

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Lynne Snowdon (Applicant)
AND Radio New Zealand Limited (Respondent)
REPRESENTATIVES G O'Sullivan for the Applicant
M Quigg and J Bates for the Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 10 June 2003
MEETING
DATE OF 13 June 2003
DETERMINATION

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. Ms Snowdon considers that the Respondent's (Radio New Zealand) refusal to allow her to return to work until she has had an independent psychiatric assessment constitutes an unjustifiable suspension. Radio New Zealand considers that it is able to require such an independent examination pursuant to its leave policies. Because Ms Snowdon wishes to return to work the matter was accorded urgency by the Authority. Therefore an investigation meeting was scheduled for within three weeks of the filing of the statement of problem. I thank both parties for making themselves available for this investigation meeting at short notice.

The Facts

2. Ms Snowdon is a senior manager (Managing Editor of News) at Radio New Zealand, reporting directly to the Chief Executive, Ms Sharon Crosbie. She has been employed in senior positions within Radio New Zealand since December 1996.

3. Radio New Zealand's leave policies comprise part of Ms Snowdon's terms and conditions of employment pursuant to its "Employment Principles" document.
4. Included therein as part of Radio New Zealand's responsibilities is a requirement to respect workers' rights to privacy. Equally, Ms Snowdon's responsibilities include co-operating with the company on health and safety issues.
5. In relation to sick/domestic leave the principles provide that workers are entitled to sick/domestic leave as provided in the Holidays Act 1981, and further on an "as needs" basis at Radio New Zealand's discretion. The principles then state:

"Your manager may require you to provide a medical certificate if you are absent for more than three days at one time, or if your pattern of sick leave indicates that the reason you are taking such leave may not be genuine. You may also be asked to undergo a medical examination by a doctor nominated by the company, at the company's expense. This would entitle RNZ to receive that doctor's assessment of your situation which would then be taken into account. If you are found to have abused the paid sick leave provisions, disciplinary action may be taken as a result.

With long-term illness, the position will be reviewed at regular intervals and any decisions made will be based on the requirements of the company and the opinions of medical practitioners, following consultation with you. Again, RNZ may require you to undergo a medical examination by a doctor nominated by the company; at the company's expense. This would entitle RNZ to receive that doctor's assessment of your situation which would then be taken into account."

6. The remainder of the section on sick/domestic leave then refers to what occurs in respect of situations where leave has been occasioned by an accident.
7. The principles also address the issue of termination for incapacity. That section states:

"In the event that you are incapable of properly performing your duties as a result of long term physical or mental illness, you and your manager will discuss possible options for your rehabilitation and continuing your employment, such as redeployment, rearrangement of workload, and/or provision of supportive equipment. Where appropriate, the company will consider advice from ACC or a medical practitioner/ specialist.

If these options are unsuitable or prove unsuccessful, the company may terminate your employment because you are physically or mentally incapable of performing your duties. Before the company takes any action to terminate your employment, you may be required to undergo a medical examination by a registered medical practitioner at the company's expense. Your manager will take account of any resultant report or advice before making a termination decision."

8. Towards the end of last year difficulties arose between the parties in the work place. However, they are not relevant to this matter except that they form part of the background to Ms Snowdon's subsequent sick leave. As Ms Snowdon's doctor later reported, she has been treating Ms Snowdon over the last six months for an agitated depression, which the doctor believes was triggered by a very stressful work environment. As a result Ms Snowdon has been away from the workplace since 9 January 2003.
9. Since that time Ms Snowdon has provided Radio New Zealand with a number of medical certificates, which provided no reasons for her absence. It was not until after the statement of problem was filed (22 May) that Radio New Zealand was given a medical certificate that indicated that the reason for Ms Snowdon's absence from work was illness caused by depression. By that point Ms Snowdon wished to return to work.
10. In the meantime, from 23 January Radio New Zealand had regularly asked for information as to the nature of Ms Snowdon's illness and the likely possible timing of her return to work. From 18 February 2003 Radio New Zealand also requested Ms Snowdon, pursuant to the leave policies, to undertake an independent medical examination by its own doctor.
11. Despite promising to supply further medical information, the information was not forthcoming from Ms Snowdon. As early as 16 April, Radio New Zealand indicated that one of the purposes of obtaining a medical assessment or clearance from its own doctor may be to determine Ms Snowdon's fitness to return to work. Having failed to receive any new medical information, or an agreement to attend its doctor, Radio New Zealand put Ms Snowdon on annual leave rather than sick leave on 24 April.
12. On 28 April Radio New Zealand received a doctor's certificate on behalf of Ms Snowdon stating that she was possibly fit to return to work on 2 May and that she should undertake a work trial commencing that day, working half days for a week.
13. The parties then sought, through various initiatives, to facilitate an independent medical investigation and a return to work, but were unable to agree on terms for doing so. As part of these initiatives Ms Snowdon obtained an independent medical assessment from a general practitioner on 12 May. That doctor consulted with Ms

Snowdon and concluded that she was fit to return to work as of 2 May as she had recovered from her depression.

14. The Authority in its investigation need not be constrained by having to examine only historical matters. This is an ongoing employment relationship problem that needs to be resolved by the Authority. Therefore, as agreed by the parties, this is evidence the Authority can take into account in its investigatory role, even though the matters occurred after the statement of problem had arisen, as are the matters following.
15. Radio New Zealand's response to the provision of the independent medical practitioner's assessment came by way of letter dated 26 May. Its doctor had advised it that a psychiatrist assessment would be appropriate (given the nature of the illness and the long period off work). This is obviously in conflict with the advice of Ms Snowdon's doctors. It is not for the Authority to determine who is right or wrong from a medical perspective.
16. Radio New Zealand had secured tentative appointments for two psychiatrists as a result of its doctor's advice. Ms Snowdon considers that the employment principles do not mean that Radio New Zealand can force her to undergo a medical examination to prove that she is well enough to return to work, particularly where she has received two medical opinions clearing her for work.
17. Radio New Zealand's position, given in evidence by Ms Crosbie, is that it needs to be satisfied that it is appropriate for Ms Snowdon to return to work, and if so, on what basis. In particular, Radio New Zealand believes that it needs an independent psychiatric assessment so that it can understand the nature of Ms Snowdon's illness and the effects it may have on her in the future as regards ongoing work duties and commitments (so that it can provide her with a good and safe working conditions) and to ensure that Ms Snowdon is capable of performing the functions she was employed to fulfil so that Radio New Zealand's business is not adversely affected.
18. Ms Crosbie also gave evidence that in the past Radio New Zealand has asked for independent medical assessments to support a request by workers to return to work. However, the distinguishing feature here is that the other workers consented to the assessment and therefore no compulsion was involved.

19. One must also question quite how important this whole matter is considering the notification given by Ms Snowden on 16 April by Radio New Zealand. In that letter (already referred to), the company's lawyers state the following:

"Immediately upon your client returning to work our client would wish to take up with her the serious misconduct allegations that were initially raised by her in a letter of 20 December ...

Once our client is satisfied that your client is fit to return to work it will arrange for a disciplinary meeting to be held with your client prior to her commencing her normal duties ...

The purpose of that meeting will be to allow your client an opportunity to comment on the possibility that our client may suspend your client on full pay pending an investigation of the matters that were outlined to your client in the letter dated 19 December that may, if proven, constitute serious misconduct."

The Law

20. There do not appear to be any decided areas on this particular issue. Cases dealing with medical examinations in the course of civil proceedings, including proceedings before the Employment Tribunal, are not particularly relevant, nor is general contractual practice, as this is a matter of principle and contractual interpretation.
21. However, the issue of s.11 of the New Zealand Bill of Rights Act 1990, which provides that everyone has the right to refuse to undergo medical treatment has been addressed on a number of occasions. In *Harrison v. Tucker's Wool Processors Ltd* [1998] 3 ERNZ 418 a collective employment contract provided the company with the right to require the employee to undergo a medical examination by the company's medical practitioner. At 470 it was held:

"So far as medical examination and treatment is concerned, it is fundamental to the law of New Zealand that it is the basic right of every New Zealander to decide for himself or herself whether to undergo medical examination and whether to agree to medical treatment, surgical or otherwise. Almost every form of medical treatment involves some kind of assault or intrusion and consent on each separate occasion is necessary and cannot ordinarily be validly given in advance because consent means informed consent. That this is so has, in this decade, been restated in the New Zealand Bill of Rights Act 1990 s 11 which provides as follows:

'11. Right to refuse to undergo medical treatment – *Everyone has the right to refuse to undergo any medical treatment.'*

While this may relate to treatment only and not expressly to examination, I do not see that examination for the purposes of the New Zealand Bill of Rights Act 1990

provision can be separated from treatment. In any event, no person is obliged to submit to medical examination against that person's will except in a small range of situations for which statutory provision has been made: see, for example, s 100(1) of the Judicature Act 1908."

In *Teague & Ors v. Wallace Corporation*, unreported, Travis J, 16 December 2002, AC 81/02, the issue of a requirement to attend a doctor of the company's choice was addressed. At paragraphs.[131]-[133] it was stated that:

"The plaintiffs seek a ruling that the requirement to attend a doctor of the defendant's choosing, at the defendant's expense and to provide a report to the defendant from that visit, was harsh and oppressive, especially as employees were required to support a claim for special leave by providing medical certificates. Mr Perkin's evidence was that the clause was only used where the defendant had some reason to question a medical certificate provided by an employee but that is a matter going to practice. Mr Mitchell observed that this limitation was not expressed in the 1998 CEC. He submitted that the power to direct an employee at any time to attend the defendant's doctor for a report to be obtained is not limited in its scope as to the reason for the absence, and was therefore harsh and oppressive. He observed that s11 of the New Zealand Bill of Rights 1990, provides that everyone has the right to refuse to undergo medical treatment, was used by the Employment Court in Tucker to indicate New Zealand's societal values, a course apparently approved by the Court of Appeal. He submitted the same conclusion should be drawn in the present case because the 1998 CEC requires the employee to consent in advance to attending a doctor of the defendant's choice.

Ms Hornsby relied on Mr Lingard's evidence that this provision was compatible with comparable provisions in the majority of other employment documents that he produced. He also sought to distinguish s11 of the Bill of Rights on the basis that the provision did not extend to medical examinations which can be distinguished from medical treatment. I am not satisfied that the latter distinction can be properly drawn: see Nelson v. Macmahon Contractors (NZ) Ltd, unreported, Shaw J, 3 October 2000, AC 82/00 and Lloyd v. Museum of New Zealand Te Papa Tongarewa, unreported, Shaw J, WC45/02, 5 December 2002.

Ms Hornsby was on stronger ground when observing that the requirement to attend a doctor of the defendant's choice was in the context of the sick leave provision. Read in that context I find that it was not harsh and oppressive as it was of relevance to the terms of employment in issue (Tucker [74]) and necessary for the operational needs of the defendant. The consent in advance contained in the 1998 CEC meant the medical examination was not derogating from a fundamental human right to have 'privacy, dignity and bodily integrity protected from non-consensual medical procedure': R v. B [1995] 2 NZLR (CA) 172, 177 per Cooke P."

22. In *New Zealand Labourers IUOW v. CBI NZ Ltd* [1985] ACJ 689, the Arbitration Court considered the case of a worker who was required to attend a medical

examination arranged by the employer. The Court noted at 691 that:

“A perusal of the Site Agreement (Doc. 1511, 29.1.82) shows that the employer had no right to make such a requirement in this case. Subsection 14(c)(vi) gives the employer the right to have a second opinion from its own nominated doctor where an employee has claimed sick pay supported by a medical certificate. Because Mr Niha was not claiming any sick pay the employer had no rights under the subclause. The arranging of the examination in this way was so seriously unfair and improper that it vitiated the results as procedurally unfair.”

23. Finally, fundamental to employment law is of course the principle that a worker has the right to actually perform his or her duties in the normal course of events. Such a proposition is normally dealt with in the context where an employer seeks to place a worker on garden leave against their will or to not require them to attend work during the period of notice of the termination of employment. However, that fundamental right needs to be respected.

Determination

24. I note that in the first instance Radio New Zealand requested a medical assessment rather than required one. As a result of the failure of Ms Snowdon to respond to the Radio New Zealand initiatives, I also note that it would have been fair and reasonable for it to require such an assessment in these circumstances, if it was able to do so within the rights and responsibilities owed by the parties to each other. In this regard, it is important to note that only after the Authority became involved in the matter was the independent medical opinion and Ms Snowdon's doctor's assessment of her provided to Radio New Zealand.
25. I also note that Radio New Zealand has to act carefully in this matter, particularly as under the Health and Safety in Employment Amendment Act 2002 harm caused by work-related stress is specifically covered. Thus Radio New Zealand could become criminally liable if it did not take all practical steps to ensure that it did not cause any harm by way of work-related stress.
26. It is clear from the above analysis of the law that an employer can not require a worker to undertake a medical examination without agreement from that worker. It is possible that such agreement can be given in advance in some circumstances. However, where agreement in advance is said to be obtained by way of agreement pursuant to the terms

of an employment agreement, the terms of that agreement need to be closely interpreted.

27. Here, in relation to sick/domestic leave, when the issue is potential abuse of sick leave, the company may ask a worker to undergo a medical examination. It is only in respect of long-term illness that Radio New Zealand may require an employee to undergo a medical examination. The subsequent paragraphs of the employment principles deal only with accidents not illness and are therefore not relevant.
28. The employment principles make no direct reference to the use of medical examinations to stop a worker from returning to work, which is the situation in this case. This is reinforced by the part of the principles that deal with ceasing employment and in particular termination for incapacity. It shows that it is only where termination is being considered that the principles allow the company to require a medical examination from a worker. At the stage beforehand, where possible options for rehabilitation are considered, there is no reference to an examination by a company doctor. Radio New Zealand has referred to the possibility of Ms Snowdon's employment being terminated for incapacity. It is concerned about options for Ms Snowdon's rehabilitation and continuing employment. Yet at that point in the process, there is no provision in the employment principles for the company to require a worker to undertake an independent medical assessment. This situation can thus, I hold, be better linked with that particular clause, rather than the clause on sick/domestic leave, although neither is in fact directly applicable.
29. I hold that Radio New Zealand is permitted pursuant to its employment principles to require a medical examination, but only in the circumstances where paid sick leave is disputed as a result of long term illness or where it is considering termination of employment for incapacity.
30. For all the above reasons, it follows that Radio New Zealand has no right to require an independent medical examination, whether by its own doctor or by a psychiatrist, before Ms Snowdon is able to return to work.
31. Ms Snowdon's present position can then best be described as a suspension which is unable to be justified, consistent with the *CBI* case. There are no extreme features,

despite the existence of differing evidence as to what constitutes best medical practice, that might justify Radio New Zealand's approach in these circumstances where agreement has not been reached, either through the terms of the employment agreement or by the parties directly.

32. In all the circumstances, the only appropriate remedy for this breach is a determination that Ms Snowdon's employment has been affected to her disadvantage by Radio New Zealand's unjustifiable action. Radio New Zealand must therefore permit her to return to work. However, while Radio New Zealand can not compel Ms Snowdon to be assessed by a psychiatrist, it behoves both parties to consider the use of professionals in workplace matters to ensure Ms Snowdon's return to work, after such a long period and in such strained circumstances, occurs on a sustainable basis, unless overtaken by other events. In this respect the duty of good faith applies to both parties.
33. There is now unlikely to be any lost wages in this case but I leave that matter open for the parties to agree on in the first instance. In the unlikely event that the parties can not agree on this matter, leave is reserved for them to revert to the Authority.
34. In final submissions Mr O'Sullivan submitted that Radio New Zealand was guilty of harassment in terms of the protected disclosure legislation. I specifically put to Ms Crosbie during her evidence that Radio New Zealand may have improper motives for refusing to allow Ms Snowdon to return to work without an independent psychiatric assessment. She denied that proposition. There is no independent evidence to conclude that Radio New Zealand was motivated by improper motives. In the absence of any such evidence I have no reason to doubt Ms Crosbie's evidence and accept it accordingly.
35. Ms Snowdon gave limited evidence about the impact of Radio New Zealand's refusal to allow her to return to work in the last three weeks. While her employment rights have been infringed, her failure to keep Radio New Zealand informed of her status throughout this process has been unhelpful. In all the circumstances of this case, including its wider context, I consider that an appropriate sum of compensation is \$3,000 and I so order.

36. I therefore order the respondent, Radio New Zealand Limited, to allow Ms Snowdon to recommence her duties at her workplace on or before 18 June 2003 and for Radio New Zealand Limited to pay Ms Snowdon the sum of \$3,000 compensation under s.123(c)(i) of the Act.

Costs

37. Costs are reserved.

G J Wood
Member of Employment Relations Authority