

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

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| BETWEEN | New Zealand Educational Institute Te Riu Roa (Inc) (applicant) |
| AND | Peter Lyman, acting as the Commissioner of Linwood Intermediate School (first respondent) |
| AND | Board of Trustees of Woolston School (second respondent) |
| AND | The Secretary for Education (third respondent) |
| REPRESENTATIVES | David Martin for the applicant Peter Gunn for the respondents |
| MEMBER OF THE AUTHORITY | Denis Asher |
| AGREED STATEMENT OF FACTS AND SUBMISSIONS RECEIVED | 1 & 22 September & 5 October 2006 |
| DATE OF DETERMINATION | 2 November 2006 |

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The NZEI disputes the respondents' interpretation, application and operation of two collective agreements applicable to a member – statement of problem received on 24

April 2006. The NZEI contends that, in accordance with their provisions, members bound by the agreements are entitled to paid sick leave that is not debited from their accumulated sick leave entitlements where illness can be traced directly to circumstances or conditions under which that member was working.

2. The Secretary says that if proper regard is had to the meaning and context of the relevant parts of the collective agreement it is apparent they were not intended to apply in the circumstances at issue in this case – statement in reply received on 19 April.
3. In the alternative, the Secretary says that the applicant has produced no or insufficient evidence that the relevant requirements of the collective agreement have been met such that the disputed sick leave should be granted.
4. In advice dated 21 April counsel for the Secretary, Mr Peter Gunn, confirmed the statement in reply was filed on behalf of all of the respondents as the Secretary of Education had required the other respondents to act together with the Secretary on this matter: s. 74A(b) of the State Sector Act 1988 applied.
5. Mediation did not resolve this employment relationship problem.
6. Following telephone conferences on 18 May and 2 June the parties agreed to put to the Authority an agreed statement of facts, relevant documents and submissions, and asked the Authority to determine the matter on the papers.

Agreed Statement of Facts

7. The NZEI and the respondents were and are parties to the Primary Teachers, Deputy Principals, Assistant Principals and Other Unit Holders Collective Agreement 2001-2004 and to its successor, the 2004-2007 Collective Agreement (the 2001 CA, the 2004 CA and the CAs).
8. The 2001 CA set out certain paid sick leave entitlements, as well as the manner in which sick leave is to be debited from an accumulating balance. Under these provisions, the balance of a teacher's sick leave at any point was the sick leave they had accumulated throughout their teaching service less the paid sick leave that had been appropriately debited during that period.
9. Relevant provisions of the 2001 CA were carried over unchanged into the 2004 CA.

10. Certain paid sick leave was not to be debited from the teacher's sick leave balance, but was instead to be known as "*disregarded sick leave*": 6.2.5 (i) of the 2004 CA.
11. The interpretation of paragraph 6.2.5 of the 2004 CA is the subject of this dispute.
12. The conditions under which teachers have been eligible to take sick leave on pay have variously been prescribed by, or referred to in, regulations, departmental circulars, awards, elective employment contracts and latterly the 2001 and 2004 CAs.
13. Attached to the agreed statement of facts are copies of relevant documents or extracts, including various collective agreements, collective contracts, awards and determinations, and manual, circular and regulation provisions that precede the 2001 CA and the 2004 CA.

Parties' Positions

Applicant's Argument

14. This dispute concerns the meaning of clause 6.2.5 of the 2001 and 2004 CAs.
15. "*Disregarded sick leave*" is available where, inter alia,

The sickness can be traced directly to the conditions or circumstances under which the employee is working ...

(6.2.5 (i) of the 2004 CA)

16. The NZEI contends that members bound by the agreements are entitled to paid sick leave that is not debited from their accumulated sick leave entitlements where illness can be traced directly to circumstances or conditions under which that member was working.
17. Ms A was at material times both a member of the NZEI and employed, initially as a first deputy principal and subsequently, elsewhere, as a primary teacher. She and her employers were all bound by the CAs.

18. Ms A's salary was paid to her pursuant to the Secretary's powers under the Education Act 1989. Under the same statutory powers, the Secretary also maintains sick leave records of individual teachers.
19. Ms A took various periods of paid sick leave during 2004. The NZEI says her illness was directly traceable to the conditions and circumstances under which she had been working, specifically a severely dysfunctional working environment and the inadequacy of the employer's attempts to address matters.
20. The sick leave taken by Ms A was debited by the Secretary until in March 2004 her sick leave balance was exhausted. Ms A remained on sick leave but received no further pay. She eventually resigned her deputy principal position without returning to work. Ms A took further sick leave during 2005 while employed as a primary teacher. While Ms A received pay for the first five days of sick leave taken during 2005, under s. 6.1.2 of the 2004 CA, the Secretary caused pay for subsequent days of sick leave to be debited from her fortnightly salary payments on the basis that she had no further paid sick leave entitlement.
21. The NZEI says that Ms A should have been granted disregarded sick leave under 6.2.5(i) and should not have had any sick leave debited from her available balance. This is because, it says, none of the factual contentions have been conceded by the respondents.
22. The NZEI understands the Secretary to contend that, in any event, the relevant provisions do not provide for disregarded sick leave to be available in (Ms A's) circumstances. The NZEI says the precise basis for that contention has still to be made plain, but earlier correspondence between the parties (annexed to the statement of problem) seem to indicate that it is because the provision referred to:
 - a. is limited to physical illnesses; and/or
 - b. excludes any matter in which the sick teacher might also have grounds for a personal grievance.
23. The NZEI also understands from correspondence from the Secretary that the respondent is asserting it is for the employer to apply for sick leave to be disregarded under the CA, and the operative causes of the illness must be "*extraordinary*" and sufficient to make

illness “*inevitable*” before sick leave will be disregarded (refer to annexures to the statement of problem).

24. The CA’s provisions do not support the Secretary’s approach. The words in dispute have a plain meaning which clearly should be applied to the applicant. Ms A was sick. There are no limitations to particular types of sickness. Her illness was causally connected to the working environment. Clauses 6.2.5 and 6.2.6, read as a whole, do not act to limit the applicant’s interpretation. The NZEI accepts that the provision in question must be read in the context of the document as a whole: doing so changes nothing in the applicant’s stance except to reinforce it. This is because of the good employer obligations set out in clause 2.1, including the fair and reasonable treatment of employees.

Respondents’ Argument

25. The Secretary says amongst other things that the applicant’s interpretation of the clause is at variance with its plain meaning and the context of the provision, which is intended to cover physical disability arising out of the physical conditions or circumstances under which the teacher is working, particularly illness of an infection nature.
26. It is relevant that a disregarded sick leave provision equivalent to clause 6.2.5 has been part of primary teachers’ terms and conditions since at least 1919 under various statutory instruments and, latterly, employment agreements. The Secretary says those provisions were originally inserted into teachers’ terms and conditions at a time when there was significant concern about infectious diseases, particularly influenza. There is no support for the proposition that the parties ever had in mind any reference to psychological or psychiatric illness arising from an employment relationship problem at the school in question due to employer action or inaction. This is not remarkable: the prospect of leave being taken for such a reason was not a realistic proposition until relatively recently (see *Attorney-General v Gilbert* [2002] 1 ERNZ 31).
27. A number of references in clause 6.2.5 are plainly historical and outmoded. An analysis of the factual matrix and surrounding circumstances of clause 6.2.5 demonstrate that the applicant’s claimed interpretation cannot be supported.
28. The NZEI’s interpretation is an unsupported and unjustified extension of clause 6.2.5 and could not have been in the parties’ minds at the time the provision was initially agreed. The parties never agreed that clause 6.2.5 should have the effect for which the applicant now contends.

29. The words of clause 6.2.5 are clear and plainly refer to matters of physical disability, particularly infectious illness, and do not extend to psychological or psychiatric illness arising from the employment relationship. This view is consistent with the definition of the term “sickness” in the New Shorted Oxford English Dictionary on Historical Principles, 1993, which defines the word as “*The state or condition of being sick or ill; illness or ill health*”. “*Illness*” is defined as “*ill health; the state of being ill; (a) disease, (a) sickness, (an) ailment*”. The wording of this clause does not support the proposition that it extends to cover “*psychological unwellness*” (par 19 of the Submissions for the Third Respondent) stemming from the employment relationship.
30. The other words of clause 6.2.5(i) reinforce the proposition that that clause is intended to refer to sickness of a physical rather than a psychological nature.
31. There is no direct case law on this issue. The claim is entirely novel and there is no justification for extending the current entitlement into situations where an applicant is claiming an entitlement to disregarded sick leave based on employment relationship problems arising from the employee’s employment. It is unnecessary and inappropriate to attempt to pursue such a grievance through a strained interpretation of the 2001 and 2004 CAs plainly unsupportable on the historical evidence.
32. The Secretary says that if proper regard is had to the meaning and context of the relevant parts of the CA, and the way in which they have been historically interpreted, it is apparent that they were not intended to apply in the circumstances at issues in this case.
33. The Secretary also says, in the alternative, that the evidence in this case does not sustain or is insufficient for the grant of disregarded sick leave to Ms A.

Discussion and Findings

34. The general principles of contractual law apply to the interpretation of collective agreements: *Association of Staff in Tertiary Education Inc v Hampton* [2002] 1 ERNZ 491, 498. These principles are well settled: *Lowe Walker Paeroa Ltd v Bennett & Ors* [1998] 2 ERNZ 568, from 566.
35. The parties are agreed that the starting point is the language adopted by them and its plain meaning: *Secretary for Education v New Zealand Educational Institute Te Riu Roa* [2002] 2 ERNZ 470, and 479 & 480. If the words are clear and can have only one possible meaning that should generally determine the matter.

36. Clause 6.1 Sick Leave of the 2004 CA provides that,

*The employer **shall grant sick leave** on full pay as set out below.*

(emphasis added)

37. At issue is the meaning of the provision set out in sub-clause 6.2.5 (i) of the 2004 CA,

Disregarded sick leave not exceeding an overall aggregate of two years shall be granted by the Secretary ... in the following circumstances:

(i) *The **sickness** can be traced directly to the conditions or circumstances under which the employee is working; or ...*

(emphasis added)

38. “Sick” is defined by the Concise Oxford Dictionary (10th Ed) as “**1** affected by physical or **mental illness**” (emphasis added); “sickness”, “**1** the state of being ill”; “ill”, “**1** not in full health; unwell”; and “injury”, “**2** the fact of being injured; harm or damage”.

39. Because of the plain meaning of the word ‘sickness’, as supported by the common dictionary definition, I find that the NZEI must succeed in its claim.

40. I am reinforced in this conclusion by the following: I do not accept that the provisions set out in the 1919 regulations can be relied on as indicative of the terms and conditions agreed by the parties in 2001 and 2004. What was contemplated then, and any way significantly broadened in subsequent provisions, simply reflects that time moves many things on including an appreciation that sickness is today appreciated as extending beyond a strictly corporeal locale.

41. It appears inconceivable to me that the respondents, as good employers, could justify applying the benefits of sick leave provisions by way of a questionable if not spurious distinction to those suffering from of physiological sickness or illness, while depriving those afflicted with “*psychological unwellness*” (above) of the same. That is because, it seems to me, that if a person is “*psychologically unwell*” (above) it inevitably follows that they are deemed to be sick, or ill.

42. I do not understand from the respondents’ argument that it is pursuing a claim that it is for the employer to apply for sick leave to be disregarded under the CA, or that it is saying the operative causes of the illness must be “*extraordinary*” and sufficient to make illness

"inevitable" before sick leave will be disregarded. I am satisfied that neither argument – were they to be advanced – have merit in light of the plain meaning of the provision in dispute.

43. The issue as to whether the cause of a particular sickness *"can be traced directly to the conditions or circumstances under which the employee is working"* is a separate matter, one to be determined – including Ms A's – on a case by case basis. In the event agreement is not reached by the parties then the matter can be taken further by way of an arrears or a lieu claim or as a personal grievance. In light of my determination, it would be prudent for the parties to take Ms A's claim to further mediation in the event that they cannot reach a prompt agreement in respect of her.

Determination

44. For the reasons set out above I find in favour of the applicant, the New Zealand Educational Institute Te Riu Roa (Inc)'s, position in respect of this dispute and against the respondents.
45. The respondents must make available to those covered by the 2004 CA the provision set out in sub-clause 6.2.5(i) without distinction as to physiological or psychological sickness.
46. Costs are reserved.

Denis Asher
Member of Employment Relations Authority