

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 386
3133340

BETWEEN DOUGLAS BARNES
Applicant

AND MID-CENTRAL DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Kelly Coley, advocate for the Applicant
Andrew Dodds, advocate for the Respondent

Investigation Meeting: 17 May 2022

Submissions Received: At the investigation meeting

Date of Determination: 12 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Douglas Barnes was employed as a Programme Manager by Mid-Central District Health Board (MCDHB) from 8 October 2018 to 6 January 2021 when his employment ended by way of resignation.

[2] On 6 October 2020, Mr Barnes became ill and went on sick leave. He was later diagnosed with Shingles. It is noted that prior to this period of sick leave, Mr Barnes had previously taken sick leave.

[3] As a result of his Shingles, Mr Barnes remained off work for a period of some eight weeks before commencing a graduated return to work on 30 November 2020. His employment

agreement contained a provision for unlimited sick leave, however sick leave could be reviewed if MCDHB considered sick leave lengthy, excessive, or revealing a consistent pattern of short-term sick leave.

[4] On 23 October 2020, MCDHB emailed Mr Barnes proposing a discontinuation of paid sick leave, relying on provisions contained in the employment agreement, namely that Mr Barnes use of sick leave was excessive. Mr Barnes replied to this email on 26 October 2020 objecting to that course of action. Although there were several emails in between, on 17 November 2020, Mr Barnes received an email advising that sick pay would now be stopped. In fact, the decision had already been made and sick pay stopped the day prior.

[5] Mr Barnes says that the decisions made regarding his sick leave, and its termination on the basis that his use of sick leave was excessive, were made without any proper consultation and without following the process set out in the employment agreement. He says this course of action by the MCDHB disadvantaged him in his employment and caused him significant stress. He claims a sum of unpaid sick leave of \$12,500.77 together with damages for hurt and humiliation, injury to feelings and loss of dignity pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[6] MCDHB in its Statement in Reply, denies the claims. It says it followed the provisions of the employment agreement correctly and its interpretation of the sick leave provisions was fair and reasonable. Further, it says it engaged in discussions with Mr Barnes prior to discontinuing sick leave payments and received and considered Mr Barnes' views on its proposal to discontinue paid sick leave.

[7] MCDHB also claimed it had been made aware Mr Barnes had sought and accepted alternative employment well before he resigned his employment and may not have met his good faith obligations to be honest, active and constructive in communications with MCDHB. MCDHB went as far as reserving its rights to pursue a counterclaim for breaches of good faith.

The Authority's investigation

[8] As it transpired, no witnesses appeared on behalf of MCDHB and accordingly no evidence was produced on its behalf to the Authority at the investigation meeting. Mr Barnes gave evidence supporting his claims both orally and in writing. His wife, Monica Barnes, also

gave evidence as to the interaction between MCDHB and her husband and gave evidence as to the effect the employer's approach to sick leave had on her husband.

[9] Because MCDHB presented no evidence and had not filed a Statement of Problem pursuing any counterclaim for breaches of good faith by Mr Barnes, Mr Dodds representing MCDHB quite rightly agreed there could be no investigation into those allegations and they were withdrawn.

[10] The issues requiring determination by the Authority are:

- (a) What are the provisions in relation to sick leave contained in the employment agreement? Have they been breached?
- (b) Has MCDHB approached the question of sick leave appropriately and if not, has Mr Barnes' conditions of employment been affected to his disadvantage by an unjustifiable action by MCDHB?
- (c) Has Mr Barnes suffered any loss of salary because of how MCDHB has treated his sick leave?
- (d) If Mr Barnes has a personal grievance, what damages should be awarded pursuant to s 123(1)(c)(i) of the Act for any humiliation, loss of dignity and injury to feelings?

Discussion

[11] Mr Barnes' claims are brought under s 103(1)(b) of the Act. That section allows Mr Barnes to pursue a personal grievance claim against MCDHB if his employment or one or more of his conditions of employment have been affected to his disadvantage by any unjustifiable action by MCDHB. The legal framework applying to unjustifiable disadvantage grievances is summarised in the Employment Court's decision in *Johnson v Chief of the New Zealand Defence Force*.¹ As noted by the Court in *NZ Store Workers etc RUOW v South Pacific Tyres (NZ) Limited*, a condition of employment is not limited to a contractual term but includes the total environment of the job and how the employment operated in practice.² A disadvantage grievance is a wider notion than merely a breach of contract.³

¹ [2019] NZEmpC 192.

² 3 NZILR 452 (LC).

³ For *ANZ National Bank Limited v Doidge* [2005] ERNZ 518.

[12] Mr Barnes bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If he succeeds in that, then the onus shifts to MCDHB to justify its actions and how it acted. MCDHB's justification is to be objectively assessed in accordance with the justification test in s 103A(2) of the Act.

[13] The immediate difficulty faced by MCDHB in this investigation meeting, is that it is presenting no evidence of justification. Accordingly, should Mr Barnes establish he was disadvantaged in his employment, there can be no justification as there is no evidence in rebuttal.

Background

[14] Mr Barnes outlined the background to his grievance. Between 6 October 2020 and 29 November 2020, he took a period of sick leave as a result of suffering from Shingles.

[15] On 7 October 2020 he had a telephone discussion with his manager, Ms Catherwood. That conversation concerned the symptoms of his illness and work that needed to be covered. On 8 October, Ms Catherwood requested a medical certificate which was emailed to her on 11 October 2020 following a review by Mr Barnes' GP. The certificate deemed him unfit to work for two weeks.

[16] On 12 October 2020, Ms Catherwood emailed Mr Barnes requesting a chat to discuss plans he had to take one week's approved annual leave. Mr Barnes had a lengthy chat with Ms Catherwood on 14 October and it was during this conversation he was advised that if he was better the following week, his approved week of annual leave would be cancelled. Mr Barnes was very unwell at this time and not fit for work. He explained to Ms Catherwood he had an appointment scheduled for review with his GP in two days' time on 16 October.

[17] Mr Barnes received a text message from Ms Catherwood on 16 October but prior to his appointment with his GP. She followed this up with a voicemail asking amongst other things whether he would be returning to work the following Monday. Mr Barnes notified Ms Catherwood after his appointment, that he had been signed off work for a further two weeks.

[18] Ms Catherwood again contacted Mr Barnes on 19 October 2020. It needs to be stressed that throughout this period, Ms Catherwood was aware that Mr Barnes was ill and away from work on sick leave. She advised him she had discussed the situation with Human Resources

and that she had reached a conclusion that Mr Barnes' use of sick leave was excessive and it was her intention to stop his pay. Mr Barnes objected to this and was advised that Ms Catherwood would be taking advice again from MCDHB's Human Resource department.

[19] On 23 October, Mr Barnes received an email from Ms Catherwood advising that his last paid day of sick leave was to be 23 October. There was no explanation as to how:

- (a) Ms Catherwood had reached the conclusion Mr Barnes' use of sick leave was excessive; and
- (b) Why it should now be stopped.

[20] The email outlined MCDHB's proposal that Mr Barnes take annual leave for the next week or a week of unpaid leave.

[21] Mr Barnes objected to the email and responded on 26 October advising that he believed the cessation of his sick pay to be both unfair and unreasonable. He further argued that Ms Catherwood's actions were inconsistent with the terms of his employment agreement.

[22] The next major occurrence was that on 29 October 2020 Mr Barnes received a response advising that Ms Catherwood's intention was not to deal with his absence on a formal basis. She advised that sick leave would now be paid during the period of his then current medical certificate and he would be asked to attend occupational health (OH) for a review and to discuss a return to work plan. Mr Barnes confirmed he was happy to do so, and attended a meeting with OH.

[23] On 31 October 2020, Mr Barnes had still not recovered and advised Ms Catherwood he had received a further medical certificate for the next two weeks.

[24] On 4 November, Mr Barnes received another email from Ms Catherwood confirming that an appointment with occupational health had been made for the following week and that sick pay would continue until 16 November. This coincided with the period of the medical certificate.

[25] On 13 November 2020, Mr Barnes emailed Ms Catherwood advising there had been a further GP review and a further two week medical certificate had issued.

[26] On 17 November 2020, Ms Catherwood emailed Mr Barnes advising she had received the OH specialist report and she was currently using this to devise a proposed graduated return to work plan. The email advised Mr Barnes that his sick pay would now be stopped. In fact, the evidence was that sick pay had been stopped the day before.

The Sick Leave Provision

[27] Clause 7.4 of the individual employment agreement provided amongst other things the following:

- (a) If you are suffering from any illness or infection which could have detrimental effect on other employees you should not return to work until you recover.
- (b) We will continue your normal pay when you are absent due to sickness or injury, or where your spouse or dependant is sick or injured, subject only to the qualification that we may review the continuation of the pay if the absence becomes lengthy or excessive or where there is a consistent pattern of short term sick leave.
- (c) In the case of your spouse or dependant being sick or injured we would see a period greater than two weeks as being excessive. In terms of your own sickness or injury it is dependent on the particular circumstances of each case, but a restrictive approach will not be taken.
- (d) Any review of sick leave will be undertaken in accordance with Mid-Central District Health Board's policy and practices for management of sick leave. The focus of the review will be to support you to recover from sickness or injury and to maintain a level of wellness consistent with your obligation to fulfil your employment agreement. Such a review may include requiring you to undergo a medical examination by a mutually agreed medical practitioner/s where we have good reason to be concerned that your performance and/or attendance at work may be affected by your health.

[28] MCDHB's policy at page 10 provided:

3.1 Initiation of formal wellness review meeting (first stage)

The manager will obtain the facts relating to the absences, e.g. an accurate record and number of days taken; and the employee's sick leave entitlement as per their employment agreement. Generally this formal process would not be implemented until the employee has taken over their annual leave entitlement (ten days for full time employees in most collective agreements), has a low sick leave balance or has taken what is considered to be excessive leave.

The manager will seek advice from their manager, Human Resources and Organisational Development and Occupational Health and Safety as appropriate.

The manager will invite the employee, together with their representative or support person, to attend a wellness review meeting

(sample letter to employee – Appendix 4(a)). The manager should be accompanied by a second person, which could be another manager, or a representative from Human Resources and Organisational Development. Occupational Health and Safety may also be invited to attend to provide expert advice.

[29] Mr Barnes' evidence was that the decision he had taken excessive sick leave was reached with no input or discussion with him. He says that the provisions relating to sick leave contained in his employment agreement and/or in MCDHB's policy, were not followed. He says at no point was he called to a formal wellness meeting to discuss his leave. Indeed, as noted earlier in this determination, MCDHB's email of 29 October 2020 specifically stated that no formal process was to be undertaken.

[30] Mr Barnes gave harrowing evidence as to the effect he says MCDHB's behaviour and approach to sick leave had on him. He says it left him sleepless and concerned about his future. Whilst he accepts he was looking for alternative employment, at this point in time it had not crystallised. He faced each day wondering whether or not his salary was to stop. He points out that he was suffering from Shingles, an illness known to be exacerbated by stress. He felt MCDHB was continually placing him under stress with its phone calls and emails during his period of sick leave. Mrs Barnes also gave evidence of the effect MCDHB's actions had on Mr Barnes. It was at a time when he was ill with Shingles and quite vulnerable.

[31] Section 103A (2) of the Act sets out the justification test. It is an objective test and requires the Authority to determine whether MCDHB's actions and how it dealt with Mr Barnes' sick leave and how it acted over that period were what a fair and reasonable employer could have done in all the circumstances at the time. There is no evidence presented by MCDHB to justify its actions.

Analysis

[32] MCDHB decided after two weeks of Mr Barnes' absence from work because of Shingles, that his sick leave was excessive. No evidence has been presented as to how this conclusion was reached. It is clear, however, it was reached without Mr Barnes' input and certainly without the sort of process expected and outlined in the policy. I accept Mr Barnes' evidence that there was a complete lack of proper engagement with him over his sick leave. Not only did this include MCDHB reaching its conclusion that sick leave was excessive without any explanation, it did not follow its own policies and Mr Barnes was denied the opportunity to meet with his employer and discuss matters.

[33] When Mr Barnes undertook a phased return to work, he was paid only for the hours he worked and sick leave appears not to have been used to top up the shortfall. On behalf of MCDHB, Mr Dodds accepted that the calculation of lost wages/salary as a result was \$12,500.77.

[34] As mentioned above there is no explanation as to why Mr Barnes' use of sick leave was considered excessive and needed to be stopped. There is a suggestion MCDHB simply looked at the total sick leave Mr Barnes had used but did not consider the new diagnosis of Shingles. It did not follow its own policies; it did not properly consult and I am left with the impression it arbitrarily reached conclusions regarding Mr Barnes' use of sick leave which a fair and reasonable employer could not have done. Mr Barnes has made out his disadvantage grievance.

Orders

[35] Mid-Central District Health Board is ordered to pay Douglas Barnes the following:

- (a) The sum of \$12,500.77 (less PAYE) short-paid sick pay; and
- (b) The sum of \$15,000.00 as compensation for humiliation, loss of dignity and injury to feelings suffered by Mr Barnes.

Costs

[36] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Barnes may lodge and then should serve a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, MCDHB would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[37] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Geoff O'Sullivan
Member of the Employment Relations Authority

⁴ See www.era.govt.nz/determinations/awarding-costs-remedies.