IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 142
EMPC 69/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANDREW LEOTA Plaintiff
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Defendant

Hearing:	27 July 2016 (Heard at Auckland)
Appearances:	G Macdonald, advocate for plaintiff P Chemis and J Manoa, counsel for defendant
Judgment:	3 November 2016

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This is a de novo challenge to a determination of the Employment Relations Authority (the Authority) dated 24 February 2016.[1] It relates to a decision of the defendant to withdraw paid sick leave from Andrew Leota, the plaintiff, following excessive sick leave taken over the preceding four months of his period of employment.

[2] Mr Leota claims breach of the applicable collective employment agreement in withdrawing the entitlement. He also claims that in the course of dealing with the matter, the defendant breached good faith obligations and in two respects misused

[1] *Leota v Chief Executive of the Ministry of Social Development* [2016] NZERA Auckland 54.

confidential information relating respectively to his medical condition and the state of health of his children.

[3] The plaintiff seeks remedies of reimbursement (with interest) for lost income arising when he took further sick leave following the withdrawal of paid sick leave. He also seeks compensation for humiliation, loss of dignity and injury to feelings amounting to $15,000. He seeks damages for breach of confidence. There is some confusion in the pleadings filed by the plaintiff as to causes and remedies and these will be discussed later in this judgment.

Determination of the Authority

[4] The Authority made the following determinations:

(a) The defendant had a contractual right under the collective agreement dated 2016 (the same provisions are contained in the collective agreement of 2012) to decide to withdraw paid sick leave.

(b) In deciding whether to withdraw paid sick leave from Mr Leota from 25 August 2015 until 19 April 2016 the defendant complied with the collective agreement and the sick leave protocol incorporated into the collective agreement.

(c) The decision to withdraw paid sick leave was therefore, substantively and procedurally justified under s 103A of the Employment Relations Act 2000. Mr Leota's claim for breach of contract could not succeed.

(d) The defendant did not breach obligations of good faith in dealing with Mr Leota's sick leave; and his claim under that head could not succeed.

(e) While information concerning Mr Leota's medical condition was passed from one officer of the defendant to a more senior officer, that was appropriate recognition of the senior officer's authority in meeting the obligations of the defendant to Mr Leota as its employee.

That senior officer had the delegated authority to deal with Mr Leota's sick leave entitlement. Similarly a reference to Mr Leota's children in a medical report, procured by the defendant with Mr Leota's consent, was not a breach of confidentiality.

(f) Mr Leota's claim for breach of confidential information did not succeed. Accordingly, the Authority did not need to consider whether any penalties should be imposed on the defendant and, if so, whether part or all of such penalties, should be paid to Mr Leota.

[5] As costs were reserved by the Authority, it was later asked to consider costs against Mr Leota.[2] He was ordered to pay the defendant the sum of $1,500 towards its actual legal costs. No separate challenge has been lodged against the costs determination.

Factual outline

[6] At the time of the circumstances giving rise to the disputes in this matter, Mr Leota had been in employment with the defendant for over five years, having commenced employment on 19 April 2010. At the time of the disputes he was a Residential Youth Worker at Korowai Manaaki Auckland Youth Justice Residence and was employed on a full-time permanent basis. He was a member of the PSA, the union which negotiated the collective agreement with the defendant Ministry covering Mr Leota's employment. This collective agreement was the Child, Youth and Family collective agreement dated 1 July 2012 until 30 June 2015 (CA 2012). This was renewed for the period 1 July 2015 until 30 November 2016 (CA 2016). There were no material differences between the collectives in respect of the relevant sick leave provisions applying in this case. The clauses of the collective agreement referred to in this judgment are those contained in CA 2016.

[7] Mr Leota was on an extended period of special leave for four months until 2 April 2015 when he returned to work. On 4 June 2015 he was to attend a periodic meeting with his Team Leader. Prior to the meeting the Team Leader had been

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2 *Leota v Chief Executive of the Ministry of Social Development* [2016] NZERA Auckland 103.

informed that Mr Leota had called in sick for one of the shifts as he had been in hospital. The Team Leader was concerned at this information and intended to raise it at the meeting to make sure that Mr Leota was all right. The Team Leader had also checked Mr Leota's sick leave balance before the meeting and as at 4 June 2015 he was found to have taken 16.5 days of paid sick leave from the time of his return to work on 2 April 2015. This was also to be a topic of conversation at the meeting, as the Team Leader was concerned that Mr Leota was unwell.

[8] At the meeting Mr Leota told his Team Leader that his doctor had advised him that he might be in the early stages of kidney failure and that he had been to the hospital for a check-up and tests. He indicated that it did not affect his ability to work at the time. The Team Leader recalls thinking at the time that Mr Leota's kidney failure could explain his absenteeism. The Team Leader explained to Mr Leota that his sick leave appeared excessive and that he needed to refer the matter to the Residence Manager who had the delegated authority to respond to concerns of excessive sick leave. This was usual practice. The Team Leader also stated in evidence that in referring the matter to the Residence Manager, he informed her of Mr Leota's kidney problems.

[9] Following the matter being referred to her, the Residence Manager, assisted by a Human Resources Consultant with the Ministry, adopted the Ministry's Management of Sick Leave Guidelines incorporated into the collective agreement, to consider and deal with Mr Leota's apparently excessive use of paid sick leave. The Residence Manager and the Human Resources Consultant described in their evidence the process that they adopted. This involved arranging meetings with Mr Leota, with proper notice being given in each case and giving Mr Leota the opportunity to be represented. He was given notice that consideration was being given to withdrawing further paid sick leave pursuant to the provisions of the collective agreement.

[10] The first such meeting occurred on 1 July 2015. During this meeting Mr Leota explained that he was often on sick leave because of common colds. He also indicated that there were no serious issues with his kidneys. Mr Macdonald, advocate for Mr Leota, claimed that the provisions in the collective agreement,

which the defendant was relying upon, did not apply unless medical retirement was being considered. He also asserted that there had been a privacy breach as a result of the Team Leader informing the Residence Manager of Mr Leota's kidney problems. It was also at this meeting that Mr Macdonald informed the Residence Manager and the Human Resources Consultant that Mr Leota would be raising a personal grievance. This was somewhat premature as the matter was still under investigation at that stage. It was agreed at the meeting that Mr Leota would be referred to a medical practitioner for an occupational health assessment; and Mr Leota signed a medical assessment form consenting to allowing Dr Steve Culpan to provide the Ministry with the results and findings arising out of the medical examination he was to make of Mr Leota.

[11] Following this meeting, Dr Culpan prepared a report and sent it to the Residence Manager via the Human Resources Consultant. It was also supplied to Mr Leota. Dr Culpan found that there was no chronic illness or underlying untreated health problem, or poor or diminished immunity, which would explain Mr Leota's claimed illnesses. Dr Culpan could not find any environmental causes of increased ill-health in the environment in which Mr Leota worked. His finding was:

> Having considered all these ma[t]ters I can see no easy way of improving his attendance at work and diminishing his sick leave. There is no medical intervention to lessen these absences, nor is there any untreated health problem that we can improve to assist him to have less sick leave.

[12] In the report which Dr Culpan provided to the Residence Manager, it referred in passing to comments Mr Leota made about his own children's health. This, however, was in the context of whether there was anything in Mr Leota's home environment which might explain his recurring problems with cold and flu. These comments of Dr Culpan are subject to a claim of breach of confidentiality by Mr Leota.

[13] A further meeting took place on 25 August 2015. Mr Macdonald was again present, representing Mr Leota. The purpose of the meeting was to consider Dr Culpan's report. Mr Leota had by then continued to take sick leave from work and as at 21 August 2015, the amount of sick leave he had taken since the anniversary of commencement of employment on 19 April 2015 had increased to 30.5 days. The

Residence Manager in her evidence stated that in four months Mr Leota had been off sick for periods totalling about six weeks. In other words he was attending work about 65 per cent of the time, which was just slightly less than three days per week.

[14] The meeting had hardly got underway when Mr Macdonald spoke on Mr Leota's behalf and indicated that there had been a privacy breach and that the Ministry was not acting in good faith in its proposal to withdraw paid sick leave. Mr Macdonald again somewhat prematurely stated that Mr Leota would be lodging a personal grievance. As the meeting progressed, neither Mr Macdonald nor Mr Leota engaged in any real way and made no comments on Dr Culpan's report except to claim that there had been a further breach of confidentiality with the comments about Mr Leota's children.

[15] The Residence Manager and the Human Resources Consultant then took a break to consider the matter further; and following this made the decision to withdraw paid sick leave from Mr Leota until the next anniversary of Mr Leota commencing employment, which would have been 19 April 2016. Any further sick leave taken would be recorded as unpaid sick leave in order to preserve Mr Leota's annual leave entitlements. The Residence Manager in her evidence also stated that between the decision on 25 August 2015 and the anniversary of employment on 19 April 2016, Mr Leota took a further 37 days unpaid sick leave.

Pleading issues

[16] As indicated earlier, the pleadings contained in Mr Leota's statement of claim are somewhat confusing. The particulars of the claim are stated to be:

(a) breach of contract;

(b) breach of good faith;

(c) breach of confidence.

[17] The remedies sought are reimbursement of the wages Mr Leota claims to have lost as a result of his paid sick leave being removed and his taking further sick leave from the date of the decision. He is also claiming compensation of $15,000 for

"hurt and humiliation, breach of contract, breach of good faith and breach of confidence". This is stated to be a global award. The remedies, which have been claimed under the Employment Relations Act 2000, are remedies in relation to personal grievances, although the statement of claim does not specifically couch the claims as a personal grievance per se. Making the best that I can of the statement of claim, apart from the claim for damages for breach of confidentiality, I take the remaining claim to be a disadvantage grievance pursuant to s 103(1)(b) of the Act.

[18] Adding to the complications arising from the pleadings, there is also the fact that during the course of evidence Mr Leota gave no evidence on compensation or damages. During the course of giving oral submissions, Mr Macdonald conceded that there had been no evidence led. While any claim for reimbursement of sick leave pay can be easily calculated, it is difficult to see how the Court could assess compensation or damages in the event that Mr Leota's claims were upheld.

Legal submissions on the collective agreement and incorporated documents

[19] The sick leave provisions in the collective agreement CA 2016 are contained in cl 6.3 and incorporate the "sick leave protocol".[3] That protocol is more correctly described as the defendant's "Management of Sick Leave Guidelines". Mr Macdonald in submissions for Mr Leota presented a complicated argument as to the interpretation of the collective agreement and the guidelines in an effort to submit that the defendant had no entitlement in this case to place Mr Leota on unpaid sick leave. For reasons stated in this judgment, his submissions are rejected as untenable.

[20] Mr Chemis, counsel for the defendant, usefully set out the applicable portions of the collective agreement and guidelines in his submissions. Mr Macdonald did not dispute that these are the applicable provisions for consideration in this case. With Mr Chemis' emphasis added, his submissions are as follows:[4]

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[3] The terms in CA 2016 are identical to those contained in CA 2012. The enumeration of the clauses is slightly different.

[4] Formatting and "Emphasis added" as in original document.

The CEA and the Guidelines

The CEA

8. Clause 6.3 of the CEA explains the purpose of sick leave (document 1, page 27):

> *The purpose of sick leave is to protect employees when by reason of illness they are prevented from attending work. Sick leave is to be administered fairly by managers and utilised responsibly by employees.*

9. Clause 6.3 also provides that:

> *For permanent employees with more than 2 years' service, sick leave is provided **as required** while an employee is sick.* (Emphasis added) (Mr Leota has more than 2 years' service.)

10. Clause 6.3.2 provides that *"sick leave shall be managed in accordance with the 'sick leave protocol'"*. The sick leave protocol is also known as the Management of Sick Leave Guidelines (the Guidelines).

11. Clause 6.3.3 addresses cases of "*long term or recurring illness*". It provides:

> *Before deciding to withdraw sick leave on pay **or** terminate employment, the Ministry will discuss the situation with the employee (and their representative if desired). The Ministry will give reasonable notice of their intention to hold such a meeting and will give due consideration to the member's views.*
>
> *Factors to be considered in the decision are:*
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> - *sick leave taken and length of service*
> - *prospect of a timeline for recovery*
> - *rehabilitation prospects, including suitable alternative duties*
> - *employee's personal circumstances, hardships and impact on their career*
> - *reasonableness of cost for the Ministry*
>
> *Following discussions with the employee (and their representative) the Ministry **may withdraw sick leave on pay, or** terminate an employee by giving appropriate notice if the Ministry is of the opinion that the employee is incapable of the proper performance of their duties as a result of incapacity due to illness or accident. Further guidance can be found within the sick leave protocol.* (Emphasis added)

12. It is clear that there are two options – the withdrawal of paid sick leave, or termination. (Termination is only an option where employees are *"incapable of proper performance of their duties".)*

The Guidelines

13. The Guidelines follow and expand on clause 6.3 of the CEA. Paragraph 8.1 of the Guidelines makes it clear that 'sick leave as required' is not an entitlement to unlimited paid sick leave:

> *Permanent employees with more than 2 years' service are entitled to sick leave 'as required while the employee is sick'.* ***This is not an entitlement to unlimited paid sick leave.*** *It is an entitlement to paid sick leave that has not been specified as having a defined maximum entitlement (known as 'unspecified paid sick leave').*
>
> *While CYF will apply entitlements to paid sick leave fairly and reasonably,* ***the obligation to maintain an employee's pay when an employee is absent due to illness or injury is not indefinite and entitlements to paid sick leave cannot be open-ended.***
>
> ***CYF may cease to provide paid sick leave*** *and place an employee on some other form of leave (such as unpaid sick leave) in appropriate circumstances. Examples of such circumstances include an employee's long term or* ***recurring*** *absence from work due to illness or injury.* (Emphasis added)

14. Paragraph 8.2(b) of the Guidelines repeats the five considerations set out in clause 6.3.3 of the CEA and specifies that a fair process must be followed prior to making a decision to place an employee on unpaid sick leave. Specifically:

> *(d) In every case where a manager is considering placing an employee on unpaid sick leave, the manager will follow due process and will adhere to principles of natural justice in making their decision. The manager will also take the employee's particular circumstances into account and must consult with their HRC [Human Resources Consultant] prior to taking any action.*
>
> *(e) The manager will advise the employee in writing as soon as practicable after making a decision to place the employee on unpaid sick leave.*

15. Paragraph 11.1 of the Guidelines provides that initially any concerns should be raised informally.

[21] Mr Macdonald's submissions seem to be that where there is conflict between the collective agreement and the Guidelines, regard must be had to the collective agreement as the primary document, to the exclusion of and prevailing over the Guidelines. He ran an argument that there are only limited circumstances where the Ministry is entitled to withdraw paid sick leave, which is otherwise open-ended. In

particular, he concentrated on the penultimate paragraph of cl 6.3.3 of the collective agreement to the effect that both the withdrawal of sick leave on pay and the alternative of termination of employment are dependent on the employee being "incapable of the proper performance of their duties as a result of incapacity due to illness or accident". No such lack of capability exists with Mr Leota.

[22] Mr Macdonald has also argued that Mr Leota's illness is neither long term nor recurring. The illnesses upon which Mr Leota took and apparently continues to take sick leave are not long-term, although they might soon reach that category in which case termination of employment may become an option. However, they can clearly be categorised as recurring despite Mr Macdonald's argument to the contrary. Mr Leota himself described his symptoms as recurring common cold or flu-like symptoms. Certainly Mr Leota's absences would be properly described as recurring absences; the wording used in the Guidelines.

[23] A rather surprising concession made by Mr Macdonald during the course of submissions was that if Mr Leota does not suffer from long-term or recurring illness and the collective agreement and Guidelines do not entitle the Ministry to withdraw sick leave on pay, then the only alternative remaining for dealing with Mr Leota's unsatisfactory attendance is to dismiss him for cause. While this might be available as an option in the event that it could be shown Mr Leota was abusing sick leave, I am not sure whether this would be the position which Mr Leota would personally want to take in the present case. It would also run counter to the stated principle in the first sentence of cl 6.3.3 of the collective agreement that the Ministry will always do its best to provide continued employment when employees are prevented from attending work due to long-term or recurring illness or accidents.

[24] The defendant Ministry's position in this case is that Mr Leota's illness is recurring and the collective agreement (at cl 6.3.3) and the Guidelines applied to give an entitlement to withdraw sick leave on pay for the period specified in the notification given to Mr Leota. The combination of the collective agreement and Guidelines set out the procedure for this being done in a fair manner.

[25] From Mr Macdonald's submissions and the way evidence was presented, I did not understand there to be any argument from Mr Leota that apart from the substantive disentitlement to withdraw sick leave on pay, the Ministry failed to carry out the investigation and decision in a procedurally fair manner. The Residence Manager stated in evidence that neither Mr Macdonald nor Mr Leota engaged in the 25 August meeting in any real way. Mr Leota, in his evidence, explained that he did not participate to any great degree in the meetings leading to the decision being made because he felt he had very little to add. This was his choice and he was represented with Mr Macdonald being present on each occasion. At an early stage in both meetings, Mr Macdonald indicated that a personal grievance would be raised, even before the defendant had considered the matter and issued its decision. Mr Leota, in his evidence, stated that the second indication of a personal grievance being raised was given after Dr Culpan's report was discussed and considered. However, the Ministry had not made any decision at that point and no criticism could be levelled at the Ministry for actions clearly those of Mr Leota and his advocate in 'beating the gun' in this way. The action of Mr Macdonald and Mr Leota indicated that they were intent on raising technical legal issues, rather than allowing the Ministry to properly proceed to deal with and decide upon Mr Leota's unsatisfactory sick leave position on the facts and the merits.

Conclusions – unpaid sick leave

[26] Clearly the combination of the collective agreement and the Guidelines present an inconvenient position for the submissions Mr Macdonald makes on behalf of Mr Leota. The problem with Mr Macdonald's attempt to minimise the application of the Guidelines is that the Guidelines are specifically incorporated into the collective agreement in more than one of the provisions relating to sick leave. Management of sick leave is mandatorily required to be in accordance with the Guidelines or "protocol" as they are referred to in the collective agreement. Mr Macdonald's attempt at interpretation of cl 6.3.3 runs contrary to the entire scheme for sick leave contained in cl 6.3 of the collective agreement and the Guidelines. He has also clearly misinterpreted the penultimate paragraph of cl 6.3.3 by arguing that withdrawal of sick leave on pay can only be made where the Ministry is of the opinion that the employee is incapable of the proper performance of their duties as a

result of incapacity due to illness or accident. However it is clear from the wording of the paragraph that the Ministry may either withdraw sick leave on pay, or, where the employee is incapable of proper performance of their duties as a result of incapacity, choose the option of terminating the employment. That is, the choice to withdraw sick leave on pay is independent of the situation where the employee's employment may be terminated for incapacity. Being incapable of performance of duties could logically only give rise to consideration by the Ministry of termination of employment. Withdrawal of paid sick leave would be the option adopted if the employee remains capable of performance and remains working.

[27] Mr Leota is a permanent employee with more than two years' service and therefore was entitled to sick leave as required in accordance with the collective agreement. There is no suggestion in this case that Mr Leota's illnesses are not genuine, even though the defendant, following Dr Culpan's assessment of them as having no apparent cause, must have harboured some doubts. However, while the provision of sick leave for persons of Mr Leota's status is generous, as both the collective agreement and the Guidelines in combination provide, the leave entitlement is not open-ended. The collective agreement contemplates at cl 6.3.3 that where there is long-term or recurring illness, withdrawal of sick leave on pay can be contemplated and managed in accordance with the provisions of the collective agreement and the Guidelines. The Guidelines also refer to recurring absence. As already discussed, termination of employment can separately be made where it is shown that there is incapacity causing the employee to be incapable of performing their duties. It would therefore be absurd to suggest as Mr Macdonald now infers that only where such incapacity exists can withdrawal of sick leave on pay with the employee remaining in permanent employment be an option.

[28] To be clear, Mr Macdonald's submission that the only position applying in this case is open-ended sick leave on pay pursuant to the collective agreement is not tenable. Mr Macdonald's further argument that cl 6.3.3 is an exclusion clause to be strictly applied in this case is similarly not tenable. His submission that the Guidelines are to be disregarded as not forming part of the collective agreement on the basis of some perceived conflict cannot be correct where the Guidelines are specifically referred to and incorporated into the collective agreement.

Conclusions – breach of confidentiality

[29] To succeed with his claim of breach of confidentiality Mr Leota must show that:

(a) The information imparted had the necessary quality of confidence;

(b) The information was imparted in circumstances importing an obligation of confidence; and

(c) There must have been unauthorised use of that information to the detriment of the communicator.

[30] These principles were established in *Coco v A.N.Clark (Engineers) Ltd*.[5] Since the test laid out in *Coco*, case law has clarified that "circumstances importing an obligation of confidence" means that there exists "a reasonable expectation of confidentiality or privacy and the defendant has agreed to keep the information confidential or has notice of its confidentiality."[6]

[31] Mr Macdonald relied upon both *Coco* and *R v X* in his submissions. While he argued that the first two criteria in *Coco* were met in this case, he was unable to point to any evidence which established the third category that Mr Leota had suffered detriment by use of the information.

[32] The claim for breach of confidentiality relates to two circumstances already mentioned. The first was the passing of information as to Mr Leota's possible kidney malfunction by the Team Leader to the Residence Manager. The second was the brief mention in Dr Culpan's report as to the state of health of Mr Leota's children. Neither of these circumstances can give rise to any claim. The Residence Manager was the only person delegated by the defendant to deal with excessive leave issues. It was appropriate for the Team Leader to pass on the information in the way that he did. As both the Team Leader and the Residence Manager stated in their evidence, the primary concern was not any disciplinary matter but concern for Mr Leota's state of health. The passing of such information internally within the

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5 *Coco v A.N.Clark (Engineers) Ltd* [1969] R.P.C. 41 at 47.
6 *R v X* [2009] NZCA 531, [2010] 2 NZLR 181 at [45].

Ministry for such purpose and to comply with delegated authority and pastoral care obligations towards an employee cannot have been a breach of confidentiality.

[33] Insofar as Dr Culpan's report is concerned, Mr Leota had authorised Dr Culpan in writing to examine him and report to his employer. The report was directed to the Human Resources Consultant and both she and the Residence Manager must have been representatives of Mr Leota's employer contemplated by the written authority which he gave. It was necessary for Dr Culpan to consider Mr Leota's home environment in reaching his diagnosis and opinions. He reported as directed and did not disseminate the information to any other officer within the Ministry. There can be no breach of confidentiality in such circumstances. Even if there was a breach it would not extend beyond de minimus.

Disposition

[34] As stated earlier, in respect of both of the alleged breaches of confidentiality and the decision to remove paid sick leave entitlement, Mr Leota gave no evidence at all of any alleged detrimental effect upon him by the Ministry's actions. Compensation and damages as remedies are claimed but the Court has no evidence which might provide it with assistance in quantifying such damages, even if it was minded to grant Mr Leota remedies on these claims.

[35] In conclusion therefore, Mr Leota's claims must fail. The technical legal arguments Mr Macdonald has raised are without substance. The findings which the Authority Member made in her determination are correct. The challenge is dismissed in its entirety.

Costs

[36] Insofar as costs are concerned, they should follow the event. The costs award in the Authority proceedings is confirmed. There was, in any event, no challenge to the determination on costs and it was made in accordance with practices applying in the Authority. Costs on the challenge are reserved. Mr Chemis is to file a memorandum as to costs on behalf of the defendant within 14 days of the date of this

judgment. Mr Macdonald then has 14 days to file any memorandum in reply. In view of the continuing employment relationship between the parties, consideration should be given as to whether the issue of costs can be finally resolved amicably without the need of further orders of the Court. However, if such an agreement cannot be reached, then the timetabling directed will apply.

M E Perkins
Judge

Judgment signed at 3 pm on 3 November 2016