IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 146
5380975

	BETWEEN	PETER ARGUS Applicant
	A N D	NEW ZEALAND STEEL LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Anne-Marie McInally, Counsel for Applicant Kylie Dunn, Counsel for Respondent
Investigation Meeting:	27 March 2013 at Auckland
Date of Determination:	29 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Argus) alleges that he has suffered an unjustifiable action causing him disadvantage and thus has a personal grievance because of the refusal of the respondent (New Zealand Steel) to pay him sick leave when he was entitled to it. New Zealand Steel resists Mr Argus' claim and contends there was no unjustifiable action causing him disadvantage and thus no personal grievance.

[2] The employment is covered by a collective employment agreement (the agreement) which came into force on 1 June 2011 and is set to expire on 31 May 2013. That agreement is between Mr Argus' union, the New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc (the union) and New Zealand Steel.

[3] Relevantly, the agreement has a provision entitled "Prolonged Sickness" at clause 30.8. The essence of that provision is to provide for further sick leave to be

available to an employee where he has first used his entitlement to ordinary sick leave and has been medically certified to take additional sick leave in accordance with the policy.

[4] The details of the implementation of that provision are covered by the human resources policy of New Zealand Steel which, amongst other things, sets out a table which quantifies the period of salary that will apply, in addition to normal sick leave, dependent on years of service of the employee concerned.

[5] It is common ground that during the 2011 bargaining for the agreement, the union sought to have the table just referred to incorporated within the agreement but that claim was resisted by New Zealand Steel. Notwithstanding that, both parties accept that there was an understanding that the implementation of the policy would remain untouched going forward.

[6] Mr Argus had worked for New Zealand Steel for around 20 years. He needed surgery on his shoulder and enquired about the prospect of applying for the "Prolonged Sickness" provision, should he need to. He was advised that, subject to medical certification, he could qualify.

[7] Mr Argus' evidence is that he had his shoulder surgery at the beginning of December 2011. He took his accrued sick leave first during his recuperation from the surgery but by 22 February 2012, Mr Argus remained certified unfit for work by his orthopaedic surgeon.

[8] That day, 22 February 2012, Mr Rick Davies, the pipe and light plate manager emailed the doctor then running the New Zealand Steel Medical Centre, Dr Burley, to indicate that he (Mr Davies) intended to attend Mr Argus' consultation with Dr Burley the following day, 23 February 2012. Mr Davies wished to attend the consultation because he wanted to use Mr Argus in a training capacity during the last stages of his recuperation from surgery.

[9] Contemporaneously with Mr Davies' contact with Dr Burley, the evidence is clear that Mr Davies also engaged with New Zealand Steel's human resources department to, *inter alia*, flag the fact that Mr Argus might need to engage the prolonged sick leave provisions of the agreement for the final three weeks of his recuperation from surgery.

[10] There is a process by which prolonged sick leave is applied for and there seems to have been some confusion about the provision of the appropriate application form but in the result, one was furnished and completed.

[11] Mr Argus presented at Dr Burley's surgery on 23 February 2012 as arranged and presented the medical certificate he had from his orthopaedic surgeon. That certificate confirmed that Mr Argus was fully unfit for work for the ensuing three weeks.

[12] In accordance with the arrangements previously made, Mr Davies, Mr Argus' manager, was present at the consultation. He sought Dr Burley's approval and Mr Argus' agreement for the latter to work part time to oversee training. The evidence the Authority heard suggested that Mr Davies thought highly of Mr Argus and wanted to use his expertise in training up other staff.

[13] The proposal was that Mr Argus would work four hours a day, for which he would be paid, and that he would receive the "Prolonged Sickness" payment for the remaining four hours of the day.

[14] Dr Burley, who gave evidence to the Authority on the matter, notwithstanding his retirement, indicated that he was prepared to certify Mr Argus as fit to return to duty on the part time basis proposed by Mr Davies, on the clear understanding that Mr Argus was not to undertake even light duties. He was to be employed exclusively in a training capacity. Similarly, Mr Argus was happy to be doing something useful to assist the employer and readily agreed to Mr Davies proposal.

[15] Mr Argus made it clear to the Authority in his evidence, not surprisingly, that the basis on which he agreed was on the understanding that it would not cost him financially to return to duty, that is that he could expect to be paid for the work that he was doing on a part time basis and for the balance of the day when he was not fulfilling the training role designed for him by Mr Davies.

[16] In his evidence to the Authority Mr Argus makes the point quite explicitly in the following passage:

> *"if anyone had said that agreeing to Rick's (Mr Davies') request would mean I would lose half a day's pay for every day, I would have refused. There was never any suggestion that I would have to go without pay, or use up my annual leave, to cover me for the time when I was medically unfit for work. Helping the company out is one thing.*

Giving up the income I am entitled to when I am unable to work is another story altogether and I would not have agreed to that."

[17] The Authority did not hear from Mr Davies but the evidence for New Zealand Steel was that the representations made about Mr Davies' engagement with this particular arrangement accurately portrayed what had happened. Furthermore, Mr Argus' evidence is consistent with the evidence given by Dr Burley who, notwithstanding his retirement, kindly attended the Authority and gave his evidence. The Authority is satisfied that all three men were clear that Mr Argus was to be paid for half the day his normal wage while he fulfilled the training role Mr Davies had for him and the other half day he was to be paid pursuant to the "Prolonged Sickness" provision of the agreement.

[18] Notwithstanding that clear understanding of the three men involved in the 23 February 2012 consultation in Dr Burley's office, New Zealand Steel's human resources declined the application to be paid pursuant to the "Prolonged Sickness" provision of the agreement. The human resources department's considered view was that, because Mr Argus had returned to duty, albeit at the request of the employer, he could not be said to be suffering a "continuous and prolonged absence from work" in terms of the relevant provision in the agreement and so could not access the "Prolonged Sickness" payment.

[19] The matter became the subject of discussion between New Zealand Steel and the union but was not able to be resolved by agreement and a personal grievance was eventually raised by the union on Mr Argus' behalf.

Issues

[20] In effect, the Authority is asked to determine whether what happened to Mr Argus was fair and just in all the circumstances and also to decide the meaning of the relevant clause in the agreement.

[21] It follows that it will be convenient if the Authority considers the following questions:

(a) What does the relevant clause mean?

(b) Is the understanding between Dr Burley, Mr Davies and Mr Argus relevant?

What does clause 30.8 mean?

[22] The interpretation of this provision must be considered in accordance with the relevant law. The Authority is satisfied that the law relating to the interpretation of employment agreements is now set out in the Supreme Court decision in *Vector Gas Limited v. Bay of Plenty Energy Limited* [2010] NZSC 5.

[23] The essence of the dispute between the parties revolves around the meaning of the word "continuous". The Concise Oxford Dictionary says that "continuous" means *"unbroken, uninterrupted, connected throughout in space or time"*.

[24] New Zealand Steel looked at the definition of "continuous" and concluded that, because the continuous nature of the absence from the workplace was broken by the effect of the agreement between Mr Argus and Mr Davies, supported by Dr Burley, it could no longer be said that Mr Argus was subjected to a continuous absence from the workplace.

[25] But the Authority's view is that that interpretation does not properly take account of the natural and ordinary meaning of the word "work" in the relevant clause. In the Authority's judgment, if the word "work" were synonymous with the word "workplace", then New Zealand Steel's interpretation would be difficult to dispute. But that cannot be the position. In using the word "work", the Authority considers that the parties were referring to the habitual and regular performance of the work normally and usually performed by the worker.

[26] It will be discerned immediately that on the basis of that understanding of the word "work", it is difficult to see any break in the period of "prolonged absence". This is because the work that Mr Argus was asked to do by Mr Davies, while tangentially related to his ordinary and habitual endeavours for New Zealand Steel, was not in fact his normal and usual work at all but was a special assignment which, by its very nature, was outside the norm of the work that he usually performed for New Zealand Steel.

[27] What is more, it is apparent on the facts that Mr Argus continued to be unfit for the work that he normally and habitually performed. Dr Burley made that perfectly plain in his evidence. And even on the basis of the agreement reached between Mr Argus, Mr Davies and Dr Burley, Mr Argus was still only attending at the workplace on a half time basis, and as the Authority has emphasised above, not

performing the work that he habitually and usually performed, and for the balance of the working day, Mr Argus continued to be unfit for the work he habitually and normally performed.

[28] It is the Authority's conclusion then that the interpretation of the relevant portion of clause 30 by New Zealand Steel cannot be sustained using the test enunciated by the Supreme Court in *Vector*. First, the Authority is satisfied that the intention of the parties contemplated work of the sort habitually and usually performed by the worker and not some unique and one-off role performed exclusively for the benefit of New Zealand Steel. Put differently, the Authority is satisfied that the intention of the parties in the drafting of the clause was not to equate the word "work" with the word "workplace".

[29] Further, the interpretation the Authority derives is in accord with the "ordinary meaning" of the word "work" *"in the context of the contract"* and the interpretation preferred by the Authority is in accordance with the ordinary and plain meanings of the words. Nothing in the Authority's interpretation of the matter does violence to commonsense.

[30] Moreover, the interpretation suggested by the Authority as the preferred one makes commercial and business commonsense as well; the whole point of the provision in the agreement is to provide an additional benefit for employees suffering a prolonged absence from work as a consequence of sickness or injury. Mr Argus, at the point at which he commenced the fateful arrangement with Mr Davies, was in possession of a certificate from his orthopaedic surgeon giving him another three weeks off work. It cannot be good commercial and business commonsense for the effect of that medical certificate from a specialist medical practitioner to be abrogated by the interpretation proposed by New Zealand Steel.

[31] It follows that the Authority does not accept that New Zealand Steel's interpretation of subclause 30.8 of the agreement is correct.

What about the agreement between Mr Argus and Mr Davies?

[32] The Authority is satisfied on the evidence it heard that New Zealand Steel is caught by the agreement made by Mr Davies with Mr Argus and even if the Authority had not concluded that New Zealand Steel's interpretation of the clause was mistaken,

the Authority would still be of the view that Mr Argus is entitled to the remedies he seeks because of the effect of the agreement between Mr Argus and Mr Davies.

[33] The evidence the Authority heard is unequivocal that there was a three-way agreement principally between Mr Argus and Mr Davies but supported by Dr Burley that in return for Mr Argus' commitment to attend the workplace and provide some training for half the working day, New Zealand Steel would pay him for that service at his usual rate of pay and the balance of his day would be paid under the "prolonged sickness" provision of the employment agreement. That is the understanding which the Authority is satisfied Mr Davies conveyed to Mr Argus and it was on that explicit basis and no other that Mr Argus accepted the arrangement proposed. Dr Burley's evidence to the Authority confirmed absolutely that that was the basis of the agreement. Indeed, Dr Burley went so far as to confirm that had it been otherwise, he would not have agreed to certify Mr Argus fit for the purpose designated by Mr Davies. That being the position, New Zealand Steel is estopped from resiling from the agreement made on its behalf by Mr Davies.

[34] The fact that Mr Davies apparently had no authority to make the agreement he did does not avoid the consequence legally of the doctrine of ostensible authority. Mr Argus believed on reasonable grounds that Mr Davies had the Authority to bind New Zealand Steel; he had no reason to believe otherwise and accordingly New Zealand Steel cannot now resile from the arrangement thus made.

[35] Put another way, New Zealand Steel made a promise to Mr Argus through Mr Davies, and notwithstanding the fact that Mr Davies had no authority to make the promise he did, the doctrine of ostensible authority must apply to create that authority. Mr Argus has relied on the promise made by Mr Davies and New Zealand Steel cannot now resile from that promise: the doctrine of promise re-estoppel applied.

[36] The Authority must conclude then that it was not available to a fair and just employer to conclude that it could resile from the promise made by Mr Davies ostensibly on behalf of New Zealand Steel on which Mr Argus relied to his detriment. Not only is that conclusion supported by the doctrine of ostensible authority and promise re-estoppel, but also by the statutory obligation for a party to an employment agreement to behave in good faith toward the other. And as the Chief Judge observed in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, *" a fair and reasonable employer will comply with the law.."*

Determination

[37] The Authority is satisfied that Mr Argus has suffered a personal grievance by having been disadvantaged by the unjustifiable action of New Zealand Steel when the latter failed to pay him prolonged sick pay in accordance with his contractual entitlement.

[38] The Authority has considered whether Mr Argus contributed in any way to the circumstances giving rise to his grievance and is satisfied that was no contributory behaviour: s.124 of the Act applied.

[39] Mr Argus is to have the annual leave that he took in lieu of going without pay returned to him for the relevant period and he is to be paid the prolonged sick pay that he was entitled to for that same period.

[40] There is a claim for compensation. In the normal course of events with these kinds of disputes around interpretation of contractual provisions, there may be a reluctance from the Authority to contemplate a compensatory award. But in the present case, the Authority is satisfied on the evidence that the individual at the centre of this matter, Mr Argus, suffered as a consequence of New Zealand Steel's approach to this matter. In particular, the Authority is satisfied that the evidence shows that Mr Argus lost confidence in an employer that he had served faithfully for fully two decades and in those circumstances, the Authority is persuaded that a modest award of compensation is appropriate.

[41] New Zealand Steel is to pay to Mr Argus the sum of $3,500 as compensation under s.123(1)(c)(i) of the Act.

Costs

[42] Costs are reserved.

James Crichton
Member of the Employment Relations Authority