IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 411/09
5137129

	BETWEEN	MATT SEBASTIAN LUUTOMES Applicant
	AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Richard Fletcher, counsel for Applicant Kevin Thompson, counsel for Respondent
Investigation Meeting:	28 May 2009
Determination:	18 November 2009

DETERMINATION OF THE AUTHORITY

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[1] This determination concerns the nature and scope of claims which Matt LuuTomes may pursue in the Authority following the termination of his employment as a flight attendant for Air New Zealand Limited ("ANZL"), with one month's paid notice, on 12 February 2008.

[2] In 2006 Mr LuuTomes reported suffering two injuries while working on board an aircraft – one was a back ligament sprain while leaning forward to hand out sweets and one was a lumbar spine sprain while catching a baby bassinet dropped by a passenger.

[3] For some time cover for treatment of these injuries was provided under the Injury Rehabilitation Prevention and Compensation Act 2001 ("the IPRCA"). This was managed by ANZL as it operates as an 'accredited employer' under a partnership programme with ACC. However on 1 November 2006 an opinion provided by a

consultant occupational physician concluded that Mr LuuTomes' back pain was "*almost certainly*" a result of disc degeneration disease in the lumbar spine rather than workplace sprains. Consequently, ACC entitlements provided to Mr LuuTomes' were cancelled from 17 December 2006 because his condition was regarded as medical rather than arising from work-related injuries.

[4] Between December 2006 and June 2007 Mr LuuTomes lodged three further workplace injury claims for lumbar sprains arising from incidents where he had tripped over a passenger's legs, walked into a cabin door and slipped on a wet floor. In this period he was also assessed by ANZL's chief medical officer Tim Sprott and referred by his GP for assessment to a musculoskeletal specialist and an orthopaedic surgeon. ANZL then had Mr LuuTomes reviewed by a second orthopaedic surgeon who confirmed a diagnosis of disc degenerative disease. Cover had initially been provided for each claim but Mr LuuTomes was told that, based on the second surgeon's opinion, entitlements for two of those claims were to be cancelled from 27 September 2007.

[5] Following that period any time Mr LuuTomes took off from work because of his back pain was either annual leave or treated as sick leave. The sick leave was provided under the terms set out in a collective employment agreement between ANZL and the Flight Attendants and Related Services Association (FARSA).

[6] He was dismissed after Dr Sprott reported to ANZL on 14 December 2007 that Mr LuuTomes was not fit to fly, was not expected back at work in the next six months and no likely timeframe could be determined for his return to work as a flight attendant. He was said to be reluctant to undertake alternative ground duties meanwhile. Mr LuuTomes, commenting on the report, advised he was in too much pain to undertake ground duties but would not resist doing so once he had surgery and was recovered fully. He was not at that time on the waiting list for surgery but told ANZL managers he understood there was a two-year waiting list and he would also need a recovery period of about six weeks after surgery before returning to work.

[7] At the time of his dismissal Mr LuuTomes had been on a continuous period of leave of around seven months. Some of this time was paid sick leave. Some of it was described as ACC leave.

[8] ANZL refused his request to keep his job open for an indefinite period. That period might have ranged from several months – if Mr LuuTomes could avoid normal waiting list times for surgery – but otherwise would have been at least two years.

The investigation

[9] Shortly before the Authority's notified investigation meeting Mr LuuTomes sought leave to be excused physical attendance as it was said to be too painful for him to travel to Auckland from his present home in Wellington. In the course of considering that unusual request and discussing the matter in a telephone conference with counsel I identified various legal issues that could be resolved on the basis of submissions from counsel and largely undisputed facts so no witness attendance was required for any party. I made arrangements for counsel to provide written and oral submissions on 28 May 2009. The necessary factual background was provided in the form of sworn or affirmed witness statements along with relevant documents such as correspondence and medical reports. Determination of the identified legal issues is to resolve what claims Mr LuuTomes can pursue in the Authority and what further investigation, if any, might then be required (subject to challenge of this determination).

[10] Sworn or affirmed statements were lodged by Mr LuuTomes, Flight Attendants and Related Services Association lawyer Stewart King, ANZL rehabilitation manager Ruth James, ANZL performance and development manager Sandy Kitchener, Dr Sprott, and ANZL instructor Larry Price.

[11] This determination, in accordance with s174 of the Act, does not set out all the available evidence or the submissions heard. However in preparing this determination on the identified legal issues, I have closely reviewed that material. I also record with regret that the preparation of this determination was delayed for a longer- than-desirable period by the demands of other Authority matters and acknowledge the patience of the parties and their representatives.

Issues

[12] Matters for determination at this stage of the investigation are:

(i) the interpretation of sick leave terms at clause 10 of the CEA (in application to Mr LuuTomes' circumstances); and

(ii) whether the IPRCA bars some or all of Mr LuuTomes' claims in the Authority; and

(iii) in what capacity ANZL managers made various relevant decisions in relation to sick leave and ACC cover – as an agent of ACC or as a representative of the company, and what effect does that have on Mr LuuTomes' claims in the Authority?

[13] There was a further preliminary or threshold matter that can be dealt with shortly. Initially ANZL disputed whether Mr LuuTomes had raised his personal grievance over dismissal for incapacity within the 90-day statutory period to do so.

[14] ANZL has since accepted that the dismissal grievance was raised in time. However it still disputes whether any grievances for alleged unjustified disadvantage said to have been incurred by Mr LuuTomes before the dismissal – and relating to its managers' actions over his sick leave and ACC – were in fact raised in time.

[15] I find no separate and earlier disadvantage grievances were raised in time. However the actions which were the basis of those alleged disadvantages may still form part of the factual matrix of the sole 'live' grievance application – that is over whether his dismissal for incapacity was justified or not. The extent those actions might be relevant and within the ambit of the Authority's jurisdiction depends on the determination of the other issues identified above and resolved below.

Interpretation of the CEA sick leave provisions

[16] The starting point for Mr LuuTomes' challenge to his dismissal is his claim that ANZL was not entitled to dismiss him for medical incapacity given the CEA's provisions for "*unlimited*" sick leave.

[17] The relevant sections of the CEA are:

> *10.3 A Flight Attendant who is absent from duty by reason of sickness not caused by his/her own wilful action or neglect shall be entitled to remain on full pay for the duration of each such sickness.*
> …
> *Should the length of any absence be 3 or more consecutive calendar days, the Flight Attendant will be required to produce a satisfactory medical certificate to be eligible to remain on pay.*
> …
> *10.4 The Company may investigate any situation where a Flight Attendant's level of sick leave/absence is considered to be unsatisfactory or whether there is a pattern associated with a Flight Attendant's absence.*
>
> *10.5 Flight Attendants who:*
> *(a) fail to maintain a satisfactory attendance record, or*
> *(b) are found to have patterns of sick leave/absence, or*
> *(c) are found to have taken sick leave or are absent unjustifiably*
> *may be subject to disciplinary procedures and/or termination of employment.*
>
> *10.6 Frequency and length of sick leave/absence will be monitored and as a general rule, the following standard will be applied when identifying sick leave/absence which may require individual follow-up:*
>
> > *Five or more occasions, or 13 or more consecutive days over any period of 12 consecutive months, or a pattern of sick leave/absence.*
>
> *10.7 If after a period of sickness/absence or inury a Flight Attendant is cleared fit for temporary ground duties by the Company's Medical Department, then subject to the approval of Inflight Services management, duties may be assigned within Inflight Services/Terminal Services departments in that priority or elsewhere within the Company as appropriate.*
> …
> *10.9 Flight Attendants shall undergo a medical examination at the Company's expense when requested to do so.*

[18] Mr LuuTomes submits that clause 10.3 means that sick leave is unlimited unless there is fault in some aspect of the flight attendant's conduct or reason for claiming the leave and that an investigation under clause 10.4 can only be triggered by such fault. He submits the requirement for fault is clear from the reference to "*unsatisfactory*" levels and patterns of leave and no broad discretion is left to ANZL to investigate sick leave simply because the employee's absence from duties is lengthy but with no suggestion of misconduct or abuse of the provisions.

[19] ANZL submits Mr LuuTomes go beyond the plain meaning of the words used in the sick leave clauses to give an absurd meaning. If what he said was correct a

flight attendant who was permanently disabled through sickness or injury would be entitled to remain on full pay for the rest of what would otherwise have been her or his working life.

[20] I accept ANZL's submissions for two reasons.

[21] Firstly, I agree that the word 'unsatisfactory' in clause 10.4, read plainly in the context of the whole clause, does not restrict ANZL to investigating situations where there is a suspicion of 'fault' in the level or length of absence. Rather it is a matter of ANZL identifying a situation as unacceptable and requiring investigation. That view must be reached reasonably and not arbitrarily. The reference to failing to maintain a satisfactory attendance record that then follows in clause 10.5 is to be interpreted in the same way.

[22] Secondly, even if the first reason were wrong and an investigation were limited to likely circumstances of 'fault', the clause relates only to sick leave and absence from duty.

[23] The CEA is not a complete code for every eventuality. It is, for example, subject to the statutory provisions for sick leave. It does not expressly state requirements in the case of extended periods of medical incapacity to perform duties.

[24] Neither does it exclude the operation of the common law. While subject to any express written terms in each situation, case law establishes that an employer is not bound to hold a job open indefinitely for an incapacitated worker. An employment relationship may be brought to an end in such circumstances but not in a summary way. The employer needs to consider the length of absence and prospects for a future return to work and do so in a fair way that ensures the employer has and considers all the relevant information that the worker is able to provide.[1]

[25] It is that latter point that remains open for the Authority's investigation. It is not a question of whether ANZL's decision breached the CEA's sick leave provisions but whether ANZL was justified in why and how it went about dismissing him for

[1] *Innes-Smith v Wood* [1998] 3 ERNZ, 1298, 1304 and *Wilson v Johnathons Catering Co Ltd* (unreported, EC, Auckland AC44A/00, 13 November 2000) at [39]-[40].

incapacity. That cannot be determined yet as the Authority, and the parties, must first have the opportunity to test the evidence available in the witness statements and background documents.

Are some of Mr LuuTomes claims barred under the IPRCA?

[26] ANZL accepts Mr LuuTomes is, in principle, entitled to advance a claim of unjustified dismissal, and even disadvantage, in the Authority because that is the only legal forum – at first instance – for such claims. However ANZL says the Authority has no jurisdiction to consider much of Mr LuuTomes present claim because he has "*intermingled*" elements that properly fall under the exclusive scope of the IPRCA and its framework for claims and review.

[27] Mr LuuTomes submits that his case is about a contractual entitlement to unlimited sick leave which ANZL denied him after deciding to withdraw his ACC coverage. However he submits that this includes information collected "*in the ACC domain*" by ANZL managers and used to decline ACC cover for his injuries and make decisions about his sick leave coverage, absence and dismissal. He says the statutory bar at s133(5) of the IPRCA does not apply to that information and those decisions.

[28] His submissions also seek to apply, by analogy, principles from the Supreme Court's decision in *Creedy v Commissioner of Police* about review by the Authority of decisions made under other statutory provisions.[2]

[29] I prefer ANZL's submission that *Creedy* supports its own analysis rather than that of Mr LuuTomes. *Creedy* confirmed the availability, at the time, of access for police officers to personal grievance procedures after they had been subject to other specific statutory disciplinary procedures. Put shortly, it confirmed that one review process followed another. Section 133(5) of the IPRCA, by contrast, expressly prohibits review in the Authority.

[30] Mr LuuTomes cannot use the Authority's personal grievance procedures to further his continued belief that he had workplace injuries for which cover was wrongly declined. The two most clearly expressed examples in his statement of

[2] [2008] NZSC 31.

problem are:

> *[At para 29] On 13 September 2007 Air New Zealand management wrongly cancelled IPRCA entitlements Mr LuuTomes had for his injuries following the report by Mr Otto.*
>
> *[At para 44(4)] The effect that the Company's decision re ACC liability had on Mr LuuTomes ability to receive treatment and return to work.*

[31] Such claims are plainly matters for the IPRCA review process and subject to its statutory bar on remedies being considered or granted in this Authority.

[32] The documentary evidence available to me shows that ANZL, on declining four of his five claims for workplace injury, clearly advised Mr LuuTomes of his right to seek review of those decisions under the IPRCA. The affirmed evidence of Ms James was that Mr LuuTomes chose not to exercise those rights.

[33] To the extent that his claims now seek to challenge those decisions, they may not be pursued in the Authority. However information gathered in the process of claiming and deciding on ACC entitlements – which were provided for a certain period and then cancelled – may be considered as part of the factual matrix in addressing his claim that he was not fairly treated in the later decision to dismiss him.

Were managers' decisions made as company representatives or ACC agents?

[34] The decisions ANZL managers made in their capacity as representatives of the company are subject to review by the Authority through the statutory requirement that ANZL act as a fair and reasonable employer would in the circumstances at the time.[3] Decisions on cover and entitlements made in their capacity as agents of ACC are not subject to such review in this Authority.

[35] However Mr LuuTomes submits the statements provided by ANZL witnesses and the background documents lodged show decisions made and material collected for ACC purposes was improperly used for purposes of the company in its capacity as his employer. Examples given relate to which managers attended various meetings about whether he was on ACC or sick leave and emails exchanged by company

[3] Section 103A of the ERA 2000.

representatives with medical advisors.

[36] He submits this breached confidentiality obligations stated in the partnership agreement between ANZL and ACC including, at clause 9.1, not to divulge information acquired under the agreement "*to any other person without the prior written approval of the other party*" and, at clause 9.6, allowing for use of claim related information only where the claimant authorised use of the information on a specific claim for a specified purpose.

[37] Mr LuuTomes suggests ANZL's "*administration of its ACC obligations appeared to be inextricably mixed with its broader management of staff*". This analysis focuses particularly on the roles of two managers – firstly, Ms James who was involved in decisions on ACC cover in 2006 and 2007 and secondly, Ms Kitchener who was involved in monitoring prolonged absences from duty by flight attendants and had a series of meetings with Mr LuuTomes and his representatives through 2007 and 2008. Ms Kitchener made the decision to terminate Mr LuuTomes's employment with ANZL.

[38] In argument the question was put as which 'hat' each manager was exercising in respect of various actions and decisions – that of the employer or that of the agent of ACC?

[39] I accept ANZL's submission that the distinction is somewhat artificial where an employer also operates as an accredited employer administering cover and entitlement matters as ACC's agent. There are practical reasons to do with both the rehabilitation objects of the IPRCA and general health and safety obligations, as well as acting as a good employer, that ANZL managers might properly share information about the health status and prognosis for a return to work of an employee.

[40] I also accept that the confidentiality obligations under ACC's agreement with ANZL generally refer to disclosure of information to third parties rather than managers of a party to the agreement, as Ms James and Ms Kitchener were.

[41] There is a requirement for signature of a consent form for release of information regarding specific claims. On the documents presently available Mr

LuuTomes appears to have signed such a form for one claim but not the other four.

[42] That form authorises collection and release of information for assessing ACC entitlements. However its purpose is clear from a statement on it that the authority, while relating to "*all aspects*" of any claim, allows external agencies such as general practitioners and specialists to provide information requested directly to ANZL. That, I consider, demonstrates its purpose is to authorise information about the employee going out from the company and being received directly back rather than prohibiting the provision of information between managers within ANZL.

[43] This is also clear from a clause in the agreement with ACC about the application of the Privacy Act. The clause refers to information not being disclosed to a "*third party*" without a claimant's consent. Different managers within one party to the agreement, ANZL, are not third parties.

[44] I find, as ANZL submitted, that decisions made by Ms James about Mr LuuTomes' injury claims were made by her for ANZL as ACC's agent and are beyond review by the Authority. However I also find that some of Ms James' actions may properly be seen as being done in the capacity of the employer rather than ACC's agent. These are limited to her actions in providing information to, and talking with, Ms Kitchener about Mr LuuTomes' health and prospects that was to be used in the assessment of his employment future with ANZL. While those interactions, arguably, are no different than those an ACC case manager might have had with Ms Kitchener if ANZL did not operate under an accredited employer scheme, they were in this particular case for the purposes of ANZL as an employer rather than in its capacity as an agent of ACC. In providing Ms Kitchener with information from medical specialists and, for example, attending a meeting on 26 March 2007 with Mr LuuTomes and Ms Kitchener, Ms James was acting in her managerial role for the employer. What Ms James did and said in the process run by Ms Kitchener – and which ultimately led to the decision to dismiss for incapacity – may be considered in any subsequent Authority investigation of the justification of that decision.

[45] The effect of these findings is that Ms James may be required to give further evidence in the Authority's investigation of the employment relationship problem but not in respect of Mr LuuTomes' claims that he was wrongly denied cover or

entitlements for injuries under the IPRCA.

Summary of determination

[46] In this determination I have resolved the identified issues as follows:

(i) the CEA provisions for sick leave neither prohibit ANZL from investigating an extended absence in circumstances such as those of Mr LuuTomes nor necessarily preclude termination of employment for medical incapacity; and

(ii) the Authority cannot consider any claims by Mr LuuTomes about whether he was wrongly denied cover and entitlements under the IPRCA; and

(iii) Ms James is not required to give evidence about ANZL's decisions in declining Mr LuuTomes' claims for cover and entitlements under the IPRCA but may be required to give evidence on other actions relevant to ANZL's actions and decision about ending his employment.

Arrangements for further investigation

[47] Counsel will shortly be asked to attend a telephone conference to discuss what now needs to be done for the Authority to continue its investigation of this matter.

Costs

[48] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority