

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 367
5623225

BETWEEN ANAM GHAZALI MOSHIN
 Applicant

A N D PHARMACY RETAIL GROUP
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 No Appearance by Respondent

Investigation Meeting: 09 November 2016 at Auckland

Date of Determination: 10 November 2016

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

No Appearance by Respondent

[1] The Pharmacy Retail Group Limited (the Pharmacy) did not file a Statement in Reply. The Pharmacy did not appear at the Investigation Meeting today. The Pharmacy's director Mr Shyam Amarsee advised the Authority that he could not attend the Investigation Meeting due to ill health.

[2] Mr Amarsee was hospitalised on 16 August 2016 which he says meant he did not have the ability to file a Statement in Reply. This position was supported by a medical report from Dr Lin at Middlemore Hospital in support of a request to hold off setting a previous Investigation Meeting date.

[3] However no current medical report has been provided about Mr Amarsee's current health or how his health issues may affect ability to participate in the Authority's current investigation.

[4] Mr Amarsee advised the Authority that the Pharmacy would be represented at the Investigation Meeting by its accountant. That did not occur. The Authority's attempts to communicate with the Pharmacy's accountant and to obtain information from it were all unsuccessful.

[5] This matter has been brought on for investigation at Mrs Moshin's request because next week she is moving her family overseas permanently so she wanted her claim determined before she left. The Authority has therefore investigated and determined this matter based on the information currently before it.

Employment relationship problem

[6] Mrs Anam Moshin was employed as a full time employee by the Pharmacy on 03 December 2013 as a Charge Pharmacist. Mrs Moshin went on parental leave from 16 March 2015. She took one month's annual leave immediately prior to commencing her parental leave.

[7] Mrs Moshin claims that when she inquired about returning to work in January or February 2016 Mr Amarsee told her that the Pharmacy had employed a new permanent employee to do her job, so there was no position for her. As a result of that Mrs Moshin claims that she was unjustifiably dismissed on or around 06 February 2016.

[8] Mrs Moshin's IR 880 parental leave form records her return to work date as 14 September 2016. Mrs Moshin acknowledges that she did not provide the Pharmacy with the written notice stating whether or not she would be returning to work 21 days before her parental leave was due to end, as required by s.39 of the Parental Leave and Employment Protection Act 1987 (PLEPA).

[9] From the written response to Mrs Moshin's personal grievance letter the Pharmacy appears to be of the view that Mrs Moshin's employment ended on 14 September 2015 when she did not return to work on the scheduled date recorded in her parental leave IR880 application.

[10] The Pharmacy says in its response to Mrs Moshin's personal grievance letter that when Mrs Moshin advised it in January 2016 that she wanted to return to work, the Pharmacy had already engaged a new permanent employee to cover her position.

Issues

[11] The following issues are to be determined:

- a. Was Mrs Moshin dismissed?
- b. If so, was her dismissal justified?
- c. If not, what if any remedies should be awarded?
- d. What if any costs should be awarded?

Was Mrs Moshin dismissed?

[12] Because it is not clear that Mrs Moshin's employment ended due to a dismissal she bears the onus of establishing on the balance of probabilities that she was dismissed.

[13] Section 31(2) of PLEPA requires Mrs Moshin to notify the Pharmacy of the duration of the parental leave she sought. Mrs Moshin did that in her IR880 form which specified she was requesting six months' parental leave from 13 March to 14 September 2015.

[14] Mrs Moshin says the information in her IR 880 form was incorrect because she actually intended to take 52 weeks' parental leave but wanted to reserve herself the right to return to work on a part time basis in September 2015 because she expected her family would need her to be earning income before 12 months after the birth of her child had elapsed.

[15] However, Mrs Moshin acknowledged that the IR880 does not mention her returning to part time work or indicate that she actually wanted to return to work after 52 weeks parental leave and not on 14 September 2015, which was the date she recorded on the form.

[16] I find that there is no other documentation which records the agreement Mrs Moshin alleges was reached to change her return to work date.

[17] Mr Amarsee's response to Mrs Moshin's personal grievance does not support Mrs Moshin's evidence about such an agreement. Mr Amarsee in his letter says he

did not agree to hold her job open for another six months after the return date specified in her IR880 had passed.

[18] Mr Amarsee's position is that he acknowledged Mrs Moshin would not be returning to work in September but did not guarantee he could hold her job open but would have to see what was available at the relevant time. Mrs Moshin strongly disputes that.

[19] I do not accept Mrs Moshin's view that Mr Amarsee's response to her personal grievance letter to her supports her interpretation of events. Rather I consider that Mr Amarsee appears to dispute Mrs Moshin's account of events.

[20] Mrs Moshin says she did not know that she had the legal right under s.45 of the PLEPA to (if her employer agreed) to end her parental leave early and return to work. That meant she could have applied for 52 weeks' parental leave then subsequently agreed with the Pharmacy to return to work earlier than that if that became necessary.

[21] The difficulty Mrs Moshin faces is that because she applied for only six months' parental leave (i.e. until 14 September 2015) this was the duration (time period) that the Pharmacy was required to legally hold her position open for her.

[22] Mrs Moshin gave conflicting evidence to the Authority about what was allegedly agreed regarding her return to work date. First there is the return to work date in the IR880, then she said it was agreed she would take 52 weeks' parental leave, then she said it was agreed she would return to work (after 11 months' parental leave) in February.

[23] Mrs Moshin was unable to give me a clear or specific date for her return to work which I find undermines her claim that agreement was reached. I consider it more likely that if the parties discussed changing her actual return to work date that was most likely a casual fluid discussion which was not a renegotiation of the parties rights and obligations under the PLEPA.

[24] I therefore find that Mrs Moshin's lack of clarity over the alleged agreed return to work date (in so far as it differed from that in her IR880 form) undermines her evidence that agreement was reached for her position to be held open outside the date specified in her IR880 form.

[25] I also consider that the lack of supporting documentation about such an arrangement also undermines Mrs Moshin's ability to reach the required standard of proof (being the balance of probabilities).

[26] Another difficulty for Mrs Moshin arises because s.39 of the PLEPA requires her to notify her employer 21 days before 14 September 2015 whether or not she will be returning to work at the end of her scheduled (as per her IR 880 form) parental leave. There is no dispute that did not occur.

[27] There is also no dispute that Mrs Moshin did not actually return to work or report to work on or after 14 September 2015.

[28] Because Mrs Moshin's IR880 records her return to work date as 14 September 2015 the Pharmacy was legally required to hold her job open for that period of time. I find that did occur because the Pharmacy employed a locum to cover Mrs Moshin's position up until then.

[29] Section 46 of PLPEA provides that an employee who without good cause fails to return to work at the end of the parental leave period or who fails to inform the employer they will not be returning to work at the end of the parental leave period (both of which scenarios apply to Mrs Moshin's situation) then (subject to any agreement between the employer and employee) the employee's employment is deemed to have ended as at the day the parental leave began.

[30] I do not find that Mrs Moshin had "*good cause*" as per s.46 of PLEPA not to return to work because I consider she was required to observe the date she had selected and recorded in her IR880 form. I do not accept that her lack of knowledge of her legal rights is good cause for not complying with the statutory obligations that apply to her return from parental leave.

[31] Nor do I accept on the balance of probabilities that the parties reached some other agreement regarding her return to work that preserved her right to have the Pharmacy hold her job open for longer than specified in her IR880 because I consider the evidence I heard fell short of establishing that to the required standard.

[32] Mrs Moshin told me that the Pharmacy employed a replacement for her in January 2016 (approximately four months after the date specified in the IR880). Mrs Moshin also says that the parties had agreed she would return to work in February

2016. I consider that the Pharmacy's decision to engage a replacement employee a few weeks before Mrs Moshin says it had agreed she could return to her job undermines Mrs Moshin's evidence that agreement was reached.

[33] An agreement needs to be mutual, the terms certain and there must be an intention to create legally binding obligations. I am not satisfied any of these critical elements have been established to the required standard of proof.

[34] So to summarise I consider that Mrs Moshin gave conflicting evidence about the agreed return to work date, the IR 880 form contradicts her evidence, Mr Amarsee's response to her personal grievance letter disputes agreement was reached to hold her position open for her, Mrs Moshin did not give the required s.46 written notice of her a return to work or otherwise, and the Pharmacy's action in employing a replacement for Mrs Moshin fundamentally undermines the claim that the parties reached a mutual agreement to extend her parental leave period.

[35] For these reasons I am not satisfied that Mrs Moshin has been able to discharge the onus of proof to establish to the required standard that her employment ended because she was dismissed.

[36] I consider it more likely than not that Mrs Moshin's employment ended by operation of s.46 of the PLEPA. This meant that the statutory operation of s.46 of the PLEPA effectively ended the parties' employment relationship, not dismissal by the employer.

[37] Accordingly, Mrs Moshin's unjustified dismissal claim does not succeed.

Rachel Larmer
Member of the Employment Relations Authority