

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Davis Lester Clarke (Applicant)  
**AND** New Zealand Trade and Enterprise (Respondent)  
**REPRESENTATIVES** Brian Spong, for Applicant  
Susan Hornsby, for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETING** 19 October 2004  
**SUBMISSIONS RECEIVED** 5 November, 16 November, 22 November 2004  
**DATE OF DETERMINATION** 8 June 2005

DETERMINATION OF THE AUTHORITY

- [1] From late 2001 until October 2002 Mr Clarke was on leave from his position as Business Development Adviser for Industry New Zealand. At that point it was still not clear how much longer it would be before he could return to full time duties. After a series of discussions with Industry New Zealand he was medically retired pursuant to his individual employment agreement. When his employment ended he received an additional payment of 45 days pay in addition to notice and holiday pay.
- [2] In January 2003 Mr Clarke raised a personal grievance of unjustified dismissal in relation to the termination of his employment. Industry New Zealand responded by saying that Mr Clarke's employment had been ended by an agreement that amounted to an accord and satisfaction. In any event it said even if it had not, a dismissal for incapacity would have been justified in all the circumstances. The parties attempted to resolve the matter through mediation without success and eventually, in 2004 the matter reached the Employment Relations Authority.
- [3] The issues for determination are:
- i. Whether a dismissal for incapacity could be justified;
  - ii. Whether Mr Clarke was dismissed or whether his employment was terminated by agreement amounting to an accord and satisfaction;
  - iii. If so, what was the scope of the accord?
- [4] Before proceeding I note that Mr Clarke's employer, Industry New Zealand was dissolved by statute (the New Zealand Trade and Enterprise Act 2003) and incorporated within New Zealand Trade and Enterprise from June 2003. It is common ground that New Zealand Trade and Enterprise assumes any liability for the organisation it replaced.

## Could a dismissal for incapacity be justified?

[5] Mr Clarke was first employed by Industry New Zealand in January 2001. He quickly established his competence and within a short time his salary was increased to \$105,000.00 per annum. In November of 2001 he went on sick leave. At that time he did not provide medical certificates or discuss the nature of his illness with his employer. Nonetheless his salary continued to be paid throughout December and January. By this time his health had improved and he advised that he intended to return to work in February. Then, on 26 January he suffered an accident which caused him serious head injuries and badly broken wrists.

[6] Mr Clarke was not able to organise his earnings related compensation until 13 March and in the meantime Industry New Zealand continued to pay him as before. By this time, he had had almost four months leave on full pay, after only nine months in the job to begin with. Meanwhile, Industry New Zealand had engaged consultants to cover Mr Clarke's work in his absence, at significant additional cost to the organisation.

[7] Mr Clarke's individual employment agreement contained the following provision:

*"This agreement may be terminated by Industry New Zealand by giving such notice, which will not be less than one month, as is appropriate in the circumstances, if, in the view of Industry New Zealand, you are incapable of the proper performance of your duties as a result of long term physical or mental illness and the position cannot be held open or covered by some other reasonable and appropriate arrangement including special leave provisions.*

*Before Industry New Zealand takes any termination action relating to your incapacity you will undergo a medical examination by a registered medical practitioner at Industry New Zealand's expense. Industry New Zealand will take account of any resultant report or advice, consider the circumstances of your situation and consider the options that are available before making a decision to terminate."*

[8] From April 2002 on there were intermittent exchanges between Mr Clarke and Industry New Zealand about work options that might be available to him depending on his prognosis (including redeployment to other roles within the organisation). During these discussions Mr Clarke mentioned that he was uncertain whether he would return to the organisation at all and was considering putting his energies into a business of his own instead. However he feared that to leave Industry New Zealand before he was recovered might affect his ACC entitlements so he preferred to hold off from making a final decision.

[9] Industry New Zealand regarded Mr Clarke highly and ideally, wanted him back in the job. It was sustainable for consultants to cover his work during the current financial year (to the end of July 2002) and so in the interim, it was decided to wait and see what happened with his health and his plans.

[10] On 13 August 2003 the respondent received a copy of a psychologist's report on Mr Clarke's progress. This was the second such report. It indicated that Mr Clarke still suffered from fatigue although his head injury had resolved to the point that he could consider a graduated return to work with the "prospect of a gradual increase" in his hours. The head injury had prevented Mr Clarke from driving but the report did not say whether he was now cleared for this. Mr Clarke was also waiting for the scheduling of surgery on his wrists.

[11] At that time Lance Wickman was the General Manager, Northern Region for Industry New Zealand. He arranged to meet with Mr Clarke on 23 August to discuss his rehabilitation and

other options in light of the recent report. Also present were Suzanne Wood (then Human Resources Advisor for Industry New Zealand) and Cheryl Crook (then Human Resources Manager for Industry New Zealand). Mr Clarke was advised that he could bring a support person but attended alone.

[12] Mr Wickman began the meeting of 23 August by seeking clarification of the time that might be involved in Mr Clarke's pending orthopaedic surgery. The position was that after the surgery he could take up to three months to recover altogether since the wrists would be operated on separately. In other words, Mr Clarke was now in a position to return to work part-time but would before too long require a further three months off work. It was not known how long it would be before he could manage full duties.

[13] Mr Wickman told Mr Clarke that the Business Development job could not be done part-time because clients needed to be able to contact their adviser at any time. In addition, it was considered essential for the Advisers to be able to visit clients, so a clearance to drive was required, and finally, the data entry requirements of the role had increased making the use of a keyboard unavoidable.

[14] Mr Wickman then said that given these constraints, it would not be possible for Mr Clarke to return to his old job. He then moved on to propose the alternative of placing Mr Clarke in another more suitable position within the organisation. He proposed three roles which were currently available and which were capable of being performed part-time. Ms Wood had already given Mr Clarke details of two of these positions. Mr Clarke felt that none of these positions were suitable for him, either because he did not have the right skill set, or in one case, because the position was at too low a level.

[15] Mr Wickman told me that at this point in the meeting he concluded:

*“Mr Clarke was not able to return to the Business Development Adviser role within the foreseeable future, he was not interested in any of the redeployment opportunities available and it was quite simply no longer sustainable for the business to hold the position open for a further indeterminate [sic] period of time. Given this I raised the possibility of a medical exit.”*

[16] Neither Mr Clarke nor Industry New Zealand considered arranging a further medical report at this stage (as provided for in the incapacity provisions of the employment agreement) because of the availability of the psychologist's reports and other information about Mr Clarke's health.

[17] After this meeting, further communication between the parties revolved around the exit package, and is of more relevance to the next issue. If a dismissal for incapacity is capable of justification, it must be justified on the events to this point.

## **Determination**

[18] In this case the parties had the benefit of an express provision in their agreement which identified what was to happen in the event of incapacity. This provision is consistent with the established case law. In submissions, Counsel for the respondent noted that in cases of termination for medical incapacity fairness is likely to involve a proper assessment of the employee's condition and a thorough consideration of possible alternatives to dismissal. (*Wilson v Sleepyhead Manufacturing Co Ltd [1992] 3 ERNZ 614.*) She asserts that the fundamental test is whether there was a realistic likelihood of a return to full duties in the foreseeable future or

alternatively, whether the employer has reached the point where it could “fairly cry halt” (*Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124,127 Horn CJ.)

- [19] In this case there was, first of all, a proper assessment of the employee’s condition, based on the psychologist’s report and the information Mr Clarke himself provided. It was clear from this information that Mr Clarke could not as yet return to his original position. It remained unclear how soon that situation might change.
- [20] There was, next, full consideration of alternatives to dismissal. The first alternative (continuing to keep his job open) was no longer viable given the changed budgetary constraints at the end of the financial year. Redeployment to alternative positions was rejected by Mr Clarke himself.
- [21] By this time, Mr Clarke’s position had been kept open for nine months, a period of absence which matched the time previously spent on the job. It remained uncertain whether Mr Clarke would return to full duties in the foreseeable future. The respondent had given Mr Clarke an opportunity to put forward any further information he might have on the issue; he had nothing more to add. Mr Clarke believes his employer should have offered him part-time work, building to full time. I am satisfied that this was not reasonably practicable. This was a case where the employer could ‘fairly call halt.’ A dismissal for incapacity was substantively justifiable.

Was Mr Clarke dismissed or was his employment terminated by agreement amounting to an accord and satisfaction?

- [22] When Mr Wickman suggested medical exit, Mr Clarke told him that he wanted his job back on the same terms as before. However, he said he would think about exiting once he knew how much his termination pay would be. Ms Wood provided an estimate and the meeting concluded on the basis that Mr Wickman would follow up in writing with a formal proposal and details of what Mr Clarke would receive. He did so in a letter of 4 September which included the following:

*“You indicated at our meeting that [medical exit] was not your preference, your preference being a return to work. However, for the reasons outlined... this is not an option.*

*You also indicated that you would consider a medical exit if you could consider the amount that you would be paid under this provision in your employment agreement.*

*The following outlines the payment you would receive under this provision.*

<i>Outstanding annual leave....</i>	<i>\$13,354.98</i>
<i>Medical exit @ 45 days salary</i>	<i>\$18,173.09</i>
<i>One month’s notice</i>	<i>\$8,076.93</i>
<b><i>Total:</i></b>	<b><i><u>\$39,605.00</u></i></b>

The figure for annual leave included a full entitlement for the 2001/2002 year, as well as what had accrued subsequently.

- [23] Ms Crooks told me that because Mr Clarke’s employment agreement made no provision for a payout in the event of medical retirement she had consulted the collective agreement in place at

the Ministry of Social Development for guidance. It provided for a payment equalling 45 days pay in a situation like that of Mr Clarke so that was the figure she used.

[24] The letter went on to add that ACC had been contacted for advice on how such a pay-out might affect his entitlements, and had advised that it would mean that he incurred a stand down of one week. It concluded:

*“I would like you to get back to me no later than 5.00pm 11 September 2002 regarding your medical exit from Industry New Zealand. If you would like to discuss this, give me a call.”*

[25] Mr Clarke responded in an email of 23 September. He expressed in strong terms his unhappiness with the proposal that he take a medical exit. However he concluded:

*“Given the situation that I find myself in I would consider agreeing to the termination of my employment but on an increased payment. If you would like to discuss this further please do not hesitate to contact me.”*

[26] Then, on Tuesday 24 September, Mr Clarke emailed again, saying :

*“Hi Lance*

*I guess you got my email.*

*I was wondering if I could catch up and have a coffee with you completely off the record.*

*Let me know.*

*If not that is also OK.”*

[27] Mr Clarke told me that he was seeking a meeting in which he and Mr Wickman could “*cut through the process to explore all available options on where to [including] his entitlements and the effects on his ACC payments of a pay out.*”

[28] He and Mr Wickman did meet again on Thursday 3 October. Neither claims to have a good recollection of this meeting and neither party kept a record of those discussions. It seems that it had an additional purpose in connection with a different subject (a possible contract for Mr Clarke’s own company) and issues to do with the medical exit were touched on only briefly.

[29] On 10 October Mr Wickman wrote to Mr Clarke stating:

*“Thank you for meeting with me last Thursday to discuss your employment options with Industry New Zealand including a medical exit. You raised two concerns with me that I have followed up on...*

...

*Industry New Zealand is now terminating your employment with effect from Friday 18 October 2002.*

*The following outlines the payment you will receive under this provision...”*

*...Total*

**\$40,534.34.”**

[30] The concerns mentioned in the first paragraph related to the ACC stand down period, and payment for statutory holidays. The change to the quantum of the final pay (compared to the first letter of 4 September) seems to have been to correct an error in the holiday pay owed.

[31] Below Mr Wickman's signature were the words:

*"I Davis Lester Clarke acknowledge that I will receive from Industry New Zealand the total of \$40,534.34 as full and final payment for medical retirement. This amount will be direct credited into my bank account on Friday 18 October 2002 and as such, my employment as Business Development Adviser will cease as at 5.30 pm Friday 18 October 2002."*

[32] On 21 October Mr Clarke responded by email in which he acknowledged the letter and followed up on issues with statutory holiday and ACC. (After these comments he then went on to discuss matters which appear to relate to his proposed business and the possible involvement of the respondent in that venture.) The clear inference to be drawn from this email is that if the issues with statutory holidays and ACC were overcome, the parties had a deal.

[33] On 24 October Mr Wickman emailed Mr Clarke advising that he believed all Mr Clarke's concerns had now been addressed and that a further revised amount of \$40,844.79 would be paid into Mr Clarke's bank account "*in full and final settlement on Friday 25 October 2002.*"

[34] Although Mr Clarke never signed the letter of 10 October, the payment duly went in to his bank account as advised. He took no steps to return it to Industry New Zealand.

[35] On 22 January 2003 Mr Clarke raised a grievance in relation to the termination of his employment.

## **Determination**

[36] As Ms Hornsby has submitted, in order for me to reach a conclusion that there has been an accord and satisfaction I must be satisfied that:

- There was a genuine dispute;
- The parties' agreement was clearly spelt out and the debtor clearly conveyed that payment was tendered in full and final satisfaction;
- There must have been a meeting of minds, or at least conduct by one of the parties of such a nature as to induce the other to think that there was a meeting of minds.

[37] The genuineness of a dispute between the parties does not itself appear to be a matter of disagreement. At the meeting of 23 August Mr Wickman made it clear that he could not continue to keep Mr Clarke's job open for him. Mr Clarke made it equally clear that he was very unhappy about this. He did not accept that it was inevitable that his employment needed to end at this point. This view was confirmed by him a month later in the email of 23 September.

[38] The real issues for determination relate to the remaining two essential elements of an accord and satisfaction.

[39] My investigation into this part of the employment relationship problem has been hindered by the inability or unwillingness of Mr Clarke and Mr Wickman to tell me anything about the discussions they had on 3 October. I was left with a sense that a piece of the jigsaw was missing. The discussions which were "off the record" appear to have created a shift in Mr Wickman's thinking at least. Afterwards, he proceeded to action a medical exit.

- [40] What I can be sure of is this. From 24 September until 24 October Mr Wickman and Mr Clarke were in communication about a proposed medical exit. The series of exchanges between them (viewed as a sequence) shows that they negotiated their way through the obstacles to agreement until (by 21 October) only minor issues remained. On 24 October, apparently in recognition of this, Mr Wickman advised that the quantum of the proposed payment would be further adjusted and that payment would be made the following day.
- [41] The email of 24 October clearly sets out the terms of the proposed agreement including the crucial matter that payment was tendered in full and final satisfaction. Mr Clarke made no response and (evidently taking silence as consent) the respondent proceeded as advised to make payment of what it believed to be an agreed settlement figure, on 25 October.
- [42] There is no express record of Mr Clarke's agreement and I am not able to make a finding as to what was in his mind at the time. However, I am satisfied that his conduct was of such a nature as to induce Mr Wickman to believe that he accepted the offer in full and final settlement. Mr Clarke had previously been prompt and clear in conveying any disagreement with communications from the respondent. This time he was silent, leading Mr Wickman to think that there was a meeting of the minds. In all the circumstances it was entirely reasonable for the respondent to conclude that all issues had been disposed of to Mr Clarke's satisfaction and that it had negotiated an agreed exit with him.
- [43] I note also that the exit package included 45 days pay over and above Mr Clarke's contractual entitlement. This clearly signifies the purchase by the respondent of a release from any obligations it might otherwise have had.
- [44] I conclude that there was an accord and satisfaction.

### **What was the scope of the accord and satisfaction?**

- [45] On Mr Clarke's behalf, Mr Spong has made the submission that even if there was an accord and satisfaction, its wording restricts its scope to medical retirement. On this basis he says that Mr Clarke is not barred from bringing a personal grievance related to the wider topic of the termination of his employment generally.
- [46] I reject this argument. The termination of Mr Clarke's employment and his medical retirement were one and the same thing. The accord operates to bar Mr Clarke from bringing a personal grievance of unjustified dismissal.

### **Costs**

- [47] I leave it to the parties to attempt to resolve this issue between themselves. Any request that the Authority determine Costs should be made within 28 days of this determination.

Y S Oldfield  
Member of Employment Relations Authority