

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Iris Habgood (Applicant)
AND Norske Skog Tasman Limited (Respondent)
REPRESENTATIVES Anne-Marie McNally, Counsel for Applicant
Lewis Turner, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
AFFIDAVITS RECEIVED 18, 19, 21, 26, April 2005
SUBMISSIONS RECEIVED 29 April, 4 and 9 May 2005
DATE OF DETERMINATION 31 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Iris Habgood seeks a form of interim reinstatement to her employment with Norske Skog Tasman Limited ("Norske Skog"). Her application has been determined on the papers.

[2] The substantive issues between the parties concern whether Mrs Habgood resigned of her own accord in November 2004, or whether she was unjustifiably dismissed in February 2005. Mrs Habgood's employment ended in association with her long term absence from the workplace because she was suffering from a stress related illness, which she says was also work-related.

[3] This application is unusual because Mrs Habgood does not seek reinstatement to her duties and is unable to specify when she might be ready to resume them. Nor has she been in New Zealand for some months. Her date of return has been left open-ended. She says she does not know when she would be able to participate in an investigation meeting, although the Authority could convene a meeting to deal with her substantive grievance within the next three months. It follows Mrs Habgood is not available in person for mediation. Her application for reinstatement was, in effect, that she be reinstated to Norske Skog's payroll on paid sick or special leave for a period that has the potential to extend into early 2006.

[4] As I understand it from her husband Bruce Habgood's affidavits, apparently filed after Mrs Habgood's departure from New Zealand, reinstatement to the payroll is now sought until 'the end of July 2005' with a review to occur at that time. That is not a satisfactory way of conveying what Mrs Habgood herself may want, since the request is a variation of the application contained in the statement of problem as well as the one in Mrs Habgood's own particularly brief affidavit. However for the purposes of this determination I will assume Mrs Habgood's wishes coincide with those of her husband.

Resignation in November or dismissal in February?

[5] Norske Skog employed Mrs Habgood as HR advisor – HR systems and payroll. Mrs Habgood began to suffer from her stress-related illness to the extent that she ceased reporting for work at her usual workplace from May 2004. She was on paid annual leave for part of that time, then from about 14 June 2004, by agreement, she worked from home on what Norske Skog described as reduced duties. Norske Skog said it considered attendance on-site, and interaction with people there, to be the essence of Mrs Habgood's position, but to assist her it reallocated most of her duties among other HR staff and gave her only lower level tasks not requiring such attendance.

[6] In October 2004 there were discussions between the parties about the possibility of Mrs Habgood being made redundant, or taking medical retirement under a total and permanent disability insurance policy Norske Skog made available to its staff. The parties had a meeting on 5 November 2004 during which, among other things, the possibility of Mrs Habgood's bringing a claim under the insurance policy was discussed. Norske Skog says that, in association with that discussion, Mrs Habgood said she would not be returning to work at the site. She did not believe she would recover while a return was contemplated.

[7] Norske Skog took as a resignation Mrs Habgood's statements at the November meeting. It says further that there was an agreement Mrs Habgood would hand her remaining tasks back to a colleague, the handover process could occur over a period of two or three months, and Mrs Habgood could remain on full salary during that time.

[8] Through an application dated 6 November 2004, Mrs Habgood claimed payment of a total and permanent disability benefit under the insurance policy. The insurance company advised of the rejection of her claim in a letter dated 2 December 2004. One of the reasons for the rejection was that the documentation in support indicated Mrs Habgood was still working (albeit on reduced duties), when to qualify for a benefit it was necessary for her to show she had been unable to work in any capacity for at least 6 consecutive months prior to the claim being lodged.

[9] Mrs Habgood denies resigning in November 2004 and says she assumed she would remain on paid sick leave if her application under the insurance policy was declined. She says further that the requests Norske Skog made of her during the period commencing in November did not amount to a 'handover process', rather she was being unduly prevailed upon to carry out work from her home.

[10] I was provided with an unsigned copy of a document dated 11 January 2005 which I understand I am asked to read as a report from Dr Ian Bissett, who was treating Mrs Habgood. The document records merely that Mrs Habgood was unfit for work due to illness from 6 December 2004 to 6 March 2005.

[11] By letter dated 15 February 2005 Mrs Habgood's representative wrote to Norske Skog referring to Mrs Habgood's seeing work pressures as a major barrier to her recovery, stating it was unacceptable to require Mrs Habgood to continue to work from home, and requiring that no contact be made with Mrs Habgood by way of requests to discuss or perform work.

[12] Norske Skog's solicitors replied by letter dated 22 February 2005, stating that Mrs Habgood had resigned in November 2004 and recording the view that the handover agreed in November had not occurred. The letter went on to say that, despite this, Norske Skog would treat Mrs Habgood's last day of employment as 28 February 2005 and would not seek to recover the previous three months' salary.

[13] Mrs Habgood says that act amounted to an unjustified dismissal.

Mrs Habgood's entitlement to sick leave

[14] In the circumstances there is no point in any order for reinstatement if Mrs Habgood is unavailable to perform work for an indefinite period, and has no entitlement to any form of paid leave either. That, of course, is why she says there is such an entitlement, so seeks reinstatement to a position in which she can receive the entitlement as if her employment had remained continuous. The relevant form of leave is sick leave.

[15] The parties' written individual employment agreement raises in a general way entitlements to sick leave, before referring to the company's written policies and procedures. I understood these to be contained in Norske Skog's HR Reference Manual ("the Manual"), which provides:

- (a) after three months' continuous service, for reasonable time off work due to genuine illness, without necessarily incurring loss of income or benefits (cl. 2.4.5.1);
- (b) in the absence of a specific provision in an employment agreement, for 10 days' sick leave per annum (cl 2.4.5.2);
- (c) in the case of long term absence, for the following procedure, -
 - . when an employee is absent for a continuous period of 2 weeks, a review with the company's medical officer is carried out,
 - . when the result of the review is known, the parties meet to discuss matters including the likely period off work, and rehabilitation,
 - . if the employee is absent for a further continuous period of 4 weeks, the medical officer undertakes a further review, and may make appropriate recommendations,
 - . if it is apparent the employee has been or will be absent for a period exceeding the entitlement to sick leave, the parties consult about what steps to take with respect to the employee's ongoing employment (cl 2.11).

1. Ordinary sick leave

[16] According to clause 2.4.5.2, Mrs Habgood had an entitlement to 10 days' sick leave per annum. Norske Skog says she had used up that entitlement, and I infer that position is based on Mrs Habgood's absence from the workplace from June 2004. An assumption to that effect seems to underlie Norske Skog's affidavits.

[17] Mrs Habgood has not alleged herself that she has an outstanding entitlement under clause 2.4.5.2. Indeed any allegation about an entitlement of that kind faces difficulties in that it seems Mrs Habgood herself changed her payroll record to show she had used up considerably more than her existing entitlement. Indeed in several documents she sought to portray as sick leave her absence from June 2004. An attempt was made in submissions to suggest there was an outstanding entitlement, but I did not find it persuasive.

2. Extended sick leave

[18] Both Mr and Mrs Habgood assert that Norske Skog has a policy of granting employees who are ill up to 12 months' leave on pay. That assertion was the basis for the application for reinstatement to the payroll on paid leave. Mrs Habgood did not nominate a date on which the 12 month period would start, but Mr Habgood nominated the date on which Mrs Habgood's doctor notified the company Mrs Habgood was unfit to work. According to the document dated 11 January 2005, the relevant date for the purpose of such an argument was 6 December 2004.

[19] Norske Skog says entitlements to extended sick leave are set out in a number of collective employment agreements not applicable to Mrs Habgood, and are not included in individual

employment agreements such as Mrs Habgood's. In other words, she does not have the entitlement claimed and the entitlement itself is based on express contractual entitlements rather than company policy.

[20] Mr Habgood acknowledged the entitlement to up to 12 months' extended sick leave on pay is present in collective employment agreements, and did not seek to say it was included in Mrs Habgood's employment agreement.

[21] Instead he seemed to be making a connection between the extended entitlement and clause 2.4.5.1 in the Manual, with particular reference to the entitlement in the latter to 'reasonable time off work due to genuine illness'. There was no evidence to support the proposition that the two are linked – on the contrary Norske Skog says the provisions in the collective agreement were included for reasons associated with wider bargaining goals at the time. Further, the argument begs the question of whether the arrangements commencing in June 2004 amounted to 'reasonable time off work due to genuine illness' as provided in clause 2.4.5.1. Nor does it acknowledge that the provision goes on to say 'without **necessarily** incurring loss of income' (emphasis added), or make any comment about what that phrase means in terms of the construction of clause 2.4.

[22] The long term absence policy applicable to Mrs Habgood's circumstances is clause 2.11 in the Manual. The provision makes no express reference to an entitlement of up to 12 months' paid sick leave, or to a discretion to grant such an entitlement. A separate policy addressing rehabilitation is silent on these points too. There was no evidence that any individual, not covered by the extended sick leave provision in a collective employment agreement, has nevertheless enjoyed such an entitlement. Nor was there any evidence Mrs Habgood sought or was offered it. Mr and Mrs Habgood have merely assumed that she would receive it.

[23] I have very little evidence directed at precisely how clause 2.11 was applied to Mrs Habgood, but it is at least clear that from time to time after June 2004 there were discussions between the parties about how Mrs Habgood's ongoing absence should be addressed. I do not know whether the medical reviews referred to in the policy were carried out exactly as set out in the policy, but I am told that Mrs Habgood provided medical certificates at an early stage in her absence, and that at some point she received EAP assistance.

[24] Mr Habgood has asserted that the policy was not applied to Mrs Habgood at all. The assertion seems to have been made in an attempt to justify the claim for up to 12 months' paid sick leave commencing in 2005. Lack of evidence means I am unable to say any more about the application of the policy other than to say I consider it unlikely there is a sustainable argument that the policy was not applied at all. Even if I am wrong on this, given the nature and length of Mrs Habgood's absence from the workplace, I would have difficulty in concluding Mrs Habgood had the entitlement now claimed.

The application for interim reinstatement

[25] While I accept Mrs Habgood has an arguable case about whether she was unjustifiably dismissed, the real issue arising from this application is whether there is anything to which she can be reinstated in the present circumstances. Mrs Habgood's circumstances differ from those in most other applications where reinstatement to the payroll only has been discussed, in that Mrs Habgood does not at present wish to, and indeed cannot, work. No-one can say when that will change. Thus the usual focus on the importance for an employee of a return to work does not apply here.

[26] In an unusual application like this, I consider that justice requires Mrs Habgood to persuade me to more than an arguable level that there is some entitlement to which she can be reinstated.

Otherwise in reality any order for reinstatement in the terms sought would amount to little more than the grant of a substantial loan, and that is not the purpose of interim relief.

[27] I accept for the purposes of this application that Mrs Habgood has no outstanding entitlement to ordinary paid sick leave. Documents which she either created herself, or with which she was associated, show her entitlement was significantly exceeded.

[28] In any event, this application has focussed on an entitlement to extended sick leave of up to 12 months. I have already indicated why I believe it is barely arguable, if at all, that Mrs Habgood has such an entitlement.

[29] For these reasons I decline the application.

Costs

[30] Costs are reserved. The parties may reach agreement on the matter themselves, or approach the Authority for a determination.

R A Monaghan
Member, Employment Relations Authority