

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 74B/08
5099026

BETWEEN

GLENARR HUNTLEY
Applicant

AND

MAATAA WAKA KI TE TAU
IHU TRUST
Respondent

Member of Authority: Helen Doyle

Representatives: Kay Stringleman, Advocate for Applicant
Brian Fletcher, Counsel for Respondent

Submissions received: 4 August 2008 from Applicant
4 and 22 August 2008 from Respondent

Determination: 22 September 2008

DETERMINATION OF THE AUTHORITY

[1] In my determination dated 30 June 2008, I found that Glenaar Huntley had a personal grievance that she had been unjustifiably dismissed and awarded remedies taking into account contribution I had found on the part of Ms Huntley.

[2] I reserved leave in the determination for the respondent to make submissions with respect to whether Ms Huntley was entitled to compensation for the loss of a benefit of paid parental leave because in final submissions, Mr Fletcher had stated he had been *ambushed* by this claim.

[3] I received submissions from Mr Scholzel from Mr Fletcher's firm on behalf of Maataa Waka Ki Te Tau Ihu Trust. Submissions were then received from Ms Stringleman in reply and Mr Fletcher made a further submission.

[4] The issue for the Authority to determine is whether Ms Huntley is entitled to compensation for the lost benefit of paid parental leave under s.123(1)(c)(ii) of the Employment Relations Act 2000.

[5] Clarification was also sought by Maataa Waka with respect to the period in the determination to be taken into account in assessing earnings or money received for the purpose of the lost wages award. I will deal with that in this determination as well.

Is Ms Huntley entitled to compensation for the loss of the benefit of paid parental leave under s.123(1)(c)(ii) of the Employment Relations Act 2000?

Preliminary matter

[6] There is a preliminary matter raised in Ms Stringleman's submission as to whether Mr Fletcher could properly state he was ambushed by the claim. Ms Stringleman does not accept that the claim took the respondent by surprise because it had been discussed earlier.

[7] I agree with Mr Fletcher when he states in his submissions that the matter is largely academic. I do want to record that statements made in mediation and during without prejudice negotiations are not admissible. I do not need to say anything further.

Is the right to paid parental leave conferred by statute or does it arise out of the employment agreement?

[8] The Parental Leave and Employment Protection Act 1987 (PLEPA) provides minimum entitlements with respect to parental leave for employees. The purpose of Part 7A of the PLEPA is to entitle eligible employees and self employed persons up to 14 weeks of parental leave payment out of public money when they take parental leave.

[9] Rights and benefits to non-statutory parental leave are ignored when considering whether a person is an eligible employee for the purposes of paid parental leave – s.71CA(2) PLEPA. This includes rights and benefits in s.4 of the Act which provides that for the parental leave provisions in employment agreements to prevail over the provisions in the Act they must be comprehensive and favourable or more favourable in their overall effect than the provisions in the Act

[10] In conclusion I find that Ms Huntley's right to paid parental leave is conferred by statute and it does not arise out of the employment agreement.

The reason Ms Huntley was not entitled to paid parental leave

[11] Ms Huntley, to be an eligible employee for paid parental leave, was required to meet the criteria under s.7 of the PLEPA.

[12] The relevant part of s.7 of the PLEPA for Ms Huntley was the requirement that, at the expected date of delivery, she was in the employment of the same employer for at least an average of 10 hours a week over the immediately preceding six months.

[13] Ms Huntley was summarily dismissed before the commencement of her approved leave and before her expected date of delivery and therefore did not meet that requirement for eligibility for paid parental leave.

What lost benefits are intended to be compensated for under s.123(1)(c)(ii) of the Employment Relations Act 2000?

[14] Section 123(1)(c)(ii) of the Employment Relations Act 2000 provides for the payment to the employee of compensation by the employee's employer, including compensation for:

- (ii) *loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

[15] The Court of Appeal and Employment Court have considered this benefit in identically worded provisions in s.227(c)(ii) of the Labour Relations Act 1987 and s.40(1)(c)(ii) of the Employment Contracts Act 1991.

[16] The Court of Appeal in *Telecom South v Post Office Union* [1992] 1 ERNZ 711 per Richardson J referred to the type of benefit that s.227(c)(ii) of the Labour Relations Act 1987 was directed to and said at pg 720:

Paragraph (c)(ii) is directed to a benefit "which the worker might reasonably have been expected to obtain if the personal grievance had not arisen". It is a prospective benefit, one to be obtained in the future, not the continuation of an existing benefit. The provision is intended to reach potential future service-related benefits and no doubt to include long service leave, superannuation, redundancy and

golden handshakes in various forms for which the worker has not already qualified but which he or she might reasonably have expected to obtain with further service.

[17] The Employment Court in *Meharry v Guardall Alarms New Zealand Ltd* [1991] 3 ERNZ 305 considered what benefits were intended under s.40(1)(c)(ii) of the Employment Contracts Act 1991. Finnegan J stated in that case:

In my view the benefits intended by the legislation under this provision are benefits which Mr Meharry was entitled to expect as contractual benefits arising out of his contract of employment. Costs of applying for other positions and loss of interest of savings used in living expenses in lieu of income are not in my view recoverable under this provision.

[18] *Meharry* was followed in *Mackintosh v Carter Holt Harvey Ltd* (unrep) AC2A/01, 11 November 2001 Travis J. In *Mackintosh* there were claims under s.40(1)(c)(ii) of the Employment Contracts Act 1991 for loss of benefits to the appellant because he had received redundancy compensation and final pay entitlements which then impacted on his qualification for family support and an unemployment benefit. Travis J accepted in para.[20] of his judgment the argument of counsel for the respondent based on *Meharry's* case that s.40(1)(c)(ii) contemplates benefits arising out of the employment relationship and not benefits payable by the State. The claim under s.(40)(1)(c)(ii) for lost benefits payable by the State was disallowed in that case.

[19] In *Prebble v Coastline FM* [1992] 3 ERNZ 294 Travis J found at pg 301, in considering lost future earnings awarded under s.40(1)(c)(ii), that it was proper for the adjudicator to have considered the rights that the employee would have under the PLEPA in terms of parental leave because, but for her dismissal, it was a prospective benefit which she might reasonably have expected to obtain if the personal grievance had not arisen.

[20] I do not find that that assists Ms Huntley in this case because *Prebble* was decided before there was a statutory right to paid parental leave and the benefit considered was parental leave in the context of assessing future earnings. It is distinguishable on that basis from the benefit that I am being asked to consider.

Conclusion

[21] The benefit of paid parental leave is conferred by the PLEPA and is paid from public money. It is not a benefit that arises out of the employment agreement itself.

In those circumstances I do not find that it is the type of benefit that can be distinguished from those benefits payable by the State in *Mackintosh* which were held to be outside of lost benefits contemplated by the identically worded s.40(1)(c)(ii) of the Employment Contracts Act 1991. I am not able to award Ms Huntley a compensatory payment for the loss of the benefit of paid parental leave for that reason.

Clarification

[22] In my determination dated 30 June 2008, I awarded lost wages to the applicant for three months from 3 March 2008 which was the date when Ms Huntley was expected to return to work from parental leave. I expressly stated in the determination that the reimbursement of lost wages was limited to a three month period which period was quite clearly set out.

[23] Maataa Waka now want a one month payment, described as having been made under the mistake that it was required or as a gratuity, paid to Ms Huntley shortly after the date of dismissal of 24 July 2007 to be deducted from that award.

[24] The determination is quite clear with respect to the period to be taken into account for lost wages and the period to be considered in terms of any money earned during that time. Paragraph [123] of the determination provides:

Subject to the findings I have made about contribution, and any reduction for any money earned by Ms Huntley in the three months from 3 March 2008, that would be an award in the sum of \$10,400 under s.123(1)(c)(ii).

[25] The respondent refers in its submissions about a payment to the applicant which falls outside the period clearly provided for in the determination.

Costs

[26] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority