DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Australian Maritime Officers' Union, The
v
Smit Lamnalco
(C2019/646)

COMMISSIONER SPENCER BRISBANE, 15 MAY 2020

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)] - s22.2 revalidation.

[1] An application pursuant to s.739 of the *Fair Work Act 2009* (the Act) was made by the Australian Maritime Officers' Union (the AMOU/the Applicant) on behalf of Mr Aaron Tarca, in relation to a dispute arising under the *Smit Lamnalco Towage (Australia) Pty Ltd and AMOU Gladstone Enterprise Agreement 2016* (the Agreement). The Respondent to the application is Smit Lamnalco.

[2] The Application for the Commission to deal with a dispute in accordance with a dispute settlement procedure (Form F10), indicates that the dispute relates to clause 22.2 of the Agreement, which is headed "Revalidation" and is extracted fully below. In essence, the dispute has arisen from a request made by Mr Tarca for reimbursement of an expense he has incurred to complete revalidation of his GMDSS (explained below) in 2018 and a denial of that request by the Respondent.

[3] The matter was listed for conference however could not be resolved.

[4] The question for arbitration, as agreed by the parties, is as follows:

> "*Is the Respondent required to reimburse Mr Aaron Tarca for the expense which he incurred for completing the revalidation of his GMDSS in 2018*?"

[5] The matter was heard in Brisbane across a number of days, with further closing submissions later filed.

[6] The Applicant called the following witnesses in their case:

- Mr Michael Farrar;[i] and
- Mr Aaron Tarca.[ii]

[7] A series of documents were also "Marked for Identification" including:

- Email dated 13 May 2019 – Enquiry to AMSA;[iii]
- Email dated 15 May 2019 – providing enquiry number;[iv] and
- Handwritten notes.[v]

[8] The Respondent called the following witnesses in their case:

- Mr Peter Sedgwick;[vi]
- Mr Evan George Milne;[vii] and
- Ms Sasha Holdsworth.[viii]

PERMISSION TO BE RERESENTED

[9] The Applicant and Respondent sought permission to be represented at the hearing. The parties "consented" to each party being granted permission to be legally represented. While it is appreciated that the parties were able to reach an agreed position on such a matter, s.596 of the Act is clear that a person may be represented by a lawyer or paid agent *only* with the permission of the Commission. Section 596 sets out that the Commission may grant such permission *only if* it is satisfied as to one of the matters in s.596(2) of the Act. The parties consent or otherwise is not directly referred to in any of those circumstances, although I accept it may be of some relevance.

[10] Independent of the parties' consent, I was satisfied in this matter that the grant of permission would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; interpretation of industrial instruments, with reference to a body of case law and facts in issue. On that basis, permission was granted for both parties to be represented by a lawyer, pursuant to s.596(2)(a) of the Act.

RELEVANT PROVISIONS OF THE ACT

[11] The dispute was notified to the Commission pursuant to s.739 of the Act, which states:

> "**739 Disputes dealt with by the FWC**
>
> (1) This section applies if a term referred to in section 738 requires or allows the FWC to deal with a dispute.
>
> (2) The FWC must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4), unless:
>
> (a) the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the FWC dealing with the matter; or
>
> (b) a determination under the Public Service Act 1999 authorises the FWC to deal with the matter.
>
> Note: This does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4) (see also subsection 55(5)).

(3) In dealing with a dispute, the FWC must not exercise any powers limited by the term.

(4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

(6) The FWC may deal with a dispute only on application by a party to the dispute."

RELEVANT PROVISIONS OF THE AGREEMENT

[12] The Agreement was approved by a decision of Commissioner Gregory on 6 February 2017.[ix] The Agreement has a number of appendices. By Order of the Commissioner, pursuant to s.594(1) of the Act, the appendices were to be confidential between the parties.[x] To maintain the effectiveness of this Order, I will not specifically identify the content of those appendices in my reasons. The contents being known to the parties.

[13] Pursuant to s.205(2) of the Act, the model consultation term was taken to be a term of the Agreement. By s.201(2) of the Act, the Commissioner noted that the Applicant in the matter gave notice under s.183 of the Act that it wanted to be covered by the Agreement and that it is covered by the Agreement. Pursuant to s.54 of the Act, the Agreement operates from 13 February 2017 and has a nominal expiry date of 31 December 2020.

[14] The Agreement applies to the towage operations of the Respondent in the Port of Gladstone and "other identified towage operations". The parties agreed that the Agreement is the relevant industrial instrument that covers and applies to Mr Tarca, the Applicant and the Respondent.

[15] The Agreement is to be read in conjunction with the *Marine Towage Award 2010* (the Award), but in the event of any inconsistency between the two instruments, the Agreement prevails.

[16] The Agreement records that the "parties" acknowledge there is no other agreement, written or unwritten, between the parties relating to harbour towage, unless it is filed with the Agreement. "Parties" is defined as Smit Lamnalco Towage (Australia) Pty Ltd, the AMOU and "Employees covered by this Agreement". "Employee" is defined as a master employed by the Respondent for towage operations, "to whom this Agreement applies".[xi]

[17] Up until the nominal expiry date of the Agreement, the "Employees, the Unions, and the Company" agreed they will not pursue any extra claims "relating to" wages or changes in conditions of employment or any other matters related to the employment of Employees, whether dealt with in this Agreement or not. The Respondent has not submitted that the present dispute amounts to an extra claim.

[18] As is apparent, the power of the Commission to deal with disputes depends upon the existence of a "term", within the meaning s.738 of the Act, allowing the Commission to deal with the dispute. Section 738 refers to a "term" including a "term" in an enterprise agreement that provides a procedure for dealing with disputes. The Agreement is an enterprise agreement and includes clause 8 that is titled "DISPUTE RESOLUTION" and provides:

> "8. DISPUTE RESOLUTION
>
> 8.1 In the event of any matter, breach and/or dispute arising under this Agreement, and/or in relation to the interpretation or application of this Agreement or the National Employment Standards, or any matter arising in the course of employment, the following procedure will apply.
>
> Step 1: The matter will in the first instance be discussed between the Employee/s (and their representative if requested) and the immediate supervisor involved.
>
> If the matter remains unresolved-
>
> Step 2: It will be referred for discussion between the Union delegate or other employee representative, and the local supervisor.
>
> If the matter remains unresolved-
>
> Step 3: It will be referred for discussion between the local representative and appropriate Union official or other employee representative and the Gladstone Manager.
>
> If the matter remains unresolved-
>
> Step 4: It will be referred for discussion between the local representative and appropriate National Union official or other employee representative and the nominated Smit Lamnalco Towage (Australia) Pty Ltd national management official.
>
> If the matter remains unresolved-
>
> Step 5: In the event that the preceding steps have failed to resolve the matter and/or dispute, any person bound/covered by this Agreement or the Company may refer the dispute to Fair Work Commission (FWC) for conciliation and/or arbitration.
>
> 8.2 Fair Work Commission may deal with the dispute in two stages:
>
> 8.2.1 Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
>
> 8.2.2 If Fair Work Commission is unable to resolve the dispute at the first stage, Fair Work Australia may then:

(i) arbitrate the dispute; and
(ii) make a determination that is binding on the parties.

8.3 The parties to the dispute agree to be bound by a decision made by Fair Work Commission in accordance with this clause.

8.4 Work shall continue without change or interruption pending determination of any matter or dispute in accordance with the above procedure, except in circumstances where an Employee holds a reasonable concern about an imminent risk to his or her health or safety."

[19] In its written submissions, the Applicant relied upon clause 22.2 of the Agreement. However, in closing submissions, the Applicant is taken to accept that clause 22.2 is limited to a "Certificate of Competency".[xii] That is a concession that has properly been made. Clause 22.2 is clearly limited in its operation and I do not accept that it is ambiguous.

SUMMARY OF THE APPLICANT'S SUBMISSIONS

Background

[20] As to the duties of Mr Tarca's employment, the Applicant relied on the "*ROSTERS OF WORK AND OPERATIONAL STANDARDS*" (the Operational Standard) document. The Applicant stated that the Operational Standard provides:

> "While rostered "on", an employee may be required to perform harbour towage, LNG towage, and maintenance. An employee may be required to man any of the company's tugs." (Applicant's emphasis)

[21] As to revalidation entitlements under the Agreement, the Applicant referred to clause 22 as extracted above. Further, it submitted that Appendix 2 of the Agreement makes reference to additional conditions as to training as follows:

> "GPH/IR to be provided with training up to Master Incapacitated (Crew ASD Driving Training Program or equivalent)
>
> Revalidations will be provided by the company to the current qualification level held by the employee and any outstanding claims will be back paid on signing of this agreement.
>
> All masters to be provided with Sigtto Support Craft Emergency Response Training within 12 months of approval of this agreement."
>
> (Applicant's emphasis)

[22] The Applicant submitted that its member, Mr Tarca, had been employed by the Respondent since August 2015, and that during his employment the Respondent had never funded Mr Tarca's GMDSS revalidation despite doing so for other employees. The Applicant submitted "*[i]t is clear that Mr Tarca has been treated differently, although it is not clear why*".[xiii]

[23] The Applicant submitted that Mr Tarca rarely operates the vessels requiring the GMDSS revalidation, however he is required as part of his employment to do so. It referred here to the Operational Standard. The Applicant submitted that the Respondent cannot require Mr Tarca to maintain his GMDSS revalidation for his employment, without paying for it. Further, it submitted that others in the same circumstances have been reimbursed and therefore Mr Tarca should likewise be reimbursed as a matter of fairness between him and like employees.[xiv]

[24] The Applicant submitted that the Respondent's suggestions that refusal to provide reimbursement are based on attempts to book the course and obtain approval for it, which are matters without merit. It relied here on the matters provided in Mr Tarca's witness statement.

First Proposition

[25] The Applicant submitted that it is understood, at common law, there is an implied term requiring an Employer to reimburse an Employee for expenses "reasonably incurred" during the course of their employment. While the Applicant conceded that an implied term may be displaced by an express term dealing with certain time of expenses for example, it submitted implied and express terms as to reimbursement can coexist.[xv]

[26] The Applicant made reference here to Mr Tarca's letter of appointment dated 15 September 2016, which provided:

> "In accordance with the Agreement, you will be reimbursed for out of pocket of expenses and travel reasonably incurred by you in the performance of your duties and approved by the Company on production of the appropriate receipts".

[27] The Applicant submitted that it is unclear where the reference to "the Agreement" is a reference to the employment contract, or to the industrial instrument that applied at the time. The Applicant concedes it could not have been a reference to the 2016 Agreement as it did not exist at that time.

[28] Regardless, the Applicant submitted that it is clear the parties intended for Mr Tarca to be reimbursed for all expenses "reasonably incurred". Further, it stated there is no suggestion that reimbursement was limited to "certain identified expenses".[xvi]

[29] As to the phrasing "*reasonably incurred in the performance of your duties and approved by the company*", the Applicant submitted the following:

> "(a) as set out above Mr Tarca required, and continues to require, the GMDSS revalidation to perform his role, so the expense was reasonably incurred; and
>
> (b) Mr Tarca made every effort to obtain approval from the respondent but it was unreasonably withheld; it would be unjust for the respondent to be permitted to rely upon that as an argument against reimbursement in these circumstances."[xvii]

[30] Therefore, Mr Tarca was, in the Applicant's submission, entitled to reimbursement in accordance with his employment contract.

Second Proposition

[31] Further to, or in the alternative to, the above, the Applicant submitted that clause 22.2 of the Agreement refers to "revalidation", requiring the Respondent to bear the cost of such. The Applicant conceded that "revalidation" is not defined in the Agreement, and therefore it is not clear whether it is limited to the "Certificate of Competency" referred to at clause 22.2.1. However, the Applicant submitted that "*[c]ertainly there are other relevant forms of revalidation and the GMDSS revalidation is one of them*".[xviii]

[32] The Applicant submitted that without a definition of "revalidation", the clause is unclear and therefore ambiguous and capable of multiple meanings.[xix] It submitted that likewise, the "Additional Condition as to Training" under the Agreement is ambiguous and cannot easily be understood without reference to background information as provided in Mr Farrar's statement.[xx]

[33] In accordance with the decision in *Australian Manufacturing Workers Union AMWU v Berri Pty Limited (Berri)*,[1] the Applicant submitted that principle 7 provides that the Commission can have regard to extrinsic material in determining whether there is ambiguity in a clause. Further, principle 10 allows the Commission rely on extrinsic material in order to determine the proper construction of the relevant clause. Here, the Applicant submitted that extrinsic material must be relied upon, in determining the proper construction of clause 22.2 of the Agreement, subject to the caution expressed in principle 14 of *Berri*.

[34] The Applicant submitted that it relied on the evidence of Mr Farrar, as summarised below, and submitted that the evidence demonstrates the Respondent "*would*" fund GMDSS revalidation going forward. However, the Applicant submitted that position is nuanced, stating "*only the existing employees who were employed with GMDSS revalidation would have that benefit; others would not*".[xxi] The Applicant submitted that Mr Tarca fell into the first category, and further that the "*end result of the parties' negotiations is reflected in the Agreement by the Additional Condition as to Training*".[xxii] The Applicant submitted:

> "While it is regrettable that the parties' bargain was not better reflected in the Agreement, assuming the Commission is satisfied of its existence, the Commission should give effect to the bargain in resolving this dispute (whether through the prism of clause 22.2, the Operational Standard, the Additional Condition as to Training, or otherwise)."[xxiii]

[35] The Applicant concluded that the first and second propositions are made out, and that the question for arbitration should be answered in the affirmative.

SUMMARY OF THE RESPONDENT'S SUBMISSIONS

[36] The Respondent submitted that the question for arbitration should be answered "no", for the following reasons.

[37] The Respondent submitted that its position was as follows:

> "(a) the *Smit Lamnalco Towage (Australia) Pty Ltd and AMOU Gladstone Enterprise*

[1] [2017] FWCFB 3005.

Agreement 2016 (AMOU Agreement) does not require the Respondent to maintain or cover the cost of the Global Maritime Distress and Safety System (GMDSS) qualification for the Applicant;

(b) the Respondent does not require the Applicant to possess the GMDSS qualification;

(c) the Applicant's employment agreement signed and dated 6 October 2016 (Contract) contains an express contractual requirement that the Applicant seek approval before incurring costs, he expected to be reimbursed;

(d) the Marine Towage Award 2010 expressly requires approval from the employer for expenses intended to be reimbursed by the employer; and

(e) the Applicant was aware he did not have permission to incur the cost of the GMDSS training, nonetheless incurred the cost and now effectively seeks to retrospectively challenge the non-approval of the cost".[xxiv]

The Agreement

[38] While the Applicant submitted that "revalidation" is not defined, and therefore its application under clause 22.2 is ambiguous, the Respondent submitted that it is "abundantly clear" that the body of clause 22.2 pertains to revalidation of the "Certificate of Competency" and therefore poses an onus on the Respondent to maintain the Masters' Certificate of Competency "only".[xxv]

[39] The Respondent submitted that the clause has a plain meaning, as contemplated in the decision in *Berri*.

[40] The Respondent submitted that Mr Tarca possesses a Certificate of Competency as Master Class 4, however he does not require the GMDSS qualification to maintain or revalidate his Certificate of Competency. The Respondent submitted it does not otherwise require him to hold the GMDSS.[xxvi]

Emergency Towage Vessel

[41] The Respondent submitted that it holds a contract with the Australian Maritime Safety Authority (AMSA) to provide the services of two Emergency Towage Vessels (ETV). It submitted this requires the ETV to sail beyond Port limits, and therefore the GMDSS qualification is required for this work.

[42] The Respondent submitted that on Mr Tarca's evidence, he removed himself from the ETV list prior to the events in dispute. It submitted further to this, that the Applicant's submissions turn on the "*mistaken presumption the Respondent requires Mr Tarca to possess the GMDSS qualification*".[xxvii]

Contract

[43] The Respondent conceded that the Contract of Employment contains a clause regarding reimbursement of travel and out of pocket expenses. However, it submitted that such is expressly conditional on:

> "(a) the expense being reasonably incurred;
> (b) in the performance of the employee's duties;
> (c) approved by the Company; and
> (d) on production of appropriate receipts."

[44] The Respondent submitted that Mr Tarca did not meet those conditions for the following reasons:

> "(a) the expense was not reasonably incurred. At the time of incurring the cost, Mr Tarca on his own evidence[6] knew the Respondent had not approved the cost and, indeed, disputed Mr Tarca incurring the cost;
>
> (b) the expense did not relate to the performance of Mr Tarca's duties;
>
> (c) the expense was not approved by the Company; and
>
> (d) Mr Tarca submitted an Expense Reimbursement Claim form after attending; however this was in circumstances where he was aware he was not entitled to incur the cost in the first instance".[xxviii]

[45] The Respondent submitted that Mr Tarca's evidence is "inconsistent". It submitted that Mr Tarca acknowledges Mr Sedgwick did not agree to the GMDSS course; further, Mr Tarca goes on to say he had a conversation with Mr Smeding regarding being "*refused the training*" on the basis "*[he] had been informed by Peter [Sedgwick] that only those who were on the ETV list were being put on the GMDSS course, or words to that effect*".[xxix] The Respondent therefore submitted that at the time of incurring the cost, Mr Tarca was aware his claim had been rejected.

[46] The Respondent submitted that any attempted reliance on the receipt of the TAFE forms by Mr Tarca is "an overstretch".[xxx]

[47] Further, the Respondent submitted that the requirement to seek approval is not "*intended to be by way of afterthought. It is a contractual requirement*".[xxxi] In addition, the Respondent submitted the expense incurred by Mr Tarca was not reasonably incurred.

Marine Towage Award 2010

[48] The Respondent submitted that the *Marine Towage Award 2010* is expressly incorporated into the Agreement at clause 2.4.

[49] The Respondent submitted that the Award relevantly provides at clause 14.2 (i)(i) :

> "The employer will reimburse an employee for any expenses reasonably incurred by the employee in the performance of their duties on behalf of the employer. Wherever possible, in order to be reimbursed the employee must seek the preapproval of the employer to undertake the expense."

[50] The Respondent submitted that this clause again requires pre-approval of any cost and that the cost be "reasonably incurred" and "in the performance of their duties on behalf of the employer".[xxxii]

Retrospectivity

[51] The Respondent reiterated that it is entitled to require pre-approval of the incurrence of any cost an employee wishes to seek reimbursement for. It submitted any other construction of the facts would lead to "*an absurd situation whereby employees could incur costs they believe were reasonable and dispute any argument to the contrary retrospectively*".[xxxiii]

[52] The Respondent submitted:

> "*To the extent Mr Tarca disputed the Company's position on either his need for the GMDSS qualification or what he considered an unreasonable withholding of approval (which is denied) the correct approach would have been to raise this under the Dispute Resolution clause prior to incurring the cost of the travel and course, rather than retrospectively dispute the non-approval.*"[xxxiv]

[53] In conclusion, the Respondent reiterated that its position is as follows:

> "(a) there is no requirement that the Company cover the cost of Mr Tarca's GMDSS qualification;
> (b) Mr Tarca does not require the qualification to perform his duties;
> (c) Mr Tarca was aware his attendance at the course and associated costs was not approved, yet elected to proceed with incurring the costs; and
> (d) as such, the costs were not properly incurred with the required approval of the Respondent and Mr Tarca must cover these costs himself and is not otherwise entitled to have any leave taken re-credited.
>
> The answer to the question for arbitration is 'no'."

CONSIDERATION

[54] As is discussed above, the Applicant's case is made on the basis of the Agreement, but also as a result of the common law contract and relationship between Mr Tarca as employee and the Respondent as employer. The Applicant has made submissions concerning the jurisdiction of the Commission to deal with the dispute on both of these grounds. The Respondent has not disputed that the Commission has jurisdiction to deal with the dispute on either basis.

[55] The Applicant's submissions are accepted and the Commission is satisfied that the disputes procedure in the Agreement allows for the Commission to deal with the dispute on the bases put by the Applicant and that the Agreement permits the Commission to arbitrate the dispute. In particular, the Applicant's submission concerning the words "or any matter arising in the course of employment" are accepted as plainly correct. The dispute is one "arising under" the Agreement or "in relation to" its interpretation or application. The dispute is also "a matter arising in the course of employment".

[56] As is apparent from the question for arbitration that has been agreed between the parties, and the discussion concerning jurisdiction above, the dispute concerns whether Mr Tarca is entitled to be reimbursed, or the Respondent is obliged to reimburse, for an expense that Mr Tarca has incurred totalling $2946.18.[xxxv] The expense was incurred as a result of Mr Tarca's attendance at a training course. The Applicant submits that the entitlement to reimbursement arises either as a consequence of the employment contract and/or relationship between Mr Tarca and the Respondent and/or as a result of the proper interpretation of the Agreement.[xxxvi]

[57] The Applicant's case altered. It is recognised that the Applicant was not initially represented, however representation was sought and permission granted. The Applicant's position is that there is implied into Mr Tarca's contract of employment a term that entitles him to reimbursement, and that implied term has not been abrogated by any express term in the contract itself or the Agreement. Secondly, Mr Tarca is entitled to reimbursement as a result of Appendix 2 of the Agreement.

[58] As to the first ground of the Applicant's case, an implied term of reimbursement, I accept that the authorities suggest the existence of an implied term to the effect of an obligation to reimburse.[xxxvii] However, that term is not absolute. It is not a term requiring reimbursement of every expense that is even remotely related to work. The main authority that the Applicant relied upon is *Pupazzoni v Fremantle Fishermen's Co-Operative Society Limited*.[xxxviii] The particular portion of that decision that the Applicant referred to is as follows:

> "*...if [the contract of employment] was silent on the question of expenses then there would be no question that the plaintiff could recover the reasonable expenses in respect of assignments he was specifically asked to carry out...I would also have little difficulty in coming to the view, having regard to the position he [unclear], that he would be entitled without further authority to incur and be reimbursed expenses in respect of entertaining the types of persons he entertained and of being paid reasonable travelling expenses in respect of travelling he did on the company' behalf*." (emphasis added)

[59] *Pupazzoni* is authority for the proposition that generally, there is an implied term to reimbursement of reasonable expenses that an employee has incurred at the direction of an employer or on the employer's behalf. The expense incurred by Mr Tarca is neither of these things.

[60] Additionally, the Applicant's submissions conceded leading reference material on the topic. Those extracts may be summarised as meaning that there is generally an implied term obliging an employer to reimburse an employee for expenses incurred on behalf of the employer;[xxxix] in carrying out the tasks assigned to the employee by the employer,[xl] innocently incurred in the performance of duties,[xli] as a consequence of obeying the directions of the employer or in the reasonable performance of the employee's duties,[xlii] in the course of his or her employment,[xliii] expenses properly incurred[xliv] Reasonably incurred when performing their duties[xlv].

[61] What all of these statements have in common is that the expense is incurred on behalf of the employer, either directly at the employer's request or reasonably in the discharge of the

employee's duties. Neither of these scenarios is this case. I accept that the Operational Standard has some requirement to man any of the company's tugs but the clause specifically says "may" be required. It is theoretically possible that the Applicant "may" in future be directed or required by the Respondent to man one of the GMDSS vessels but the evidence discloses, at the moment that is a voluntary option and not one that is directed or required by the Respondent. Taking into account that whether 'in the port of Gladstone' or 'at sea', the simple fact is the clause is worded as "may", whatever the position may be.

[62] I also consider it as being arguable that such a general implied term might not extend to reimbursement of such matters as the cost of accreditation or qualifications. In many Australian workplaces such things are paid by employers, usually as a result of an express contractual term or company policy. To find a general implied term of this nature extends to all qualifications or accreditations held by employees would be going too far and the Applicant has not referred me to any authority that specifically has this reach.

[63] The contract of employment does specifically provide for reimbursement of expenses "*reasonably incurred…in the performance of your duties*". The expense that Mr Tarca has incurred was not incurred in the performance of his duties. Arguably, it was also not incurred reasonably given that at the time it was incurred, Mr Tarca knew that the Respondent's position was it would not reimburse the expense.[xlvi] Despite this, Mr Tarca proceeded to incur the expense.

[64] In my view, there is no entitlement to reimbursement of this expense as a result of Mr Tarca's contract of employment and/or clause 6.2 of the Operational Standards. The argument that is reliant on the Agreement and, in particular, Appendix 2 of the Agreement is a little more complicated. I note again that the Applicant no longer relies upon clause 22 of the Agreement, and as I understand it, relies solely, and most importantly,[xlvii] on Appendix 2 of the Agreement. There are, it seems, three appendices to the Agreement that are called "Appendix 2", each one relating to a different union. It is not entirely clear how the appendices relate to the main body of the Agreement; however, it seems that Appendix 2 is one of the "agreements" referred to in clause 2.6 of the Agreement. It is not in dispute that Appendix 2 does form a part of the Agreement and operates as terms of the Agreement. The Respondent made reference to the late change in the Applicant's position.

[65] Whilst matters of confidentiality are noted it is necessary to refer to what the clause relied upon states:

> "*Revalidations will be provided by the company to the current qualification level held by the employee and any outstanding claims will be back paid on signing of this agreement.*"

[66] The clause is not drafted very clearly but on one reading, this clause is broader than clause 22.2 in that it refers to the plural - "[R]evalidations". This raises some ambiguity. Does this mean the various kinds of revalidations will be maintained or does it mean that the revalidation of the various employees (and therefore more than one revalidation) will be maintained to the current qualification level?

[67] Mr Farrar's evidence about his intention regarding the clause during negotiations was:

> "*Our intention for how we wanted the revalidation clause to operate was that regardless of the certification level of an individual vessel, the Masters which were currently employed as GMDSS qualified (which were all the Masters), would still be revalidated to that level of certification. We were seeking more descriptive terminology for the revalidation clause to avoid the ambiguity and misinterpretation that we believed had been occurring after [Mr Milne] came into management.*"[xlviii]

[68] Mr Farrar recalls that during negotiations on 8 June 2016 Mr Clay Frederic stated that "*the company will continue to run business as it is currently*". Mr Farrar states that Mr Frederic was part of the "previous" negotiations team. On the same day, Mr Farrar states he met with Mr Milne, who was part of the Respondent's "current" negotiating team to discuss the issue of revalidations. Mr Farrar's evidence is that Mr Milne indicated his position being to downgrade the current registrations of the vessels so they no longer had a GMDSS system installed. Ultimately, there was a change from the word "required" to "current" qualification level. Mr Farrar states that the Respondent maintained that this change would correct any "misinterpretation" as to the Respondent's obligation to reimburse.

[69] In September 2016, a log of claims was provided. That log of claims, in relation to revalidation, states:

> "*reinstatement and retrospectively of any previously paid entitlements in Gladstone, this to be reworded to stop any future ambiguity (revalidation, most prominent)*

[70] Mr Farrar's evidence relates, in part, to clause 22.2, which, as noted above, the Applicant no longer relies upon. Mr Farrar doesn't specifically give evidence in respect of Appendix 2 in his evidence in chief. This is perhaps unsurprising given that at the time the Applicant's case did not focus on Appendix 2 but rather clause 22.2.

[71] The substance of Mr Farrar's evidence is that he understood, whatever the wording is, that the Respondent had agreed to maintaining the status quo. That is, the Respondent had agreed to keep the "current" level of qualifications that the Masters had at that time, including the GMDSS qualifications. In addition, the Respondent had agreed to backpay and the claim for reimbursement that had been declined.

[72] Mr Sedwick's evidence is that:

> "*Appendix 2 of the [Agreement] further references revalidation. This refers to the qualification to be revalidated under the "Revalidation" clause (being the Certificate of Competency).*"[xlix]

[73] In so far as Mr Sedgwick purports to give evidence as to meaning to be attributed to Appendix 2, I will accept this as evidence of Mr Sedgwick's subject view as to the meaning only. It is apparent from the wording of Appendix 2 that this is not what it says, although I accept that Mr Sedgwick's view is that the two clauses do relate to each other.

[74] Ms Holdsworth's evidence is that:

> "*All discussions in the [Agreement] negotiations with relation to the 'qualifications being maintained at their current level' related to ensuring that those with Master 1*

and Master 3 COC's could maintain those tickets despite our operational requirement to only hold a Master 4 COC."[1]

[75] The principles applicable to interpretation of an enterprise agreement are well-settled. The Full Bench of the Commission summarised, comprehensively, the principles in *AMWU v Berri Pty Limited*[li]

[76] The primacy of the text of the Agreement itself must always be kept in mind. Appendix 2, on its face, obliges the Respondent to provide revalidations to the "*current qualification level held*". This clause does not refer to the current certificate of competency level so is on one reading, broader than clause 22.2, which is limited to maintaining the "*Employee's Certificate of Competency to its present level regardless of the level of qualification required to perform his/her duties"*. Clause 22.2, in the words just extracted, refer to a certificate of competency as a "qualification". So, on one view, the reference to qualification in Appendix 2 might be read as a reference to certificate of competency. I am satisfied that the Agreement is capable of more than one meaning.

[77] Both parties have sought to give their subjective views and recollections as to the meaning to be attributed to Appendix 2. They have been of limited assistance, given that the subjective views of the parties are in conflict.

[78] It is important that Appendix 2 records an "other agreement" and Appendix 2 is called "ADDITIONAL CONDITIONS" by the main body of the Agreement. From this, Appendix 2 is 'additional' to those terms contained in the Agreement. In my view, this is significant. On the Respondent's interpretation, Appendix 2 does not add anything to what is already contained in the Agreement at clause 22.2. Both clauses, on the Respondent's interpretation, require the Respondent to maintain the level of employee's current certificates of competency. On the Applicant's interpretation, Appendix 2 imposes the additional obligation to provide "current qualification level", which is all current qualifications.

[79] I have considered the evidence of each of the 'negotiators' to the extent that it may assist in identifying the surrounding circumstances, and in so far as it establishes objective background facts, known to both parties. The wording of Appendix 2 establishes some important surrounding circumstances. Firstly, that it establishes 'additional conditions' as discussed above, and secondly that there was, at the time of negotiations, a dispute concerning reimbursement of expenses. As is apparent from the second half of Appendix 2, the Respondent agreed to paying outstanding claims, which, included more than maintaining minimum levels of certificates of competency.

CONCLUSION

[80] Therefore, taking this and all of the circumstances of the matter into account, the interpretation of Appendix 2 means that the Respondent is obliged to maintain the current levels of qualifications, as at the time the Agreement was 'made'. Appendix 2 is additional to the obligation in clause 22.2 to maintain present levels of certificates of competency. If Appendix 2 was not additional to clause 22.2 it would, have no work to do, but rather would be an unnecessary poorly worded restatement of clause 22.2

[81] For these reasons, the question for arbitration is answered in the affirmative.

[82] I Order accordingly.

COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR719377>

---

[i] Exhibit 1; Exhibit 2.
[ii] Exhibit 4; Exhibit 5.
[iii] MFI1.
[iv] MFI2.
[v] MFI3.
[vi] Exhibit 6.
[vii] Exhibit 3.
[viii] Exhibit 9.
[ix] [2017] FWCA 778.
[x] Ibid at [3].
[xi] See s.53 of the Act.
[xii] PN249.
[xiii] Ibid at [18].
[xiv] Ibid at [20].
[xv] Ibid at [25].
[xvi] Ibid at [28].
[xvii] Ibid at [29].
[xviii] Ibid at [32].
[xix] Ibid.
[xx] Ibid at [33].
[xxi] Ibid at [35].
[xxii] Ibid.
[xxiii] Ibid at [36].
[xxiv] Respondent's Outline of Submissions dated 13 May 2019 at [3].
[xxv] Ibid at [5]-[7].
[xxvi] Ibid at [10]-[11].
[xxvii] Ibid at [16].
[xxviii] Ibid at [18].
[xxix] Ibid at [19]; Statement of Aaron Kai Tarca, paragraphs [31] - [34].
[xxx] Respondent's Outline of Submissions dated 13 May 2019 at [21].

[xxxi] Ibid at [24].

[xxxii] Ibid at [30].

[xxxiii] Ibid at [32].

[xxxiv] Ibid at [33].

[xxxv] PN244 to PN245.

[xxxvi] Opening submissions of the Applicant, dated 12 April 2019 at 8.

[xxxvii] See for example *Pupazzoni v Fremantle Fishermen's Co-Operative Society Limited* (1981) 23 AILR 168.

[xxxviii] (1981) 23 AILR 168.

[xxxix] Macken's at [5.350], citing *Adamson v Jarvis* (1827) 4 Bing 66.

[xl] Creighton and Stewart at [17.44]; citing *Pupazzoni v Fremantle Fishermen's Co-operative Society Ltd* (1981) 23 AIRL 168.

[xli] Ibid.

[xlii] Ibid; citing *NRMA v Whitlam* (2007) 25 ACLC 688 at [85] amongst others.

[xliii] The Modern Contract of Employment at [6.90] to [6.92].

[xliv] Laws of Australia at [26.1.1670]; also citing *Adamson v Jarvis* (1827) 4 Bing 66 and others.

[xlv] Stewart's Guide to Employment Law at 12.8.

[xlvi] Exhibit 4 at paragraph 34.

[xlvii] PN274.

[xlviii] Exhibit 1 at 14.

[xlix] Exhibit 6 at paragraph 19.

[l] Exhibit 9 at paragraph 21.

[li] [2017] FWCFB 3005 at [114].