

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 218
5412018

BETWEEN

JOANNE ROBERTS
Applicant

A N D

BANK OF NEW ZEALAND
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: R Alchin, Counsel for Applicant
L Robinson, Counsel for Respondent

Investigation Meeting: 29 May 2013 at Hamilton

Date of Determination: 30 May 2013

INTERIM DETERMINATION OF THE AUTHORITY

- A. The personal grievance of unjustifiable disadvantage arising from BNZ's failure to do a sick leave review including meeting with the applicant and a failure to actively consult with the applicant regarding her sick leave is dismissed.**
- B. Costs are reserved.**
- C. The hearing is adjourned due to the late withdrawal of applicant's representative and prejudice to the applicant in being required to represent herself.**
- D. Parties are directed to liaise with the support officer regarding their availability for a 1 day urgent fixture in Hamilton in June, July and August 2013.**

Employment relationship problem

[1] The Authority has been asked by the parties to make a ruling in respect of jurisdiction to hear an issue about sick leave. During discussions regarding the issues for hearing today, applicant counsel stated her client's sick leave issue was about an unjustifiable disadvantage arising from BNZ's failure to do a sick leave review including meeting with the applicant and a failure to actively consult with the applicant regarding her sick leave. The Authority (and BNZ) had understood the issue of sick leave related defective medical information.

[2] The Authority asked applicant counsel to refer it to where this disadvantage claim had been raised in her pleadings or in correspondence with the BNZ prior to hearing. Counsel referred to the final paragraph in a letter dated 18 March 2013 to the BNZ¹ and to paragraph 1.2(iii) of the amended statement of problem. The letter dated 18 March to the BNZ refers to failure to follow processes and seeks an objective review. Paragraph 1.2(iii) of the amended statement of problem refers to a personal grievance about failure to follow policies, unilateral withdrawal of sick leave and failure to provide a safe workplace.

[3] Applicant counsel submitted to the Authority that there was no requirement to particularise the sick leave issue other than as set out above to raise a personal grievance. She submitted:

- a. The above alleged behaviour was a pattern of behaviour faced by the applicant;
- b. The statement of problem makes reference to this in paragraphs 1.2(iii) and in the remedies, paragraph 3(i)(a);
- c. There had been two mediations where these issues were live;
- d. The BNZ should have known of the policy and its failures;
- e. The BNZ was not entitled to remove sick leave without adhering to its policies;
- f. The statement of problem was filed quickly and the BNZ could have asked for further particulars about the sick leave but failed to do so;

¹ Bundle of documents, p.142

- g. The Authority's process was informal, implying it had discretion to accept the sick leave issue 'as is'.

[4] Respondent counsel submitted the pleadings were defective and it was unfair to ask an employer to cryptically guess what the sick leave issue was about. BNZ alleged it was prejudiced as it had no opportunity to address this grievance prior to hearing.

Legal framework

[5] Employees must raise personal grievances within a period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred, or came to the notice of the employee, whichever is the later.² This period may be extended by consent. There is no consent from the BNZ.

[6] A grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer, aware that the employee alleges a personal grievance that the employee wants the employer to address.³

[7] What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.⁴

[8] There is a low threshold of information required to raise a personal grievance⁵ but it is insufficient to raise a grievance, where the employer is expected to deduce the grounds relied on for raising a personal grievance.⁶

Determination

[9] Counsel was unable to identify any correspondence or pleading which specifically raises BNZ's failure to do a sick leave review including meeting with the applicant and a failure to actively consult with the applicant regarding her sick leave. The correspondence between the parties focused on defects in the medical information supplied by the applicant.

² Section 114(1)

³ Section 114(2)

⁴ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at para [36]

⁵ *Board of Trustees of Tekura Kopapa Motuhake o Tawhiuau v Edmonds* [2008] ERNZ 139 (EmpC)

⁶ *Dickson v Unilever New Zealand Limited* (2009) 6 NZELR 463 (EmpC)

[10] The statement in reply and the respondent's evidence for hearing today primarily addresses an unjustified disadvantage claim by the requirement of further medical certificate information. The evidence does not address the above sick leave disadvantage claim.

[11] The date for raising a personal grievance in respect of the above sick leave disadvantage claim expired on or about 25 May 2013. No exceptional circumstances in terms of s.115 have been submitted to justify the Authority exercising its discretion to extend the time for raising this grievance. Even if they had been raised, the respondent's preparation for hearing today has been upon a different basis from the above sick leave disadvantage claim.

[12] Given the applicant was offered the opportunity of an adjournment but sought a ruling, the lack of exceptional circumstances and the urgency of this claim, the Authority dismisses the personal grievance of unjustifiable disadvantage arising from BNZ's failure to do a sick leave review including meeting with the applicant and a failure to actively consult with the applicant regarding her sick leave.

Addendum

[13] Following the delivery of the above oral determination, applicant counsel sought to make an application pursuant to s.115 alleging exceptional circumstances. This was declined. The matter had been determined and options of reopening and/or appeal could be examined after today's hearing had concluded. The Authority provided applicant counsel 15 minutes to discuss with her client the above determination.

[14] Upon returning, applicant counsel informed the Authority she saw no benefit in her remaining to represent the applicant "*as the decision was going to be appealed anyway*" and the applicant was going to stay "*to get what hurt and humiliation compensation she could.*" The Authority invited counsel to reconsider her client's lack of representation. This was refused. The Authority asked applicant counsel to come with the member and advise respondent counsel. This was refused. Applicant counsel left and did not return.

[15] The Authority asked the parties to reconvene in the hearing room. There were two other unjustified disadvantage claims still to be heard. However the applicant was not in a position to represent herself. She was tearful and upset, did not have a

strong grasp of the procedure or evidence and is on unpaid sick leave due to stress. The hearing was adjourned given the late withdrawal of representation and the prejudice to the applicant in having to prepare for a one day hearing. Costs are reserved.

[16] This matter requires urgent resolution. The applicant has been on unpaid sick leave since 25 February 2013. The BNZ expressed a wish for her to return to work. The parties are directed to liaise with the support officer regarding a hearing date. An urgent one day hearing date is available in June, July and August 2013.

T G Tetitaha
Member of the Employment Relations Authority