IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 215
5360730

	BETWEEN	ARUN SHARMA First Applicant
	AND	RAIL & MARITIME TRANSPORT UNION INC Second Applicant
	AND	VEOLIA TRANSPORT AUCKLAND LIMITED Respondent

Member of Authority:	Dzintra King
Representatives:	Guido Ballara, Counsel for Applicants Shan Wilson and Rebecca Rendle, Counsel for Respondent
Investigation Meeting:	20 and 21 December 2011
Submissions received:	21 December 2011 from Applicant 21 December 2011 from Respondent
Determination:	22 June 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants, Mr Arun Sharma and the Rail & Maritime Transport Union Inc ("RMTU") claim that the respondent, Veolia Transport Auckland Limited ("Veolia") is in breach of the Multi-Employer Collective Agreement ("MECA") by refusing to provide additional paid sick leave to Mr Sharma.

[2] The applicants also claim that Veolia has failed to comply with a Record of Settlement dated 9 February 2011 by refusing Mr Sharma additional paid sick leave.

[3] The respondent says it has complied with the Record of Settlement reached on February 2011 and there are no grounds for a compliance order with the Record of Settlement. The applicants have the onus of proving on the balance of probabilities that there has been a breach: *United Food & Chemical Workers' Union of NZ v Talley* [1992] 1 ERNZ 756.

[4] Veolia says it has exercised its discretion fairly and reasonably and in good faith in declining Mr Sharma's application for additional paid sick leave.

[5] The applicants query what remedies are available if they are found to be correct and seek leave to come back to the Authority for a related determination should the parties be unable to agree on remedies. The respondent opposes this application. It says that even if it is found to not have exercised its discretion in good faith that would not entitle the applicant to additional paid sick leave. Mr Sharma would need to establish that he had lost remuneration. The respondent also says that even if the discretion should have been exercised differently it was not probable that Mr Sharma would have been granted additional sick leave.

[6] The respondent says that Mr Sharma has not claimed he has suffered hurt and humiliation either in the email from Mr Wilson raising the grievance or in the Statement of Problem or in his witness statement and that therefore there can be no basis on which to award compensation.

MECA provisions for additional paid sick leave and accidental injury

[7] Clause 26.15.2 deals with payment for accidents:

> *Where your absence is due to a non-work accident and you have a sick leave entitlement your accident compensation pay will be supplemented to the sick leave rate and debited on a proportionate basis to your sick leave entitlement.*

[8] Additional paid sick leave is provided under clause 26.13.2 of the MECA. This provides:

> *If your sick leave entitlement is exhausted you and your manager may agree to additional paid sick leave. Favourable consideration will be given in case of serious illness or fatigue/stress that could affect safety.*

[9] Veolia maintains that Mr Sharma does not qualify for *"favourable consideration"* and that non-work accidents are provided for separately by clause 26.15.2 of the MECA.

Guidelines

[10] In January 2009 guidelines for granting additional paid sick were agreed by the RMTU and Veolia.

[11] On 9 February 2011 a Record of Settlement provided that Veolia would withdraw its guidelines for the granting of sick leave. The parties agreed that additional paid sick leave would be considered on a case by case basis and that the additional sick leave provision in the MECA did not create an automatic right to unlimited sick leave. The RMTU undertook that at that time it was not aware of any employees other than the person in respect of whom the Settlement was signed who had any current issues regarding additional sick leave. The RMTU claims that Veolia has not withdrawn the guidelines and made the decisions regarding Mr Sharma in accordance with those guidelines.

[12] The guidelines provided that Veolia could consider asking an employee to take annual leave as part of a compromise based on the amount of annual leave accrued.

[13] The guidelines set out relevant factors which the company was to consider in making its decision and also provided that the consideration would not necessarily be limited to those factors. Nine factors were listed. These include whether an employee's sick leave entitlement was exhausted, whether a medical certificate had been provided and any other information that the company decided was relevant. The availability of annual leave is not listed as a specific relevant factor.

[14] The respondent says that if it is unable to consider any of the factors listed in the withdrawn guidelines then it is fettering its discretion to such an extent that it has no discretion.

[15] In my estimation, Veolia must be able to consider whether or not an employee has exhausted his or her sick leave entitlement and whether a person has provided a medical certificate that supports the request for additional sick leave. In the absence of information such as this the discretion provided for in the MECA is rendered nugatory.

[16] When I consider what withdrawing the guidelines means and whether there has been compliance with the withdrawal I am faced with, for example, the seemingly contradictory provision that the withdrawn guidelines provide that a decision is to be made on a case by case basis yet the Record of Settlement provides that the parties agree that consideration will be on a case by case basis. The Record of Settlement also provides that the parties will abide by the MECA with regard to the granting of additional paid sick leave. Abiding by the MECA means that a discretion has to be exercised as the MECA provision does not provide for an automatic extension of sick leave and the Record of Settlement expressly recognises that.

[17] The guidelines required the employer to consider at least the nine factors listed. The evidence regarding the consideration given to Mr Sharma's applications did not demonstrate that Veolia considered all the nine factors in the guidelines. It considered, as it was bound to do, whether or not he had exhausted his sick leave entitlement; and amongst other information which it decided was relevant was Mr Sharma's annual leave entitlement.

[18] If none of the provisions contained in the guidelines can be applied to a consideration of an application for additional sick leave, then there can be no consideration at all. That is clearly a nonsensical outcome. Amongst other things a collective agreement provision cannot be invalidated using the mediation process. The only interpretation that makes any sense is that the parties agreed that Veolia could not apply the guidelines in their entirety to any consideration for additional paid

sick leave. They did not agree that Veolia could not apply any of the provisions in the guidelines.

[19] The withdrawal of the guidelines did not prevent Veolia from taking account of Mr Sharma's annual leave balance.

Mr Sharma's accident and requests for additional paid sick leave

[20] Mr Sharma commenced employment with Veolia on 13 October 2003. He was employed as an engine driver. On 14 March 2009 Mr Sharma had a non-work accident and injured his shoulder. In 21 February 2011 he had surgery for the injury and was still off work at the time of the hearing.

[21] In early March 2011 Mrs Karen Dexter, the Remuneration Manager, phoned Mr Sharma and talked to him about options for topping up his wages by 20%. She did not refer to the MECA additional sick leave provision. Mr Sharma asked to be topped up using his sick leave.

[22] In May 2011 Mrs Dexter told Mr Sharma his sick leave was exhausted and he asked to use his alternative holidays to top up the 20%. Mr Sharma claims he did not agree but was told he had to use his other leave entitlements

[23] On 13 May 2011 Mr Sharma discussed his situation with the RMTU and applied for additional paid sick leave.

[24] Mr William Els, the Train Services Manager, spoke with Mr Gavin Cook, the HR Manager, about Mr Sharma's application and indicated he was considering declining the application, which he did on 3 June 2011.

[25] The RMTU alleges there are *"blanket exceptions"* to the granting of additional paid sick leave. However, Mr Els asked Mr Cook's opinion before making a decision.

[26] On 7 June 2011 Mr Sharma reapplied for additional sick leave. Mr Els informed Mr Cook of the second application which Mr Cook forwarded to Mr

Graham Sibery, the Managing Director, for consideration. Mr Sibery indicated that he was tentatively considering declining the application but first wished to meet with Mr Cook. Mr Sibery advised Mr Cook that he intended to decline the application. This took place in an area between the two men's offices and has led the applicant to maintain that the decision was made in passing in a corridor. I do not accept that the consideration was limited in that manner.

[27] On 13 June 2011 Mr Cook advised Mr Els who emailed Mr Sharma informing him of the declining of is second application. The same day Mr Wilson, the RMTU Northern Industrial Officer, asked Mr Els to review the application. The following day Mr Els informed Mr Wilson, Mr Sharma and Mr Bill Sweeney of the RMTU that the application had been declined.

[28] On 29 June 2011 Mr Sharma raised a personal grievance.

[29] On 3 July 2011 Mr Sharma applied for 5 weeks' annual leave to travel to India in November and December of 2011. The application was granted.

[30] On 10 August 2011 and 7 November mediations were held. They did not resolve the matter.

[31] On 5 October Mrs Dexter spoke to Mr Sharma who agreed to top up his ACC payments by using his annual leave.

[32] I find that Mrs Dexter did not instruct Mr Sharma to use annual leave or alternative holidays. Mr Sharma said at the hearing he felt he had no choice but to use other leave. While his position is understandable, feeling he had no choice is not the same as having been instructed to take leave. Mr Sharma chose, albeit reluctantly, to exercise the option to use his leave entitlements.

Interpretation of employment agreements

[33] The principles for interpreting employment agreements are well-established:

- The starting point is the words themselves;

- The Authority must take an objective, common sense approach and look to find the meaning which the agreement would convey to a reasonable person having all the background knowledge and commercial context which would reasonably have been available to the parties in the situation which they were in at the time of the contract;
- The words must be interpreted in the context of the agreement as a whole; and
- The circumstances of entering the transaction may be taken into account.

[34] The words *"may agree"* plainly indicate that there is no entitlement to unlimited sick leave. A decision to decline additional sick leave does not in itself amount to a breach of the MECA.

[35] Veolia is required to give "*favourable consideration*" in cases when "*serious illness or stress/fatigue that could affect safety"*.

[36] Mr Cook's position was that while Veolia may agree to additional paid sick leave for a non work accident it does not have to give it favourable consideration.

Injury vs illness

[37] The sole ambiguity is the meaning of *"illness"*.

[38] According to Mr Wayne Butson, the General Secretary of the RMTU, sick leave was to be provided on the basis of need. Mr Els said it was to cover cases where financial hardship may otherwise occur and that it had never been used to protect excessive annual leave balances.

[39] In the MECA negotiations the parties expressly revoked unlimited sick leave.

[40] Veolia says the MECA clearly distinguishes between work and non-work accidents and between injury and illness.

[41] In *Kelcold v O'Brien* [1999] 2 ERNZ 70 (CA) the Court noted that "*sick*" is a word of variable meaning and that "*the sense in which it is used is necessarily dependent on the context in which it is used.*"

[42] Additional paid sick leave was to allow for consideration of such leave in cases of need or financial hardship. If a person is in receipt of ACC then that does not present the same need as employee who is seriously ill and has no income.

[43] At the time of the exercise of the discretion Veolia did not consider that Mr Sharma's non-work injury was serious. This was because the injury had occurred in 2009 and Mr Sharma had continued to work for a two year period. Mr Sharma's absence from work to recover after surgery had not been lengthy at the time that the discretion was exercised in June 2011. Mr Sharma was expected to be back at work by 31 July 2011.

Exercise of discretion

[44] An employer must exercise discretion in a fair and reasonable manner taking relevant factors into account and acting in good faith to the employee without ulterior motives.

[45] In *Dorset v Chemcolour Industries (NZ) Ltd* (Employment Relations Authority, 8 April 2004, AA117/04) the Authority noted at para [19] that the factors taken into account by the employer are for the employer to decide as part of the discretion, provided they are not contrary to law. The weighing of the relevant factors is also for the employer.

[46] In *Bates v BP Oil* [1996] 1 ERNZ 657 at 671 the Court stated that the way in which a discretion was to be exercised had to comply with the implied obligation of fair and reasonable dealing.

[47] In *Gwynn v A Professional Conduct Committee of Nursing Council of New Zealand* (HC, 26/10/11) McKenzie J held that the High Court could not substitute its discretion or view for the NZ Health Practitioners' Disciplinary Committee's view in the absence of error; and that the onus was on the applicant to show that there had been an error in its approach or reasoning or that it could not have reasonably reached that conclusion.

[48] The MECA provides that in *"any"* situation where sick leave has been exhausted an employee and his or her manager may agree to additional paid sick leave. The word *"any"* means *"all without specification"*. It does not exclude injuries.

[49] In circumstances of *"serious illness or fatigue or stress which may affect safety"*, the consideration to be given to a request must be *"favourable"*. In *Electrical IUOW v Otago Electric Power Board* [1991] 2 ERNZ 133 *"favourable consideration"* was defined as *"well disposed" "propitious"* and consideration as *"the act of considering, careful thought." "Favourable consideration"* is something that tends to promote or facilitate, is encouraging, approving or pleasing, positive, well disposed or affirmative. It is something that is very likely to result in a positive outcome.

[50] I have considered whether Mr Sharma's injury falls within the ambit of a *"serious illness."* I agree that the sense in which the word illness is interpreted depends upon the context: *Kelcold.* Sick leave pursuant to the MECA and the Holidays Act covers both injury and being sick due to, for example, disease, whether physical or psychological, or degenerative processes. It means being unfit to work for health reasons of any kind and however caused.

[51] Mr Sharma's non-work accident resulting in injury constituted an illness. *"Serious"* means *"important, grave, complex, of great consequence, threatening great harm, life threatening, dangerous, severe"*. Some conditions readily fall within the category of serious illness, for example, cancers which may be life threatening,

conditions which result in disabilities such as loss of sight or a limb, altitude sickness which may cause death. Other illnesses may or may not be serious depending on factors such as who has the illness (children and the elderly are more at risk of death from some conditions) and the availability of medical treatment (malaria is more readily treatable in first world countries). Whether an illness is "*serious"* may also depend on the extent of severity, for example, a stroke may be a minor event with limited effects or it may be a major event which results in loss of physical co-ordination and memory loss. It is important, therefore, that each case is considered on its particular merits.

[52] Mr Sharma's illness, while debilitating, painful and upsetting was not such as to prevent him from travelling to India to participate in his son's wedding. It cannot be categorised as "*serious*". Capsulitis is a disease that takes time to resolve.

[53] Having found that Mr Sharma's illness was not of a nature that required being given "*favourable consideration"* I turn to consider whether the consideration that was given to Mr Sharma's requests was a fair and reasonable exercise of discretion.

[54] Sharma says a blanket decision was made to rule out additional paid sick leave on the basis of his other leave entitlements and the fact that he had been injured away from work.

[55] Capsulitis can occur as an idiopathic condition. In those circumstances the sufferer would not be eligible for ACC payments. In those circumstances it is possible that Veolia could use its discretion to grant additional paid leave because of the length of time that recovery usually takes and that the person would be financially seriously disadvantaged.

[56] Adopting the availability of other leave entitlements in the case of Mr Sharma was not unreasonable. Taking a person's financial circumstances into account is not unreasonable. It is, indeed, a major reason for the provision of extended sick leave.

[57] I do not accept that the MECA says that more sick leave is to be provided unless there is a relevant and compelling reason not to. That interpretation may have

merit in circumstances where there is a serious illness and favourable consideration is to be given; but it does not apply where, as in this case, the applicant does not have a serious illness and there is no requirement for the consideration to be favourable.

Annual leave as a relevant consideration

[58] Taking other leave available into account is reasonable given that Veolia offers enhanced leave entitlements; sick leave 6.5 days; annual leave minimum 5 weeks for shift workers and up to 6 weeks depending on service; and long service leave.

[59] Mr Sharma confirmed at the hearing that the basis of the application was that he was having to use annual leave to top up his ACC payments. He confirmed that neither he nor the RMTU had requested a further meeting to provide additional information and that he had nothing to add to the undisputed medical information that he had already supplied to Veolia.

[60] At no stage did Mr Sharma say he had a concern about his son's wedding "*slipping away*" if additional sick leave was declined and he had to use his annual leave to top up his ACC payments. His applications for annual leave were made on 23 May and 11 June 2011 and he did not apply for annual leave to travel to India until 3 July 2011 despite saying it had been planned for a very long time.

[61] Even after a 5 week holiday in India Mr Sharma had annual leave of 70 odd days and a sick leave entitlement. His leave entitlements at the time of the hearing were greater than when he first applied for additional sick leave on 23 May when he had 55 days annual leave and no sick leave.

[62] Section 39 Holidays Act 2003 expressly permits an employee and employer to agree to the employee using his or her annual leave when a sick leave entitlement has been exhausted.

[63] Mr Sharma is entitled to 6 weeks' leave each year. This comprises 4 weeks' statutory leave entitlement; one week for shift work and one week for long service leave.

[64] Mr Sharma had not used any of his statutory annual leave entitlement as at 12 December 2011.

[65] Clause 26.2.1 of the MECA allows an employee to cash up any annual leave above 4 weeks.

[66] Section 28A Holidays Act allows an employee to request that up to one week's annual leave be paid out. This is a recognition that an employee can chose to take the financial benefit without the opportunity for rest and recreation.

[67] Mr Sharma topped up using alternative holidays. Section 61 Holidays Act recognises that after the expiry of 12 months an alternative holiday can be exchanged for payment.

[68] Both the Holidays Act and the MECA recognise and allow for an employee to make a choice to exchange holidays for payment.

Decision

[69] Veolia's view that serious illness does not encompass injuries is incorrect. However, in the circumstances of this case Veolia was correct in not treating Mr Sharma's injury as a serious illness. Although it reached this conclusion not by a consideration of whether or not Mr Sharma's illness was serious but through an erroneous interpretation of the MECA clause the outcome cannot be said to constitute a breach as consideration, albeit not favourable consideration, was given to the two requests. That was what was required by the circumstances of this case.

[70] There was no breach of the Record of Settlement.

[71] Veolia exercised its discretion fairly and reasonably and acted in good faith in declining Mr Sharma's application for sick leave.

Costs

[72] If the parties are unable to agree on the issue of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority