

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 139
3082897

BETWEEN MIKAYLA ZHANG
 Applicant

AND WAITEMATĀ DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Mark Donovan, counsel for the Applicant
 Tim Oldfield, counsel for the Respondent

Investigation Meeting: On the papers

Submissions [and further 25 February and 13 March 2020 from the Applicant
Information] Received: 10 March 2020 from the Respondent

Date of Determination: 2 April 2020

DETERMINATION OF THE AUTHORITY

- A. This matter is removed to the Employment Court to hear and determine.**
- B. Costs are reserved.**

Application for removal

[1] The applicant, Ms Mikayla Zhang, asks for her applications in the Authority under the Employment Relations Act 2000 (the Act) and the Parental Leave and Employment Protection Act 1987 (PLEPA) to be removed to the Employment Court to hear and determine.

[2] Ms Zhang's employment relationship problems are that she was unjustifiably dismissed by the respondent, Waitematā District Health Board (WDHB) and that she has a parental leave complaint.¹

[3] Ms Zhang says important questions of law arise out of her employment relationship problems which should be removed to the Court for it to hear and determine.

[4] WDHB opposes removal of Ms Zhang's employment relationship problems to the Court. It says the questions raised by Ms Zhang are largely factual, not legal or are matters that can and should be dealt with by the Authority.

Employment relationship problem

Ms Zhang's claims

[5] Ms Zhang was employed by WDHB as a management accountant in October 2016.

[6] It appears Ms Zhang commenced parental leave on 12 March 2018. On 25 July 2018, Ms Zhang received an email from WDHB advising of a proposed restructure of the finance team, including the proposed disestablishment of Ms Zhang's position as well as other management accountant positions.

[7] Confirmation of the disestablishment of Ms Zhang's position was made on 23 August 2018 and Ms Zhang was informed of new positions within WDHB that she could apply for. No suitable redeployment options were available. On 11 March 2019, Ms Zhang's position was terminated on the grounds of redundancy.

Unjustified dismissal

[8] Ms Zhang claims that her dismissal was unjustified and seeks remedies including;

- (a) Compensation for hurt and humiliation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);
- (b) An order reinstating her to a Senior Financial Analyst position or another position no less advantageous pursuant to s 123(1)(a) of the Act;
- (c) Lost wages, holiday pay and Kiwisaver contributions.

¹ Section 56 of the Parental Leave and Employment Protection Act 1987 (PLEPA).

Parental leave complaint

[9] Ms Zhang also claims that her dismissal amounts to a parental leave complaint under s 56 PLEPA on the basis that she was made redundant by WDHB because she was pregnant. This action Ms Zhang says, breached s 49(1) of PLEPA because the dismissal occurred during her absence on parental leave, or during the 26 week period after her parental leave ended.² Ms Zhang seeks remedies under PLEPA similar to those sought in [8] above.

WDHB's response

[10] In response to Ms Zhang's claims, WDHB says Ms Zhang was not unjustifiably dismissed, she was made redundant following a fair process, in accordance with the Act. Therefore, Ms Zhang has no entitlement to remedies.

[11] With regard to the PLEPA claims, WDHB says Ms Zhang's employment was terminated on the grounds of redundancy, in a situation in which s 51(b) of PLEPA is a special defence. Namely, there was no prospect of being able to appoint Ms Zhang to a position which was substantially similar to the position held by her at the beginning of her parental leave.

Investigation meeting

[12] At a case management conference held on 21 January 2020 with the parties' representatives, arrangements were made for Ms Zhang's application for removal to be dealt with by the Authority. Timetable directions were set for the filing of a response affidavit by WDHB to Ms Zhang's affidavit in support of her application for removal, and for the filing of submissions by both parties. Mr Andrew Dodds, Employment Relations Specialist, contracted to WDHB, filed an affidavit on 10 March 2020. Both parties filed submissions.

[13] By agreement, the application for removal was dealt with by the Authority on the papers.

The removal application

[14] Under s 178 of the Act, the Authority may order removal of Ms Zhang's matters to the Court, if:

² Section 49(1)(a) & (c) PLEPA).

- (a) An important question of law is likely to arise other than incidentally; or
- (b) The case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or
- (c) The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- (d) The Authority is of the opinion that in all the circumstances the Court should determine the matter.

[15] Ms Zhang's application for removal is on the grounds that an important question of law is likely to arise in the matter other than incidentally, under s 178(2)(a) of the Act, and that in all the circumstances the Employment Court should determine the matter pursuant to s 178(2)(d) of the Act.

Alleged important questions of law

[16] In support of the application to remove her claims to the Employment Court, Ms Zhang has advanced the following alleged questions of law she says are important:³

- (a) For the purposes of determining which of the defences under s 51 or s 52 of PLEPA may be available to the respondent, as a matter of law, did the termination of the applicant's employment take place either during her absence on parental leave or, alternatively, during the subsequent 26 - week period?
- (b) For the purposes of s 51(b) PLEPA, was there no prospect of the respondent being able to appoint the applicant to a position that was:
 - (i) vacant; and
 - (ii) substantially similar to the position held by the applicant at the beginning of the applicant's parental leave?
- (c) For the purposes of s 51(c) PLEPA, did the respondent prejudicially affect the applicant's seniority, including by:
 - (i) appointing Heidi Zhang, who was engaged on a contractor basis to provide parental leave cover for the applicant, to one of the Senior Financial Analyst positions; or
 - (ii) appointing non-WDHB employees to other Senior Financial Analyst positions?
- (d) If the special defence under s 52 PLEPA is available to the respondent, for the purposes of s 52(b) PLEPA, was the respondent prepared to accord the applicant preference over other applicants for

³ Schedule A to Application for Order for Removal of the Matter to the Employment Court dated 29 November 2019.

positions that were vacant and substantially similar to the position held by the applicant at the beginning of her parental leave?

[17] WDHB says these are not questions of law, but rather questions of fact to be determined by the Authority and/or matters which the Authority is capable of investigating and determining. Further, WDHB states that a removal to the Court adds further costs to the matter and would deprive it of a further right of appeal from the Authority to the Court.

[18] In *Visagie v Worksafe New Zealand* the Employment Court stated:⁴

A question of law does not need to be complex, tricky or novel to justify the adjective ‘important’. As has previously been observed,⁴ a question of law may be important because the outcome will be decisive of the case or the answer to it is likely to have a broad effect or assume significance in employment law generally. It need not be important beyond the parties.

First alleged question of law

For the purposes of determining which of the defences under s 51 or s 52 of PLEPA may be available to the respondent, as a matter of law, did the termination of the applicant’s employment take place either during her absence on parental leave or, alternatively, during the subsequent twenty-six week period?

[19] Ms Zhang says that she commenced parental leave on 7 March 2018 and was due to return to work in early March 2019.

[20] Mr Dodds has attached to his affidavit a letter from WDHB dated 5 March 2018 confirming Ms Zhang’s parental leave as including fourteen weeks paid parental leave from 12 March 2018 to 18 June 2018, maternity leave without pay from 19 June 2018 to 11 March 2019 and a return back to work date on 12 March 2019.

[21] On 11 March 2019, Ms Zhang’s employment was terminated for redundancy. She says the dismissal was unjustified and in breach of s 49(1)(a) because she was pregnant and the dismissal was also in breach of s 49(1)(c) because it occurred during her parental leave or in the twenty-six week period following.

⁴ [2020] NZEmpC 8 ⁴*Kazemi v RightWay Ltd* [2018] NZEmpC3 at [11], citing Johnston, above n2.

Relevant provisions of PLEPA

2 Interpretation

In this Act, unless the context otherwise requires –
parental leave—

- (a) Means, for an employee, -
 - (i) primary carer leave to which the employee is entitled in accordance with this Act;
 - (ii) partner's leave to which the employee is entitled in accordance with this Act;
 - (iii) extended leave to which the employee is entitled in accordance with this Act;

Dismissal by reason of pregnancy or parental leave prohibited

49(1) No employer shall terminate the employment of any employee –

- (a) By reason of, in the case of a female employee, -
 - (i) her pregnancy; or
 - (ii) her state of health during her pregnancy, unless her state of health during her pregnancy is materially affected by causes not related to her pregnancy; or

51 Special defences relating to dismissal during parental leave

Where the termination is proved to have taken place during the employee's absence on parental leave, it shall be a defence for the employer to prove -

- (a) that, -
 - (i) in the case of a period of parental leave to which section 40(1) applies on the ground of the occurrence of a redundancy situation that occurred in the employer's business after the employer gave the employee notice in terms of section 36(1)(c)(i), the employer was unable to keep the employee's position open; or
 - (ii) in the case of other periods of parental leave, on the ground of circumstances (of the type referred to in section 41) that occurred in the employer's business after the employer gave the employee notice in terms of section 36(1)(c)(i), the employer was unable to keep the employee's position open; or
- (b) that the employer terminated the employee's employment on account of a redundancy situation of such nature that there was no prospect of the employer being able to appoint the employee to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of the employee's parental leave; and
- (c) that the employer had not, in the period commencing with the beginning of the employee's parental leave and ending with the termination of the employee's employment, prejudicially affected either the employee's seniority or the employee's superannuation rights.

52 Special defence relating to dismissal during the 26 weeks following parental leave

Where the termination of employment is proved to have taken place during the period of 26 weeks beginning with the day after the date on which any period of the employee's parental leave ended, it shall be a defence for the employer to prove –

- (a) the matters set out in paragraphs (b) and (c) of section 51; and
- (b) that, during the period between the end of the period of the employee's parental leave and the termination of the employee's employment, the employer had (despite being prepared to accord the employee preference over other applicants) been unable to appoint the employee to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of the employee's period of parental leave.

56 Parental leave complaints

- (1) Where any employee alleges that the employee's employer...
 - (b) has, in contravention of section 49(1), terminated the employee's employment or given the employee notice terminating the employee's employment;...
 - (c) that the allegation shall be a parental leave complaint to which this section applies, and the employee may use, in respect of that parental leave complaint, the procedures provided in sections 57 to 67.

[22] Counsel for Ms Zhang submits that s 51 PLEPA provides a special defence to an employer in relation to a dismissal for redundancy occurring **during** a period of parental leave. Section 52 PLEPA provides a special defence to an employer where the dismissal occurred during the twenty-six weeks **following** the parental leave.

[23] Counsel submits that WDHB treated Ms Zhang's period of parental leave as ending on 11 March 2019 which was also the date of the termination of her employment. Accordingly, a question of law arises as to the date on which Ms Zhang's period of parental leave ended. This, it is submitted, is relevant to the question of which special defence may be available to WDHB. The date on which it is proved that Ms Zhang's parental leave ended determines whether the special defence under s 51 or s 52 of PLEPA applies.

[24] In a letter to Ms Zhang on 5 March 2018, WDHB informed Ms Zhang that her parental leave was not to exceed fifty-two weeks. Ms Zhang says her parental leave commenced on the day that her primary carer leave started, namely 7 March 2018. Therefore, Ms Zhang's period of fifty-two weeks of combined primary carer leave and extended leave appears to have started on 7 March 2018 and ended on 6 March 2019, not 11 March 2019, being the date WDHB treated Ms Zhang's parental leave as concluding and the date of her dismissal.

[25] If Ms Zhang’s parental leave ended on 6 March 2019 or prior to 11 March 2019, then she was dismissed after her parental leave ended and the special defence at s 52 PLEPA may be available to WDHB.

[26] The question arises as to whether WDHB was correct as a matter of law to treat Ms Zhang’s period of parental leave as ending on 11 March 2019 and not 6 March 2019. This enquiry requires an interpretation of the relevant statutory provisions within a factual context.

[27] WDHB says that an employee may extend parental leave, if the employer consents.⁵ Accordingly, WDHB says the special defence available under s 51 PLEPA applies by virtue of s 45(3) PLEPA. This is debatable in a situation in which there was no request by Ms Zhang for an extension to her parental leave requiring WDHB’s consent.

[28] I accept the submission by Ms Zhang that the question as to whether WDHB correctly treated Ms Zhang’s period of parental leave as ending on 11 March and not 6 March 2019, is an important question as it will determine the special defences available to it under ss 51 or 52 PLEPA. It is of relevance to other employers who may find themselves in a similar situation of having to determine the date a period of parental leave ends and therefore what the available defences under PLEPA may be.

Second alleged question of law

For the purposes of s 51(b) PLEPA, was there “no prospect” of WDHB being able to appoint the Ms Zhang to a position that was “vacant” and “substantially similar” to Ms Zhang’s previous position?

[29] Section 51(b) requires WDHB to prove:

- (b) that the employer terminated the employee’s employment on account of a redundancy situation of such nature that there was no prospect of the employer being able to appoint the employee to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of the employee’s parental leave ...

[30] The terms “vacant”, “no prospect” and “substantially similar” under s 51(b) of PLEPA were considered by the Employment Court in *Lewis v Greene*⁶. That decision appears to be the only decision by the Court on the application of s 51(b) PLEPA and is sixteen years old.

⁵ Section 45(3) PLEPA.

⁶ [2004] 2 ERNZ 55.

Further, its facts differ from those in the present case which involves a restructure and the creation of new positions, not the absorption of an employee's duties by another role.

[31] The question of how to interpret s51(b) PLEPA is important, because the outcome will be “decisive of the case”... and “...the answer to it is likely to assume significance in employment law generally,”⁷ and I add to those cases, involving parental leave complaints.

Third question of law

For the purposes of s 51(c) PLEPA did WDHB prejudicially affect Ms Zhang's seniority?

[32] Section 51(c) requires proof:

- (c) that the employer had not, in the period commencing with the beginning of the employee's parental leave and ending with the termination of the employee's employment, prejudicially affected either the employee's seniority or the employee's superannuation rights.

[33] The terms “prejudicially affected” and the “employee's seniority” in the context of s 51(c) do not appear to have been subject to judicial interpretation. Counsel for Ms Zhang gives examples of ways in which to understand “seniority” which may be relevant for the purposes of s 51(c) PLEPA. I accept that s 51(c) PLEPA is open to broad interpretation as to how an employee's seniority may be “prejudicially affected”. The appointment by WDHB of employees to the senior financial analyst positions, who did not share Ms Zhang's senior status, being positions Ms Zhang may have taken up, may have “prejudicially affected” her seniority. I agree, in that context the application of the test in s 51(c) PLEPA is an important question of law and the answer to it will have a broad effect on employers and employees in workplace restructurings.

Fourth alleged question of law

For the purposes of s 52(b) PLEPA, was WDHB prepared to accord Ms Zhang preference over other applicants?

[34] WDHB does not rely on s 52 PLEPA; it relies on s 51 PLEPA and s 103A of the Act. However, in the event s 2(b) PLEPA is the available defence, I agree with the submission for Ms Zhang that there is a question of whether or not the positions were “substantially similar”

⁷ *Visagie* at [4].

or not. This issue was considered at [30] above. There is an added element to s 52(b) PLEPA as follows:

...during the period between the end of the period of the employee's parental leave and the termination of the employee's employment, the employer had (despite being prepared to accord the employee preference over other applicants) been unable to appoint the employee to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of the employee's period of parental leave.

[35] This requires an interpretation of the meaning of a "vacant" and "substantially similar" role. It also requires consideration of what is required of an employer to establish that they were "unable" to appoint someone to such a role or if such a role did not exist, that they were "prepared to accord the employee preference over applicants".

[36] In my view, these issues are important and arise other than incidentally in the event the special defence in s 52 PLEPA applies.

[37] **Accordingly, under s 178(1) of the Act this matter is removed to the Employment Court to hear and determine.**

Costs

[38] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority