

[2] Professor Ohms' employer, the Vice Chancellor Auckland University of Technology (AUT), opposes the application.

Background

[3] Professor Ohms specialises in tax law and is employed in the business and law faculty at AUT. His terms and conditions of employment are contained, among other sources, in the Academic and Associated Staff Members Collective Agreement (the CA). The CA reads at clause 3.3.3:

Incapacity

- a. *If as a result of physical or mental incapacity the Employee is unable to perform the duties of the position, the Employer:*
 - i. *Will consult with the TEU on behalf of the employee;*
 - ii. *May require the Employee to undergo a medical examination at the Employer's expense, ...*
 - iii. *Will take into account any report and/or recommendation made available as a result of the medical examination(s) ... and apply one or a combination of the following options:*
 - . *no further action under this clause;*
 - . *redeployment;*
 - . *proportional employment;*
 - . *an agreed period of leave without pay up to one year;*
 - . *terminate employment by giving two months' written notice.*

[4] In 2011 Professor Ohms became concerned about the appointment of another professor specialising in tax law, C, and believed the appointment was a precursor to his own redundancy. He was also concerned that C was paid a higher salary than he was. He says the concern about C's appointment and its implications, and concerns about bullying by his immediate manager, caused him to suffer from stress. He sought medical attention, and in March 2012 he made AUT aware both that he was seeking such attention and of the reasons for his stress. His written account of the reasons included a description of symptoms which he said were akin to post traumatic stress disorder. He believed, however, that he was fit for work.

[5] The material led AUT to conclude an investigation was necessary. By letter dated 6 March 2012 it expressed concern that Professor Ohms' stress would be exacerbated if he remained at work. It required him to remain away from the workplace on paid sick leave while it obtained further information about the causes of

the stress, and until it could be assured either that there was no risk to his health or the risk could be managed.

[6] Professor Ohms says that, although he was fit for work as at 6 March 2012, subsequent difficulties and disagreements associated with his participation in the investigation caused his health to deteriorate. By about early April he was no longer fit for work. He provided medical certificates to AUT in support of his lack of fitness to work.

[7] By letter dated 28 May 2012 AUT advised Professor Ohms of his current sick leave and annual leave entitlements. His outstanding entitlement to sick leave was exhausted on 6 June 2012. He has been absent on paid special leave since then.

[8] By letter to Professor Ohms' solicitors dated 7 June 2012 AUT sought: more information on the nature of Professor Ohms' current illness; and views on a proposal that he undergo a medical examination under clause 3.3.3.

[9] Professor Ohms had been attending on his own psychiatrist and general practitioner. On the information provided to it AUT was not satisfied as to his fitness to work or that his stressors had been dealt with so that the workplace was safe for him. The parties attended mediation in August and November 2012, but were unable to resolve the matter.

[10] In December 2012 AUT invoked clause 3.3.3 to require Professor Ohms to undergo a medical examination with a practitioner of its choice.

[11] Further exchanges between the parties over that matter led to the provision of further reports from Professor Ohms' doctors indicating Professor Ohms was fit to work. AUT considers the reports do not address important questions associated with Professor Ohms' health and safety in the workplace. It believes it does not have enough information to ensure his safety at work, and in turn considers it cannot allow him to return to work.

The claims and counterclaims

1. Professor Ohms' claims

[12] Professor Ohms' seeks general damages for a number of alleged breaches of contract, with injunctions also being sought to remedy some of the breaches.

[13] The first set of claims concerns alleged breaches of the employment agreement and other breaches associated with his absence from the workplace from March 2012. They address AUT's actions in:

- requiring him to remain away from the workplace on 6 March 2012;
- requiring the absence to be taken as paid sick leave until the entitlement to paid sick leave was exhausted;
- not providing a safe place of work from 6 March 2012 and exacerbating his stress;
- refusing from June 2012 to allow him to return to work, for which an injunction is also sought restraining AUT from enforcing directions that he remain away from work;
- directing that that he attend a medical practitioner for a medical report pursuant to clause 3.3.3 of the CA, for which an injunction is also sought restraining AUT from invoking clause 3.3.3; and
- failing to act as a good employer in refusing to allow him to return to work with the expectation that he would resign.

[14] The second set of claims alleges breaches of equal employment and pay parity provisions. One of the claims is relevant to the present application. It alleges AUT breached these provisions by

- paying Professor Ohms a salary which is less than that paid to certain other professors, including C, the remedy for which is,
 - an injunction restraining AUT from paying him at a lower salary, and
 - damages quantified as the difference between C's salary and his.

[15] The remaining set of claims alleges various breaches. Some are not directly relevant to the present application and I do not record them. Some which are relevant include allegations of breach of good faith in: the appointment of C to the staff; and

failing to permit Professor Ohms to return to work in the expectation that he would resign.

[16] It was not clear from the statement of problem as first lodged whether personal grievances were being pursued, and if so what they were. An amended statement of problem clarified the matter by identifying the claims for damages as summarised above, and alleging a series of personal grievances in the alternative. In essence, the personal grievances concern the justification for: the direction that Professor Ohms remain absent from work; the debiting of entitlement to paid sick leave; the refusal to allow a return to work after early June 2012; the publication of certain personal information; and the payment of a salary less than that of others named. They are not the focus of the present application.

2. AUT's counterclaims

[17] Among the counterclaims relevant to this application, AUT seeks:

- an enquiry into whether the relationship of trust and confidence has broken down to the extent that the employment relationship can no longer continue;
- a declaration that it is entitled to cease paying special leave, and if so from when;
- an order that Professor Ohms comply with clause 3.3.3 by providing a medical report; and
- an order that Professor Ohms participate in the investigation into the allegations he raised in March 2012.

The questions of law

[18] The questions of law said to arise are:

- (i) is a Professor who is appointed to a chair at a university an employee for life or until he or she resigns;
- (ii) is it lawful for AUT to direct an employee to leave the workplace and remain away from the workplace because of concerns about whether it is providing a safe place of work,

- without prior consultation with the employee about his medical condition, and
 - without medical advice;
- (iii) does an employee have a right to attend the workplace when he considers he is fit for work and his medical practitioner has advised the same;
- (iv) where an employee is directed to remain away from the workplace because of a concern that the workplace is not safe, is the employer entitled to regard the employee as being on sick leave and debit sick leave entitlements accordingly;
- (v) where an employee suffers illness as a result of the employer's actions and is absent from work as a result, is the employer entitled to regard the employee as being on sick leave and debit sick leave entitlements accordingly;
- (vi) is an employee who performs the same duties as another employee entitled to be paid the same as the other employee when both are employed under a collective employment agreement setting a range of payments, or where the other employee is paid above that range;
- (vii) does clause 3.3.3 of the CA apply where the employee's medical practitioner has stated that the employee is fit for work;

[19] Further to the counterclaims, the questions of law arising concern whether either the Authority or the Court has jurisdiction to act as set out at [17].

Should the matter be removed

[20] The components of an application under s 178(2)(a) are that:

- (i) a question of law is likely to arise;
- (ii) the question of law is important; and
- (iii) the question of law arises other than incidentally.

[21] Regarding whether a question of law is 'important', several judgments of the Employment Court have referred to and applied this statement from *Hanlon v International Educational Foundation (NZ) Limited*:

It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not by itself enough to render the question of law an important one ...

A question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. ...

Importance ... cannot exist in isolation. ... The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.¹

[22] Further, in that the Authority ‘may’ remove a matter under s 178, the decision on a removal is discretionary. Where a ground for removal has been established the Authority must still consider whether, despite this, removal should not be ordered. Factors relevant to the exercise of the discretion include:

- the number of questions of disputed fact, which Parliament intended to be dealt with in the first instance by the Authority;
- the prospect of a prompt investigation meeting in the Authority;
- the existence of a statutory right of challenge;
- the availability of the Authority’s methodology in crafting solutions which the parties can live with;
- bearing in mind the limited right of appeal from judgements of the Employment Court, the prospect of the parties being deprived of a general right of appeal if the matter was removed to the Court.²

[23] Question (i) of the questions of law arising from Professor Ohms’ claims reflects his underlying concern that AUT is attempting to secure the termination of his employment, and his efforts to resist this. However, other than through the posing of this question, none of his claims alleges in principle that, as a professor with tenure, his employment can be ended only by his resignation. Moreover, his employment has not ended. In that respect this question of law arises incidentally.

[24] Questions (ii) – (v) and (vii) are concerned with: whether AUT’s instructions that he leave and remain away from the workplace were lawful and reasonable; whether sick leave could be debited from his entitlement in respect of the absence

¹ [1995] 1 ERNZ 1, 7

² These were listed in *NZEPMU v Carter Holt Harvey Limited* [2002] 1 ERNZ 74, at [38]

from the workplace; and the extent to which clause 3.3.3 applied when his own medical practitioners stated he was fit for work.

[25] I consider the law in this area to be sufficiently settled to make the Authority's principal task one of applying that law to the facts. The questions posed may amount to an indication of the issues from Professor Ohms' point of view, and may include elements of law. I would not, however, elevate those to the status of important questions of law requiring the attention of the Court, in the sense discussed in *Hanlon*.

[26] Moreover, broadly speaking this employment relationship problem concerns how the employer dealt with the allegations of stress in the workplace, the employee's entitlements to sick leave, and the interpretation of the employment agreement. These matters are appropriate for the Authority in the first instance, and the Authority should address them accordingly.

[27] Question (vi) concerns the difference between Professor Ohms' salary and that of C in particular. I do not accept it amounts to an important question of law which the Court should determine. Its resolution will require a consideration of the salary scale in the CA, and any policies or other provisions alleged to have been breached in respect of the matter.

[28] Again, even if I am wrong in this view, the question of whether an employee has been correctly paid, and the remedy available if the answer is 'no', is well within the range of matters properly dealt with by the Authority in the first instance.

[29] AUT's counterclaim is concerned with the impasse the parties have reached over Professor Ohms' return to work. It has sought various orders and declarations which amount to an attempt to resolve that impasse.

[30] The questions of law said to arise are framed as challenges to the Authority's and the Court's jurisdiction to make these orders. Again I consider the resolution of the matter will depend significantly on the facts, their application to settled law, and in some respects on the interpretation of the employment agreement. I would not elevate the questions to the status of important questions of law which the Court should address.

[31] Finally, this problem overall is one which would benefit from the Authority's role in resolving employment relationship problems and crafting solutions. Addressing whether and how Professor Ohms' employment is to continue is within the scope of that role, as is addressing his workplace stress and the reasons for it.

Conclusion

[32] For these reasons the application for removal is declined.

Investigation meeting

[33] This matter will now be set down for an investigation meeting. The Authority has dates available from 1 August 2013. Counsel are directed advise the Authority's support officer at their earliest convenience of their own and their witnesses' availability in August and September 2013.

Costs

[34] Costs are reserved pending the determination of the substantive matter or a resolution by the parties.

R A Monaghan

Member of the Employment Relations Authority