

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mele Uilou (Applicant)
AND Campanella Confectionery Limited (Respondent)
REPRESENTATIVES Timothy Oldfield, Advocate for Applicant
Alan Stewart, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 23 September and 4 October 2005
DATE OF DETERMINATION 13 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mele Uilou says her former employer, Campanella Confectionery Limited (“CCL”), unjustifiably dismissed her during a period of parental leave. She says she has a personal grievance and a parental leave complaint.

[2] CCL says Mrs Uilou was justifiably dismissed on the ground of redundancy.

The lead up to the commencement of leave

[3] Mrs Uilou was employed by CCL as a packer, commencing in mid-2003. A packer’s position is an unskilled, entry-level position from which employees can be promoted to an operator’s position. Operators work in specified production areas, receive a higher rate of pay, and if necessary are trained to use machinery associated with the manufacture of particular products. In due course Mrs Uilou was promoted to the position of operator in the chocolate panning section. That position involved lifting product, including nuts and raisins, into chocolate pans and taking the chocolate-coated product out of the pans.

[4] In general CCL employed a production staff of 12 people, spread over 6 production areas. Each area had its own operator, and an assistant.

[5] Mrs Uilou became pregnant in October 2003. By December 2003 she was experiencing severe morning sickness and was off work sick on 4 and 5 December. She returned to work for a week, before requiring a further month off work because of her sickness. An employee named Nau had commenced employment in December, and she began assisting Mrs Uilou in the chocolate panning area some time before Christmas. Nau worked as the main operator in panning while Mrs Uilou was off sick, and another assistant moved into the area.

[6] On her return to work in mid-January 2004 Mrs Uilou continued to experience pregnancy-related health difficulties. She took more time off in late January 2004. A medical certificate dated

17 February 2004 confirmed she was suffering from severe morning sickness, and she found the use of gas and chemicals – in a cold work environment – aggravated her condition. It also referred to the need for Mrs Uilou to avoid lifting anything greater than 5 kg, and to avoid prolonged standing.

[7] In an attempt to address these difficulties the factory manager, Jeffrey Hopkins, gave Mrs Uilou a job preparing product for the bagging machine. However her work rate was too slow and that, too, became a problem. Mr Hopkins told Mrs Uilou she could carry out the duties required of her, receive a series of warnings in respect of her performance, or she could resign and be given a reference. That was not the way to address the problem and, predictably, Mrs Uilou became very upset. Alan Stewart, CCL's managing director, and Mrs Uilou's union representative became involved. The parties reached an agreement that Mrs Uilou be moved to a special packing job, and would receive the lower rate of pay associated with that position.

[8] Mrs Uilou continued in that position until her parental leave began on 4 May 2004. Her leave was to continue until 4 May 2005. Another employee was also leaving on Mrs Uilou's last day of work. Mr Hopkins made some very unfortunate comments about how he was sorry to see one of the departing employees leave, but was glad the other one was leaving. There was no dispute that the latter reference was to Mrs Uilou, and Mrs Uilou understood herself to be the target of the comment. It is far from surprising that Mrs Uilou was left with the impression CCL wanted to get rid of her.

[9] Before turning to the circumstances of her redundancy, I comment on aspects of Mrs Uilou's rights as they stood up to and including the time when her parental leave began. Although no complaint has been raised in respect of them, discussion during the investigation meeting revealed that CCL held a number of misconceptions about them. The most relevant concerned:

- (a) Dealing with pregnancy-related illness;
- (b) Identifying the position attracting protection for the purposes of parental leave; and
- (c) The nature of a 'key position'.

1. Dealing with pregnancy-related illness

[10] Section 16 of the Parental Leave and Employment Protection Act 1987 provides:

“Where, by reason of pregnancy, a female employee is unable to perform her work to the safety of herself or others or is incapable of performing her work adequately, her employer may temporarily transfer her from one job to another.”

[11] The medical certificate of February 2004 indicates Mrs Uilou was incapable of performing her work as a panning operator both to her own safety and adequately for the employer's purposes, by reason of her pregnancy. The same probably went for her efforts to prepare product for bagging. Although it is doubtful whether s 16 was in mind when the relevant transfers were made, CCL was entitled to transfer Mrs Uilou to other positions in response to these difficulties but the transfers could only be temporary.

[12] I would accept that Mrs Uilou's health difficulties were a problem for all concerned. However CCL is fortunate that no complaint was raised in respect of its handling of the matter, other than one which was not well-founded and was not proceeded with. The appropriate way to address the problem was under s 16 rather than by threats of performance management and disciplinary action. I draw attention, too, to s 14, which permits an employer to direct an employee to commence her maternity leave early if, by reason of her pregnancy, she is unable to perform her work to the standard set out in s 16, and no other suitable work is available. Thus if CCL had been

unable to find the packing work it did for Mrs Uilou, the appropriate response would have been to direct the early commencement of her leave.

2. The position attracting protection for the purposes of parental leave

[13] CCL took the view that Mrs Uilou's protected position for the purposes of her parental leave was the packing position she held at the time her leave began. Section 41 of the Act sets out the presumption that an employee's position can be kept open when parental leave of more than four weeks' duration is sought. Section 41 (3) provides:

“The reference ... to the employee's position in the employment of the employer shall be a reference to the position ordinarily held by the employee, and shall not include any position to which the employee was temporarily transferred under section 16 of this Act.”

[14] Thus the position attracting protection under the Act was Mrs Uilou's position as operator in the panning area. That was the position she ordinarily held. The transfers could not change that.

3. The nature of a 'key position'

[15] Section 41 also contains a presumption that an employee's position can be kept open until the end of the employee's parental leave, -

- . unless a temporary replacement is not reasonably practicable due to the key position occupied by the employee; or
- . because of the occurrence of a redundancy situation.

[16] There is in Part IV of the Act a series of detailed requirements regarding the provision of written notice. Among other things employees must, when seeking parental leave and well before it commences, provide details of the leave sought, and the employer must reply saying whether or not leave is granted, and whether or not the employee's position can be kept open. If the employer takes the view that the position cannot be kept open, for either of the above reasons, the employee must be advised of this, be told which of the two reasons set out above is relied on, and be provided with the further information set out in s 36 of the Act.

[17] Neither party complied with the notice provisions, but there is no need to take that matter any further. I mention the s 41 presumption and the notice provisions because, during the investigation meeting, Mr Stewart sought to say Mrs Uilou's position was a key position. That matter had not been raised before. The appropriate time to raise it was in response to the employee's request for leave, and prior to the commencement of the leave.

[18] There was also some misunderstanding of the law about key positions. I now summarise the applicable principles.

[19] The focus is not on the employer's convenience (ref: **Auckland Provincial District Local Authorities Officers IUOW v Onehunga Borough Council** [1989] 1 NZILR 476, 481). The focus is on the level of skill required for the position and the size of the enterprise concerned (ref: **NZ Bank Officers IUOW v ANZ Banking Group Limited** [1983] ACJ 803 and **Finsec v NML** [1990] 3 NZILR 29). It is also on the practicability of finding a temporary replacement for such a position. 'Practicable' means something much more than 'possible' or 'convenient'.

[20] I see no grounds for arguing it was not practicable to employ a temporary replacement for Mrs Uilou – on the contrary temporary replacements were moved into the panning area in December 2003. It was obvious the skills required could be imparted relatively quickly, and

finding someone to whom they could be imparted was relatively straightforward. While the position might have been important in the employer's operation, that is not the applicable test. Mrs Uilou's position did not come close to meeting the test.

The occurrence of a redundancy situation during parental leave

[21] Section 49(1) of the Act prevents an employer from terminating an employee's employment during the employee's absence on parental leave. Sections 50 and 51 create a defence if the employer can prove that, because of the occurrence of a redundancy situation the employer was unable to keep the employee's position open. The employer must also prove there was no prospect of appointing the employee to a position that was vacant, and substantially similar to the position held at the beginning of the leave.

[22] CCL experienced a sharp drop in turnover in March 2005. Turnover in January and February was also down on the same months in 2004. Further, turnover for February and March was less than the overall monthly average. That is significant because the company's profit is closely related to its turnover. In addition the company's product has a short shelf life and cannot be stockpiled. Accordingly if sales are lower, production is cut back. There is limited scope for creating other work for employees, so staffing levels also have to be addressed. CCL's initial response to the drop in turnover was to ask employees to take annual leave, and when its cleaner left employees were asked to share cleaning duties. Two other employees also left, and Messrs Stewart and Hopkins concluded one more position needed to disappear.

[23] It was about then that Mrs Uilou wrote asking to return to work early. By letter dated 9 March 2005 she advised of her wish to return to work on 5 April 2005.

[24] Messrs Stewart and Hopkins believed there was no position for her to come back to, so asked her to come into the office. When she did so, she was merely told that there was no work and was offered two weeks' pay in lieu of notice. Mrs Uilou sought advice from her union, and there was another meeting on or about 4 April 2005. This time Mr Hopkins merely confirmed her position was surplus to CCL's requirements, and this was repeated in a letter of the same date.

[25] I accept there was a genuine redundancy situation, and there was no vacant position available at the time, but that is not the end of the matter. One option for dealing with Mrs Uilou's request would have been simply to decline it. CCL was not obliged to agree to her request (see s 45), and was not obliged to offer Mrs Uilou work again until 4 May 2005. If there was still a redundancy situation as at that date, Mrs Uilou's future employment could be considered then. This is merely an observation on my part, however, and it is not the reason for the decision I have made.

[26] Moreover in any circumstances the mere occurrence of a redundancy situation while an affected employee is on parental leave does not automatically justify making that employee's position redundant. The requirements of the general law of redundancy must still be observed.

[27] The implementation of Mrs Uilou's redundancy fell far short of those requirements. I am afraid I cannot accept the company's view that the matter was handled with dignity and respect. This is so not only because of the sudden and insensitive way in which Mrs Uilou was advised of her redundancy, but because CCL failed to follow a fair process in selecting which employee's position should be declared surplus.

[28] It might be more accurate to say no selection process was carried out at all. It seems CCL considered it obvious Mrs Uilou's position could and should be made redundant, but I believe its

view was influenced by notions of convenience (Mrs Uilou was not at work anyway) and the complete failure to grasp the nature of her rights.

[29] As for the approach that should have been taken, the Employment Court made the following comments in **Lewis v Greene** (28 July 2005, Judge Shaw, AC 7A/04) when dealing with a redundancy imposed during a period of parental leave:

“[119] ... the PLEPA creates an assumption that the employee’s interests will be paramount in circumstances when an employer is contemplating her return to work following parental leave. The obligation on an employer to conduct a fair procedure with active consultation increases when a person is on parental leave. The reason for this is that the mere fact that she is on leave increases her vulnerability. Her employment has been suspended but still exists but she is out of sight and out of mind while on leave. Because she is not physically present in the workplace there may be a tendency, as in this case, not to ‘see’ her when the time for consultation arises.”

[30] Not only was Mrs Uilou out of sight and out of mind here, but once she came to mind it was only to identify herself as someone whose position could conveniently be made redundant. The redundancy put to a formal end a position that was already invisible. This impression was not helped at all by the insensitive treatment Mrs Uilou received prior to the commencement of her leave and the comments made on her departure.

[31] Finally, it was CCL’s view that, if Mrs Uilou had not been made redundant then her replacement, Nau, would have been. CCL complained it would then have been facing a claim from Nau. In fact, Mrs Uilou’s position in the panning area should have been identified as the protected position at the outset, and her replacement should have been moved into the position expressly on the basis that it was temporary, pending the return of the incumbent from parental leave. The Act makes provision for those circumstances. Mrs Uilou was entitled to displace Nau anyway. CCL failed to address that matter.

[32] For all of these reasons I find Mrs Uilou’s dismissal was unjustified. I uphold her parental leave complaint.

Remedies

[33] Mrs Uilou seeks compensation for injury to her feelings, and reimbursement of earnings lost as a result of her dismissal. In the light of the way the termination of her employment was handled, and the evidence of her resulting upset, the claim for compensation in the sum of \$7,500 was reasonable. CCL is ordered to pay that amount to her. I anticipate the amount will come as a shock to it, but for its information the amount of compensation awarded in **Lewis v Greene**, from which I have quoted, was \$15,000.

[34] As for lost earnings, Mrs Uilou was entitled to return to her position in panning, at a rate of \$11 per hour and for 42 hours per week. As a starting point, her total gross lost earnings per week were \$462. Mr Oldfield was correct to say the correct starting date for calculating the loss is the date on which Mrs Uilou was to return to work. He calculated her loss at \$3,006.40 (gross) and I award her that amount.

Summary of orders

[35] CCL is to pay to Mrs Uilou:

- (a) \$7,500 as compensation for injury to her feelings;
- (b) \$3,006.40 (gross) as reimbursement of lost remuneration.

Costs

[36] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they should file and exchange written statements of their position.

R A Monaghan
Member, Employment Relations Authority