IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2020] NZEmpC 199
EMPC 324/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CANTERBURY WESTLAND KINDERGARTEN ASSOCIATION INCORPORATED Plaintiff
AND	JANE ROSEMARY BARNES Defendant
AND	NZEI TE RIU ROA Intervener
AND	SECRETARY FOR JUSTICE Intervener

EMPC 349/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JANE ROSEMARY BARNES Plaintiff
AND	CANTERBURY WESTLAND KINDERGARTEN ASSOCIATION INCORPORATED Defendant
AND	NZEI TE RIU ROA Intervener
AND	SECRETARY FOR EDUCATION Intervener

Hearing: 12 August 2020
(Heard at Christchurch)

Appearances: M O'Flaherty, counsel for Canterbury Westland Kindergarten Assoc Inc
A Halse, advocate for Ms Barnes
P Cranney, counsel for NZEI Te Riu Roa as intervener
AL Russell, counsel for Secretary for Education as intervener

Judgment: 19 November 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] The key issue in this case revolves around the correct interpretation and application of a clause in a collective agreement. The clause relates to the circumstances in which sick leave will be disregarded for the purposes of calculating sick leave entitlement. Both the NZEI Te Riu Roa (the Union) and the Secretary for Education applied for, and were granted, leave to intervene and be heard. Ms Barnes has also challenged the Employment Relations Authority's costs determination in her favour. Both challenges were pursued on a de novo basis.

Background

[2] The sick leave issue has come before the Court following a lengthy process. Ms Barnes taught for many years as an early childhood teacher. Issues arose within the workplace and Ms Barnes made a complaint to her employer (the Canterbury Westland Kindergarten Assoc Inc (the Association)), which was subsequently investigated. Ms Barnes became unwell and went on extended sick leave. In the event, she has never returned to work.

[3] Ms Barnes pursued a claim of unjustified dismissal and unjustified disadvantage in the Authority. The background to Ms Barnes' concerns, and how they were dealt with, is set out in the Authority's first determination.[1] The Authority upheld the unjustified disadvantage claim and dismissed the unjustified dismissal claim. Compensation of $30,000 was awarded in Ms Barnes' favour, along with lost wages and holiday pay.

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[1] *Barnes v Canterbury Westland Kindergarten Assoc Inc* [2019] NZERA 210 (Member Doyle).

[4] While the Authority concluded that Ms Barnes may be entitled to a payment in respect of sick leave under the collective agreement, it was left to the parties to work through that issue between themselves. The Association advised Ms Barnes that it was prepared to make a payment equivalent to three months' wages having regard to various factors which it said were relevant. Ms Barnes disagreed that this was the appropriate methodology and contended that she ought to be entitled to the full two years' worth of disregarded sick leave. The matter accordingly returned to the Authority. The Authority concluded that the Association had not exercised its discretion under the collective agreement in an appropriate manner and directed it to reconsider matters further. The Association has challenged that determination. It says that its approach to the discretionary exercise reflected a correct interpretation and application of the disregarded sick leave clause in the collective agreement, and the way in which it had arrived at its decision as to disregarded sick leave was open to it.

[5] It is convenient to turn to the sick leave provisions of the agreement at this point. Clause 4.3 of the agreement relates to sick leave generally. It includes provision for accumulated sick leave (to a maximum of 306 days), anticipated sick leave and the transfer of up to 106 days' accumulated sick leave on employment with another Association. Clause 15 (Disregarded Sick Leave) provides:

> Sick leave not exceeding an overall aggregate of two years may be granted by the employer in circumstances where an illness can be traced directly to the conditions or circumstances under which the teacher is working, or where an injury suffered by the teacher in the discharge of duties occurred through no fault of the teacher, and where payment has not been made by the Accident Rehabilitation and Compensation Insurance Corporation. Leave granted under this sub-clause will not be debited from the employee's sick leave entitlement.

[6] As cl 15 makes plain, an employee must pass through a number of qualifying gates, some of which are alternative, before reaching the point at which sick leave might be granted under this provision:

- There must first be an illness or an injury.

- If it is an illness, it must be one that can be traced directly to the conditions or circumstances under which the teacher is working.

- If it is an injury:
    - it must be one suffered by the teacher in the discharge of their duties;
    - it must have been suffered through no fault of their own; and
    - no ACC payment has been made.

[7] The Association concedes that Ms Barnes has met the threshold test – she suffered from an illness that was directly traced to the conditions or circumstances under which she worked. Nor do I understand there to be any dispute that Ms Barnes continued to suffer the same illness throughout the two-year period in question. The nub of the issue is whether, as the Association says, it had a discretion to grant whatever period of sick leave (under two years) it considered appropriate, so long as it reached its decision in good faith. Ms Barnes argues that, having met the qualifying threshold, and having continued to suffer from the same qualifying illness throughout the entire two-year period (indeed, as it has transpired, well beyond the two-year period), the Association had no discretion to decline entitlement to the full two years' disregarded sick leave.

Analysis

[8] The parties are bound by the terms of their collective agreement. The basis on which those terms are to be interpreted is well established. The Supreme Court summarised the position as follows:[2]

> [60] … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

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[2] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd, (T/A Zurich New Zealand)* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]-[63] (footnotes omitted). See also *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [71], where the Supreme Court confirmed that these principles are applicable to the interpretation of employment agreements.

> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.

[9] Clause 15 is open to two different interpretations on its face – first, that the employer may, but need not, grant disregarded sick leave in circumstances where the qualifying criteria are met. This is the interpretation advocated for by the Association, supported (in large measure) by the Secretary for Education. The second is that if a teacher meets the qualifying criteria and the qualifying condition (illness or injury) continues for the two-year period referred to, the teacher is entitled to the grant of two years' disregarded sick leave. This is the interpretation advanced by Ms Barnes, supported (in large measure) by the Union.

[10] The term "may" is not defined in the collective agreement. It is defined in the dictionary as "1 expressing possibility. 2 expressing permission. 3 expressing a wish or a hope."[3] While I agree with counsel for the Association that the ordinary meaning includes a discretion to do something and that a number of possible outcomes can be implied, "may" can sometimes mean "must" (as the discussion in *Mathews v Bay of Plenty District Health Board* reflects).[4]

[11] The use of the word "may" in cl 15 is pivotal to both parties' interpretations, although used with varying degrees of emphasis and in different ways. What the parties, in entering into the collective agreement, intended their words to mean is to be objectively determined. This involves a contextual exercise.

[12] Relevant to the contextual exercise is the way in which the provisions relating to sick leave are expressed. An overarching point that emerges from the parties' agreement is that they have chosen to adopt a relatively generous approach to sick leave entitlements. This is reflected in the circumstances in which sick leave

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3 Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2008) at 863.

4 *Mathews v Bay of Plenty District Health Board* [2019] NZEmpC 49, [2019] ERNZ 94.

entitlements may be carried over from year to year, up to a maximum of 306 days; the number of sick days per annum that a teacher is entitled to (nine days, so well above the statutory minimum); the ability to transfer sick leave entitlements; and provision for anticipated sick leave.

[13] There is a notable absence of two things in the wording of cl 15. First, the absence of the word "discretion". This can be contrasted with, for example, cl 14 (Change of Employer): "An employer *may* agree to transfer sick leave in excess of this maxima *in its discretion*."[5] Also absent from the wording of cl 15 is reference to any express requirement to have regard to any particular factors. This is similar to the wording of, for example, cl 4: "Discontinuous employment with the same employer may be recognised for sick leave purposes" and cl 5: "Sick leave not used in the year in which it is granted may be accumulated for use in the subsequent years, to a maximum of 306 days". The wording of cl 15 can be contrasted with the wording of, for example, cl 4.4, which provides that the Association "shall" grant bereavement leave with pay and, in granting time off and for how long, "must" administer the provision in a culturally sensitive manner taking into account a list of six specified factors and "shall" recognise at least the minimum entitlements provided for under statute.

[14] It is true, as Ms Russell for the Secretary for Education says, that the word "may" has been extensively analysed in terms of its use in statute law and it is, in that context, generally regarded as permissive although accepting that on occasion it has been interpreted as meaning "must".[6] The key point in this case is not how Parliament utilises the word, but how it has been used in the context of this collective agreement. That is to state nothing more than the generally accepted proposition that, in some circumstances, power conferred on a decision-maker by use of the word "may" must be exercised, and that will be dictated by the particular context of the words and the circumstances. This seems to me to be a useful shorthand for the approach that needs to be applied in this case.

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5 Emphasis added.

6 *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 at [31].

[15] The evident purpose of cl 15 is to make extended sick leave available to an employee where they are unable to work because of illness which is directly attributable to the workplace. Reading cl 15 as providing for disregarded sick leave for the period of time that the affected employee suffers from the illness directly linked to the workplace, up to but not exceeding two years, fits with the overall scheme of the sick leave provisions in the agreement. Reading the provision down, to reserve to the employer an ability to whittle such sick leave back having regard to a variety of factors which are not spelt out and which are only said to be constrained by good faith, sits uncomfortably with the underlying intention of the provision. It also sits uncomfortably with the expansive approach to sick leave entitlements otherwise reflected in this part of the agreement.

[16] The multi-factored discretionary approach advanced on behalf of the Association at stage two, namely having regard to the length of any leave previously granted to the affected employee for any reason and whether the employee had mitigated their "losses" or contributed to them (in this case by refusing to take up a position at a different kindergarten), does not emerge when the provision is read in context. It might be expected that, had the parties intended such an approach, cl 15 would have been worded differently; for example, by making it clear that the employer had a discretion as to the quantum of leave that would be granted if the qualifying criteria had been met; and/or setting out the factors that must be considered in deciding what period of disregarded sick leave would be granted up to the maximum two-year period.

[17] It is also relevant, as Mr Cranney for the Union pointed out, that under the agreement, sick leave not used in the year in which it is granted may be accumulated for use in the subsequent years, to a maximum of 306 days (see cl 5). It would be odd for the agreement to allow an employee to accumulate 306 days of sick leave, caused by any reason whatsoever, from one year to the next with no limitations of the sort the Association seeks to read into cl 15, but to interpret cl 15 (which applies where the employee's illness is directly attributable to the workplace) as conferring on the employer a largely unfettered ability to reduce the availability of disregarded sick leave. It seems unlikely that the parties intended such a consequence.

[18] I have considered, insofar as it can be discerned, the history of cl 15. Ultimately I have found it of limited utility to the interpretative exercise. The previous iteration of cl 15 was discussed by Judge Shaw in *Secretary for Education v New Zealand Educational Institute Te Riu Roa (Inc)*.[7] She referred to the origins of the clause as traceable to 1919, noting that in 1924 an Order in Council under the (then) Education Act referred to leave over and above the usual sick leave entitlements where "illness resulting from causes … can be directly traced to the conditions under which a teacher is working." By 1951 the equivalent of the clause considered in *Secretary for Education v New Zealand Educational Institute* was in place and was incorporated into the 1988 Primary Teachers Award and subsequent instruments. It is at this point in history that the trail goes cold for the purposes of the current case, as no evidence was put before the Court as to any further changes that were made or the circumstances in which they occurred. What is evident is that the introductory wording of cl 6.2.5 (the earlier version of cl 15) changed from "shall" to "may". While it could be inferred that the change in wording was deliberate to inject a heightened degree of discretion into the decision-making process, there is no evidence, or any other indicators, before the Court to conclude that this was so, rather than a simple rewrite.

[19] While I do not exclude the possibility that there may be circumstances in which the Association could properly decline to grant sick leave for a period of two years where the injury or illness otherwise met the qualifying requirements of the provision, those circumstances would likely be limited. In the present case there is no dispute that Ms Barnes' illness was directly attributable to the workplace and that she continued to suffer that directly attributable illness for a two-year period. I do not consider that the circumstances of this case fall within the sort of limited category of case where the exercise of the discretion not to grant leave might otherwise be permissible.

[20] It follows that the Association's challenge is dismissed. Ms Barnes is entitled to the grant of two years' sick leave.

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[7] *Secretary for Education v New Zealand Educational Institute Te Riu Roa (Inc)* [2007] ERNZ 755 (EmpC) at [15].

Costs in the Authority

[21] There is one further matter before the Court. That is a challenge by Ms Barnes to the Authority's costs determination.[8] While the Authority Member ordered that costs be paid to Ms Barnes, issue is taken with the quantum. The Authority took a starting point of the daily rate and then reduced that amount to $7,666.67 to reflect what were effectively regarded as wasted costs and the fact that Ms Barnes was not entirely successful on her claim. The challenge was pursued on a de novo basis. That means that the Court must stand in the shoes of the Authority and decide what contribution to costs is appropriate in the particular circumstances.

[22] The Authority is designed as an accessible forum, in which the Authority Member takes a key role in investigating the matter, calling for evidence and information, questioning parties and witnesses and generally shouldering the bulk of the load which (in an adversarial context, such as the Court), generally falls on the parties themselves. This means that any legal costs incurred by parties in preparing for and attending at an investigation meeting ought generally to be modest. Costs of $32,000, which was the amount incurred by Ms Barnes, cannot be described as modest.

[23] I did not understand either party to take issue with the Authority's assessment of time (for the purposes of the daily rate) to be two and a third days. Mr O'Flaherty (counsel for the Association) submitted that costs should lie where they fell on the basis that Ms Barnes was not wholly successful in her claim. While Ms Barnes did not succeed on the unjustified dismissal part of her claim, she did succeed on the main thrust of her grievance and received a significant sum by way of relief (namely, $30,000 compensation under s 123(1)(c)(i)).

[24] It was also submitted on behalf of the Association that the nature of the case was relevant,[9] and the fact that it had taken steps to mitigate Ms Barnes' grievance by offering her a return to work ought to be reflected in a reduction in costs. Costs are

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8 *Barnes v Canterbury Westland Kindergarten Assoc Inc* [2019] NZERA 509 (Member Doyle).
9 Citing *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

not designed to punish an unsuccessful party; nor are they designed to reward them. There will be circumstances when the nature of a case may be relevant to costs, for a variety of reasons, but I do not consider it necessary or appropriate to reduce the costs I would otherwise order having regard to the steps taken by the Association in this case.

[25] The Association also submitted that the conduct of Ms Barnes' case in the Authority unnecessarily increased costs, and that this ought to be reflected in a reduction of any costs award. In this regard, it was submitted that medical evidence was filed late, unnecessarily increasing costs, including because it required additional counsel to appear to deal with the evidence. I am not satisfied, based on the evidence before the Court on the de novo costs challenge, that the medical evidence referred to reasonably required additional counsel to appear at the investigation meeting or that the late filing of the evidence in question unnecessarily increased the costs that would otherwise have been incurred by the Association. Nor am I satisfied, based on the material before the Court, that the way in which the case was otherwise conducted in the Authority warrants an adjustment. Accordingly, I do not accept that a decrease in the costs is warranted.

[26] While I do not accept the Association's submission that no costs, or reduced costs, should be ordered in Ms Barnes' favour, nor do I agree with the submission made on her behalf that full costs ought to be awarded. It is well accepted that actual costs are seldom ordered against an unsuccessful party. Egregious conduct is generally required. The Association's position in relation to the litigation may not be something with which Ms Barnes or Mr Halse agree, but it does not follow that Ms Barnes should effectively be indemnified.

[27] Mr Halse submits that any costs award ought to reflect the significant amount of preparation time which was required to pursue the claim. Increased preparation time was required, it is said, because Ms Barnes suffers from post-traumatic stress disorder. She gave evidence (which I accept) of the difficulties she has confronted, and continues to confront, in receiving correspondence in relation to her claim, discussing matters with her representative and giving effective instructions.

[28] There does not appear to be any authority for the proposition that the personal characteristics of a litigant are relevant to an assessment of what a reasonable contribution to costs in a particular case might be. There may be an argument that, where a litigant suffers from mental health issues which impact on the time it takes to prepare for and present their claim, that may relevantly be taken into account in assessing an appropriate award of costs in the Authority, including because of the special nature of its jurisdiction and the broad scope of its discretionary powers.[10] Such an approach would appear to be novel, and I would want to hear full argument on the point before reaching such a conclusion.

[29] It is desirable that costs awards be reasonably predicable for reasons which have been expressed elsewhere.[11] That is one of the reasons why a daily rate in the Authority is said to be a helpful tool. Application of the daily rate in this case would result in a contribution of around a third to Ms Barnes' actual costs. The daily rate which is generally applied in the Authority appears to be set against an assumed reasonable contribution to assumed reasonable costs in average cases in that forum. While a high costs award may be appropriate in some cases, routine awards of this sort of magnitude would likely undermine the statutory objective of accessibility. And, while parties are entitled to make their own decisions about the extent of resource they wish to apply to presenting or defending a matter in the Authority, that does not mean that their decisions are automatically visited on the other party.

[30] Having regard to the particular features of this case I am satisfied that the daily rate is the appropriate yard-stick in assessing a just award of costs. The Association is accordingly ordered to pay Ms Barnes the sum of $9,170.00, rounded up by way of contribution to costs in the Authority.

[31] The Authority's costs determination is set aside and this judgment stands in its place.

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10 Employment Relations Act 2000, sch 2 cl15.
11 See for example *Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

Summary of orders

[32] The Association's challenge to the Authority's determination is dismissed. The Association misapplied cl 15 of the collective agreement. On a proper interpretation and application of cl 15 of the collective agreement to the particular circumstances of this case, Ms Barnes is entitled to two years' disregarded sick leave.

[33] Ms Barnes's challenge to the Authority's costs determination succeeds. The Association is ordered to pay her the sum of $9,170, less any amount of costs already paid pursuant to the Authority's determination, within 20 working days of the date of this judgment.

[34] The parties are encouraged to agree costs on the challenge. If that does not prove possible, I will receive memoranda, with Ms Barnes filing and serving any memorandum and supporting material within 20 working days of the date of this judgment; the Association within a further 15 working days; and anything strictly in reply within a further 10 working days.

Christina Inglis
Chief Judge

Judgment signed at 10:20am on 19 November 2020