

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 80
EMPC 167/2022**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for clarification of remedies

BETWEEN AJY
Plaintiff

AND CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS
Defendant

EMPC 174/2022

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for clarification of remedies

BETWEEN CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS
Plaintiff

AND AJY
Defendant

Hearing: On the papers

Appearances: JA Hope, counsel for AJY
E Coats and A Codlin, counsel for Department of Corrections

Judgment: 15 April 2025

JUDGMENT (NO 2) OF JUDGE KATHRYN BECK

[1] In its decision dated 3 October 2023, the Court found that AJY, an employee of the Chief Executive of the Department of Corrections (Corrections), was unjustifiably dismissed and unjustifiably disadvantaged.¹ The Court awarded various remedies to AJY and stated that if the parties were unable to reach agreement on that issue, they could make submissions setting out their respective positions.

[2] In particular, the Court held:

[242] AJY seeks compensation for loss of a benefit pursuant to s 123(1)(c)(ii) in relation to loss of long service and retirement benefits. If they would have been entitled to any long service leave or retirement benefits as a result of nine months' additional service, they are entitled to them also. If the parties are unable to reach an agreement on that issue, they may make submissions on the issue.

...

[267] In light of my findings that AJY was unjustifiably dismissed and unjustifiably disadvantaged and by way of summary of the remedies ordered, I make the following orders:

(a) Corrections is to pay AJY the following sums within 14 days of the date of this judgment:

...

(iii) Compensation pursuant to s 123(1)(c)(ii) of the Act in relation to any long service leave or retirement benefits that would have arisen as a result of nine months' additional service.

[3] The parties were able to agree on the long service leave issue but were unable to agree on the retirement benefits issue and filed submissions. Accordingly, the Court must now resolve that issue.

[4] The first topic addressed by the parties' submissions was the fact that no claim for retiring leave was specifically pleaded as part of AJY's claim. Ms Coats, counsel for Corrections, submitted that when the judgment refers to retirement benefits arising from nine months' additional service, it refers only to employer contributions to a retirement-related savings or superannuation scheme. She also submitted that AJY's claim for retirement leave raises new issues which cannot now be litigated given that the judgment has been issued.

¹ *AJY v Chief Executive, Department of Corrections* [2023] NZEmpC 168, [2023] ERNZ 642.

[5] Mr Hope, counsel for AJY, submitted that the judgment's reference to retirement benefits includes any entitlement to retiring leave under the collective agreement. He submitted that if Corrections wishes to raise concerns about pleadings and evidence, it should file an appeal.

[6] The reference to retirement benefits in the extracts of the judgment set out above covered not only employer contributions to retirement savings but also retirement leave if AJY could reasonably have been expected to have obtained it under the collective agreement. Therefore, I turn to consider whether any sum of retirement leave ought to be paid to AJY as a lost benefit.

[7] Mr Hope submitted that AJY could have requested retirement leave or been medically retired. He said that the issue of whether or not they would have retired has been rendered irrelevant because of the dismissal and the Court's findings about retirement leave.

[8] However, Ms Coats submitted that there is no evidence that AJY could reasonably have been expected to obtain retirement leave. She submitted that the only evidence before the Court was that AJY had no intention of retiring in the foreseeable future. She submitted that any suggestion that AJY would have retired was inconsistent with their seeking reinstatement. She also emphasised that there was no information before the Court that Corrections would have considered initiating retirement on medical grounds. Ultimately, she submitted that AJY's employment could have ended in a number of ways but that there is no reason to believe that they would have retired and become entitled to retirement leave but for the dismissal.

[9] In response, Mr Hope submitted that AJY could have retired. He also submitted that in its judgment the Court found that contemplation of early retirement would most likely have occurred before a dismissal and that termination on medical grounds could have occurred if Corrections had dealt with the matter appropriately. Further, he submitted that the entitlement to retirement leave is not dependent on there having been an expectation that AJY would have retired but for an unjustified dismissal; he submitted that it is sufficient that retirement would have presented itself as one of a range of options.

[10] The test is whether AJY could reasonably have been expected to have obtained retirement leave but for their unjustified dismissal.² It is not necessary for them to establish that they would certainly have retired, but there does need to be a reasonable expectation.³ The fact that they were contractually entitled to the option of requesting retirement leave is not sufficient by itself if they would not in fact have made such a request or been required to take such leave had Corrections initiated the process.

[11] It is common ground that AJY met the requirements to be entitled to request the payment of retirement leave under the collective agreement; however, they did not have an automatic entitlement. Retirement leave on medical grounds was “at the discretion of the Chief Executive”, and retirement leave for employees who had completed between ten and forty years of service could be “granted by approval of the Chief Executive”. Similarly, under the collective agreement, if an employee was required by Corrections to retire on medical grounds, they were entitled to retirement leave, but they could only be required to retire “following a medical assessment by two independent medical practitioners”.

[12] In its substantive decision, the Court found that “Corrections could have explored medical retirement with them if follow-up inquiries had raised issues about their health or fitness to return to work.”⁴ However, retirement (medical or otherwise) is only one of the options that may have been available to Corrections if it had followed a fair process – it may also have been open to Corrections to retain them as an employee, to transfer them, or even possibly to dismiss them. Other options may also have presented themselves.

[13] As noted above, AJY could have requested retirement leave (medical or otherwise). There is no evidence before the Court that they did so. Further, there is no evidence of how Corrections was likely to respond to such a request. However, what is before the Court is AJY’s consistent evidence that they wished to remain employed and that they did not wish to end their employment. Accordingly, I consider they were unlikely to have requested retirement leave in the normal course of events

² Employment Relations Act 2000, s 123(1)(c)(ii).

³ See *McKendry v Jansen* [2010] NZEmpC 128, [2010] ERNZ 453 at [4], [13]–[15] and [68].

⁴ *AJY*, above n 1, at [239].

as that was only available if they ceased duty. There is also no evidence that they would have requested retirement of any kind if they had been presented with an option at the end of an investigation/disciplinary process.

[14] It is possible that Corrections could have required AJY to retire on medical grounds. However, that would only have been possible following a medical assessment from two independent medical practitioners. I agree with Ms Coats that there is insufficient evidence before the Court (it not having been explored in cross-examination or otherwise) to find that AJY could reasonably have been expected to obtain retirement leave on the basis of being required to retire on medical grounds.

[15] Accordingly, irrespective of whether or not they performed an additional nine months' service, I am not satisfied that AJY could reasonably have been expected to have obtained retirement leave but for their unjustified dismissal.

[16] Therefore, I find in favour of Corrections that AJY is not entitled to retirement leave.

[17] I understand that AJY is legally aided. I consider that this may be a situation where costs should lie where they fall, but the parties may file memoranda if they have a different view.

Kathryn Beck
Judge

Judgment signed at 2.30 pm on 15 April 2025