



New Zealand Employment Relations Authority Decisions

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Enright v Nemea Holdings Limited (Auckland) [2012] NZERA 870; [2012] NZERA Auckland 113 (30 March 2012)

Last Updated: 25 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

5307788

[2012] NZ ERA Auckland 113

BETWEEN CAROLINE JOY ENRIGHT Applicant

AND NEMEA HOLDINGS LIMITED

Respondent

Member of Authority: James Crichton

Representatives: Applicant in person

Maureen Blackburn, for Respondent Investigation Meeting: 19 March 2012 at Whitianga Determination: 30 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Enright) alleges that she is owed sick pay from her employment with the respondent (Nemea). Nemea says that all entitlements due to Ms Enright have been paid.

[2] Ms Enright commenced working for Nemea on 20 November 2004 and finished on 9 September 2006.

[3] Ms Enright was a cleaner for Nemea which operates the Marina Park Apartments at Whitianga in the Coromandel. By virtue of her role, Ms Enright was employed on a roster and was called to work as and when required. The Authority is satisfied she was a permanent employee working no fixed hours.

[4] During Ms Enright's employment with Nemea, her mother was diagnosed with terminal cancer. Ms Enright cared for her mother at various times during her final illness and while employed by Nemea. But there was no claim for sick pay

made to the employer during the employment, and the claim was not advanced by

Ms Enright until well after the employment had terminated.

[5] Ms Enright kept records of the various blocks of time when she was looking after her mother and now seeks to be paid sick leave in relation to that commitment.

[6] Nemea says that Ms Enright is only entitled to payment of any remuneration in relation to periods when she is called to work, that Ms Enright never refused a request to work during the employment because of her mother's ill health, and that in any event, Ms Enright's mother was not a dependent relative for which it would have been appropriate to be paid sick leave.

[7] Nemea had a number of workers performing the same role as Ms Enright and it endeavoured to apportion the available work equally to all of the workers available to perform the work.

[8] In support of her claim to be paid sick pay, Ms Enright produces her diary notes which record her activities in caring for

her mother. But those diary notes were not produced to the employer at any stage until Ms Enright commenced the pursuit of her claim and in any event, never evidence any occasion where work was turned down because of the ill health of Ms Enright's mother.

[9] Although Ms Enright correctly identifies that she had 25 days off to care for her mother and that on 18 of those days there was work available (theoretically) at Nemea, the fact is that Ms Enright was not offered that work because it was made available to somebody else. That is the reality of work on a rostered basis and there is no evidence at all before the Authority which would confirm that at any stage Ms Enright told Nemea that she was unable to work because of her mother's ill health.

[10] Even if that were the position, there is still the question of whether the ill health of a parent living independently can constitute a basis for sick leave in any circumstances.

Determination

[11] The Authority is not persuaded that Ms Enright has proved her case on the balance of probabilities. She has claimed sick leave for the periods when she was

looking after her mother and she maintained in her evidence to the Authority that "*if I had not been looking after mum, I would have been working*". But that is not the position at all, given that Ms Enright was an on-call cleaner doing hours as and when required. All that could be said with certainty was that Ms Enright would have been available to work if she had not been otherwise engaged looking after her mother. In the Authority's view then, Ms Enright might have had a contingent entitlement to sick leave but no more and given that she has failed to demonstrate that on any occasion she did not work because she was looking after her mother, her claim must, of necessity, fail.

[12] As an on-call cleaner, her only entitlement to sick leave is for the periods that she actually was working and in the absence of any demonstrated examples where she could not actually work because she was looking after her mother, there can be no entitlement to pay of any kind, including sick leave.

[13] It is not enough that Ms Enright can demonstrate that she would have been available to work were it not for the fact that she was looking after her mother because there is ample evidence that there were a number of other cleaners who were on exactly the same employment basis as Ms Enright and who would have worked, assuming there was work available, on days when Ms Enright did not work.

[14] For those reasons, Ms Enright's claim is dismissed.

Costs

[15] Costs are to lie where they fall.

James Crichton

Member of the Employment Relations Authority