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Stubbings v Ministry of Social Development (Auckland) [2007] NZERA 185 (28 August 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 264/07 5073538

BETWEEN

AND

HOWARD STUBBINGS

Applicant

MINISTRY OF SOCIAL DEVELOPMENT

Respondent

Member of Authority: Representatives:

Investigation Meeting:

Further information received:

Determination:

MarijaUrlich

In person, for Applicant

Hamish McIntyre, Counsel for Respondent

6 August 2007

13 August 2007, from Applicant

28 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In May 2006 Mr Stubbings applied for early retirement on medical grounds from his employment with the Ministry of Social Development ("MSD"). He had discussed this option with his manager and a MSD human resources advisor who advised that, under the terms of his employment agreement, he would receive a payment for medical retiring leave and retiring leave. He was later advised by his manager that this advice was incorrect and that he was only entitled to a payment for medical retiring leave. Mr Stubbings has brought a claim to the Authority for the retiring leave payment.

[2] MSD says the medical retiring leave entitlement is retiring leave, that the information provided to Mr Stubbings was given in good faith but was mistaken and that that mistake was corrected as soon as it was discovered. MSD says Mr

Stubbings' final pay was carefully calculated and that he has received all the payments to which he is entitled.

The employment agreement

[3] Mr Stubbings' terms of employment were contained in a written individual employment agreement based on the relevant collective agreement. The following clause provides for medical retirement:

11. 7 Medical Retirement

MSD may approve your early retirement for medical reasons. Where you retire on this basis you will receive a minimum payment of 65 days' salary.

[4] Appendix B to the employment agreement provides:

SPECIAL PROVISIONS

Cessation Leave Eligibility

Employees who were employed prior to 1 October 1998 by the Department of Labour or Income Support and who are terminated, as a result of redundancy will receive cessation leave in accordance with the following scales:

Retiring Leave Eligibility

An employee with a minimum often years unbroken service in the Public Service will be entitled to retiring leave in accordance with the following tables when:

- *the employee retires and has attained the age of eligibility for NZ Superannuation under the provisions of section 3 of the Social Welfare (Transitional Provisions) Act 1990 or*
- *the Chief Executive has approved the employee's earlier retirement on medical grounds or on other grounds at the employee's request **and***
- *the employee was employed by the Department of Labour prior to 1 September 1996 or was employed by Income Support prior to 1 October 1998.*

Payments [table]

Years Amount of Retirement Leave (days)

20 65

Employees who have 25 years or more of service will receive retirement leave in accordance with the corresponding scale contained in the Cessation Leave provisions in the 'payments' table above.

The parties' positions

[5] Mr Stubbings says the medical retiring leave provision in his employment agreement provides for a minimum payment of 65 days and that he meets the criteria for payment of retiring leave (an additional 38 day payment) because retirement on medical grounds has been approved and he was employed by Income Support prior to 1 October 1998.

[6] Mr McIntyre submits that the retirement eligibility provision provides for two scenarios; either retirement because the age of eligibility has been reached or medical retirement because it has been approved and the employee has been employed for the specified period with the specified agency. Mr Stubbings' entitlement to medical retiring leave flows from the second scenario because he met the criteria. Mr McIntyre submits that it is not possible to receive two retiring leave benefits because of the "or" in the provision; an employee is eligible for retiring leave either on age related or medical grounds.

Determination

[7] Mr Stubbings applied to retire early on medical grounds. His application was approved. He seeks a payment for both medically retiring and retiring. Grounds for age related retirement did not exist because Mr Stubbings had not reached the age of entitlement. I accept Mr McIntyre's submission that the provision is for "either" "or". The plain words of the provision provide for either retirement leave on medical grounds or age related grounds. Mr Stubbings application for retirement leave was on medical grounds. His application is declined.

[8] At the investigation meeting the issue of whether a personal grievance had been raised in relation to the mistaken advice received by Mr Stubbings from the MSD representatives was discussed. Mr Stubbings' 10 November 2006 letter raising

1 Refer bullet points 2 and 3 retirement leave eligibility provision

his personal grievance concerns the issue of entitlement. It is not readily apparent from that letter that MSD has been put on notice that he wished to raise a disadvantage grievance regarding the advice he received.

Costs

[9] This may be a situation where it is appropriate that costs should lie where they fall. Notwithstanding, costs are reserved and leave is granted for a timetable to be set.

MarijaUrlich

Member of the Employment Relations Authority

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