

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 49A/09
5136412

BETWEEN

MARY MACFARLANE
Applicant

AND

CANTERBURY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Paul Montgomery

Representatives: Amy Shakespeare, Counsel for Applicant
Penny Shaw, Advocate for Respondent

Submissions received: Undated by each party

Determination: 12 October 2009

DETERMINATION OF THE AUTHORITY

[1] This matter arises primarily from a dispute between the parties regarding whether Ms MacFarlane was entitled to or was permitted by specific agreement with the respondent, to transfer her unused sick leave, annual leave and long service leave entitlements from her previous DHB employment at Nelson/Marlborough to her employment with the respondent.

[2] Another issue is a claim of unjustifiable action by the respondent and a resulting disadvantage arising from the same factual matrix. In particular, the applicant alleges assurances were given her by Mr Taylor, Service Manager and Nursing Director for Oncology, prior to her accepting the position with the respondent.

[3] The respondent says the applicable clause of the collective agreement does not apply to Ms MacFarlane as she was not a party to the CEA at the time it was negotiated between the respondent and the PSA. The relevant document is the

CDHB-PSA Clerical and Administration Support Services Collective Employment Agreement, 1 April 2004-30 June 2005 (the agreement). The agreement was later rolled over for a further year.

[4] The respondent says the clause was agreed between the parties to preserve existing entitlements of staff covered by the earlier CEA and not to those employed thereafter.

[5] Further, it denies Mr Taylor did more than agree to have the respondent accept Ms MacFarlane's DHB service. It strenuously denies, as does Mr Taylor himself, that accrued entitlements other than accrued DHB service were agreed to with Ms MacFarlane prior to her accepting the position with the respondent.

[6] The relevant clause in the CEA is clause 4.2:

4.2 *In respect of the parties to this agreement, this agreement supersedes the expired collective employment contract for those parties and any other remunerative agreements and any other agreements with regard to matters addressed in this agreement, and any such contracts or agreements are cancelled as at the coming into force of this agreement, provided that accrued annual leave, accrued long service leave and accrued sick leave shall remain as entitlements for employees who have qualified for such leave, and the employer shall recognise previous service with the employer insofar as it is consistent with the definition of current continuous service.*

4.3 *Clause 4.2 above does not apply to letters of appointment/application forms or to the employer's Human Resources and Administrative Policies and Procedures manual or where provided otherwise in writing, provided that grandparenting letters arising out of the 31 October 1994-22 October 1996 Canterbury Health Limited Support Services CEC negotiations shall be cancelled in respect of those persons who become parties to this agreement and such employees who previously had those grandparented provisions shall be entitled to the grandparented provisions listed in Schedule 1 of this agreement.*

The essential facts

[7] Ms MacFarlane was employed by the respondent prior to resigning and taking up work with the Nelson/Marlborough DHB in October 2002. The applicant worked there until securing employment with the Canterbury DHB. In her evidence, Ms MacFarlane uses the term *transfer* to describe her movements between various DHBs.

When I transferred from CDHB to the NMDHB in October 2002, my then current sick leave entitlement transferred with me. NMDHB recorded that I had an entitlement of 80 days. The agreement entitles me to 10 days sick leave per annum, and this has been the same in previous collective agreements. When I transferred to CDHB in 2006, I was concerned to ensure that my sick leave entitlements transferred back with me.

[8] The applicant says that before she confirmed her employment with Canterbury DHB she spoke to Chris Taylor and told him that she wanted her long service, annual leave and sick leave entitlements transferred to her new position. In August 2006, Ms MacFarlane said she noticed that a record of her sick leave entitlement did not appear to include the sick leave she said she had been assured would be carried over by Mr Taylor. Ms MacFarlane says since that time she has tried on numerous occasions to resolve the issue with the Board with the assistance of the union, the PSA, and more latterly with the support of legal counsel.

[9] Summing up her position, Ms MacFarlane told the Authority:

I believe the fact that I am entitled to continuous service and the transfer of sick leave provisions in terms of the applicable clauses in the agreement and that the CDHB promised me transfer of my sick leave is corroborated by the letter I sought and received from the NMDHB on 30 October 2006. That letter advised that I had 80 days of entitlement to sick leave, had taken 21.5 days, and a balance of 58.5 days owing. I clearly read the relevant provisions (4.2 and 6.5) to mean that because my service between health boards has been continuous, my sick leave and other leave should carry over.

The investigation meeting

[10] At the Authority's investigation, evidence was presented by the applicant in person. Evidence for the respondent was provided by Mr Chris Taylor, Mr Keith Moran, Employment Relations Manager, and by Marilyn Ollett, Service Manager for the General and Vascular Surgical Departments at Christchurch Hospital. The Authority wishes to thank those who gave evidence and for the open way in which the meeting was able to be conducted in spite of the parties' differences. I record also my thanks to both representatives for their assistance and the submissions provided following the investigation meeting. I have considered those submissions in coming to my determination.

The issues

[11] To resolve this employment relationship problem, the Authority needs to make findings on the following issues:

- What was the intention of the relevant parties in agreeing to clause 4.2 of the CEA; and
- Was the clause relevant to a person employed after the ratification of the CEA; and
- Was the applicant given an assurance by Mr Taylor that all accrued leave entitlements would be recognised by the respondent; and
- Was it agreed the applicant would retain her entitlement to four weeks' annual leave; and
- Was the applicant unjustifiably disadvantaged by being denied her accrued leave entitlements; and
- If the applicant has a personal grievance, to what remedies is she entitled.

Analysis and discussion

Dispute

[12] As counsel for both parties have submitted, the interpretation principles in cases such as this are well settled. I agree. The meaning of clause 4.2 is relatively clear. The issue is to determine what the intention of the parties was at the time the clause was negotiated and finally ratified. Interpretation of the words alone will not reflect the meaning of the clause and reference to its historical context is essential.

[13] Ms Shakespeare submits the Authority could find the applicant is not entitled to have her previous service recognised at the date of her employment *only by strained construction*. The note on the CDHB's *start up form* clearly records an agreement to recognise Ms MacFarlane's service. It does not make any reference to an agreement to transfer accrued leave of any kind. I think it most likely, had such an unusual request been granted, it would certainly have been recorded on that form.

[14] Clause 4.2, as agreed in the 1 April 2004-30 June 2005 CEA, does not appear in the document negotiated under the Labour Relations Act 1987. It is included in the collective employment contracts negotiated under the Employment Contracts Act 1991, appearing as clause 3.2 in the October 1994-October 1996 document. Under the ECA 1991, the employees bound were actually parties to the contract. Ms Shaw submits the term *parties* as used in the 1994-1996 contract must be understood in that historical context. As Ms Shaw submitted, Shaw J in *NZ Merchant Service Guild IUOW Inc v. InterIsland Line, a division of Tranzrail Ltd* [2003] 1 ERNZ 510:

To these general rules of contract interpretation is added the recognition that employment agreements are often the product of a history of instruments of varying sorts by which the parties have attempted to define their relationship. The result may be a document which is a mix of new provisions designed to meet changing statutory or industrial requirements grafted onto existing and longstanding provisions. The agreement in this case is such a document.

[15] The evidence of Mr Moran was of considerable assistance. He advised the Authority that during the late 1990s when the Employment Contracts Act was in place, Canterbury Health Limited operated common terms and conditions across its collective contract. He said:

At the time Canterbury Health had to deal with a range of historical arrangements contained in different formats and the desire was to encompass those as far as possible within the collective agreement to make it clear for the future as to what entitlements actually applied to the individual. A number of previously grandparented arrangements were included in the schedules to the collective agreement.

At the same time, the format wording of 4.2 and 4.3 of the PSA/CDHB collective agreement dated 3 March 2005 was introduced. The clause was to ensure that when a new collective agreement was negotiated, no entitlements existing prior to that date, be they in an expired collective agreement or in a letter or in an individual employment agreement applied in addition to anything in the collective agreement except as specifically spelled out in subclause 4.3.

I specifically recall that the wording in 4.2 relating to the protection of accrued leave, sick leave and long service leave was inserted following concerns raised by unions that the proposed wording overriding all previous arrangements could mean existing employees would lose existing accrued levels. Accordingly the last part of the sentence in clause 4.2 was added by agreement after the words "coming into force of this agreement". From that point on the clause along with clause 4.3 became the standard wording in CHL collective agreements and later in CDHB collective agreements based on those agreements. It clearly only relates to service with the employer which is the CDHB.

Clause 4.2 only applies in relation to existing agreements having expired and have been replaced by the new collective agreement. It has no application to anyone having joined from another employer.

[16] Mr Moran also points out that district health boards and their predecessors are separate legal entities and there is no ability to transfer between them. He says a move from one entity to another within the health sector involves a full resignation and a formal offer of employment on each occasion.

[17] In essence, the terms set out in 4.2 of the CEA are a *grandparenting* provision to protect the leave accrued by employees bound by the expired collective. Ms MacFarlane was not bound by the expired CDHB agreement and as an employee joining the respondent after that agreement was ratified, is not entitled to have her leave accrued at Nelson/Marlborough transferred. Such an entitlement could arise only from the specific agreement between her and a representative of the respondent. As noted above, Mr Taylor's evidence and the start up note acknowledge the agreement to honour Ms MacFarlane's **service** within DHBs, but falls short of agreeing to transfer any other accrued entitlements.

Personal grievance

[18] The applicant's statement of problem lodged on 12 September 2008 makes no reference to the claim of unjustified disadvantage. The claim first surfaced in an email from the applicant to Mr Turnbull on 13 June 2008. The respondent resists this claim strenuously on the basis it was notified beyond the 90 day limit.

[19] In the Authority's Minute of 5 March 2009, the applicant was granted leave to raise a personal grievance by way of an amended statement of problem with the right of reply from the DHB. The respondent says the email in question does not amount to the lodging of a personal grievance.

[20] The grievance is said to arise out of the same factual matrix, the disadvantage appearing to be the loss of the accrued sick leave.

[21] On the evidence before the Authority, and in particular that of Mr Taylor, I am satisfied that no undertaking was given to Ms MacFarlane to transfer any of her accrued entitlements from her previous employment at Nelson/Marlborough DHB. I accept, however, that Mr Taylor agreed the Canterbury DHB would provide her with four weeks' annual leave. I am also satisfied he agreed to recognise her service only.

[22] On that basis, I decline to find the applicant has a personal grievance.

Determination

[23] Returning to the issues set out above in this determination, I find:

- The intention of the parties in agreeing to clause 4.2 of the CEA was to provide protection for the accrued entitlements of employees who were a party to the previous expired collective arrangements.
- The clause was therefore not relevant to a person employed after the ratification of the 1 April 2004-30 June 2005 CEA.
- I find that no assurance was given by Mr Taylor that all accrued leave entitlements would be recognised by the respondent when it employed Ms MacFarlane.
- I find Mr Taylor agreed to provide Ms MacFarlane with four weeks' annual leave and to recognise her service within DHBs.
- The applicant was not unjustifiably disadvantaged by being denied her accrued leave entitlements.
- I find the applicant does not have a personal grievance and therefore is not entitled to any remedy.

Costs

[24] Costs are reserved. The parties' representatives are encouraged to attempt to resolve this matter between them. Failing that, Ms Shaw may file a memorandum and Ms Shakespeare will have 21 days from the date of Ms Shaw's memorandum to file a memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority