

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 54
5579687

BETWEEN ANDREW LEOTA
Applicant

A N D CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: Rachel Larmer

Representatives: Grant Macdonald for Applicant
Judith Manoa and Nikki Farrell, In-House Counsel for
Respondent

Investigation Meeting: 23 February 2016 at Auckland

Written Record of Oral 24 February 2016
Determination:

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Leota is a Residential Youth Worker at Korowai Manaaki Justice Residence (Korowai Manaaki). He has been employed on a full-time permanent basis by the Ministry of Social Development (formerly Child Youth and Family Services) (MSD) since 19 April 2010. At all material times Mr Leota was a member of the Public Service Association (PSA) Union.

[2] Mr Leota is employed under the Child, Youth and Family (CYF) – PSA covered by a Collective Agreement between the PSA and MSD dated 01 July 2015 to 30 November 2016 (CA 2016). At the material time Mr Leota was covered by the CYF - PSA Collective Agreement dated 01 July 2012 to 30 June 2015 (CA 2012).

There are no material differences between the two Collective Agreements in respect of the contractual terms which are in issue.

[3] Mr Leota claims that MSD has breached:

- (a) Breached the CA by withdrawing paid sick leave from him,
- (b) Breached its good faith obligations to him; and
- (c) Misused his confidential information.

[4] MSD says it has:

- (a) Acted in accordance with the CA which enables it to stop paying an employee paid sick leave;
- (b) Complied with its own Management of Sick Leave Guidelines (Sick Leave Protocol);
- (c) Complied with good faith requirements when addressing Mr Leota's sick leave.

[5] MSD withdrew paid sick leave from Mr Leota after he had 30.5 days paid sick leave over a four month period. MSD says it did not do that until after it had obtained a medical report on Mr Leota's health and had consulted with him about its proposed decision.

[6] MSD says that on 04 June 2015 Mr Leota told his Team Leader, Mr Ie Nua, that his (Mr Leota's) doctor had told him he (Mr Leota) was in the early stages of kidney failure. Mr Leota also told Mr Nua that he (Mr Leota) had recently been to hospital for a check-up.

[7] Mr Nua emailed his manager, Ms Paranui Wiki (the Korowai Manaaki Residence Manager) about this, also identifying that Mr Leota had taken 16.5 days paid sick leave over the period 19 April to 04 June 2015.

[8] Mr Leota claims that this email from Mr Nua to Ms Wiki disclosing information about his supposed kidney issues amounts to a breach of Mr Leota's confidential information.

[9] After receiving Mr Nua's email Ms Wiki invited Mr Leota to attend a health and wellness meeting to discuss concerns about the level of his paid sick leave. Ms Wiki identified that she would be considering whether or not to withdraw paid sick leave from him with the possible consequence that further sick leave absences would be unpaid.

[10] Ms Wiki stated that she wished to consult with Mr Leota so wanted to give him an opportunity to provide his views, submissions or other information (including medical information) before deciding how to proceed. Ms Wiki's letter referred to the right under clause 6.3.3 of the CA 2016 (which is the same as clause 6(C)(c) CA 2012) to withdraw paid sick leave in the case of recurring illness.

[11] Mr Leota says clause 6.3.3 did not apply to his situation because he did not have "*recurring illness*." Mr Leota says his sick leave absences were mostly flu related so because he had recovered fully from the flu on each occasion he did not have a "*recurring illness*".

[12] By the time the consultation meeting occurred on 01 July 2015 Mr Leota had taken 19.5 days paid sick leave since 19 April 2015. Present at this meeting were Ms Wiki, Ms Mala Naidoo (Human Resources Adviser), Mr Leota and Mr Grant Macdonald (a co-worker who attended as Mr Leota's support person/representative).

[13] During this meeting Mr Leota said he did not have any serious issues with his kidneys and that his sickness absences were mostly due to the common cold. It was agreed at this meeting that Mr Leota would be referred to a medical practitioner for an occupational health assessment. Mr Leota signed a medical assessment consent form.

[14] A medical report dated 10 August 2015 was provided to MSD by Dr Culpan. The medical report found that there was "*No chronic illness or underlying untreated health problem or poor or diminished immunity.*"

[15] Dr Culpan advised that he could not find "*any environmental causes of increased ill health in the environment in which Andrew operates*". The report concluded:

Having considered all of these matters I can see no easy way of improving his attendance at work and diminishing his sick leave. There is no medical intervention to lessen these absences, nor is there any untreated health problem that we can improve to assist him to have less sick leave.

[16] A second meeting was held between the parties on 25 August 2015 to discuss Dr Culpan's medical report. As at 21 August Mr Leota had taken 30.5 days paid sick leave since 19 April 2015. By 08 January 2016 Mr Leota had taken 45 days sick leave since his anniversary date.

[17] At the meeting on 25 August 2015 Mr Leota said that;

- (a) MSD had no right to withdraw paid sick leave from him;
- (b) MSD was not acting in good faith by proposing to withdraw his paid sick leave;
- (c) His privacy had been breached by Mr Nua disclosing information to Ms Wiki about possible kidney problems and by Dr Culpan's referring in his medical report to Mr Leota's children.

[18] Ms Wiki considered this feedback and the factors set out in clause 6.3.3 of the CA 2016 and concluded that it was appropriate to withdraw paid sick leave from Mr Leota from 25 August 2015 to 18 April 2016. Mr Leota's further sickness absences over that period would therefore be recorded as unpaid sick leave.

The issues

[19] The following issues are to be determined:

- (a) Did MSD have a contractual right to withdraw paid sick leave?
- (b) If so, did MSD breach the CA when it decided that Mr Leota's sick leave from 25 August 2015 until 19 April 2016 would be unpaid?
- (c) If so, what if any remedies should be awarded?
- (d) Did MSD breach its good faith obligations under s.4(1)(a) of the Act?
- (e) If so, should a penalty be imposed?
- (f) If so, should some or all of any penalty that is imposed be paid to Mr Leota?
- (g) Did Mr Nua breach Mr Leota's confidentiality?

(h) If so, what if any remedies should be awarded?

Did MSD have a contractual right to withdraw paid sick leave?

[20] Clause 6.3 of the CA contains the sick leave provisions that apply to Mr Leota. As a permanent full-time employee with more than two years' service, Mr Leota was entitled to sick leave "*as required*" while he was sick.

[21] Clause 6.3.3 deals with long term or recurring illness. This clause recognises that MSD may withdraw paid sick leave (or terminate employment) after discussing the situation with the employee and considering the employee's views.

[22] MSD's Management of Sick Leave Guidelines (the Sick Leave Protocol) contains guidelines for what is reasonable regarding the management of sick leave. Clause 8 of the Sick Leave Protocol expressly states that the CA right to "*as required*" sick leave is not an entitlement to unlimited paid sick leave, rather it is an entitlement to "*unspecified*" paid sick leave.

[23] The Sick Leave Protocol expressly recognises that MSD's obligation to maintain paid sick leave is not indefinite or open ended. It expressly states that MSD may place an employee on some other form of leave (such as unpaid sick leave) if the employee has long term or recurring absence from work due to illness.

[24] I find that MSD clearly has the contractual right under CA 2016 (CA 2012) right to decide to withdraw paid sick leave.

Did MSD breach the CA?

[25] Clause 6.3.3 CA 2016 (CA 2012) sets out five factors which are to be considered before a decision may be made to withdraw paid sick leave or terminate employment on the grounds of incapacity.

[26] Mr Leota submits that these five factors are "*conditions*" all of which must be present before paid sick can be withdrawn. I do not accept that.

[27] The matters relied on are merely factors to be considered before a decision is made. They are not prerequisites to a withdrawal of paid sick leave. To adopt Mr Leota's submission would involve reading words (and restrictions) into the clause that simply are not there.

[28] Mr Leota says because he had intermittent sickness absences which were resolved on each occasion before he returned to work clause 6.3.3 does not apply to him so MSD cannot withdraw paid sick leave from him.

[29] I do not accept that submission. Mr Leota had ongoing sickness absence. It is the nature of the leave (i.e. paid sick leave) that triggers clause 6.3.3 – not the type of illness an employee has. MSD has applied clause 6.3.3 where an employee has different and discrete reasons for their sick leave absence.

[30] I consider that an employee such as Mr Leota who has had 30.5 days of paid sick leave absence over a four month period can be said to have “*recurring*” illness in terms of the requirements and application of 6.3.3 CA 2016. I find that recurring means Mr Leota had repeated or ongoing days off work on the grounds of illness as opposed to a one day or one period of sick leave.

[31] Mr Leota claims that because he fully recovered from each bout of sickness absence and was able to continue to do his job then clause 6.3.3 could not apply. I do not accept that. The matters Mr Leota relies on to support his position relate to a decision about whether or not to terminate employment on the grounds of incapacity.

[32] That is not the situation here. MSD never suggested that Mr Leota was unable to perform his role or that termination on the grounds of medical incapacity was being considered. Clause 6.3.3 clearly states that MSD may “*withdraw sick leave on pay*”. That right is not limited to situations in which an employee can no longer perform all of the functions of their job.

[33] Mr Leota says that MSD could only require him to obtain a medical certificate for any further sickness absence – it could not stop his paid sick leave. I do not accept that. MSD was not disputing the genuineness of Mr Leota’s sick leave, rather it considered it had got to the level where it could not continue to pay him for his repeated sickness absence.

[34] MSD’s Sick Leave Protocol required it to consult with Mr Leota and to consider the five factors set out in clause 6.3.3 of CA 2016 (CA 2012) before deciding to withdraw ongoing paid sick leave. I am satisfied that occurred and that MSD complied with the requirements of clause 6.3.3.

[35] I now turn to consider whether MSD's decision to withdraw paid sick leave with justified in accordance with the justification test in s.103A(3) of the Act. This requires the Authority to consider whether MSD's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances.

[36] I am satisfied that MSD's decision was substantively and procedurally justified. It had a good reason for stopping Mr Leota's paid sick leave for a period of time and it followed a fair and proper process before it made that decision.

[37] I find that MSD complied with the CA and its Sick Leave Protocol in its dealings with Mr Leota. His breach of contract claim therefore does not succeed.

Did MSD breach its good faith obligations to Mr Leota?

[38] Mr Leota did not give evidence about what exactly he says MSD had done to breach its good faith obligations to him under s.4(1)(a) of the Act. He appears to be of the view that it was unfair for MSD to withdraw paid sick leave so that in itself amounts to a breach of good faith.

[39] I do not accept that. It was not in itself a breach of good faith for MSD to exercise a contractual right which stop his paid sick leave for a period of time.

[40] I find that MSD met its good faith obligations in terms of how it dealt with Mr Leota regarding its concerns about his sick leave.

[41] I am satisfied that MSD provided Mr Leota with information about its specific concerns, allowed him an opportunity to comment on that, obtained his agreement to undergo a medical assessment, shared the medical report with him and gave him the opportunity to comment on it before making its decision to withdraw his ongoing paid sick leave for a period of time.

[42] Mr Leota's breach of good faith claim does not succeed.

Did MSD breach Mr Leota's confidentiality?

[43] I do not accept Mr Leota's submission that the information he disclosed to his manager regarding possible kidney issues was confidential information or that it was a breach of confidentiality for Mr Nua to pass that information on to his manager Ms Wiki.

[44] I find that Mr Nua had an informal meeting with Mr Leota on 04 June during which Mr Nua inquired about Mr Leota's health. Mr Nua informed Mr Leota that he (Mr Nua) was concerned about Mr Leota's health so wanted to know if he was okay.

[45] Mr Nua told Mr Leota he was concerned because Mr Leota had taken 16.5 days paid sick leave in the past six weeks and because another staff member had advised Mr Nua that Mr Leota had told her he had been to hospital the previous weekend.

[46] It was during this discussion that Mr Leota disclosed the potential kidneys issue. Mr Nua gave Mr Leota a heads up that his high level of paid sick leave over such a short time would cause MSD to want to look at his situation.

[47] Mr Leota told the Authority that he did not tell Mr Nua that he could not share the information about the kidney concerns with anyone. Mr Nua was concerned about Mr Leota's health which is why he passed the information on to his manager Ms Wiki.

[48] Ms Wiki was responsible for ensuring the health and safety of staff and residents so this was information she needed to know. I consider it was reasonable and appropriate for this information to be shared with Ms Wiki, who was the person responsible for following up with Mr Leota about his health.

[49] MSD had an obligation to ensure that Mr Leota was healthy enough to be at work. The information that his doctor considered he was suffering from kidney failure and that he had recently been to hospital about this was clearly relevant information that Ms Wiki needed to know.

[50] I do not accept that Dr Cuplan's brief reference to Mr Leota's children in his medical report amounts to a breach of confidentiality. Mr Leota knew Dr Cuplan would be providing his report to MSD and he freely provided Dr Culpan with the information that appears in the medical report. Mr Leota had consented to that being shared with MSD.

[51] Mr Leota's breach of confidential information claim does not succeed.

Costs

[52] MSD as the successful party is entitled to an award of costs in its favour provided it has actually incurred costs. Given it was represented by in-house counsel there is a question about that.

[53] MSD has asked for costs to be reserved. MSD therefore has 14 days from the date of this determination to file a costs application and Mr Leota has 7 days within which to file his response. This timetable will be strictly enforced so any departure from it requires the prior leave of the Authority.

[54] The Authority is likely to adopt its usual notional daily tariff based approach to costs so the parties are invited to identify any factors which they say should result in the notional daily tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority