

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Nechia Tokona (Applicant)
AND Bridgeman Concrete Akld Ltd (Respondent)
REPRESENTATIVES David Fleming, counsel for the Applicant
Gary Taylor, counsel for the Respondent
MEMBER OF AUTHORITY Marija Urlich
SUBMISSIONS RECEIVED 11 and 18 October 2006
DATE OF DETERMINATION 28 November 2006

DETERMINATION OF THE AUTHORITY

[1] In a determination dated 28 August 2006 (AA 274/06) dealing with Ms Tokona's paid parental leave complaint remedies were considered with as follows:

[16] By way of remedies Ms Tokona has claimed a period equivalent to five weeks wages calculated from the date she was directed to commence maternity leave to the date she intended to commence maternity leave. The basis for this claim is that because Ms Tokona was directed to commence maternity leave five and a half weeks earlier than she intended she had a shortfall of five and a half weeks paid leave and suffered hardship as a consequence. Information before the Authority suggests that Ms Tokona may have received a double payment for some of this period. I record that Ms Tokona has not sought a compensatory sum for hurt and humiliation consequent to the actions of Bridgeman Concrete or interest on the wages sought pursuant to section 65 of the PLEP Act.

[17] In the circumstances the issue of remedies is referred back to the parties to attempt to resolve. If they are unable to do so they have leave to put further evidence and submissions to the Authority to enable the issue to be determined."

[2] In a memorandum dated 19 September 2006 Mr Fleming advised the Authority that the parties had unsuccessfully attempted to resolve the issue of remedies, that the applicant wished the Authority to determine remedies and sought leave to claim the following additional remedies:

- (i) compensation pursuant to section 65(c) of the PLEP Act; and
- (ii) interest of 7.5% pa on any order of reimbursement of lost wages

[3] The grounds for seeking leave to raise additional remedies are:

- (i) that it is in the interests of justice that Ms Tokona have available to her the full range of remedies;
- (ii) there is no prejudice to the respondent in raising additional remedies as the process has been dealt with separately;
- (iii) compensation is a statutory remedy under section 65(c);
- (iv) the Authority has found the respondent has breached the Act;
- (v) Ms Tokona is able to give further evidence;
- (vi) Ms Tokona should not be left without an effective remedy; and
- (vii) It is appropriate that interest be awarded given the nature of the investigation.

[4] The respondent opposes the application for leave on the following grounds:

- (i) the statement of problem is required to specify the remedies sought and personal grievance type remedies were not sought;
- (ii) the respondent was never put on notice of the factual basis of any personal grievance type claim; and
- (iii) if the Authority grants leave Ms Tokona cannot claim any remedies arising from a process flaw.

[5] In her statement of problem dated 12 April 2006 Ms Tokona stated that she wished to have her employment relationship problem resolved in the following way:

"3.1 ...declarations that:

3.1.1 Other suitable work was available at the time she was required to begin maternity leave; and therefore

3.1.2 The employer was not entitled to direct her to commence maternity leave at the time it did.

3.2 The applicant further seeks an order that she be paid the equivalent of the five weeks' wages lost by her as a result of this matter."

[6] Ms Tokona now seeks to have those remedies extended to include compensation (section 65(c) PLEP Act) and interest calculated on any award reimbursing lost wages. The factual basis for any award of compensatory damages would be the respondent's failure to fairly consult with Ms Tokona regarding its decision to direct her to commence paid parental leave (section 14 PLEPA); a situation akin to an unjustifiable disadvantage which is remedied with an award of damages for hurt and humiliation.

[7] I find that the statement of problem put Bridgeman Concrete on fair notice that Ms Tokona challenged its decision to direct her to commence maternity leave. Any such challenge would necessarily involve scrutiny of the substantive and procedural elements of the process undertaken by Bridgeman Concrete in reaching its decision. The Authority found that Ms Tokona was directed to commence paid parental leave without fair consultation, that in accordance with her employer's direction she lodged the paid parental leave application form with IRD and that a meeting with her union representative did not remedy the found breach because her parental leave had commenced.

[8] The assertion that the parties determined the parameters of the Authority's investigation to the limited question of whether a suitable alternative position existed mistakes the role of the Authority in such a process¹ and ignores the established legal principles to apply to a consideration of section 14 of the PLEP Act², which I record the parties were expressly referred to. There is no prejudice to the respondent who will have an opportunity to respond to any further evidence received by the Authority in support of Ms Tokona's claim for remedies. Information provided after the investigation meeting which indicates Ms Tokona received wages from Bridgeman Concrete after she commenced her period of parental leave required further investigation into the question of remedies.

[9] Ms Tokona is entitled to pursue the remedies available for a breach of section 14 of the PLEP Act. Her application for leave is granted.

[10] Ms Tokona is to provide the following information to the Authority within 14 days of the date of this determination:

- (i) an affidavit in support of her claim for compensatory damages;
- (ii) the wage and time records for the period in question;
- (iii) her bank statements, or other documentary evidence, recording wages received

¹ Section 160(3) Employment Relations Act 2000

² Brooker's Employment Law, PL 15.01; *Mikkleson v Sky Television Limited* 9/1/98, Yvonne Oldfield (adjudicator), HT 1/98; *Horne v Air New Zealand Ltd* 28/3/01, WC Hodge (adjudicator), AT 34/01.

- (iv) and paid parental leave payments; and
the paid parental leave application form lodged with IRD.

[11] When this information is received a telephone conference call will be convened with the representatives to discuss if an investigation meeting should be convened or if it is sufficient for the respondent to file affidavit evidence in reply.

[12] Costs are reserved.

Marija Urlich
Member of Employment Relations Authority