Act 2000, s 51.

⁵³ Section 54(1)(a).

⁵⁴ Sections 62 and 63.

⁵⁵ See for example *Westland Savings Bank v Hancock*, above n 28, at [31]–[32].

⁵⁶ See also *Konica Minolta Business Solutions (UK) Ltd v Applegate* [2013] EWHC 2536 (Ch).

[149] I reserve costs. These should be discussed between the parties in the first instance. If necessary, an application for these is to be made within 21 days of this judgment, with any response given within 21 days thereafter.

B Corkill
Judge

Judgment signed at 4.00 pm on 2 September 2020