

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 162
5549412

BETWEEN ULRICH LANKES
Applicant

A N D CANTERBURY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Christine Hickey

Representatives: Applicant in person, via telephone
Penny Shaw, Counsel for Respondent

Investigation meeting: 5 July 2016

Submissions received: Orally from Mr Lankes at the investigation meeting and
in writing on 12 July 2016
In writing from the CDHB at the investigation meeting

Date of determination: 20 September 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Mr Lankes' claims

[1] Ulrich Lankes began work for the Canterbury District Health Board (CDHB) as a scientific officer on 26 April 2010. He resigned with effect from 3 July 2015.

[2] Mr Lankes is originally from Germany. When he was engaged by the CDHB, he was living and working in Blenheim. He moved to Christchurch for the CDHB job. His job required that, for the most part, he needed to be based in Christchurch.

[3] Mr Lankes claims that the CDHB wrongly, on two occasions, failed to pay him all the sick leave entitlement he is entitled to under the Holidays Act 2003 (the HA) and his individual employment agreement (IEA).

[4] Mr Lankes claims that his IEA entitlement to take leave to care for dependants should be interpreted using the wording of s 65(1)(c) of the HA and not using the wording in clause 12.3.1 of his IEA.

[5] He says that CDHB failed to deal with his claims for leave in good faith, and that he has personal grievances arising from its refusal to grant the paid leave on two occasions. The grievances are said to be unjustified actions causing disadvantage from the unfair process used to make the decisions and that the CDHB discriminated against him because of his nationality.¹

[6] By way of remedy Mr Lankes claims he is entitled to be paid 5 further days sick leave under the HA provisions. He also claims he is entitled, under clause 12.3 of his IEA, to be paid 40 days domestic leave as a charge against his sick leave. If a personal grievance is proved, he also claims compensation for humiliation, loss of dignity and injury to his feelings. He claims a penalty for breach of good faith.

CDHB's response

[7] The CDHB denies all of Mr Lankes' claims. It says he is not entitled to domestic leave under clause 12.3.1 of his IEA. In any event, it says that the possible granting of paid domestic leave under that clause is entirely discretionary and that it exercised its discretion in a fair and reasonable way.

[8] It also says that although it does not consider it was bound to do so it has paid Mr Lankes 20 days of sick leave under s 65(1)(c) of the HA, which is the maximum number of sick days that can accrue at any one time.

[9] The CDHB says that the issue is solely a dispute about what clause 12.3.1 means and, as such, it cannot be treated as a personal grievance. In any event, it says Mr Lankes only raised a personal grievance very late and well outside of the necessary 90-day period. It does not consent to a grievance being raised late.

[10] Mr Lankes now lives in Germany again. He appeared at the investigation meeting by telephone.

¹ Mr Lankes must be referring to s 21(1)(g) of the Human Rights Act 1993, which prohibits discrimination on the grounds of "ethnic or national origins, which includes nationality or citizenship."

[11] For the purposes of the Authority investigation Mr Lankes, John Lewis, Mr Lankes' line manager at the relevant time, Matthew Hayman, the manager of the specialist biochemistry cluster Mr Lankes worked in, and Kirsten Beynon, the CDHB's operations manager lodged written witness statements. Under oath or affirmation, they each confirmed their own statement and answered questions from me. Mr Lankes and Ms Shaw had the opportunity to ask questions. They also had the opportunity to provide closing submissions on the facts and legal issues.

[12] As permitted by s 174 of the Act, this determination has not recorded all the evidence and submissions received but findings of fact and law are stated and conclusions on the issues for determination are expressed.

Factual background

Periods of leave and leave applications

[13] In 2014, the CDHB granted Mr Lankes annual leave from 16 July to 22 August. He visited his family in Germany during that time. He discovered that his parents were becoming increasingly unwell. Mr Lankes' father had Alzheimer's disease. Mr Lankes' mother had been caring for him at home. However, Mrs Lankes' own health was failing.

[14] On 20 August 2014, Mr Lankes requested that he be able to extend his absence from work to 21 September 2014. He stayed in Germany longer than originally planned to assist his parents and to put some additional care arrangements into place for them. The CDHB granted that leave as unpaid leave. The CDHB gave Mr Lankes the option of taking annual leave in advance instead. He did not take that option.

[15] Mr Lankes returned to work on 7 October 2014. On 14 October 2014, Mr Lankes made an application for "domestic leave" from 8 December 2014 until 23 February 2015. The CDHB sought further information from Mr Lankes about his request. On 20 October 2014, Mr Lankes advised that his application for domestic leave was to care for his elderly parents whose health had deteriorated.

[16] The CDHB clearly agrees that Mr Lankes' parents were ill and in need of care. On 13 November 2014, it decided to grant a further period of leave, on "compassionate grounds". However, it did not grant any paid leave.

[17] On 17 November 2014, Mr Hayman went to meet with Mr Lankes and handed him the decision letter stating that the CDHB granted him unpaid leave. In the letter, he wrote that he was very sorry to hear about Mr Lankes' family situation.

[18] Later that day, Mr Lankes sent an email to Mr Hayman thanking him for granting him the leave from 8 December 2014 onwards. However, he pointed out that he had applied for domestic leave as a charge against his sick leave entitlement and he understood that the HA applied, specifically s 65(1)(c). He wrote:

I would expect you to change the granted "leave without pay" to either "sick leave" or "domestic leave as a charge against sick leave entitlement" whatever suits best to CDHB policies in accordance with New Zealand legislation.

[19] Mr Lankes appended s 65 of the HA and an excerpt from the Ministry of Business Innovation and Employment (MBIE) website about sick leave for Mr Hayman's information.

[20] On the same day, Mr Hayman responded that he had taken advice from the Human Resources Department and that Canterbury Health Laboratories (CHL)²:

... is prepared to grant leave without pay (LWOP) for the period requested but not use of domestic leave (i.e. paid sick leave). The context in which "domestic" leave is applied would normally be, as per the MECA³ provision below, where it's a child, partner or household member; not a relative that lives in another country. However, for compassionate reasons, CHL is prepared to give time off (as LWOP) to deal with your family situation. In doing so, this will impact the science work for CHL, but we are prepared to do this to help your personal circumstances.

[21] Mr Hayman included clause 12.3 from Mr Lankes' IEA in his letter.

[22] The following day Mr Lankes replied:

In my opinion the New Zealand legislation is very clear:

"An employee may take sick leave if a person who depends on the employee for care is sick or injured." Holidays Act 2003, Clause 65(1)(c).

Neither the employment agreement nor the underlying Holidays Act excludes overseas parents or restricts the "sick leave" to Christchurch

² The division of the CDHB Mr Lankes worked for.

³ Mr Hayman mistakenly wrote that Mr Lankes was employed under a collective employment agreement.

household members only. It is my understanding that “sick leave” is a minimum employment right of the employee according to the Holidays Act 2003 and therefore “sick leave” is not granted on discretionary basis.

I would really appreciate if we could find some prompt sympathetic agreement on this matter in good faith as I am only asking for my entitlement and not for any additional leave on compassionate grounds and would not claim travel time as part of the “sick leave”. I have to reiterate that it is a really stressful situation for my whole family. I need to sort out a permanent care solution for both of my parents as my sister is unable to cope with the situation.

[23] Mr Lankes sought assistance from MBIE’s Service Centre. On 28 November 2014, he wrote to Mr Hayman again:

Your final decision that my application for “sick leave” to care for my parents in Germany is a discretionary matter when clearly it is not is of grave concern to me.

I appeal this decision you have made as it contravenes minimum employment rights.

As discussed on Wednesday night ... I look forward to your response.

[24] On 2 December 2014, Mr Hayman replied:

Regarding your request for a review of our decision to grant you leave without pay ... I referred the matter urgently to our HR & Legal departments.

A review was undertaken. The review has not changed the decision. It was noted that our position is consistent with previous requests of a similar nature from other staff.

On a personal note, I hope that you have a safe journey and that your trip goes as well as can be expected in the circumstances.

[25] On 4 December 2014, Mr Lankes notified Mr Hayman that he had asked for MBIE to arrange a mediation meeting. He wrote:

You should be aware of my opposition to your decision. I will go on leave under protest.

Could you please pass on a copy of the legal opinion on this matter produced by the CDHB Legal Department to me?

[26] Mr Hayman replied that he did not have a copy of any legal opinion because he had sought a decision from the HR Department. He wrote:

As soon as I received it, it was passed onto you.

[27] Mr Lankes did not return on the original date in February 2015 because he asked for a further leave of absence. CDHB granted that extension as further unpaid leave. He returned to work on 16 March 2015.

[28] On 25 March 2015, Mr Lankes lodged his first statement of problem with the Authority claiming the CDHB's decision to decline to grant him sick leave under the HA and sick/domestic leave, and its reasons for doing so:

contravene the minimum employment rights outlined in the Holidays Act 2003 section 65(1)(c), which allows an employee to use [their] sick leave if a person who depends on the employee for care is sick or injured.

[29] By way of remedy, Mr Lankes claimed 400 hours (40 days) of sick leave to be granted retrospectively; as opposed to the leave without pay he had been granted. He also asked for reimbursement of his costs and wrote, "compensation should be granted".

[30] Mr Lankes had asked MBIE to invite the CDHB to a mediation meeting. On 24 March 2015, Mr Lankes asked the CDHB to follow up urgently with Mr Hayman and Ms Beynon to confirm a date for mediation.

[31] On 6 May 2015, Mr Lankes made a further application for sick leave for the period 8 May 2015 to 21 May 2015 again to care for his mother who was residing in Germany. By that time, Mr Lankes' father was living in a care home. However, his mother was still living in the family home and had a number of complex health problems. Mr Lankes also sought various other types of leave to cover his absence through to 5 June 2015.

[32] On 7 May 2015, the CDHB notified Mr Lankes that on "compassionate grounds" it had decided to pay him 20 days' sick leave under the HA as a lump sum, but not to pay him any additional entitlement which he may have accrued under his IEA.

[33] The CDHB says that after it paid Mr Lankes for 20 days of sick leave in June 2015, he had an outstanding balance of 40 days' sick leave.

[34] On 22 May 2015, Mr Lankes filed an amended statement of problem with the Authority to include a claim in relation to his second claim for domestic leave, which CDHB had refused. He wrote:

The applicant claims personal grievance: the repeated refusal of the respondent to pay "Sick Leave" unconditionally and according to legislation and employment agreement is considered as unjustified disadvantage and discrimination.

[35] On 3 June 2015, Mr Lankes gave written notice of his resignation to be effective from 3 July 2015.

The issues

[36] The issues I need to determine are:

- (a) Are these proceedings a dispute, or personal grievances or both?
- (b) Is Mr Lankes entitled to be paid for five more days under the HA?
- (c) Does the test in s 65(1)(c) of the HA apply to all sick leave, including that accumulated under Mr Lankes' IEA?
- (d) Is Mr Lankes entitled to further paid leave (domestic leave) as a charge against his sick leave under the provisions of his IEA? To answer this I need to interpret clause 12.3.1 of the IEA.
- (e) Did the CDHB fail to treat Mr Lankes in good faith?

Are these proceedings a dispute or personal grievances?

[37] Section 129 of the Act provides that a person bound by an employment agreement may pursue a dispute:

- (1) Where there is a dispute about the interpretation, application, or operation of an employment agreement, any person bound by the agreement or any party to the agreement may pursue that dispute in accordance with Part 10.

[38] Section 103 of the Act defines personal grievances. Section 103(3) of the Act provides that an:

unjustifiable action by an employer does not include an action deriving solely from the interpretation, application, or operation, or disputed operation, application, or operation, of any provision of any employment agreement.

[39] Mr Lankes' email to the CDHB of 18 November 2014 clearly stated:

... that there is a disagreement between the employer and myself. The interpretation of the employment agreement and the underlying

legislation with respect to my “sick leave” or “domestic leave” application is in dispute.

[40] The substance of Mr Lankes’ claim is that the CDHB has interpreted and applied clause 12.3.1 of his employment agreement wrongly. This claim is clearly a ‘dispute’ over the interpretation and application of the clause. The parties interpret the clause differently and Mr Lankes disagrees with how the CDHB has applied the clause.

[41] However, Mr Lankes also claims to have personal grievances under s 103(1) of the Act that the process the CDHB used to consider his claim was an action that was unjustifiable and caused him disadvantage in his employment, and that the CDHB discriminated against him because of his nationality, or the nationality of his parents.

[42] Section 103(3) of the Act makes it clear that an unjustifiable action by an employer cannot include any action of the employer deriving solely from how an employer has interpreted or applied any provision of an employment agreement.

[43] Mr Lankes is not able to bring personal grievances of unjustified action causing disadvantage or discrimination against the CDHB based on the same facts and arguments that apply to the dispute over clause 12.3.1.

[44] Therefore, I have no jurisdiction to consider any personal grievances.

Is Mr Lankes entitled to be paid for five more days under the HA?

[45] One of the purposes of the HA is to provide employees with minimum entitlements to sick leave to assist them because someone who depends on the employee for care is sick or injured.

[46] Section 65 (1)(c) of the HA provides that an employee may take sick leave if:

a person who depends on the employee for care is sick or injured.

[47] The CDHB says that it acted in good faith to grant Mr Lankes the maximum of what his entitlements would have been under the HA, as if he had taken leave to care for a person who depended on him for care.

[48] It has granted him 20 days leave. Mr Lankes says he is entitled to more than that, being a further 5 days. The number of days he would have been entitled to under the HA can be easily worked out.

[49] The effect of ss 63(1)(a) & 65 of the HA is that the minimum entitlement an employee in Mr Lankes' situation is entitled to is 5 days sick leave for each of the 12-month periods of employment which begin to accrue only after the employee has completed their first 6 months of continuous employment with the employer.

[50] Mr Lankes began work on 26 April 2010. The first 12-month period that he began to accrue 5 days sick leave for ran from 6 months after that, being 26 October 2010. From then until 26 October 2014 he accrued 5 days sick leave per year, being a total of 20 days under the HA. The CDHB paid him 20 days sick leave under s 65(1)(c) of the HA in May 2014.

[51] Mr Lankes resigned before a further 12-month period (from 26 October 2014 to 25 October 2015) was up and finished work on 3 July 2015. Therefore he did not accrue a further 5 days of sick leave under the provisions of the HA. He is not entitled to be paid for a further 5 days under the HA.

Does section 65(1)(c) of the HA apply to sick leave accumulated under the IEA?

[52] Clause 12.1.3 of Mr Lankes' IEA provided:

Sick leave shall be paid in accordance with the Holidays Act 1981 (and its amendments) and from 1/4/04 in accordance with the Holidays Act 2003 at the rate of relevant daily pay.

[53] That clause does not mean that sick leave under the more generous provision of the IEA had to be *granted* in accordance with the HA, but simply what it says. Any pay for sick leave had to *be paid* at the rate of relevant daily pay, which is in line with what the HA requires.

[54] Clause 12.2 of the IEA provided the CDHB had discretionary power to grant leave in excess of leave required to be provided under the HA.

[55] Clause 12.3 is entitled "*Domestic leave*". The relevant part reads:

12.3.1 The Employer **may** grant an employee leave on payment at ordinary base rates (T1 only) as a charge against sick leave entitlement **when the employee must stay at home to attend to a member of the household who through illness becomes dependent on the employee**. This person would in most cases be the employee's child or partner but may be another member of the employee's family or **household**. [my emphasis]

[56] Mr Lankes argues that in deciding whether to grant him the enhanced sick leave provisions under his IEA the CDHB should have used the wording in s 65 of the HA rather than the wording in the IEA itself.

[57] Section 65(1)(c) of the HA provides:

An employee may take sick leave if –

(c) a person who depends on the employee for care is sick or injured.

[58] This gives an employee the ability to take sick leave to care for a dependant who is sick or injured.

[59] Immediately on appointment Mr Lankes' IEA provided that he was entitled to 10 working days' sick leave. That is a more generous allowance than the HA minimum entitlement by 5 days per year.

[60] The IEA also provided that when he completed each subsequent 12-month period, he would be entitled to a further 10 working days. That is also more generous than the minimum provisions provided under the HA.

[61] Section 65 of the HA applies only to the provisions of the HA. Logically, it cannot and does not apply to a provision in an IEA that may grant a charge against more generous sick leave on a discretionary basis. The HA provisions are mandatory, not discretionary.

[62] Under the HA Mr Lankes could only accrue 20 days of sick leave,⁴ unless the employer allowed him to carry over any days in addition to that. Under the IEA the CDHB allowed Mr Lankes to accrue a maximum entitlement of 260 working days' sick leave.⁵

[63] The HA is paramount in that the IEA must be interpreted to be consistent with the HA, insofar as the minimum entitlements granted by the HA are concerned. But that does not mean that the HA wording also applies to domestic leave under clause 12.3.1 over and above the maximum number of accrued sick leave days allowed under the HA.

⁴ Section 66(2) of the HA.

⁵ Clause 12.1.2

[64] If the CDHB had simply allowed greater accrual of sick days than the 20 under the HA, as it was empowered to do under s 66(3), without including a domestic leave provision in the IEA then the HA test would be the only one that could be applied. But in this case the CDHB and Mr Lankes agreed under clause 12.3.1 to put further limits on the additional accrued leave's use for domestic purposes.

[65] Clause 12.3.1 is not dependent on the wording of the HA because it relates only to the more generous provision of sick leave granted by the CDHB in excess of the minimum entitlements set out under the HA.

[66] In other words, the CDHB is bound to consider applications for the sick leave accrued under the HA, for a maximum of 20 days, using the provisions of the HA. However, applications for domestic leave as a charge against sick leave over and above 20 days would be considered using the wording in the IEA.

Is Mr Lankes entitled to further paid leave?

[67] Clause 12.3.1 gives the CDHB discretion to grant leave as a charge against sick leave. It says the CDHB *may*, not must, grant an employee leave. It is not obliged to do so. It is obliged to give all employees their minimum entitlements under the HA. However, clause 12.3.1 does not create an entitlement as of right, in contrast to s 65 of the HA.

[68] Instead, clause 12.3.1 creates an entitlement for Mr Lankes to have the CDHB consider granting him the benefit of using domestic leave as a charge against the 40 days sick leave he had accrued. The CDHB had to use proper principles when considering whether to grant Mr Lankes that benefit.⁶

[69] Therefore, even if I find that the CDHB has not exercised its discretion in a proper and principled way the only remedy I could award is to direct the CDHB to consider Mr Lankes' application again, applying proper principles.

[70] Employment contracts are interpreted using the same principles that are used to interpret statutes. The first approach, when there is no ambiguity, is to examine the ordinary meaning of the words used. I do not consider there is any ambiguity in the words in clause 12.3.1.

⁶ I agree with the approach taken in *NZPPTA and Josephine Webb v The Board of Trustees of Okaihau College* [2015] NZERA Auckland 262.

[71] The first requirement of clause 12.3.1 is that the *employee must stay at home*. What does ‘home’ mean? It is common ground that at the relevant time he was working for the CDHB Mr Lankes had a home in Christchurch. The Oxford Dictionary defines ‘home’ as:

Home – The place where one lives permanently, especially as a member of a family or household.

[72] Mr Lankes submits that he had more than one ‘home’. He had a home in Christchurch and a home in Germany at the house of his parents. Mr Lankes told me that he first moved away from the home he had shared with his parents in 1988. He agreed with me that since 1988 he lived more often than not somewhere other than at home with his parents. He says that in 2005, his parents moved to another house and at the time he lived 400 kilometres away from his parents. However, he kept some of his own goods at his parents’ house and at the relevant times that the CDHB considered his applications for leave there was a bedroom at his parents’ house that was his bedroom.

[73] I consider Mr Lankes is asking me to stretch the ordinary meaning of ‘home’ beyond its limits. Mr Lankes has been living as an independent adult in his own home, or series of homes, probably since 1988 when he first moved away from ‘home’. When he was employed by the CDHB his home was in Christchurch, not in Germany.

[74] Even if I am wrong, and Mr Lankes had more than one home, the use of the words “stay at” home prove that clause 12.3.1 is not written with Mr Lankes’ situation in mind.

[75] The Oxford Dictionary defines ‘stay’ as “remain in the same place.” Therefore, the natural and ordinary meaning of clause 12.3.1 is that the CDHB may grant an employee the chance to use sick leave when the employee is required to remain in the place where he lives to attend to a member of his household.

[76] Mr Lankes was not required to stay at home but to leave home and travel to Germany to his stay at his parents’ home.

[77] The CDHB’s reasons for not granting Mr Lankes paid leave are that the context in which domestic leave is applied would normally be where the person to be cared for is a household member.

[78] The Oxford Dictionary defines ‘household’ as “a house and its occupants regarded as a unit”. Mr Lankes’ parents were not members of his Christchurch household. When Mr Lankes lived and worked in New Zealand, he was not a member of his parents’ household.

[79] However, the CDHB did have the discretion to include family members other than an employee’s child or partner in its consideration of whether to grant the leave. Had Mr Lankes’ parents moved to New Zealand to live with him in his home they would have been members of his household, as well as of his family, and the CDHB would have had to consider that in exercising its discretion under clause 12.3.1.

[80] Although Mr Hayman’s letter did mention that Mr Lankes’ parents lived “in another country” that was by way of contrast to “a child, partner or household member”. However, that is not evidence of discrimination based on Mr Lankes’ national origin, and could have equally applied to any staff member including one born in New Zealand whose parents were also New Zealanders but had emigrated to Australia, for example.

[81] There is no evidence that the CDHB took into account that Mr Lankes was German by way of his national origin in making its decision.

[82] There is disagreement between the parties about when Mr Lankes’ parents became dependent on him. However, that is not something I need to consider because the natural and ordinary meaning of the words of clause 12.3.1 cannot bear the meaning Mr Lankes seeks to put on them.

[83] There is no evidence the CDHB exercised its discretion improperly. The CDHB was not liable to grant Mr Lankes the benefit of paid leave as a charge against his sick leave to go to Germany to care for his parents.

Did the CDHB breach its duty of good faith to Mr Lankes?

[84] Section 4 of the Employment Relations Act 2000 requires parties to deal with each other in good faith. They must not do anything to mislead or deceive each other or anything that is likely to mislead or deceive each other. They must be active and constructive in establishing and maintaining a productive employment relationship and be responsive and communicative with each other.

[85] Mr Lankes is unhappy with the decisions made by the CDHB but has been unable to establish that it acted in breach of its duty of good faith towards him.

Costs

[86] Mr Lankes has not succeeded in any of his claims. Often in cases of true disputes of statutory or contractual terms the parties bear their own costs as the clarity provided about the meaning of the term or terms interpreted by the Authority benefits both parties.

[87] However, Ms Shaw indicated that if the CDHB was successful and I found the matter to be a dispute the CDHB would still be seeking its legal costs due to factors that are outside of my current knowledge.

[88] The unsuccessful party is usually expected to make a reasonable contribution to the successful party's legal costs. I encourage the parties to agree on costs.

[89] If I am asked to determine costs, I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$3,500. The investigation meeting went from 9.30 am, with a shortened lunch adjournment, until 2.30 pm. I consider that to be half a day.

[90] If the parties cannot agree on costs, the CDHB has 28 days from the date of this determination to file a memorandum seeking costs. It should identify any factors it considers should result in an adjustment to the notional daily tariff.

[91] Mr Lankes has a further 14 days to file his response to that.

Christine Hickey
Member of the Employment Relations Authority