

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 219/09
5132289

BETWEEN RICHARD CRAVEN
 Applicant

AND CAIRNS LOCKIE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 James Lockie for Respondent

Investigation Meeting: 30 June 2009

Determination: 3 July 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns the issue of whether an employee is entitled to receive his ordinary pay for a period in lieu of notice when during that time he was receiving an ACC entitlement of 80 per cent of his wages.

[2] Richard Craven began work as an underwriter for mortgage broking firm Cairns Lockie Limited (CLL) in May 2006. In July 2008 his employment was terminated on the grounds of redundancy.

[3] The redundancy was confirmed by a letter to Mr Craven, dated 4 July and received by him on 5 July 2008. In a meeting on 3 July to discuss the prospect of redundancy he asked if CLL would “*hold him*” to a one month’s notice period and was told it would not.

[4] However at the time of the notice of redundancy Mr Craven was off work because he had been injured in a motorbike accident on 8 May 2008.

[5] Three days before that accident Mr Craven was told that CLL was looking at restructuring the business and to expect redundancies. Formal discussions were due to start the following week but meanwhile he was injured and began a period of rehabilitation during which he received entitlements under the Injury Prevention, Rehabilitation and Compensation Act 2001 (the IPRCA) paid to him by the Accident Compensation Corporation (ACC). This included earnings-related compensation – that is 80 per cent of his usual weekly pay.

[6] While Mr Craven was in hospital he spoke by telephone with CLL director William Cairns and discussions about the restructuring proposal were deferred until Mr Craven recovered.

[7] In June 2008 he met an ACC occupational therapist to discuss a gradual return- to-work plan.

[8] Feeling fit to return to work Mr Craven met with Mr Cairns and the other CLL director James Lockie on 3 July 2008. They discussed the business restructuring proposal, including the prospect of redundancy of Mr Craven's position. Mr Craven also talked about the prospects of implementing his ACC return-to-work plan. Doing so remained subject to him receiving medical clearance. At the time Mr Craven had a current medical certificate, issued in mid-June, saying he was not fit for work for another 60 days – that is until around mid-August. However in the meeting Mr Craven was hopeful he would receive medical clearance to return to work on a part-time basis from as early as 7 July, if his position was not made redundant.

[9] The following day Mr Cairns telephoned Mr Craven to say his position was redundant.

[10] The written confirmation of redundancy – the CLL letter dated 4 July 2008 – stated that Mr Craven would “*be provided with the contractual period of notice in your employment agreement and your final date of employment, inclusive of the notice period, will be 4 August 2008*”.

[11] Mr Craven continued to receive earnings-related compensation from ACC through the notice period and beyond. He did not receive a medical clearance at any time during that period saying he was fit to return to the work. At the Authority investigation meeting Mr Craven said he was still receiving weekly compensation following a recent operation which related to the earlier motorbike injury.

[12] Mr Craven received his final pay from CLL in mid-July 2008. It accounted for holiday pay, sick leave and a service-related redundancy compensation payment provided under the terms of his written individual employment agreement. He does not dispute the genuineness of the redundancy and agrees he received the correct payments for redundancy compensation and outstanding annual leave.

[13] The issue for determination relates solely to whether he was entitled to be paid for a one month notice period, as he contends, or, as CLL contends that he has received what he was entitled to for that period – that is the earnings-related compensation paid by ACC.

[14] Mr Craven wants the Authority to order CLL to pay him for that period on the basis of the following terms of his employment agreement:

9 Termination

...

(ii) The Company may terminate this agreement, after discussion with the Employee, as follows:

- i. With one month's notice, or an equivalent termination payment in addition to holiday pay due, in the event that the Employee becomes surplus to the requirements of the Company after considering all practicable alternatives; ...*

...

10 Redundancy

...

(ii) In the case of redundancy the employee shall be entitled to notice in accordance with Clause 9.

...

The investigation

[15] The respective case of each party was set out clearly in the statement of problem, statement in reply and attached correspondence. Mr Craven and Mr Lockie

attended the investigation meeting to provide additional sworn oral evidence and had the opportunity to provide closing arguments.

Determination

[16] I find that Mr Craven is not entitled to the payment he seeks from CLL.

[17] At the time of his redundancy he was not at work and was not able to work. That remained the situation through the notice period of his redundancy. He had a medical certificate for beyond that period – and it was the basis on which he continued to be paid earnings-related compensation by ACC.

[18] CLL, in the specific circumstances of this case, correctly identified that it was not liable to pay his wages for that notice period. It was not a situation where it had said it decided not require him to work and would then have been liable to pay him the wages. There was no such election by the company as the factual situation was that Mr Craven did not have a medical clearance to return to work and was yet to seek one. Neither would CLL have been able to insist that he work during the notice period. He was not able to work and has not established that, but for the redundancy, he would have been able to do so. Rather, as suggested by ACC paying him earnings-related compensation throughout the notice period, he remained unfit for work.

[19] Accordingly, Mr Craven's application for orders against CLL is dismissed.

Costs

[20] CLL accepts there is no issue of costs. Mr Lockie confirmed CLL has incurred some costs for advice prior to mediation but none subsequent to Mr Craven lodging his claim in the Authority.

Robin Arthur
Member of the Employment Relations Authority