

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Sharon Harcombe
AND Bakers Delight (NZ) Limited
REPRESENTATIVES Dean Organ for applicant
Chris Patterson for respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 30 June 2006
DATE OF DETERMINATION 11 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a reference under the Parental Leave and Employment Protection Act 1987 of a parental leave complaint that has not been disposed of between the parties, Ms Sharyn Harcombe and her employer which is a company trading in the name 'Bakers Delight.' (Although the respondent has been named in the commencement documents – the SOP and SIR - as Bakers Delight (NZ) Limited, the employment agreement of 8 June 2004 is in the name Bakers Delight Holdings Limited, apparently an Australian registered company. Extensive use by the employer of a letterhead bearing the name Bakers Delight (NZ) Limited has no doubt contributed to this confusion of corporate entities, but as no issue has been raised by the respondent about the identity of the employer this determination is issued in the name the parties have used for it.)

[2] When Ms Harcombe was appointed by Bakers Delight to the position of Marketing Business Consultant she signed a comprehensive employment agreement, one term of which expressly referred to her entitlement to parental leave in accordance with the Parental Leave and Employment Protection Act 1987 (PLEPA). The March 2003 Personnel Policy document of Bakers Delight which applied to her employment, had similar provisions including the following;

An employee, on returning to work after maternity leave, is entitled:-

- *to the position which she held immediately before commencing maternity leave or*
- *in the case of an employee who has been transferred to a safe job during her pregnancy, to the position which she held immediately before that transfer; or*
- *in the case of an employee whose position no longer exists, to the position that is considered as close as possible to the position held*

prior to taking maternity leave, or, alternatively, a redundancy payment as the case may be.

[3] On 2 June 2005 the General Manager – Corporate Services of Bakers Delight, Mr Richard Taylor, wrote to Ms Harcombe confirming that the company had granted a request she had made to take parental leave from 1 July 2005 until 3 July 2006. In his letter Mr Taylor reproduced the above provisions of the Personnel Policy document and confirmed them as her entitlements.

[4] Ms Harcombe commenced parental leave and duly gave birth to her child.

[5] For the one year term of her absence Bakers Delight had contracted with another person to fill the position of Marketing Business Consultant. When that person left unexpectedly before the year of parental leave had expired, the employer appointed another employee, Ms Fleur McKinney, permanently to the position.

[6] Ms Harcombe, I find, was not consulted about that appointment and only heard of it while still on leave, during a visit to the firm she made on 27 March 2006 to meet Ms Colleen Milne, the new manager, and to show the staff her baby. After that visit Ms Milne wrote to Ms Harcombe on 5 April 2006 to confirm this change of personnel in the Marketing Business Consultant position. She said in her letter:

I am writing to confirm Bakers Delight Holdings Ltd situation regarding the above return from maternity leave due 03 July 2006.

In correspondence from Richard Taylor detailing your maternity leave status, it states – On your return from maternity leave you are entitled to the following:

In the case of an employee whose position no longer exists, to the position that is considered as close as possible to the position held prior to taking maternity leave or, alternatively, a redundancy payment as the case may be.

As discussed with you, we have an unfortunate situation where the current Marketing Consultant, Victoria Spillane, will be leaving her position earlier than contracted. Bakers Delight New Zealand has found it urgently necessitates an appointment of a Marketing/Business Consultant to continue on with this essential role.

We are fortunate to have a current employee, Fleur McKinney, who has extensive marketing experience within the franchise industry, and who has accepted this position.

A position as a Business Consultant which is the same role held by you prior to your marketing role, is available. This role will include Bakery visits and support in Auckland, Hamilton, Rotorua down to Hastings. This position will include travel and some weekend work.

Sharyn, can you please give the above careful consideration and please advise if this role will be acceptable to you.

[7] Ms Harcombe wrote back to Ms Milne on 26 April 2006, expressing disappointment that there had been no consultation with her at the time the contracted employee had left and the position had been offered to Ms McKinney. She stated in her letter;

At this time it was your responsibility as an employer to meet with myself to discuss the option of my return to work early to fill this

position, or at that point, offer me your current option of a similar role, which I would fill at the end of my Maternity Leave.

[8] Ms Harcombe stated in her letter that she would consider the Business Consultant role that had been offered as an alternative position, but noted that she had no obligation to accept that position in place of the Business Marketing Consultant role that she had taken leave from for 12 months. She said;

At the time I went on Maternity Leave, if you did not feel that you could hold the Marketing Consultant position open for me (that is, the fulltime position that I was employed in before I went on Maternity Leave), for the full period of 12 months, this should have been clearly stated to me – before I went on Maternity Leave.

[9] Ms Harcombe concluded her letter to Ms Milne by saying that she was agreeable to meet and discuss the role being offered in place of her former position.

[10] In a reply to this letter on 5 May, Ms Milne referred to Ms Harcombe having previously indicated that she had been unable to return to work early because of commitments to her family, including her baby daughter. Ms Milne also noted in her letter that the role of Business Consultant had been an integral part of Ms Harcombe's previous employment with Bakers Delight.

[11] With her agreed return to work date drawing nearer, Ms Harcombe consulted Mr Dean Organ, an employment law specialist. He wrote on her behalf to Bakers Delight on 26 May, expressly raising both a complaint under the PLEPA and a personal grievance. He said that Ms Harcombe had not been made aware of the Ms McKinney's permanent appointment until after that had happened. Mr Organ pointed out in his letter that despite the change of personnel Ms Harcombe's position still existed, and he correctly observed, "It is not redundant, obviously."

[12] Ms Harcombe's concerns about her employment situation grew further still to the point where she instructed Mr Organ to bring her formal PLEPA complaint to the Authority for resolution. Her application was lodged on 7 June 2006, less than a month before she was due to return to Bakers Delight on 3 July.

[13] In her application Ms Harcombe alleged that Bakers Delight had breached the PLEPA by appointing a permanent replacement to her position while she was on parental leave. She sought an urgent investigation by the Authority and the resolution of her problem by reinstatement into her former position, with orders for reimbursement of any wages lost by her and the payment of compensation and her legal costs.

Directions to mediation

[14] The application was served by the Authority on the respondent on 8 June 2006 and the following day a telephone conference was held with Mr Organ and Mr Chris Patterson, counsel instructed by Bakers Delight. Immediately following the telephone conference on 9 June 2006, the Authority issued a Notice of Direction to the parties, ordering them to attend mediation which they were required to arrange by Friday 23 June 2006.

[15] A notice was sent by the Mediation Service advising Mr Organ and Mr Patterson that assistance would be given to their clients on 19 June 2006 at 2.30pm. Unfortunately Mr Patterson had apparently accepted the 19 June fixture without knowing that Ms Milne was going to be in Australia, where Bakers Delight has its parent company or headquarters. He responded to the notice straight away after receiving it on 15 June by advising the Mediation Service that Ms Milne could not attend on 19 June. He asked if the mediation could be set down on various dates he

gave, starting from 30 June. That date was the last working day before Ms Harcombe was due to return to work on 3 July. Mr Patterson also suggested other dates, although they were after the intended return to work date.

[16] When told of this development, Mr Organ advised the Mediation Service to leave the mediation set down for 19 June. He acknowledged the possibility of non-attendance by Bakers Delight because of Ms Milne's absence in Australia.

[17] That is exactly what happened; Mr Organ and Ms Harcombe attended at the notified time on 19 June, but not Ms Milne or Mr Patterson. The mediator then made contact by telephone with Mr Patterson who advised that the employment problem had arisen because of a "misunderstanding in Australia." He advised that Ms Harcombe would be able to return on 3 July and resume the position she had held before going on parental leave a year earlier. The mediator duly relayed that message to Mr Organ and Ms Harcombe, who were not directly addressed by Bakers Delight or even by Mr Patterson about this apparent turn around in the employment situation.

[18] On 21 June Mr Organ contacted the Authority to advise what had taken place on 19 June at the meeting with the mediator. With reference to what he understood Mr Patterson had told the mediator over the telephone, Mr Organ wrote;

3. To make such a statement (see below) to a Mediator when being contacted regarding his non-appearance but not any time to the applicant's representative is unusual. Ms Harcombe does have concerns over the "bona fides" of the offer given the way it was communicated and the wording used. Ms Harcombe finds it difficult to accept "that there has been a misunderstanding in Australia as to what was to happen". The applicant is not sure what this phrase means or how there could have been any "mistake". It has also not been explained what will happen to the person who replaced Ms Harcombe in her position, ie Fleur McKinney. Does Ms McKinney even know that this offer has been made to Ms Harcombe? Will the company attempt to manufacture a redundancy? These are some of the fears held by the applicant.

[19] Mr Organ advised that Ms Harcombe did accept, "albeit tentatively," the offer of reinstatement to her position of employment. He asked for the Authority to nevertheless continue to hear the application for compensation and costs, as had been claimed.

Statement in reply

[20] In a statement in reply lodged on 23 June 2006 by Bakers Delight, the employer contended that Ms Harcombe had not been dismissed and that therefore none of the remedies claimed were available to her. The employer expressly acknowledged that it had not tried by mediation or any other way to resolve the complaint. That acknowledgment was communicated on the date by which the parties had been directed, two weeks earlier on 9 June, to arrange mediation. Bakers Delight also stated that it was willing to attempt mediation.

Authority investigation meeting

[21] On Friday 30 June the Authority met with Ms Harcombe, Bakers Delight and their representatives, Mr Organ and Mr Patterson. In particular, I heard accounts given by Ms Harcombe and Ms Milne of all that had taken place. Immediately following that meeting the parties attended mediation, upon my direction. Settlement of the parental leave complaint was not able to be reached, leaving it now for the Authority to determine Ms Harcombe's application.

Breach of the PLEPA

[22] I find that there was a breach of the PLEPA by the employer, Bakers Delight. It occurred in about March 2006 when another person, Ms McKinney, was appointed to the position Ms Harcombe had held before going on parental leave. Ms Harcombe was in effect dismissed from her position. As this occurred while she was on parental leave, the dismissal was in breach of s.49(1)(c) of the PLEPA.

[23] It seems the employer thought or was advised, erroneously, that in the circumstances of the temporary employee leaving the position suddenly, if someone else was appointed to it the position itself would disappear. I am not concerned about how this error was made, or whether it was made in New Zealand or Australia where the law may be different. What is significant is that the employer discovered its error on about 2 June 2006, as soon as it took advice from Mr Patterson, yet failed to take any timely steps to retract the advice it had given Ms Harcombe based on its own error. Even on 19 June the advice given was at best uncertain and third hand, and by then the return to work was looming only two weeks away.

[24] By failing to act swiftly and decisively to correct its error once Ms Harcombe complained about what had been done to her position, Bakers Delight breached its own Personnel Policy procedures. Policy No 25 expressly provides that "timeliness" is to be a key element of the employer's grievance handling procedure, under which all complaints from employees are to be finalised "promptly" and "within as a short a period as possible." That was a standard Bakers Delight represented to its employees that it would achieve.

[25] Under s.64 of the PLEPA, Bakers Delight and Ms Harcombe had a duty to promote settlement of the parental leave complaint. I find that the employer's actions in failing to undertake mediation or a similar process in an attempt to resolve the complaint expeditiously, amounted to a breach of the statutory duty. Even if Bakers Delight had had a lawful reason for appointing someone else to Ms Harcombe's position, it should have consulted her first. A failure in that regard is a breach of the duty of good faith under the Employment Relations Act 2000 at s.4.

[26] While the Authority must recognise that Bakers Delight has now rectified the problem by allowing Ms Harcombe to return to her old position, I do not consider that that wipes away the breach of the PLEPA or the harm the breach caused Ms Harcombe. The situation has been exacerbated by a failure of the company to contact Ms Harcombe immediately after 2 June when it received legal advice, and arrange to meet with her and give its personal assurance that her job was still available after all. The employer, I find, failed to act proactively, responsibly and communicatively in the way the law requires an employer to act in good faith. The employer needlessly allowed a situation to grow until an employee became mistrustful and suspicious of its possible motives.

[27] At the meeting with the Authority, I found Ms Milne to be genuinely regretful about what had happened. I also found Bakers Delight to be genuinely wanting Ms Harcombe to resume her employment on 3 July in her old role. Unfortunately, what has happened must inevitably have caused some diminishment in the trust and confidence Ms Harcombe ought to have been able to retain in her employer. However I believe that Ms Milne and Ms Harcombe together will work to restore the previously good employment relationship.

Compensation

[28] I find, therefore, that there has been a breach of the PLEPA and that there has been harm caused to Ms Harcombe as a result. She is entitled to compensation, notwithstanding the availability to her of the same job she had before going on

parental leave. As was observed by the Employment Court in *Ter Harr v Eliot Cotton Assocs* unreported, 30/4/93, AEC16/93, in relation to s.65(c) of the PLEPA;

If the circumstances of the case warrant it, a complainant may be compensated for matters such as humiliation, loss of dignity and injury to feelings occasioned irrespective of whether reinstatement is granted or even sought. There are no limitations contained in section 65(c) as to the matters which may be taken into account under this head, save that it is described as "compensation" and therefore should not involve the imposition of a penalty on the employer.

[29] Ms Harcombe described herself as feeling "sick" and "sad" that the matter had had to go so far, and she talked about the stress and uncertainty that she and her family have suffered over the last few weeks in the course of getting this matter resolved. She said that the letters she had received from Ms Milne had left her feeling that she was not wanted back at Bakers Delight. The alternative position that had been offered to her was quite impracticable as it required her to travel, at a time when she was caring for a baby. She found this offer hurtful, she said, and it had increased her feeling of not being wanted. Adding to her burden, Ms Harcombe incurred the expense of having to engage an advocate. She said she has been worried about the payment of those costs, which in total are about \$7,000.

[30] In awarding compensation to Ms Harcombe, I must take into account the harm she has suffered as a direct consequence of the employer's breach, but I must also recognise that she has been able to resume her old job. There must also be some proportionality in setting awards under s.65(c) of the PLEPA, which are not to serve the function of a penalty.

Determination

[31] The Authority orders the respondent Bakers Delight to pay to Ms Harcombe \$3,000 compensation, and the Authority further orders that sum is to be paid to her within 14 days of the date of this Determination.

[32] I do not expect there will be any further complications in the employment relationship, but should she consider it necessary Ms Harcombe may apply at any time to have her complaint and grievance re-opened by the Authority.

Costs

[33] Ms Harcombe is entitled to some compensation for the cost she has been put to in retaining a professional advocate to help her resolve a matter which needlessly came to the Authority and which should have been resolved much earlier. Mr Organ is seeking an order for costs on a full reimbursement basis. As directed, he has supplied to the Authority an itemised account of costs billed to his client. Bakers Delight shall have until 5 pm on Tuesday 18 July 2006 to provide any response to the costs application.