New Zealand Employment Relations Authority Decisions

Milne v Barnardos New Zealand [2011] NZERA 364; [2011] NZERA Christchurch 80 (9 June 2011)

Last Updated: 22 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 80

5343099

BETWEEN

A N D

JUNE MILNE Applicant

BARNARDOS
ZEALAND
Respondent

NEW

Member of Authority: Representatives:

Investigation Meeting: Submissions Received: Date of Determination:

M B Loftus

Karina Coulston, Counsel for Applicant Linda Ryder, Counsel for Respondent

30 May 2011 at Christchurch
At the investigation
9 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms June Milne, seeks an urgent injunction compelling the respondent to allow her to return to her teaching position with the respondent, Barnardos New Zealand (Barnardos).

[2] The claim arises from a situation where Ms Milne, having been absent from work due to illness for a considerable period of time, obtained what she claims to be a medical clearance to return. She contends that she has been improperly precluded from doing so by the unjustified actions of her employer.

[3] The reply comes in two parts. Barnardos questions whether the Authority has jurisdiction to deal with the matter. That aside, and in respect of the substantive claim, Barnardos contends that it is doing nothing more than exercising rights granted to it under the employment agreement existing between itself and Ms Milne. Even if that were not the case, it contends that its actions were fair and reasonable, perhaps even obligatory given the circumstances and its duty to provide Ms Milne with a safe workplace.

Background

[4] Barnardos is registered as an incorporated society under the Charitable Trusts Act 1957. As part of the services which

Barnardos provides to the community, it operates a residential care unit for young males aged between 12 and 17 who have displayed sexualised behaviours. As a adjunct to providing this residential care, Barnardos is obliged to provide education to NCEA standards for the residents and employs teachers. One of these was Ms Milne, who commenced on 29 January 2007.

[5] It would, I suspect, be fair to say that Ms Milne was disappointed by the environment within which she found herself. She comments on a lack of educational policies and procedures and claims:

There is a toxic environment within the workplace that has led to disparity of treatment of staff members, myself included, and an unacceptable level of bullying and intimidation, and health and safety issues for both staff and residents.

[6] She states that she has repeatedly raised these concerns however Barnardos has failed to address them, let alone resolve them. Barnardos does not comment on this allegation in the affidavits of its witnesses, but moves directly to the events that triggered this application.

[7] About those matters, at least in respect of the issues I must address and in very broad terms, there are few differences with the facts being well documented. It should be noted the same can not be said about the events of late 2009/early 2010 which triggered these events but they are the subject of a separate application and not issues I must determine here.

[8] On 15 December 2009, Ms Milne was issued with a final written warning with respect to an alleged incident that occurred on 8 December 2009. The following day, another event occurred. It led to allegations that Ms Milne had dealt inappropriately with some of her colleagues along with other, subsequently withdrawn, allegations. The outcome was a further written warning which was issued on 16 February 2010.

As a consequence of the warning, Ms Milne was required to attend a meeting with Lesley Ashworth, the lead educator, to discuss a remedial action plan.

[9] The meeting was not a success, with Ms Ashworth and Ms Milne disagreeing on a number of items. Ms Milne *felt so stressed, bullied, and intimidated by the end of the above meeting she immediately went to her doctor. The ... doctor placed her on stress leave* ... [extract from the applicant's submissions].

[10] The warnings are, as indicated in 7 above, the subject of separate proceedings filed in the Authority. Those proceedings were discussed in a mediation which occurred on 20 December 2010. About that, Ms Milne says:

The matter was not resolved. I advised the respondent that I wanted to return to work at the beginning of the new school year of 2011 and that I would have a medical clearance at that time. The respondent refused to allow me to return to work.

[11] There then followed a series of correspondence which commenced with a letter dated 17 January 2011 from Barnardos to Ms Milne's solicitor, Ms Coulston. Contained therein is advice that:

We require the latest medical certificates stating when your client will be fit to return to full and normal duties at Te Poutama Arahi Rangatahi. The medical certificate must be substantive and provide us with information that gives us assurances of your client's mental capacity to return to the duties of a teacher in the Te Poutama environment.

[12] Ms Coulston replied the following day. Contained therein is advice that:

2. *As previously advised my client's psychiatrist has provided a clearance for her to return to work at the end of January 2011.*
3. *Ms Milne will be returning to work at Te Poutama Arahi Rangatahi on Tuesday February 1st 2011 as discussed in mediation on 20 December 2010. In light of the non resolution of matters at mediation and matters being filed in the Employment Relations Authority, we request the following to facilitate her return to work in the "safest possible" environment until the hearing and to prevent a relapse of her illness.*

[13] There then follows a list of six requirements which include:

- A draft of your proposal of what you consider will need to be in Ms Milne's action plan . in order that this can be considered and negotiated in writing before 1 February 2011 and prior to any teaching being undertaken by her.

- The provision of external supervision for my client to attend on a regular basis during work time.

- A guarantee of "safety" from vexatious and false allegations particularly from the following staff members: (there then follows a list of specified staff members).

[14] The letter concludes by advising:

My client will provide a medical certificate upon her return.

[15] Barnardos replied on 28 January through the offices of its then solicitor, Mr Jeff Goldstein. He says, amidst other things:

I understand that Ms Milne has a medical clearance to return to work at the end of January 2011. I note that Barnardos requested a copy of this medical certificate in their letter dated 17 January 2011. A medical certificate has not yet been provided.

*Barnardos insist that a medical clearance for return to work be furnished **before** any return to work occurs. The practitioner completing assessment for return to work needs to do so in writing and be cognisant of June's job description and the nature of the work at Te Poutama. Given the length of time June has been ill and the nature of her illness this is essential for everyone's safety. Once the medical clearance has been provided the parties can then discuss a date for return to work. This will need to be agreed with Lesley Ashworth and be suitable to the workplace needs.*

[16] Ms Coulston responded on 31 January 2011. Included is the following:

iv. *It was agreed at the mediation hearing attended by both parties that my client would in fact be returning to work at the beginning of the new school year. We will provide a medical certificate/clearance provided to my client by her clinical psychologist, Katrina Falconer Beach. Ms Falconer Beach is fully aware of my client's occupation and has taken this into account when providing her medical clearance. We will also provide a further medical clearance from my client's GP.*
v. *Accordingly my client will be reporting to work as previously agreed tomorrow morning to undertake her duties as normal. The failure to allow my client to return to work and/or access to the workplace could be construed as a lockout. Further if Barnardos refuses to allow my client to undertake her duties, then it is liable to pay my client her full salary.*

8 With respect to the issue of internal supervision my client invokes clauses 10 and 12 of her employment agreement which allows her to seek external supervision if she believes her health and safety are endangered. Accordingly my client invokes these clauses.

[17] Here it must be noted that despite the letters assertions to the contrary, Ms Milne's evidence is that a return had not been agreed on December 20th [see 10 above].

[18] At 4.33, Ms Coulston faxed the medical certificates to Mr Goldstein. The first, dated 20 January 2011 from Ms Milne's GP, reads:

To whom it may concern,

Re Meriam June Milne, [d.o.b and address]

This letter is to confirm that June has been treated by myself, a psychiatrist and a psychologist for significant depression which was secondary to workplace stress. She has been off work since 12 January 2010 and should be fit to return 31st January 2011.

[19] The second dated 24 January 2011, which was not on letterhead, reads:

To whom it may concern, Re: June Milne

I consider June to be able to return to work on 1st February. I regard the things that June has listed are needed for her to commence work to be reasonable requirements. Thank you,

Katrina Falconer Beach Senior Clinical Psychologist Clinical Psychology Services

[20] The following morning, Ms Milne went to work. All that she says about the events of both that, and the following day, is:

I reported to work on both the 1 and 2 February 2011 and was ordered to leave the premises.

[21] Ms Ashworth states that Ms Milne arrived unannounced. She, Ms Ashworth, then asked Ms Milne to come into her office for a conversation but Ms Milne refused, *saying that she has to feel safe.* Ms Ashworth says she stood in the doorway and spoke to Ms Milne, with another employee present. She states:

I said that as per the letter she was not supposed to be onsite and she needed to leave so that we could have a planned return to work. June said that she had no knowledge of the letter. She said that we had had two weeks to sort this out and had not.

[22] Ms Milne then went to the staffroom and approximately 10 minutes later took a telephone call, after which she advised Ms Ashworth that her lawyer had told her it was okay that they meet. About the subsequent conversation, Ms Ashworth says:

I explained to June that she was not supposed to be here that she needed to leave the premises and we needed to arrange a plan to return to work. June agreed to this, said thank you and left.

[23] That afternoon, Ms Ryder acting on Mr Goldstein's behalf, sent an email to Ms Coulston. Preamble aside, it reads:

1. *As you know we have debated the issue over the notice given by June to return to work and the employer's direction in relation to the requirement to provide a medical clearance in advance of any return to work and that the return to work*

date is agreed between the parties.

2. *Despite Barnardos desire that these issues were addressed in a managed way, June has insisted that because she has a medical clearance that she is entitled to resume work immediately and hence the suggestion that the actions of the employer in not allowing her to return to work today constitutes a lock out. Barnardos does not accept that suggestion. Barnardos maintains that the request for a managed process is fair and reasonable. A negotiated return to work programme is provided for in clauses 5.7 of June's agreement.*
3. *Barnardos have considered the medical information provided. Both "certificates" are inadequate reports as to June's fitness to return to work.*

The GP certificate does not provide any helpful information. . The other certificate is entirely unsatisfactory, no letterhead, no signature, no information to say why June is deemed fit in relation to her illness or the type of work she does. Barnardos requests fuller reports from June's medical treatment providers.

We note that clause 5.7 makes provision for an independent medical assessment. Barnardos would like to obtain such report. They will take steps to identify a suitable person to undertake such an assessment

4. *Barnardos are concerned about June's readiness for a return to work based on her conduct this morning. June refused to meet with her manager Lesley because she said she felt unsafe and she refused to leave the premises when asked.*
5. *Barnardos is of the view that she cannot return to work until they are satisfied that she is fit to carry out all the duties of her job and prepared to perform these duties in a constructive and positive manner and that she obeys all reasonable instructions and requests of her employer. It is not acceptable for June to dictate the terms of her return without input from the employer.*

Accordingly Barnardos have requested an urgent mediation to address the return to work issue. As you are aware there are a number of outstanding issues to be resolved to ensure that June is supported in her return to work Some of those issues are over her practising certificate, supervision etc.

[24] Ms Coulston responded the following day. Amidst other things, she advised:

My client agrees to undergo a full medical/psychological assessment providing your client pays the cost and it is undertaken by Katrina Falconer Beach. My client is more comfortable with her as opposed to some unknown doctor.

[25] Barnardos' response, again penned by Ms Ryder, referred to the fact that Ms Milne had again reported for work that day (2 February) before going on to advise:

June is directed not to return to work until a date has been agreed to and all outstanding issues relating to her return to work are resolved.

[26] Ms Coulston's response, forwarded the same day, advises:

I am fully aware that my client reported to work this morning. it was on my advice that she did so. Ms Milne is entitled to be paid her salary as she has medical certs clearing her for normal duties. Neither yourself or your client are medical practitioners and therefore cannot determine that my client is unfit for work. In the absence of any other medical advice the information Ms Milne has provided must be accepted. Given that she has now been threatened with disciplinary action if she continues to carry out her legal right of attending the workplace I shall advise her not to do so. However this is a matter that will be raised with the Authority in the context of my client's personal grievances which have been filed with the Authority yesterday. Given your client's actions in locking my client out we shall seek urgency.

[27] There was further correspondence forwarded on behalf of Barnardos later that day referring to the fact that a mediator was available on 7 February but noting Ms Milne's previously advised position that she would only attend if her legal costs were met by Barnardos. Barnardos declined to pay those costs. Barnardos then notes that there is an alternative and that is that the parties meet as contemplated by clause 5.7, that such a meeting should proceed and that Ms Milne should attend given that Barnardos considers that request to be a reasonable one.

[28] Ms Milne's response, forwarded by Ms Coulston, was to advise that she saw no benefit in meeting without a mediator and that she, Ms Milne, would obtain a further report from her psychologist detailing her illness, recovery and that she is fit to return to work. That was followed by a demand that the cost of that examination be paid by Barnardos.

[29] Barnardos' response, forwarded by Mr Goldstein on 7 February, reads:

My client would like June to attend an independent medical assessment with Kelly Shore a clinical psychologist. Kelly is available to see June this week.

Can June please make an appointment with Kelly Shore for this week? Kelly can be contacted on ... Please confirm that this will occur.

June is also encouraged to obtain an updated medical report from her health provider.

[30] Ms Milne refused to see Ms Shore. She did, however, arrange for a more detailed prognosis from Ms Beach. It was dated 16 February and forwarded to Barnardos on 18 February.

[31] This report is significantly more extensive than that previously provided, being of approximately a page and a half. Ms Milne portrays it as detailed but Barnardos continued to have concerns about its content. They again note that it was not on letterhead and was not signed. They were of the view that it was incomplete and noted that it states that it was not going to cover personal information about Ms Milne on the grounds that it was not going to another treating clinician. The last paragraph was also of concern to Barnardos in that they considered it to suggest that perhaps Ms Milne was not completely recovered. That paragraph reads:

The only thing that could adversely impact on June's ability to do her job is the behaviour of the staff at her workplace. As teaching relies on total personal confidence, especially with the very challenging students that June has, any actions that are perceived as being undermining and disrespectful towards June may interfere with her ability to stay confident in her role and therefore maintain control of the classroom.

[32] Barnardos responded via Mr Goldstein on 21 February. Included therein was a reference to clause 5.7 of Ms Milne's employment agreement and an assertion that:

The clause provides that Barnardos is <u>entitled</u> to obtain an independent medical assessment (at their expense) if/when there is a need to clarify the medical status of the long term illness. This is the purpose for which the independent report is requested. Barnardos are therefore contractually entitled to obtain such a report. June is in breach of her contract if she persists in refusing and/or failing to cooperate with the request.

Please urgently advise whether or not June is prepared to make an appointment to see Kelly Shaw. A return to work programme cannot be advanced until this issue is resolved.

[33] Further correspondence followed but, essentially, the lines had been drawn. Ms Milne was of the view that she had provided more than enough evidence that she was capable of returning to work. Barnardos was of the view that it had a contractual right to seek the opinion of a clinician of its choosing; it was exercising that right and until Ms Milne complied no further progress could be made in respect of her return.

[34] Another issue canvassed throughout this correspondence was Ms Milne's teacher's registration. The detail need not be canvassed for the purposes of this determination. Suffice to say that the Teachers' Council issued Ms Milne with a certificate on 14 April 2010.

[35] What brought matters to a head, and triggered this application, was a proposal from Barnardos to restructure the education unit. The unit previously engaged two registered teachers and the proposal would see this reduced to one, with a couple of teachers' aides. Assuming the proposal is adopted, and Ms Milne argues that such an outcome has already been predetermined as evidenced by the fact that the new positions were advertised on 24 May, a significant factor is that a decision about successful candidates will be made by Barnardos' current lead educator. The incumbent of that position was appointed after Ms Milne commenced her stress leave and has never worked with her, witnessed her capabilities or developed a relationship with Ms Milne. Ms Milne believes it is crucial that she has a presence in the workplace so that these factors can, albeit for a very short period of time, be addressed thereby assisting her to compete for what she believes will be the one remaining qualified teacher position.

Submissions

[36] The following is a summary of what were detailed submissions proffered by both Counsel.

[37] For Ms Milne, it is noted this is not an application for reinstatement given that whilst she is not at work, she has never been dismissed. It is an application for injunctive relief. It is therefore submitted, in reliance on *American Cyanamid Co v. Ethicon Ltd* [1975] AC396; All ER 504 (HL) that the test to be applied is:

(i) Is there an arguable case;
(ii) If so, is there an adequate alternative remedy available to the plaintiff;
(iii) If not, where does the balance of convenience lie;
(iv) What is the overall justice of the case?

[38] In respect to whether or not there is an arguable case, it is submitted that if the facts are in dispute, the dispute cannot be resolved at the interim stage and the fact that there is a dispute over what occurred will, in itself, illustrate the existence of an arguable case.

[39] It is submitted that there is no alternative remedy given the imminent restructure and a resulting desire to lessen the disadvantage Ms Milne already faces given the fact she has never worked with the new lead educator.

[40] With respect to the balance of convenience, it is submitted:

That the outcome of this test of course comes down in essence to the interpretation of the employment agreement and whether or not the respondent has a legal right to refuse to allow the applicant to return to work.

[41] It is submitted, for reasons which follow (43 to 47), Barnardos does not have that right, but even if it does it will not be disadvantaged should Ms Milne return forthwith. Overall justice must, therefore, favour Ms Milne.

[42] Other issues were covered but these need not be discussed (see 63 below).

[43] It is submitted that Ms Milne has complied with the requirements of clause 5.4.5(3) in that she has provided not only one clearance but, effectively, three and, in any event, the clause does not require that the medical certification be to the satisfaction of the employer.

[44] It is then submitted that clause 5.7 simply does not apply to Ms Milne and her present situation. It is submitted that the clause only comes into play where the employee is unable to return to work and prior to a full medical clearance being provided. It is not therefore applicable given Ms Milne has been fully rehabilitated through the assistance of her counsellor, psychologist, and general practitioner and has obtained and provided substantial evidence of her ability to return.

[45] It is also submitted that the requirements of the clause cannot be met as it would be difficult for the *independent* medical adviser to be considered independent when one of the parties is paying the cost. It is submitted that to overcome that possible impediment, independence must be guaranteed by both parties agreeing the identity of said provider and that that did not occur.

[46] It is further submitted that the ability of the respondent to obtain an independent medical assessment can only be utilised where *there is a need to clarify the recovery time or medical status of the injury or illness.* It is argued that given the assessments Ms Milne had obtained, there was nothing that required clarification.

[47] Finally, it was submitted:

That when interpreting the phrase used 'there is a need to clarify the recovery time or medical status' that the recovery time and medical status must be read together. Accordingly it is submitted that this clause is only to be utilised in circumstances where the employee has not yet obtained medical clearance to return to work. The tone and the mechanics of this phrase all point to a process that must be followed prior to a medical assessment being obtained.

and , in the present circumstances, such clearance was already extant.

[48] It is Barnardos initial contention that the Authority does not have jurisdiction to hear this matter. The jurisdictional argument is summarised as follows:

22. *The applicant cannot obtain reinstatement under s.127 ERA because the order she is seeking is not an interim order but a permanent order to return to work.*
23. *A permanent order can only be obtained under s.123(1)(a) and s.125 ERA. The applicant cannot obtain an order under those sections because she has not raised and successfully established a personal grievance claim in relation to the alleged refusal to allow her to return to work.*
24. *The failure to raise a personal grievance claim also prevents any order under s.127 ERA.*
25. *Even if the applicant had raised a personal grievance claim then the applicant would not be able to pursue a claim for interim reinstatement due to s.103(3) ERA.*

[49] With respect to the substantive issue, the respondent submits that it relates solely to a dispute over the interpretation and application of the applicant's employment agreement, specifically the content of clause 5.7. It is submitted that where an employee is recovering from a long term illness as occurred here, both parties have obligations to each other and that the words and the nature of those obligations are express and clear. It is submitted that the respondent has met its obligations, whilst the applicant has refused to do so.

[50] The respondent maintains that clause 5.7 means that it is contractually entitled to insist upon an additional medical assessment to clarify Ms Milne's medical status before she returns to work. By refusing to undergo that examination, it is Ms Milne who is in default and not Barnardos.

Determination

Jurisdiction

[51] The respondent's jurisdictional argument (48 above) comes in two parts. The first, referring to sections 123(1)(a), 125 and 127, assumes the applicant is seeking reinstatement. That is not the case. To be reinstated, one must first be dismissed. Ms Milne has not been dismissed, has never raised a grievance that suggests she thinks she has, and has never sought reinstatement, whether it be interim or permanent.

[52] Ms Milne is saying that Barnardos has, in the context for an ongoing employment relationship, improperly precluded her from performing her duties. She therefore seeks an injunctive remedy - namely an order *.. compelling the respondent to allow the applicant to return to her teaching position.*

[53] It is my view that the Authority can consider this application given the context in which it is raised. Early suggestions that the Authority's injunctive jurisdiction was limited to applications for interim reinstatement (see *Greenlea Premier Meats Ltd v New Zealand Meat & Related Trades Union Inc (No 1)* [2006] ERNZ 312 (EmpC)) are no longer valid. In *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205 the full Court observed:

[46] We find that as an injunction is a form of relief which may be granted in order to preserve rights under a contract, it is a rule of law relating to contracts.

[47] We conclude, therefore, that by expressly conferring on the Authority the power to make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts, the Authority is empowered to grant injunctions both under rules of law relating to contracts and under enactments.

[54] The Court said the words *related to contract* are not to be read down and, notwithstanding a limited number of express exceptions, gives the Authority jurisdiction to award injunctive relief, be it interim or permanent.

[55] An injunction is:

A remedy of an equitable nature, whereby a person is ordered to refrain from doing (restrictive injunction), or ordered to do (mandatory injunction) a particular act or thing. Injunctions may also be interlocutory, to preserve the status quo until the relevant facts can be ascertained, or perpetual, based on a final determination of the rights of parties and permanently intended to prevent infringement thereof.

Walker, DM (1980) The Oxford Companion to Law. New York: Oxford University Press.

[56] That this application stems from a dispute over the contract between the parties and the rights granted thereunder is, in my view, clear. Indeed, that is accepted by the parties (see 59 to 62 below). At its simplest, an employment contract may be considered an exchange of labour for remuneration. Ms Milne seeks an order permitting her to provide that labour, thus preserving the contract and its integrity. She is entitled to do so.

[57] Similarly, and perhaps ironically, Barnardos' position is also contractually based. They assert an ability to demand medical confirmation that Ms Milne is, given her extended absence, now fit to return to work.

[58] The argument that section 103(3) precludes this matter from proceeding fails for similar reasons. This is not a personal grievance but an application for injunctive relief.

The substantive issue

[59] Notwithstanding Ms Coulston's reference to *American Cyanamid Co* the parties agreed, during the telephone conference at which we discussed administrative arrangements in respect to the investigation meeting, that determination of this application came down to one narrow issue - clause 5.7, its applicability and the rights granted thereunder.

[60] That approach was confirmed by both in submissions presented at the investigation meeting, with Ms Coulston stating that the balance of convenience, with it the issue of overall justice and therefore determination of the matter, would revolve around an interpretation of the rights bestowed by employment agreement.

[61] Ms Ryder was stronger in her submission and argued that this matter relates solely to a dispute over the interpretation and application of the applicant's employment agreement and, in particular, the content of clause 5.7.

[62] Counsel are, in my view, correct. The issue of arguable case (if it really applies in this situation given the relief will, as argued by Ms Ryder, be permanent (or as permanent as it can be given the spectre of imminent restructuring)) will, in itself, be determined by an interpretation of the agreement. If Barnardos has the right to demand Ms Milne attend upon a medical practitioner of its choice so as to inform its approach to the return to work, Ms Milne has, by refusing to comply, acted in breach of her contract and has no valid claim. Conversely, and if Barnardos have been making a demand they are not empowered to make, they will have unjustifiably prevented Ms Milne's return.

[63] Other issues canvassed in the meeting, such as disputes about Ms Milne's attainment of a Teachers Registration certificate and various accusations of bad faith are, while interesting, beyond the ambit of the narrow issue the parties agree I need to consider in order to reach a conclusion in respect to this claim. They shall not, therefore, be discussed further.

[64] The clauses central to this dispute read as follows:

> *5.4.4 - requirements to supply medical certificate. Employees may be required to produce a certificate from a medical practitioner (within the meaning of the Medical Practitioners Act 1995) for sick leave, on request by the employer or if*

the sickness or injury is for a period of three or more consecutive calendar days, whether or not the days would otherwise be working days for the employee. Barnardos may also require an employee to attend a meeting with a medical practitioner in order to be able to offer a suitable workplace, including consideration of support or reasonable adjustments.
5.4.5 - Long term sick leave ...

(3) An employee who has been on long term sick leave will be required to produce a medical certificate stating their fitness for normal duties before they return to work. They shall be entitled to return to the same position and at the same rate of pay they were employed in when long term sick leave commenced. Employees shall maintain any service entitlement accrued before the leave commenced.

5.7 - Rehabilitation programme. Barnardos is committed to assisting the early, durable and full return to work of any employee recovering from injury or long term illness. Any employee who suffers either a work or non work related injury or long term illness and requires more than four weeks off work, will negotiate a return to work rehabilitation programme in consultation with their manager/team leader and nominated medical adviser. Barnardos is entitled to be advised of the current medical advice by the employee and to obtain an independent medical assessment (at their expense) if/when there is a need to clarify the recovery time or medical status of the injury or long term illness. Confidentiality and privacy issues will be respected in this situation. The objective of the work rehabilitation programme is to ensure a progressive and full resumption of work duties with full medical clearance. Both parties are to demonstrate "good faith" in this process.

[65] Barnardos' argument is simple and, on the face of it, quite compelling.

[66] The clause applies where an employee has (amidst other options) suffered a long term illness resulting in four or more weeks off work. Ms Milne meets that criteria.

[67] It states that such employee ***will*** *negotiate a return to work rehabilitation programme in consultation with their manager/team leader and nominated medical adviser.* [Emphasis is mine].

[68] 'Will' is a word of compulsion.

[69] It then goes on state that *Barnardos is* ***entitled*** *to be advised of the current medical advice by the employee and to obtain an independent medical assessment (at their expense) if/when there is a need to clarify the recovery time or medical status of the injury or long term illness.* [Emphasis is mine].

[70] 'Entitled' is a strong word and clearly confers a right. [71] The counter argument comes in four parts.

[72] First it is argued that clause 5.4.5 also refers to the return of an employee from long term sick leave. The clause only requires one certification of ability to return and does not require that to be from a practitioner agreeable to the employer. While that is correct, clause 5.7, aside from being more specific, grants to Barnardos a right that may be exercised. Clause 5.4.5 does nothing to limit that right.

[73] Secondly it is submitted that clause 5.7 can not apply as it only comes into play where the employee is unable to return to work and prior to a full medical clearance being provided. This is not, in my view, a valid approach.

[74] Its first problem is that the clause provides that a return to work program is compulsory. The programme must be informed by the opinion of the employees' medical practitioner and may, in addition, be informed by input for a practitioner of the employers choosing. To argue, as Ms Coulston has, that by obtaining a second version of the first type of opinion Ms Milne has confirmed her ability to return would totally nullify the employers entitlement to obtain a further opinion. That would completely nullify the clause and an express entitlement. Such an outcome is, in my view, inconceivable.

[75] The second impediment to this argument lies in the evidence. Even Ms Milne accepts that the employer raised concerns about her fitness to return as early as 20 December and demanded a *substantive* clearance prior to any certification being prepared by either of Ms Milne's medical advisors. Those original documents can not, by any stretch of the imagination, be considered substantive and it is therefore arguable that a full clearance had in fact been provided. The first document that might possibly (though arguably not, given the position adopted by Barnardos in 23 above) be considered substantive was written by Ms Beach on 16 February. By that time Barnardos had made it clear it was enforcing its *entitlement.* If I were to accept this submission given those facts, I would be accepting that one party can simply nullify the others rights by doing its own thing. That would be a nonsensical outcome.

[76] Thirdly it is submitted that the medical practitioner nominated by Barnardos could not be independent as Barnardos was paying. The clauses use of the words *independent medical assessment (at their expense)* illustrates that the concept of independence and payment are not mutually exclusive. The practicalities of the situation suggest that independence can be maintained provided Barnardos does not try to influence the outcome of the assessment. There is no evidence they did.

[77] Lastly, it is argued that Barnardos can only obtain an independent medical assessment where *there is a need to clarify the recovery time or medical status of the injury or illness.* It was submitted that given the assessments obtained by Ms Milne there

was nothing that required clarification.

[78] As said earlier, the documents proffered by Ms Milne as at the time that Barnardos exercised its right to demand a further examination fell well short of providing the level of clarity that Barnardos had already indicated it required. The words of the clause suggest it had right to seek that clarity and I must add given the evidence about Ms Milne's behaviour around this time I am not surprised. Barnardos were, in my view, given sufficient evidence to suggest questions remained about the completeness of Ms Milne's recovery. They had both a legal, and in this case contractual (refer clause 7), duty to provide a safe work place. They are entitled to be satisfied they can and clause 5.7 provides the mechanism under which they can obtain that satisfaction.

[79] I must conclude that Ms Milne has failed to establish that clause 5.7 did not apply to her prospective return at the start of this school year.

Summary

[80] This is an injunctive application. It is therefore about the maintenance of the status quo and the enforcement of extant contractual rights. The parties have agreed the pertinent clause to be 5.7.

[81] Ms Milne seeks to assert a right to return prior to having agreed a compulsory return to work programme and without having attended upon an independent medical practitioner as required by Barnardos. She does not have the right to do so, having waived it by agreeing to the employment agreement and, in particular, clause 5.7 and its content.

[82] Conversely, Barnardos seeks the input of a medical practitioner of its choosing so as to inform the return to work programme. Clause 5.7 of the employment agreement grants it the right to do so.

[83] For these reasons the application must be dismissed.

Costs

[84] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Barnardos seeks an order for costs, it is required to file its application within 28 days of this determination. A copy shall be served on Ms Milne who is to file any response within 14 days of the application.

M B Loftus

Member of the Employment Relations Authority

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