



New Zealand Employment Relations Authority Decisions

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McKendry v Jansen and anor (Christchurch) [2010] NZERA 941 (20 December 2010)

Last Updated: 11 January 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 155A/10 5166673

BETWEEN JANE JOYCE McKENDRY

Applicant

A N D JANINE JANSEN and COLIN

PROUTING Respondents

Member of Authority: Representatives:

Submissions Received:

Philip Cheyne

Bob Gillanders, Representative for Applicant Jay Lovely, Counsel for Respondent

7 December 2010 from the Applicant

17 December 2010 from the Respondent

Determination:

20 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an earlier determination I upheld Ms McKendry's personal grievance claim, awarded her compensation for lost remuneration of a sum to be quantified by the parties, reserved for later determination her claim for compensation for lost benefits being the loss of paid parental leave and referred to the Employment Court a question of law as to whether the Authority could compensate her for that loss.

[2] By judgment dated 24 September 2010 a full Court of the Employment Court held that [s.123\(1\)\(b\)](#) and [s.123\(1\)\(c\)\(ii\)](#) of the [Employment Relations Act 2000](#) permit the Authority to award compensation for the loss of the entitlement to paid parental leave under the [Parental Leave and Employment Protection Act 1987](#) (PLEPA): see *McKendry v Janine Jansen and Colin Prouting* [2010] NZEMPC 128. This determination resolves the issue about the quantum of compensation due to Ms McKendry for the loss of her paid parental leave.

[3] For the respondent it is argued that, because Ms McKendry received a parental tax credit, [s.71G\(2\)](#) of the PLEPA means that Ms McKendry loses ...her entitlement to a parental leave payment under this Part of the PLEPA. In other words, Ms McKendry has not suffered any loss because she became disentitled to paid parental leave. Although not mentioned by the respondent, a similar point arises by reference to [s.71D\(1\)](#) and [s.71I](#) of the PLEPA. As events unfolded Ms McKendry did not give a written notice to her former employer, did not take parental leave and fell outside the definition of *eligible employee*; nor did she make an application for paid parental leave in accordance with the PLEPA.

[4] As a matter of principle the purpose of an award of compensation is to restore the grievant to the position they would have been in but for the grievance. To be compensatable, the loss must have been caused by the employer's wrongful actions giving rise to the grievance. By way of a simple example, a grievant is awarded compensation for lost remuneration not because he or she earned that remuneration by working for the employer, but because they did not earn the remuneration due to having been unjustifiably dismissed. It is compensation for remuneration they would have earned. The Authority must assess to a standard of probability what would have happened but for the grievance. That is explicit in the case of s.123(1)(c) (ii) which permits the Authority to award compensation for *loss of any benefit, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen* (emphasis added).

[5] It is also necessary to consider what actually happened since that can affect quantification of the relevant loss.

[6] Here, my earlier finding was *If Ms McKendry had not been dismissed but continued to work for Ms Jansen and Mr Prouting she would have had sufficient service and great enough weekly average working hours to be entitled to the [paid parental leave] payment*. Implicit in that was an acceptance that Ms McKendry would have done all that she needed to do to qualify for the paid parental leave payment: she would have properly notified her employer of her wish to take parental leave, she would have applied for paid parental leave and she would not have applied for or received a parental tax credit. Those are the assumptions properly made in order to assess the loss attributable to Ms McKendry's personal grievance of unjustified dismissal. On that basis Ms McKendry has suffered the loss of paid parental leave, a loss caused by her personal grievance.

[7] As it eventuated, Ms McKendry actually applied for and received a parental tax credit. It is accepted by her that this payment which mitigated her loss should be brought to account to reduce her claim against Ms Jansen and Mr Prouting. As noted her receipt of that payment means that she could not also receive paid parental leave under the PLEPA. However that does not negate the fact that she suffered the loss of that payment caused by her personal grievance.

[8] For the respondent it is argued that the relevant weekly sum is \$325.00. However, that was the applicable sum when the legislation first came into force and it does not take into account the required annual adjustment applicable on 1 July each year. The correct figure is that applicable when Ms McKendry would have taken her leave. Ms McKendry's period of paid parental leave would have commenced in early August 2009. The maximum rate of paid parental leave payment from 1 July 2009 was \$429.74 weekly: see [Parental Leave and Employment Protection \(Rate of Parental Leave Payment\) Regulations 2009](#) (now revoked). Ms McKendry would have received \$6,016.36 in paid parental leave. Her claim is for that sum less \$1,200.00 in parental tax credit, leaving a loss of \$4,816.36.

[9] There is also an argument that other taxation benefits received by Ms McKendry should be brought to account as mitigation to further reduce her claim against Ms Jansen and Mr Prouting. I do not accept that submission. There is nothing before the Authority to establish the circumstances in which those other benefits were paid to Ms McKendry or how they relate to the paid parental leave payments which was lost by Ms McKendry because of her grievance.

[10] In the earlier determination leave was reserved if there was an issue as to the quantum of lost remuneration payable to Ms McKendry. There is a submission made for the respondents that Ms McKendry is only entitled to lost remuneration for one week after the termination of her employment because she obtained other employment. The submission may not properly take account of the extent of the earlier order. It is for Ms Jansen and Mr Prouting to compensate Ms McKendry for lost remuneration from the end of her notice period until when she would have commenced paid parental leave with a deduction for her earnings during that period from the other job that she commenced shortly after the dismissal. Leave is still reserved if the sum cannot be agreed.

Summary

[11] Ms Jansen and Mr Prouting are to pay Ms McKendry compensation of \$4,816.36 pursuant to [s.123\(1\)\(c\)\(ii\)](#) of the [Employment Relations Act 2000](#).

[12] Costs are reserved. If there is to be a claim for costs that must be done by lodging and serving a memorandum within 28 days and the other party may then lodge and serve a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority