

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 118
5329440

BETWEEN

MARY-ANNE KINDELL
Applicant

AND

THE NEW ZEALAND
PUBLIC SERVICE
ASSOCIATION TE
PUKENGĀ HERE TIKANGA
MAHI INCORPORATED
(PSA)
Respondent

Member of Authority: P R Stapp

Representatives: Barbara Bucket, Counsel for the Applicant
Bruce Corkill QC, Counsel for the Respondent

Investigation Meeting: 23 and 24 May 2012 at Wellington

Submissions Received: 6 July 2012 at Wellington

Determination: 1 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Kindell was employed by the PSA. During her employment, she needed time off for ill health. Ms Kindell's amount of the time off for sick leave became a concern for the PSA. On 13 October 2010 the matter of Ms Kindell's absences was raised with her for discussion. Ms Kindell took exception to the letter from the PSA which contained details of her absences. She accused the PSA of making a false allegation in regard to her absenteeism.

[2] The parties went to mediation in regard to the matter but this did not result in any resolution of the issues emerging between the parties. There was further correspondence and this led to a letter dated 23 September 2011, which informed

Ms Kindell that she had been dismissed. The reason for the PSA dismissing Ms Kindell was that there was no realistic prospect in the future that Ms Kindell would be able to carry out her duties with reasonable continuity. The decision was based on her failure to attend two scheduled appointments with a specialist occupational physician and having regard to her medical information from two reports and other information from Ms Kindell and her representative

[3] Ms Kindell claims her dismissal was unjustified. She also claims that the PSA has breached her employment agreement (a collective employment agreement) and the Employment Relations Act. She claims reinstatement, lost wages, future lost earnings special damages, compensation and costs. In addition there are also claims for various declarations about Ms Kindell's employment and superannuation entitlements. The PSA denies the claims.

Issues

[4] The issues for the Authority to determine are:

- (a) Were the PSA's actions the actions a fair and reasonable employer would/could have done in all the circumstances? (Letter dated 13 October 2010 about absences, 17 August 2011 request to attend a specialist occupational physician for assessment, and 23 September 2011 dismissal).
- (b) Has the PSA breached Ms Kindell's employment agreement?
- (c) Has the PSA breached any obligations to act in good faith?

[5] Ms Kindell's employment relationship problem effectively centres on her dismissal and the background leading to the decision made by the PSA to dismiss her. Her claims include the following:

- (a) The request for an order under s.123(1)(a) of the Employment Relations Act 2000 (the Act) for reinstatement;
- (b) Ms Kindell seeks damages equivalent to the money she would have earned if she had remained in employment until the age of 65, if she is not reinstated;

- (c) Compliance with all aspects of the collective agreement but specifically in relation to the PSA's duty to provide Ms Kindell with a quality working environment, Ms Kindell's right to time off to recover from illness without fear of loss of pay or termination, and the PSA's duty to assist Ms Kindell to reintegrate back into the workplace;
- (d) Penalties;
- (e) Payment of lost wages;
- (f) Payment of any loss for the full and unabated superannuation entitlements that Ms Kindell would be entitled to;
- (g) A declaration that medical retirement or dismissal is inappropriate in the absence of:
 - (i) A medical report;
 - (ii) Exhaustion of the applicant's contractual rights; and
 - (iii) Consideration of other options;
- (h) Confirmation of the applicant's unabated employment and hours of work;
- (i) Damages for undue mental distress, anxiety, loss of dignity, hurt, humiliation and stress caused by the PSA's alleged offensive and oppressive conduct;
- (j) Costs, including special damages;
- (k) Any other remedies.

[6] Ms Kindell is pursuing reinstatement. However, there is no evidence that she has been cleared to return to work. She confirmed to me that she had not been cleared to return to work as she was still ill and on a sickness benefit.

Ms Kindell's employment with the PSA

[7] Ms Kindell was employed by the PSA on 30 November 2004. She was a member of the PSA. On 3 October 2005 she was appointed as an organising

administrator in the PSA's Wellington office. Arrangements in regard to hours of work ensued later. The terms of her employment were set out in a collective employment agreement between the parties-her union/the PSA and the PSA/her employer. The terms of the employment agreement included provision for sick leave entitlements and medical retirement. The sick leave entitlement enabled Ms Kindell to take time off work on pay as "*necessary to recover from the illness and return to work*". It also made provision that "*after extended periods of absence, the employer will assist the employee to reintegrate back into the workplace*". It also provided for:

"In exceptional circumstances the employer shall have the right to request an employee to visit a registered medical practitioner nominated by and at the expense of the employer at any time..."

[8] Ms Kindell's absences from work were set out in a letter dated 13 October 2010 from Mr Ben Burger the PSA's HR advisor. Ms Kindell objected to the information and alleged it was false and as such she considered there was no reason to meet with her employer at first. Ms Kindell and her representative and the PSA did subsequently meet to attempt to discuss the issues arising from the letter and although the meeting apparently was constructive and friendly, there was subsequently a disagreement about what happened at the meeting. There is a recording but it has not been possible to get a transcript. The 2010 Christmas break intervened, and in early 2011 Ms Kindell had a medical procedure which gave rise to a treatment injury claim with ACC. Despite a return to work in February 2011 Ms Kindell had more time off work from March 2011. Mediation was scheduled for 12 April 2011, but did not go ahead over an issue from Ms Kindell's representative about who would attend from the PSA.

[9] The parties had mediation on 7 July 2011, but they failed to resolve the conflict in regard to the nature of her leave and the communications between the parties.

Mr Burger's visit to Ms Kindell after the mediation

[10] Mr Burger delivered a letter dated 7 July 2011 from the PSA to Ms Kindell at her home after the mediation. This was unfortunate because it immediately followed the mediation without any prior agreed arrangements. Also, it upset Ms Kindell who obviously did not expect it. The PSA's response to the allegation about this was that

it was done because previous communications appeared not to always be received. This assertion was made in the statement in reply without any detail and Mr Burger's evidence referred to it but added no more detail. However he and Ms Kindell have disputed what happened upon his arrival. Nevertheless he left the letter with her, and hand delivered a copy of the same letter the next day to Ms Kindell's representative. As I said it was unfortunate that Mr Burger decided to deliver the letter personally to Ms Kindell, but it was not fatal, I hold.

Workplace allegations from Ms Kindell

[11] On 12 July Ms Kindell's representative replied and raised for the first time issues to do with the work environment being damp and draughty and alleged this had caused Ms Kindell's sickness.

[12] Also, during these proceedings Ms Kindell made a number of allegations about her workplace, in particular that it was unhealthy, cold and damp and draughty. She referred to a banner that had been put up outside the building affecting her workspace inside the building. She claims that there must have been some causal linkage to her health causing pneumonia and asthma problems because of the work environment. The evidence did not prove this claim, I hold. My reasons are:

- i. That the evidence provided no certainty about when and where a banner was put up.
- ii. That there has been no proof that there is any linkage between Ms Kindell's health and the building environment.
- iii. That the circumstances relating to the physical environment on Ms Kindell's floor remained unclear and inadequate to draw any firm conclusions.
- iv. That there were personal health issues that might account for Ms Kindell's complications.

Workplace assessment for Ms Kindell

[13] Ms Kindell has been critical of the PSA for refusing to allow a workplace assessment when one of her doctors involved with ACC requested to visit the workplace. This became an issue about whether or not it had been agreed during

mediation that the PSA would allow a workplace assessment to take place. There was no evidence of any such agreement.

Request to attend a specialist occupational physician

[14] On 17 August 2011, the PSA requested Ms Kindell to attend a specialist occupational physician to determine her capacity for work. Two appointments were made (24 August 2011 and 21 September 2011), but an assessment never eventuated because at first Ms Kindell objected, and second, she had an issue about the notice she was given and that the arrangements occurred when she was away on a short holiday. The specialist occupational physician deposed by affidavit that he was told by Mr Burger that no further appointments should be booked at that time, and subsequently Ms Kindell was informed of this over the telephone. In the meantime two medical reports were provided in regard to Ms Kindell's health from her doctors.

Information available to the PSA

[15] In September 2011, it was unclear to the PSA as to whether or not Ms Kindell could return to work. The information and medical reports which the PSA had received did not directly address whether or not Ms Kindell was able to return to work, and or if so when she could return to work. It is common ground that Ms Kindell had periods of time off work for ill health. It is also common ground that Ms Kindell did provide medical certificates during the latter part of her employment. The certificates did not contain any more detail that would have helped the situation. The PSA claims that it did not have enough information from the reports and the medical certificates to ensure it was appraised of Ms Kindell's circumstances.

Dismissal

[16] The PSA raised the possibility of medical retirement that Ms Kindell took exception to as threatening and intimidation. On 23 September 2011, Ms Kindell was dismissed. The PSA's decision was confirmed by a letter with reasons and gave Ms Kindell the option to apply for medical retirement.

Determination

[17] I hold, without hesitation, that the PSA was entitled to write to Ms Kindell and raise concerns about absences, given the amount of time she had off and the open

nature of the sick leave provision in the terms of employment. Ms Kindell's interpretation that the letter involved a false allegation about her time off work was exaggerated, I hold. She certainly was entitled to challenge the accuracy of the information, but the information was not a false allegation. The correctness, accuracy and interpretation of some of the information were at issue. The PSA gave Ms Kindell an opportunity to discuss the information and concerns, but this did not happen initially because of Ms Kindell's response to the matter. I hold that the information put in the letter by the PSA was not deliberately and/or maliciously false. Given the open ended nature of the sick leave provisions a fair and reasonable employer would be entitled to raise concerns and seek some discussion on leave, and if any of the information was incorrect to then take that into account.

[18] The PSA was entitled to meet with her to discuss the schedule of absences. It was incumbent on Ms Kindell to meet with the PSA and to discuss anything she disagreed with. Ms Kindell should have been more communicative and responded more positively, I hold. Her response to the PSA accusing it of falsifying information was inflammatory and unhelpful, especially when she stated that there was nothing to meet about. Helpfully a meeting did occur on 9 December 2010 and mediation took place on 7 July 2011, albeit with further problems and issues arising.

[19] During her time at the PSA, Ms Kindell was hospitalised up to eight times. She required periods of time off work for recuperation. This involved an ACC matter and a report was prepared by a specialist in regard to her, and there were other medical issues and complications. Some of the time off also involved annual leave.

[20] On 17 August 2011 Ms Kindell was requested by the PSA to get an assessment from an independent specialist occupational physician. Arrangements were made for this by the PSA. However, an appointment for an assessment did not take place. Ms Kindell was horrified that this had been arranged without any input from her and that she had not given her approval for the named specialist. The appointments were made with a specialist Ms Kindell did not know and she did not know that details of dates and periods of her time off had been provided to the specialist. There has been no explanation from the PSA as to what the exceptional circumstances were, although it has acknowledged Ms Kindell's representative challenged that in her reply.

[21] The PSA's decision to refer Ms Kindell to a specialist occupational physician of its choice, without any discussion with Ms Kindell beforehand was not the action of a fair and reasonable employer. This is because Ms Kindell had a right to be involved since there was sensitivity about medical information and given that Ms Kindell was personally involved. She did not know the consultant and had never been to the consultant's premises before. Also as the employment agreement only permitted such a referral in exceptional circumstances and it is implicit some consultation and/or discussion should have taken place beforehand, I hold.

[22] There remains an issue about why an appointment did not go ahead. It has emerged that Ms Kindell received a communication that the PSA had informed the specialist that another appointment should not go ahead and Ms Kindell was entitled to rely on that.

[23] I hold that there was an unjustified action disadvantaging Ms Kindell when the PSA required her to attend the medical assessment with a doctor of Mr Burger's choosing, without consultation, and especially after the issue of "exceptional circumstances" was raised.

[24] Correspondence between the parties then eventuated. Ms Kindell provided medical certificates for the period she was off work, and provided two doctors' reports in regard to her health. One of these reports stated that the current reason for restricting a return to work related to the complications of a preliminary embolism. Any clearance for work needed to post date a review. A subsequent report from a chest physician gave no indication of a return to work date. Ms Kindell subsequently did agree to attend the PSA's choice of specialist occupational physician, but without prejudice and subject to various conditions. However no consultation actually took place. The two doctors' reports brought about two developments. First the PSA took exception to the tone and legalistic nature of Ms Kindell's approach to the matter through her representative. This appears to have been an influence in the PSA's attitude towards Ms Kindell, and resulted in its frustration being put in writing. Second the PSA considered that the medical reports did not provide much certainty about Ms Kindell's ability to resume work and attend work consistently. I hold:

- a. That Ms Kindell did provide two medical assessments. They were not clear about a return to work date and did not provide a medical clearance to resume work.

- b. That Ms Kindell did agree in the end to attend the PSA's consultant, but a consultation never took place because Ms Kindell understood Mr Burger had said that an appointment was no longer necessary. Ms Kindell was entitled to rely on this communication.

[25] Ms Kindell's dismissal was unjustified when she did not get the opportunity to face the decision maker before the final decision was made. Whilst there was a reference made by the PSA to medical retirement in the notice of possible intention (7 July 2011) and the dismissal letter (23 September 2011) that was an issue open for discussion, I hold. This is because Ms Kindell was sick. She had a number of lengthy absences and was on sick leave. The PSA has been accused of using medical retirement to intimidate and to put pressure on Ms Kindell. Ms Kindell also alleged that her union representative told her that the PSA was looking to medically retire her. The union representative denied her claim and says any discussion had to be put in the context of looking at all the options available. I accept that. I hold that the PSA was not threatening and intimidating Ms Kindell with the use of the medical retirement. This is because the employment agreement made provision for it (clause 3.21). Also the PSA kept it open for a claim after the dismissal. At the very least it was raised as a possible outcome, I hold. I read nothing more in it.

[26] The PSA's reason for dismissing Ms Kindell was that there was no realistic prospect in the future that Ms Kindell would be able to carry out her duties with reasonable continuity. First that assessment was made on the basis of the failure to get Ms Kindell to attend a specialist, twice. A fair and reasonable employer could not have relied upon this because Ms Kindell was entitled to rely on a communication whereby the specialist had been informed not to go ahead with another appointment and by which time Ms Kindell had agreed to take part. Her reasoning in refusing initially was genuinely based on the PSA's failure to consult and get some measure of agreement with her about who the specialist should be, and to get permission on the information to be provided. Also the information relating to the reasons for the cancellation of the appointments and arrangement for any more appointments was not discussed and there should have been comment and input from her. The request for comments on the reasoning finally reached for the dismissal did not include this matter (see letter dated 13 September 2011). In fact this was a new issue raised in the dismissal letter. I hold that raising it without Ms Kindell having an opportunity for input and comment before any decision with the decision maker was unfair.

[27] Second the PSA received information from Ms Kindell's doctors and it was entitled to conclude that she was not cleared to return to work and that there was no realistic prospect in the future that Ms Kindell would be able to carry out her duties with reasonable continuity. It was open to a fair and reasonable employer to reach at least that conclusion, I hold. I am supported in this finding by the open ended sick leave provision that the PSA was entitled to enquire about Ms Kindell's absences with her.

[28] Any fair and reasonable employer would have met with Ms Kindell to enable her to have comment and input on the decision before finalising it, I hold. In this case Ms Kindell was represented, but even so she should have had an opportunity to make any comment and have input before the final decision was made. Otherwise potential unfair presumptions were being relied upon and a fair and reasonable employer had an obligation to ensure all its information was correct and up to date. I am supported in this conclusion by the obligation existing under the sick leave provision for "*after extended periods of absence, the employer will assist the employee to reintegrate back into the workplace*" and that the PSA had decided to call a halt to the employment relationship.

[29] I must have regard to the provisions of section 103A (3) of the Act. Given the resources available to the PSA a fair and reasonable employer could have investigated better by persevering to engage Ms Kindell and assemble all relevant information from the appropriate medical sources before making a final decision. This included an agreed independent assessment, especially since Ms Kindell did agree to accept it in the end. In addition the PSA could have then enabled Ms Kindell an opportunity to respond fully to the information that it planned to rely on. The PSA's decision to communicate the decision without Ms Kindell having the opportunity to respond in person to the decision maker was unfair, I hold in regard to the final outcome. The process ended up being done in writing because of the deteriorating relationships, and that is not good enough when someone's employment is being brought to an end. These faults I hold were not minor given the open ended nature of the sick leave provision and the PSA calling halt to the employment relationship, the medical circumstances and the involvement of the specialists that certainly invited more information being made available. The PSA's action meant that Ms Kindell was treated unfairly.

The remedies to resolve the employment relationship problem

[30] I hold that it is not practicable to reinstate Ms Kindell either to the position she held or a position no less advantageous to Ms Kindell. Ms Kindell confirmed that she had not been cleared to return to work and is on a benefit. It is also apparent that the relationship has broken down because of the way in which Ms Kindell decided to approach the problems in her employment relationship with the PSA. The relationship has become combative and legalistic and Ms Kindell must take some responsibility for that, I hold. Therefore I am not satisfied that either of the parties will be able to mutually get on, and resolve their differences.

[31] Ms Kindell has sought damages equivalent to the money she would have earned if she had remained in employment until the age of 65. I have not been satisfied that Ms Kindell would have worked for the PSA for any length of time after her dismissal given her illness and that she has not been cleared to return to work. This claim seems to relate to future lost earnings claimable when there is a personal grievance. For the same reasons I would not have granted the remedy. Moreover Ms Kindell has not been able to mitigate any losses because she has been ill.

[32] Ms Kindell has claimed lost wages. I am not satisfied that she has established the claim given that she was sick and has not been cleared to work and given the amount of time she had off. Even although there is an open ended sick leave provision there is no certainty that Ms Kindell would have earned any lost wages in the time since her dismissal when the employer had already called halt to the situation.

[33] The following remedies were included in the applicant's statement of problem but were not argued in submissions and it seems that they have been lost sight of with the primary issues to do with the claims for personal grievance.

- i. Although Ms Kindell has applied for compliance with her employment agreement I am not in any position to order compliance on provisions that do apply since the employment ended.
- ii. This is not a matter for penalties. This is because the employment relationship problem is mostly to do with Ms Kindell's termination of employment. Whilst there are other

issues in the background, I hold that they have arisen because of tactics pursued by Ms Kindell over matters she genuinely holds different views about and the matters are not underpinned by any deliberate action by the PSA other than in an attempt to resolve matters relating to Ms Kindell's employment.

- iii. Ms Kindell has claimed any loss of full and unabated superannuation entitlements. The claim has not been sufficiently quantified on the loss there has been, and given that there have been no awards for lost wages and future lost earnings, the claim must be dismissed.
- iv. A declaration has been requested that medical retirement or dismissal is inappropriate. I am not satisfied that any declaration is needed given that Ms Kindell has not been reinstated. In any event the issue was not the primary matter in the employment relationship problem to be resolved I hold.
- v. There is no need for me to confirm the applicant's employment and hours of work as claimed.

[34] Ms Kindell is entitled to an amount of compensation for the employer's unjustified action causing disadvantage in failing to consult Ms Kindell properly on requiring her to attend a specialist and including that as a reason without justification for her dismissal. Furthermore she was clearly upset by the information that was passed to the specialist. It was only a schedule of absences without much other personal detail, but I accept that with the demand for her to attend the assessment there was an impact on her feelings. I accept that Ms Kindell's feelings were affected by the loss of her job as it related to both reasons given by the PSA and that she did not meet the decision maker and had the message conveyed to her in writing. I award Ms Kindell \$5,000 compensation under s 123 (1) (c) (i) without deduction for any contributory fault under the Act.

[35] I have decided to reserve the matter on special damages for costs. Such an award is very rarely made and Ms Kindell should not have any expectations that it will be made. This is because it is a principle that parties are expected to meet their

own costs in employment relationship problems before coming to the Authority. It's a remedy seldom made. I would need more detailed submissions and possibly about the issue of any conflict of interest between the PSA as an employer, and being a union party to the collective employment agreement that is Ms Kindell's union where in a matter she decided to get independent legal advice of her own volition and choice.

[36] Costs for the Authority's investigation are reserved.

P R Stapp
Member of the Employment Relations Authority