

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 10/08
File Number: 5039496

BETWEEN TANIA BENTLEY
 Applicant

AND LAND TRANSPORT NEW
 ZEALAND
 Respondent

Member of Authority: G J Wood

Representatives: Alan Millar for Applicant
 Susan Hornsby-Galuk for Respondent

Investigation Meeting: 13 December 2007 at Palmerston North

Determination: 25 January 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Bentley claims that she was unjustifiably given a warning for excessive use of sick leave, whereas Land Transport New Zealand (LTNZ) claims that the warning was justified on the basis of Ms Bentley continuing to take more sick leave than she was entitled to under the collective employment agreement, despite being given notice of previous concerns.

The Facts

[2] Ms Bentley is a senior customer service representative working in the Transport Registry Centre of LTNZ in Palmerston North. This centre is responsible for most vehicle registration and licensing functions for all of New Zealand. The centre deals with thousands of customer inquiries a day.

[3] Under the collective employment agreement applying to her, Ms Bentley is entitled to nine days paid sick leave per year, which may be taken if she, or her spouse, or a person who depends on her for care, is sick or injured. Sick leave may be accrued. For any period of sick leave employees

will be paid their relevant daily pay providing they have an unused entitlement. Ms Bentley is required as soon as is practicable on or before the first day of absence to advise LTNZ of her absence and the expected duration of that absence. A medical certificate is required for all sick leave taken in excess of one week. However, LTNZ may require a medical certificate in support of any claim in excess of five days in any leave year. Employees who have used all of their sick leave entitlement and have further absences as a result of sickness or injury will be accepted as being on sick leave without pay, except if concession sick leave is approved. Concession sick leave, i.e. paid leave in excess of the standard entitlement, will be considered on its merits.

[4] LTNZ's sick leave usage policy at the time also bound Ms Bentley. The policy states that the rationale for sick leave is that it is designed for a specific purpose and management must assure themselves that the entitlement is being used for genuine reasons and is not being abused or misused. The policy sets out a process to be followed for monitoring sick leave and dealing with instances of suspected abuse, misuse, or long term absences. Managers and team leaders are to monitor the sick leave of all staff. The policy then states:

Once an employee has five or more days absent within a six month period, the manager/team leader will decide whether or not they will raise the matter with the employee. ... At this stage of the process the matter is NOT being treated as a disciplinary issue.

[5] The purpose of raising the matter with the employee is to:

- *inquire whether there are any reasons/circumstances that may be causing the employee to be absent on sick leave.*
- *provide the employee with the opportunity to provide an explanation for the amount of sick leave they have had.*
- *agree an outcome to address the situation or determine whether there is any help or assistance that can be provided by management to help resolve the problem.*
- *seek an improvement in the level of sick leave being taken over a given period of time;*
- *determine if sick leave is being abused or misused.*

As a result of this meeting the employee may be requested to produce a medical certificate to support any further absence on sick leave, for a period of time. The employee may also be requested to provide detailed information/documentation to support their claim for sick leave, which must be treated in accordance with the principles of the Privacy Act.

The manager/team leader will make a diary note of the meeting and its outcome for the record. This will not be placed on the employee's personal file unless this escalates into a disciplinary matter.

Continue to monitor the employee's sick leave.

If no improvement and there is doubt that sick leave is being used for genuine reasons:

*Convene a **disciplinary meeting** between the manager and employee to address the issue. If a disciplinary meeting is being convened, it is on the basis of misconduct by the employee, in which case an allegation of abuse or misuse of sick leave may be made.*

[6] The policy finally deals with ongoing long term absences. It states:

In certain circumstances ongoing long term absence on sick leave, whether paid or unpaid, may mean that management must determine if the continued absence of the employee is sustainable to the business. The employer may have grounds to terminate an employee's employment in such circumstances.

Where the employer has concerns about an employee's ongoing long term absence, the employer will notify the employee in writing of its concerns. The employee will be asked to attend a meeting to discuss the situation and the employee will be requested to provide all information and documentation as to the reasons for the ongoing absence and the prospect of the employee being able to continue in employment without continued long term absence, whether intermittent or not. ... There may be a number of options available to the employer in relation to considering the employee's continued employment, including termination.

[7] There is no doubt that Ms Bentley took a lot of sick leave. Her sick leave entitlement is calculated from 11 September each year and was taken as follows:

- 2001/2002 25.5 days;
- 2002/2003 41 days;
- 2003/2004 16.56 days;
- 2004/2005 14.5 days;
- 2005/2006 30.5 days; and
- 2006/2007 16 days.

[8] There are a number of reasons for Ms Bentley's great use of sick leave. In addition to having two children of her own she fosters a number of children at the same time, on occasions as many as three. Not surprisingly, these foster children tend to have more physical and mental health problems than other children and therefore they require greater assistance, which sometimes requires Ms Bentley to take sick leave to look after the fostered children, who depend on her for their care. Furthermore, Ms Bentley took seven day's sick leave in late 2006 because of work stresses associated with severe interpersonal difficulties within Ms Bentley's team at the time. Finally, Ms Bentley's husband faced a number of serious health issues in the last two years or so,

which have required her to take time off to assist him. The genuineness of these reasons for illness has not, quite properly, been disputed by LTNZ.

[9] Mr Brett Dooley is the Manager of the Transport Registry Centre. Since his appointment absenteeism has been the greatest issue he has faced in relation to the 250 staff in the centre. For instance, at least 20% of all staff are under active monitoring at any given time because of their use of sick leave pursuant to the policy document.

[10] These absences not only have a large financial cost on LTNZ, but it is difficult to replace Registry staff at short notice, because of the amount of training required for a replacement be able to perform the wide range of functions required of the regular staff. Therefore Mr Dooley saw it as a key role of his to reduce absenteeism, including sick leave.

[11] As a result of an analysis of Ms Bentley's sick leave to 15 November 2005, Mr Dooley met with Ms Bentley to note that she had 10 days off in the last six months. He required that she provide a medical certificate for each further absence on sick leave. This requirement was to be reviewed by 10 May 2006.

[12] The review took place on 8 May 2006, during which time Ms Bentley had taken a further 5.5 days sick leave. She was told that it would be no longer necessary for her to provide medical certificates for further absences, but that her attendance would be continued to be monitored. There is a dispute as to whether Ms Bentley's team leader then discussed her level of absenteeism in September 2006. Certainly there was no file note produced by LTNZ, as required by its policy, to support its contention that it was discussed with Ms Bentley.

[13] In any event in March 2007 Mr Dooley noted that there were still ongoing issues about Ms Bentley's high level of absenteeism. Mr Dooley accordingly wrote to Ms Bentley stating that since September 2006 she had had another 11.5 days' absence, bringing the total of her days off work in the past 10 months or so to 19 days. Mr Dooley stated that he had to now consider if that could be sustained because her continued absenteeism was impacting on the business, not to mention the fact that she could not fulfil the requirements of the role that she had been employed for. He stated that if it was deemed that the organisation could not sustain this level of absenteeism, some form of disciplinary action may be instigated, and that she should be aware that one option that may be considered was termination of her employment. He wanted first, however, to establish what Ms Bentley's prognosis was. He therefore requested she provide any supporting information from a medical practitioner detailing any circumstances that may be affecting her health.

[14] A meeting was accordingly held on 26 March 2007 with Ms Bentley and her supervisor. At this meeting several reasons for Ms Bentley's absences, as highlighted above, were given. In his letter to Ms Bentley following the meeting, Mr Dooley noted the following:

I thank you for sharing a significant amount of information from both a work and personal perspective which I am sure has contributed in one way or another towards your absenteeism. As we discussed, you seem to feel that your work environment has now settled and certainly it sounds as if your personal situation has now returned to a level of normality in comparison to what you have experienced in the last 12 months. On this basis, I would expect to see a marked and sustained improvement on the level of absenteeism.

As I have indicated to you, my concern is not particularly about the reason for your sickness, although I thank you for sharing this information, but more importantly I am concerned about the amount of time off that you are having. Each day that you have off has a significant impact on the operation of the business, and while the rostering makes an allowance for staff sickness, at the level of our sick leave entitlement, it does not cater for the level of absenteeism that you have had. If it did, I would need a significant increase in staff numbers, which cannot be justified.

It is my preliminary conclusion that your continuing absenteeism is not sustainable to the operation of the business as I cannot rely on you to be at work to fulfil the requirements of your role and I am therefore proposing to issue you with a formal verbal warning (which will be confirmed in writing) that will remain on your file for a period of 12 months. In coming to this conclusion Tania, I have taken into the consideration the information that you have shared with me about work-related matters that may have impacted on the situation.

[15] Ms Bentley was given the opportunity to respond, which she did in writing through her representative, Mr Millar. Mr Millar stated that any warning would constitute an unjustified disadvantage to her employment. He noted that sickness was not normally regarded as a deliberate act that could attract a formal disciplinary outcome, and that a warning could not be justified simply because Ms Bentley's absence due to illness was inconvenient to LTNZ.

[16] Mr Dooley responded, stating (amongst other things):

When a staff member uses significantly more than their entitlement, as Tania has, it is my right and duty to investigate the reason for this and to make an assessment of the impact that this has upon our business activities. If in my opinion I come to a conclusion that the quantum of absenteeism, not the reason for it, cannot be sustained by the organisation, then I have an option of considering disciplinary action.

[17] Mr Dooley then determined, after giving Ms Bentley a final opportunity to make submissions, to issue a formal verbal warning for a period of 12 months. The letter concluded:

You must understand that your employment may be in jeopardy should there not be a sustained improvement in the level of your absenteeism. Should I need to speak with you again about absenteeism while this warning remains in place, then I may need to

consider issuing you with a formal/final warning. The most serious course of action that may be considered is termination of your employment.

[18] It is clear from the above and Mr Dooley's evidence that he did not question that Ms Bentley had genuine reasons to take sick leave in accordance with the sick leave provisions of the collective employment agreement, which provide for both paid and unpaid sick leave. Furthermore, in terms of the policy, Mr Dooley not only accepted in evidence that Ms Bentley's leave was for genuine reasons, but that he did not consider that she was abusing her sick leave entitlement, or misusing it. There was clearly no issue of long term absence either.

[19] It was Mr Dooley's evidence that Ms Bentley had to be treated the same as other staff and in effect LTNZ's policy was that any staff member who exceeded their paid sick leave entitlement would be disciplined if the situation continued beyond the short term.

[20] Ms Bentley has also claimed that she recently missed out on a promotion because of her warning she had received, but no other evidence in support of this claim was provided.

[21] Unfortunately, this employment relationship problem has been unable to be resolved, despite Ms Bentley remaining an employee of LTNZ. Thus as the matter remains unresolved, despite mediation assistance, the Authority is required to make a determination.

The Law

[22] The Court of Appeal dealt with the issue of excessive use of sick leave in *Lang v. Eagle Airways Ltd* [1996] 1 ERNZ 574. The Court of Appeal noted at 582:

Mrs Lang's employment record was abysmal. The average flying time for aircrew employed by Eagle from mid 1988 to mid 1992 was 74.16% of the employment hours, the balance being accounted for by annual leave, sick leave, and training, standby and positioning. Mrs Lang's flying time for the years 1988 to 1992 was respectively 90.66%, 60.75%, 33.84%, 58.46%, and 26.11%. The 1989 and 1990 figures were affected by periods on accident compensation following two accidents involving horses, the second involving four month's absence from work. The only similar problem thereafter was an absence of 5 days in 1991 as a result of a sprained ankle. Apart from annual leave, the other reason for her limited availability was sickness.

Her conditions of employment entitled her to sick pay for generous periods, but it does not follow that the employer was bound to continue to employ a pilot who consistently needed to use her sick leave to such an extent. Most of the sick leave, however, was related to headaches and other symptoms. These had been diagnosed by the doctor in 1990 as due to sinusitis ... A diagnosis of migraine was eventually made as late as March 1992 by Dr Hinkley, the designated medical practitioner appointed by Civil Aviation. For the first time she was able to be put on appropriate medication, with good results. Dr Hinkley's reply to Mr Campbell's inquiry prior to the meeting of 27 May 1992 when the question of dismissal was reconsidered, gave a positive prognosis suggesting minimal future absences from productive employment.

The position as known to Mr Campbell at that date would not seem to justify dismissal.

...
We pass over the third reason for the moment. The next two reasons relate to Mrs Lang's horse racing interests. What an employee does in his or her spare time is normally of no concern to the employer, unless it interferes with the performance of the job. There had been three periods of absences from work due to accidents involving horses, but those in 1989 and 1990 were not seen at the time as justifying dismissal. That in July 1991 involved an absence of five days, and could hardly justify dismissal in May 1992.

[23] The Court of Appeal therefore held that even in those circumstances of significant continued intermittent sick leave dismissal could not be justified.

[24] In *Cooper v. Mars New Zealand Ltd t/a Mars Pet Care* (unreported, D Asher, 6 December 2007, WA 163/07) my colleague concluded that an employer in similar circumstances was in error to use the misconduct process because the applicant's absences from ill health were for genuine reasons that were not disputed by the company, and there was no suggestion of any deliberate or wilful breach by the applicant of his attendance obligations. He noted that the company's code of conduct provided for a warning in respect of poor time keeping and attendance, and was satisfied that that provision was intended for an employee who without good reason, or knowingly fails to report for duty. In other words, there needed to be deliberate or wilful absenteeism, of which the applicant had not been guilty.

Determination

[25] It is clear law that an unjustifiable warning may constitute an unjustifiable disadvantage to the worker's employment. In this case I conclude that Ms Bentley's warning was unjustified for a number of reasons.

[26] First, the matter falls to be determined by applying LTNZ's sick leave policy. While one of the purposes of the sick leave policy is to seek an improvement in the level of sick leave, disciplinary meetings are only provided for where there is an allegation of abuse or misuse of sick leave. Ms Bentley was not accused of abusing or misusing sick leave, as Mr Dooley made very clear in his evidence to the Authority. She was being accused of simply taking too much sick leave, albeit that on each occasion there were genuine reasons for it. Thus there was no misconduct alleged by LTNZ, because it accepted that Ms Bentley's claims for sick leave were at all times genuine. There was therefore no misconduct in this case by Ms Bentley justifying a warning (*Cooper* applied).

[27] Second, while an employer can “fairly cry halt” (to use an enduring legal phrase) to a worker’s employment if excessive sick leave is taken, I conclude that no fair and reasonable employer would have concluded that that position was anywhere near being reached in Ms Bentley’s case, even to simply formally warning her. While LTNZ was not arguing that dismissal was being considered at the time in question, and it may be said that in issuing a warning it was simply putting Ms Bentley on notice that it was reaching the point where her leave was becoming a serious problem, that does not mean that a warning is appropriate. The cases where excessive sick leave has justified dismissal have involved significantly more leave than was involved in Ms Bentley’s case. In this context, effect must be given to the collective employment agreement’s provision that provides that sick leave in excess of the paid annual amount may be granted, albeit on an unpaid basis. This is what occurred with Ms Bentley. That is not to say that continuing excessive intermittent sick leave may never be addressed in a disciplinary setting – as with all employment relationship issues it is a matter of fact and degree. Any ‘overuse’ of sick leave may or may not amount to abuse or misuse – each case depends on its facts.

[28] Third, the sick leave policy has been implemented by LTNZ and Mr Dooley in a completely mechanistic way. It was apparent from LTNZ’s practice and Mr Dooley’s evidence that disciplinary outcomes for employees utilising more than the amount of paid sick leave were applied in a ‘follow the numbers’ way. Thus anyone who needed to take more sick leave than that provided for as paid sick leave would be disciplined if the situation continued. If it continued for long enough it was clear that such an employee would be dismissed. The effect of this process may in fact be to discourage employees from taking sick leave that the collective agreement provides for in paid and unpaid forms, as use of sick leave can not be predicted in advance.

[29] Fourth, in terms of the fact and degree to which Ms Bentley utilised her sick leave, she had particular reasons for using sick leave in excess of the paid maximum and LTNZ, as a fair and reasonable employer, should have accepted that. In particular, Ms Bentley had to support her husband and her five children, three of whom, being foster children, were more needing of domestic care than ordinary children. In these circumstances no fair and reasonable employer would have disciplined Ms Bentley for abuse or misuse of her sick leave, I conclude.

[30] Ms Bentley claims \$3,000 compensation for the way she was unfairly given a warning. Ms Bentley has been discouraged from taking leave that is needed to support her family, including foster children who she looks after out of the goodness of her heart. She has lived for almost a year under the threat of further disciplinary action, and even dismissal, for falling ill or having members of her family falling ill. Furthermore, she has not taken leave when she has been ill herself, which

rather defeats the purpose of sick leave and could potentially expose other workers to harm, such as them contracting diseases if staff were to return to work while still infectious.

[31] There was, however, insufficient evidence for me to conclude that Ms Bentley had been unfairly assessed and therefore missed out on a promotion as a result of this warning. It therefore follows that there can be no compensation awarded to her on this ground.

[32] I conclude that Ms Bentley is quite entitled to feel upset about her treatment and \$3,000 compensation is an appropriate amount to order. I therefore order the respondent, Land Transport New Zealand, to pay the applicant, Ms Tania Bentley, the sum of \$3,000 compensation under s.123(1)(c)(i) of the Act to remedy the unjustifiable warning.

Costs

[33] Costs are reserved.

G J Wood
Member of the Employment Relations Authority