IN THE EMPLOYMENT COURT
WELLINGTON

WC 1/07
WRC 1/07

IN THE MATTER OF	an application for interlocutory injunction
BETWEEN	LEN HUNTER Plaintiff
AND	THE NATIONAL INSTITUTE OF WATER AND ATMOSPHERIC RESEARCH LIMITED Defendant

Hearing: 24 January 2007

Appearances: R M Crotty, counsel for plaintiff
Penny Shaw, counsel for defendant

Judgment: 26 January 2007

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

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[1] Mr Hunter is an employee of The National Institute of Water and Atmospheric Research Limited (NIWA). He is employed pursuant to a collective employment agreement dated November 2004. The agreement contains provisions for the setting and increase (or decrease) in remuneration and promotion within salary levels. An appeal process is contained within the provisions of the agreement. The appeal process does not preclude access to personal grievance or dispute resolution procedures. The collective agreement is supplemented by a policy and procedure manual.

[2] Mr Hunter became disaffected with his failure to gain increases in remuneration or promotion within salary levels. He claims that this has resulted from personality conflicts with his supervisors and reviewers rather than genuine performance issues. He has pursued the appeal process but failed. As a result of the stress arising from this issue he alleges he has suffered a decline in his health. He is

now diagnosed as suffering from an anxiety disorder and depression. The medical advisors refer to the personal relationships as causative but of course rely upon Mr Hunter's self reporting. There is no doubt, however, that Mr Hunter's illness is genuine and he has for some time been unfit for work. Recently a registered consultant psychologist has reported to NIWA that Mr Hunter may return to work but in a position other than the field work he was previously undertaking. NIWA does not presently have a position, which would take account of the special requirements if he was to return to work.

[3] Mr Hunter has been on extended paid leave since 17 January 2006. The generous sick leave provision in the collective agreement is clause 18. Clause 18.1 as far as it is relevant to this matter reads as follows:

> ***18.1 Sick Leave***
>
> *The company recognizes that employees take sick leave only in cases of genuine illness or accident.*
>
> ***18.1.1*** *In the event of absence because the employee is sick or has an accident the employee shall be allowed leave with pay.*
>
> …

[4] The clause appears to be open ended. However, in December 2006 in reliance upon clause 30.1 of the agreement, NIWA notified Mr Hunter that while his employment will remain intact his sick leave pay would be stopped on 17 January 2007, being the anniversary of its commencement. He was thereafter to be on leave without pay. NIWA indicated that in view of the fact that suitable alternative positions were not available it would consider retirement on medical grounds. The process to initiate such retirement has not yet commenced. Discussions were held as to whether in the meantime Mr Hunter should elect to use his accumulated annual leave.

[5] Clause 30.1 of the collective agreement relied upon by NIWA is set out as follows:

30.1 Retirement on Medical Grounds

a) *If an employee through serous illness or accident becomes unable to perform satisfactorily, NIWA will provide that employee with paid sick leave for the period of incapacity, for up to 12 months. If the incapacity extends beyond 12 months such an employee can be medically retired, if in the certified opinion of a medical practitioner nominated by NIWA, the employee is medically unfit to perform the duties of the position, provided there are no suitable duties which, with the employee's agreement, can be assigned to the employee in another position.*

An employee who is medically retired will be paid a lump sum retiring leave of 65 working days.

b) *Where an employee is eligible for payment through the NIWA Group Life Insurance Scheme, the above does not apply.*

[6] In response to the notification of expiry of sick leave Mr Hunter has applied to the Employment Relations Authority in Wellington for resolution of an employment relationship problem with NIWA. That proceeding follows the submission or raising of the grievance with NIWA on 21 December 2005. In addition, Mr Hunter has applied to this Court for an interlocutory injunction restraining NIWA from discontinuing his paid sick leave in the interim until his employment relationship problem is determined by the Authority. This process is adopted by Mr Hunter pursuant to regulation 6 of the Employment Court Regulations 2000, Rule 238 of the High Court Rules and the suggested procedure for such applications contained in the full Employment Court decision *Axiom Rolle PRP Valuations Services Ltd v Kapadia* (2006) 3 NZELR 390.

[7] The application before the Authority seeks reconsideration of the decisions by NIWA not to grant salary increases and that increases be paid retrospectively from 1 July 2005. Conceptually such an application may pose grave problems for the Authority but it is not for me to resolve such a difficulty now. Mr Crotty, counsel for Mr Hunter, indicated that the proceedings have been filed in haste and may require amendment prior to hearing. In addition the proceedings before the Authority claim compensation and costs.

[8] NIWA opposes the granting of an interim order. Ms Shaw, counsel for NIWA submitted that there is no arguable case as NIWA has fully complied with its obligations and adopted its entitlements under the collective agreement in relation to sick leave. She further submitted:

a) That the interim order sought bears no relationship to the cause and remedies sought in the Authority and therefore there is no substantive application to which the injunction relates;

b) That Mr Hunter is now in a position where he must work to be paid;

c) That his sick leave entitlement will come to an end when his employment ceases as NIWA is considering retirement on medical grounds;

d) That his allegation that NIWA is responsible for his ill health and inability to work is a weak one.

[9] Insofar as the balance of convenience is concerned Ms Shaw submitted that this favoured the employer, NIWA. Mr Hunter, she submitted, has not provided evidence of how he might be inconvenienced by loss of income until the determination by the Authority. The Authority she advised has agreed to accord urgency to the application and Mr Hunter has access to accumulated annual leave of 38.5 days to tide him over in the interim.

[10] Ms Shaw submitted that in respect of the overall justice of the matter the application should be refused. Mr Hunter could have acted more promptly, that redeployment could have been a possibility had he done so and that he knew his sick leave entitlements were due to end on 17 January 2007. Further, she submitted, Mr Hunter did not lodge his personal grievance until over a year after it was first raised with NIWA.

[11] Mr Crotty submitted in support of the application that Mr Hunter relies upon the proper construction of the sick leave provisions in the collective agreement to establish an arguable case. He conceded that on the face of the documents filed with the Authority, the causes and remedies contained in the statement of problem and statement of claim filed in this Court do not immediately show a nexus with the orders sought in the interlocutory application. That, he submits, is a result of the general way in which employment relationship problems such as this are placed before the Authority and the process then imposed by *Axiom Rolle* as to the interim orders having to be sought in the Court as opposed to the Authority. In any event he

indicated that with time now available the pleadings in the Authority can be tightened. He also submitted that when the documents in their entirety are considered as a whole, the claim for compensation must include remedies specifically related to the alleged health consequences of NIWA's actions and go beyond merely re-traversing the remuneration review and subsequent appeal. When read in this light he submitted there is a nexus with the present application, which is made merely to preserve the status quo, pending determination of Mr Hunter's claim, not only for remuneration increases but compensation for the effects upon him. Mr Crotty submitted that any remedy granted by the Authority is more likely to be contained within compensation than lost remuneration. He made that submission, I perceive, in consideration of the serious conceptual difficulties the Authority will face to which I have referred earlier.

[12] Insofar as balance of convenience is concerned Mr Crotty submitted that Mr Hunter is not a member of any income protection insurance. Stopping Mr Hunter's pay will have obvious consequences on his wife and two children. He has obligations to the Government Superannuation Fund. Stopping his pay, Mr Crotty submitted, will have an immediate effect on his entitlement to subsidy and may affect elections he is entitled to make in such circumstances, which may have substantial on flow consequences. Unfortunately, as Ms Shaw submitted, the evidence on such matters is not contained in Mr Hunter's affidavit and consists of statements Mr Crotty made from the bar. However, as a matter of commonsense, the effect on Mr Hunter and his family of his sick pay ceasing will be grave. NIWA's submission to the contrary strikes me as being somewhat facetious.

[13] Insofar as the overall justice is concerned Mr Crotty in reply pointed out that while over a year has elapsed since the grievance was raised, in the interim there has been ongoing correspondence, medical assessment and reporting and attendance at mediation. Mr Hunter, he submitted, did not anticipate suspension of his sick pay and on a proper construction of the employment agreement had no reason to do so.

[14] I am of the view that in determining whether there is an arguable case for the purposes of the present application the matter may be resolved by a proper construction of the clauses of the collective agreement. As I have indicated the provision as to sick leave provides open ended entitlement to sick pay in cases of

genuine illness or accident. Clause 30.1, which relates to retirement on medical grounds, and upon which NIWA now relies, provides that NIWA will provide paid leave for the period of incapacity up to 12 months. If the incapacity extends beyond 12 months then the employee can be medically retired. This is not a case where the NIWA group life insurance scheme applies. Ms Shaw submitted that clause 30.1(a) effectively limited the maximum payment under 18.1.1 to 12 months. If that is so then there is a clear conflict between the provisions in the collective agreement. However, I do not consider the submission by NIWA represents a true construction of clause 30.1(a). The decision by an employer to medically retire an employee is discretionary. It seems to me that the 12-month period specified in that clause is not to set a mandatory limit on the period of sick pay, but merely to trigger the circumstances after which the employer can elect to retire the ill employee. To hold as NIWA submits in this case would mean that an employee who continued to be ill and was to be medically retired would have to wait for what might be a significant period of time without pay while the formalities of the retirement were carried out. Medical opinion is to be necessarily obtained and alternative suitable duties are to be canvassed. In the present case that is the very circumstance, which has arisen, although NIWA has not yet even exercised the discretion and of course the proceedings here have intervened. Additionally, the construction submitted for by NIWA would, if it chose not to medically retire an employee who continues to be ill, simply allow it to cease payment and sit on its rights. The ill employee would then remain in employment but be unable to work, be without remuneration and with all rights suspended. I cannot see how such a consequence could have been contemplated or be fair or equitable.

[15] It seems clear that when the collective agreement is read in its entirety any period of sick leave beyond the 12-month period, whether the discretion under clause 30.1 has been exercised or not, is to be on a paid basis. The consequences of the alternative suggested by NIWA would, as the present case shows, be disastrous for an impecunious employee and have the potential to promulgate grave disadvantages in respect of superannuation entitlements. Such a construction would also clearly offend against the statement of principles contained in clause 1 of the agreement which reads as follows:

> ***1. STATEMENT OF THE PARTIES***
>
> *The parties recognize that they have a mutual interest in the efficient and profitable operation of the business of NIWA. NIWA recognizes that the employee is entitled to fair and equitable treatment. If any interpretation is required of this agreement it will be based on the intent of the agreement.*

I prefer the interpretation submitted by Mr Crotty for this reason.

[16] However, if I am not correct in this conclusion it is clear that the prospect of disputed construction and the lodging of an statement of an employment relationship problem with the Authority give rise to an arguable case. The threshold for the granting of an interim injunction on this ground is therefore reached. In saying that, however, I need to emphasise that I reach this conclusion only for the purposes of the present application for interim intervention. While I have decided there is an arguable case on these points the matter remains to be finally concluded by the determination of the Authority. Indeed it is the Authority, which is solely vested with first instance jurisdiction to construe employment contracts.

[17] Insofar as the balance of convenience is concerned it seems to me that it clearly favours the plaintiff. The disastrous consequences of loss of pay in the interim are obvious. While it is unfortunate that there is not further evidence on the superannuation consequences enough is known about superannuation schemes to enable me to presume that failure or inability of the employee to make his own contributions is likely to negate entitlement to subsidy from the employer. In the event of retirement certain elections having financial consequences must be notified in a timely manner to the manager of the scheme. Immediate termination of the payment as proposed by NIWA is likely to prejudice Mr Hunter in these respects. Against these likely significant consequences to Mr Hunter, the consequences for NIWA as employer are far less significant. Any payments made to which Mr Hunter may eventually be held to be not lawfully entitled can be retrieved by way of reimbursement on the basis of the undertaking as to damages. In addition, because of my decision on the outstanding holiday pay on which I shall shortly elaborate, a potential fund for such reimbursement will, albeit in part, be available.

[18] It is clear that the balance of convenience favours Mr Hunter.

[19] In a consideration of the overall justice of the case I am sympathetic to the submission that Mr Hunter has somewhat sat upon his rights and waited to bring the application to the Authority in a situation of crisis. However, as Mr Crotty submitted, the year, which has elapsed since the grievance was initially raised, has seen more than one mediation and correspondence was continuing between the parties right up until the decision of NIWA to cease payment of sick leave. In addition, the Christmas and New Year vacation period has made communication between Mr Crotty and Mr Hunter difficult.

[20] I consider that for reasons I have already enunciated any considerations of overall justice do not lead me to any conclusion that I should exercise my discretion against Mr Hunter and refuse his application. Simply on the grounds of fair and equitable treatment the status quo should be maintained.

[21] During my discussions with counsel the issue of the outstanding leave entitlements were raised. This was in the context of whether Mr Hunter should, in the interim, use up his leave entitlements in the period leading up to the determination by the Authority. Of course if the period exceeded the leave outstanding then the sick leave pay would need to be reinstated in view of my findings. I have decided not to deal with this aspect of the matter in the way suggested and in particular by Ms Shaw. First, my role in the present application is to merely consider whether Mr Hunter's position in respect of sick leave pay should be preserved. To go further and insist that he first use his outstanding holiday pay unnecessarily impedes on an issue, which may be before the Authority as part of the employment relationship problem. In addition, clause 12.3 of the collective agreement would seem to suggest that an employee is not required to relinquish annual leave entitlement while on sick leave. Further, clause 12.8 might suggest that in any event Mr Hunter's accumulated annual leave might not be as extensive as previously indicated, particularly if part of the 38.5 days have accrued over the past 12 months. These are issues, which I should not attempt to conclusively resolve in the present application. They should be left to the Authority as part of its determination.

[22] In view of my conclusions there will therefore be an order restraining the defendant, NIWA, from ceasing to pay Mr Hunter sick leave pay until further order of the Court. Commonsense dictates the payment of such sick leave pay is to resume from 17 January 2007 being the date from which NIWA's unilateral decision to cease payments took effect. If any additional deductions or payment are necessary to preserve or reinstate superannuation entitlements then such deductions or payments are also to be made but ensuring that Mr Hunter nevertheless receives the same amount of net sick pay he was receiving prior to 17 January 2007. There will be no further order that prior to the determination of the Authority (and any appeal period, which may elapse, or period leading to any appeal being heard) Mr Hunter is to receive his outstanding holiday pay in lieu of sick leave pay. Such an order might offend against the provisions of the collective agreement but in any event is a matter for the Authority to decide as part of its determination.

[23] It is unlikely that this matter will come back before the Court. Accordingly, counsel have requested I deal finally with costs on the application for interim injunction. Mr Crotty submitted that the application was necessary on an urgent basis and that I should make an order based on Category 2(B) of the High Court Scale. This, he stated, would amount to $3,200.00 plus disbursements of $300.00. Ms Shaw submitted that costs should reflect the fact that Mr Hunter has not pursued his rights earlier and that if he had this matter might have been resolved, or at least the present application would have been unnecessary. I am conscious that the vacation period has imposed strains on counsel not of their own making. While I have not been prepared to find that the overall justice of this matter is affected by Mr Hunter's belated actions, I consider the present urgency has been partly of his own making. That should be reflected in costs. However, I propose to act on the principle that costs should follow the event. Mr Hunter has been successful. There will be an award of costs in his favour of $2,500.00 plus disbursements of $300.00.

M E Perkins
Judge

Interlocutory judgment signed at 5.05pm on Friday, 26 January 2007