

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Telesia Blaker (Applicant)  
**AND** Mainfreight Limited (Respondent)  
**REPRESENTATIVES** Paul Pa'u for Applicant  
Lorne Campbell, for Respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 25 November 2004  
**DATE OF DETERMINATION** 28 January 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

The applicant submits she was unjustifiably dismissed from her employment with the respondent during a period of approved maternity leave. To remedy her alleged grievance the applicant seeks lost remuneration, compensation pursuant to s123 (c)(i) of the Act and costs.

The respondent denies that it dismissed the applicant.

Note: The respondent also submits the applicant's claim is time barred in that the applicant failed to allege a parental leave complaint within 26 weeks of the date on which the subject matter of the complaint arose.

**Background**

Ms Blaker was employed by the respondent as a dispatcher at the Chemcouriers' site in Penrose. She had been in the company's employ for approximately five years prior to the events that led to her departure from the company.

It is not in dispute that Ms Blaker took approved maternity leave in March 2003. It appears, however, there is no formal documentation relating to the application for and approval of leave. The evidence reveals the parties agreed that Ms Blaker would take maternity leave from 7 March 2003 and that she would return to work on 6 October 2003. It also seems to have been agreed that Ms Blaker might return to her employment in a different role than that she occupied at the time of her departure on maternity leave. She was happy with this arrangement.

Ms Blaker had previously been issued with a company fuel card by a former Manager of Chemcouriers - Anthony Brown. She was apparently entitled to use this card to obtain a discount on

petrol for private motoring. During her period of leave there was a review of company fuel cards and a decision was taken that the cards would only be available for use with company vehicles. Mr George – who had taken over as Manager of Chemcouriers instructed his Operations Manager to advise Ms Blaker’s husband that the card was to be cancelled.

This led Ms Blaker to ring Mr George on 9 June 2003 to discuss the advice received that the fuel card was to be cancelled. During the telephone call Ms Blaker questioned Mr George as to what job she would be doing when she returned. She was told by Mr George that work was quiet at that time and that they didn’t want to bring someone in to sit around. Ms Blaker was shocked and asked Mr George if that meant that she no longer had a job. He simply repeated that he did not want to pay someone to do nothing.

Ms Blaker continued to press Mr George who responded that there was night job in manifesting. Ms Blaker submitted that she asked Mr George to confirm in writing that her employment had been terminated. He declined to do so.

Immediately after the call Ms Blaker prepared a letter outlining her understanding of the conversation with Mr George. She had her husband take it to Chemcouriers with the intention of having Mr George sign the letter confirming the conversation that had taken place between them. Ms Blaker’s evidence is that she wanted the conversation confirmed in writing because the fuel card she had been given by Mr Brown had been cancelled and her trust in the company had been undermined.

The record of relevant parts of Ms Blaker’s conversation with Mr George reads:

*“9/6/03*

*To Carl George*

*Confirming our phone conversation @ 16.45pm on Monday 9<sup>th</sup> June.*

*You have informed me that because of quietness at Chemcouriers that I no longer have a role to return back to after my maternity leave. I was due back on the 6<sup>th</sup> October 2003. I find this unfortunate that I cannot return to my role & are devastated with this news.*

*.....*

*Your offer on working at night is not practical to my needs as you are aware I have just had a baby & finding night care for him is not an option.*

*You mentioned none of the above when I left to go onto maternity leave in March 2003”.*

Ms Blaker asked for a reference and requested her holiday pay be paid out. She has never received a reference from the company.

She signed the document and requested that its contents be confirmed by Mr George by affixing his signature to the document.

Mr George refused to sign the document. He now says he refused to sign it because Ms Blaker’s understanding of their conversation was wrong.

Ms Blaker’s husband gave evidence that he had the document copied at the company’s offices and that he left a copy with Mr George. The original is notated “*Given copy to Carl 9/6/03 @ 5.45pm*”.

The original is also notated “Rang Jim<sup>1</sup> @ 6.28 asking for a letter of termination. He will ring Karl (sic) on mobile to give ask (sic) him”.

Ms Blaker received no response to her communication to the company. To say she was upset would be an understatement. She waited two weeks and took legal advice. On 11 July 2003, her lawyer, Ms Bush of Gubb and Partners, wrote to Mr Braid, Chief Executive Officer of Mainfreight outlining Ms Blaker’s concerns. She advised:

*“It is clear that Ms Blaker has been unjustifiably dismissed from her employment with Chemcouriers”*

*Please treat this letter as raising a personal grievance on her behalf.*

.....

*We look forward to your response. Please advise whether you are willing to attend mediation”*

There was no response to the submission of grievance.

The following steps were taken by Ms Blaker’s representative:

4 August 2003 Follow up letter to Mr Braid noting there had been no response to the 11 July letter and advising that unless the company indicated (within 10 days) its willingness to attend mediation, proceedings would be filed with the Employment Relations Authority to obtain a direction to attend mediation.

In a letter dated 14 August a Mr Howard-Smith of Howard-Smith and Co. (Barristers and Solicitors) responded. Mr Howard-Smith noted he was a director of Mainfreight. He advised he would take instructions and respond to Gubb and Partners’ letter within a week. He advised the Mainfreight was willing to attend mediation.

No further communication was received in line with the Mr Howard-Smith’s advice that he would respond to the substantive submission of grievance within a week of 14 August.

1 September Gubb and Partners wrote to Mr Howard-Smith again. It was noted that the response promised for the week beginning 18 August had not been received. A response was requested and it was noted Gubb and Partners had requested a date for mediation. No response to this request was received.

3 November In light of the mediation set down for 11 November Ms Baker’s representative again wrote to Mr Howard-Smith requesting an urgent response (by way of the company’s substantive position on the applicant’s the submission of grievance). No response was received to this communication.

7 November A second request for an urgent response was sent by Gubb and Partners to Howard-Smith and Co. (This letter was faxed to Howard-Smith and Co. on 7 November). No response was received.

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<sup>1</sup> Another employee at Chemcouriers.

- 10 November One day prior to the mediation another letter requesting an urgent response was sent to Howard-Smith and Co.
- 10 November In a letter dated 7 November (but faxed from Howard-Smith and Co at 15.22pm on 10 November)<sup>2</sup> Mr Howard-Smith provided a substantive response to the submission of grievance. The essence of Mainfreight's position is that Ms Blaker was not dismissed and she was aware that a job would be available to her on her planned date for a return to work. It was advised "*Mainfreight will attempt to find a position for [Ms Blaker] and would suggest that she attend HR to discuss the matter.*"

The matter did not resolve in mediation.

## **Positions of the parties**

Ms Blaker is clear she was dismissed on 9 June by Mr George after she asked him what job she would be doing on her return to work. She asked for the termination to be confirmed in writing by Mr George. Mr George refused to do that so she recorded her understanding of the conversation and had her husband go to the company to have Mr George sign her record of that conversation. Mr Blaker's evidence was that Mr George refused to sign the record of the conversation and threw it on his desk without reading it. Mr Blaker copied it and left a copy with Mr George. In a subsequent telephone call to the company a message was left for Mr George requesting a letter of termination. Ms Blaker waited for two weeks to hear from the company if her understanding of the conversation was incorrect.

When she did not hear from Mainfreight she obtained legal advice. A grievance was submitted to the company on her behalf. The record shows that no substantive response was received from the company until 10 November 2003 (5 months after Ms Blaker submitted her record of events to Mr George and 4 months after Gubb and Partners submitted a personal grievance on her behalf).

Ms Blaker described in compelling terms the effect this dismissal had on her. She was distressed and depressed at a time she should have been enjoying her new baby. The couple's financial plans were thrown into disarray including their plans to be in their own home by Christmas 2003.

Mainfreight's position explained by Mr George is that on 9 June 2003 when Ms Blaker telephoned him she did not ask what job she would be returning to – she asked about the availability of work. He understood she was asking to return to work early. He advised her that no jobs were available at that time with the exception of a night job in manifesting. He says he advised her to ring closer to her planned date of return.

Mr George accepts that Mr Blaker came to the company on 9 June and that he saw and read the letter of that date. He would not sign it because it was not an accurate record of the conversation he had with Ms Blaker. He denies throwing the letter on his desk without reading it and denies that a copy of the letter was left with him by Mr Blaker.

The company's position is that Ms Blaker was not dismissed and she did not turn up to work on 6 October as expected.

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<sup>2</sup> Just hours before the mediation was to take place.

## Discussion and Findings

For the company it is argued that Ms Blaker's complaint is out of time for the submission of a parental leave complaint.

I find on this submission that Ms Blaker has never formally alleged pursuant to s56 of PLEPA that the respondent has, in contravention of s.49(1) of the Act, terminated her employment. On 11 July 2003 Ms Blaker's legal representative (acting in accordance with the provisions of the Employment Relations Act 2000 (ERA)) submitted a personal grievance on her behalf on the basis she had been unjustifiably dismissed. There is no prohibition in either PLEPA or ERA on a worker whose employment is terminated during a period of maternity leave treating that termination as an unjustified dismissal within the meaning of the ERA. I also note that the respondent was put on notice on 11 July 2003 that Ms Blaker considered she had a personal grievance in that she had been unjustifiably dismissed. At the time the respondent took no issue with the vehicle by which Ms Blaker sought to have her concerns addressed and the respondent attended mediation to address Ms Blaker's alleged *personal grievance*. It was not until the respondent filed a formal Statement in Response on 25 May 2004 that it took issue with the nature of the complaint brought. I consider the respondent, by its delay, has forfeited any right to rely on the time limits in PLEPA to avoid responsibility for the events of June 2003 particularly in light of its overall delay in addressing Ms Blaker's concerns – delays which in themselves have greatly exacerbated the distress she has suffered.

In treating this matter as an alleged grievance brought under the provisions of ERA I also note the advice of the Court in *Denley v Service Workers Union of Aotearoa (Inc)* [1994] 1 ERNZ 863 that employment institutions should be proactive in protecting complainant's rights in minimum code cases.

### Credibility

Ms Blaker and her husband were extremely credible witnesses and their evidence had an overall coherence about it even down to the explanation as to why Ms Blaker would be inquiring in June about the position that would be available for her in October – it is in her nature to plan carefully. This was confirmed in her evidence of this couple's plans for her parental leave, their financial plans, their planned childcare arrangements and it explains her wish to know what she was coming back to on her return to work and her desire to have written confirmation of the position communicated to her by Mr George on 9 June 2003.

Mr George on the other hand presented as somewhat cavalier. This is consistent with the respondent's attitude overall but to be fair to Mr George who gave evidence for the company this may have been a defensive reaction on his part because he could not offer any explanation for not responding to Ms Blaker's letter of 9 June – a letter he acknowledged he had read. Neither could Mr George explain the company's delay in responding to the submission of grievance sent to Mr Braid, Mainfreight's CEO. I note too that no-one else from the company attended to explain this delay. This too is consistent with the cavalier and dismissive attitude taken by the company to Ms Blaker's concerns.

The documentary evidence supports the applicant's position and looking at the evidence overall it is the evidence of the applicant and her husband that I prefer where there are disputes in that evidence.

## Findings

Ms Blaker's evidence was that on 9 June 2003, when she asked Mr George what was in store for her jobwise when she returned to work, she was told that "*work was quiet at that time*". This could possibly be interpreted to support Mr George's evidence in this matter. However, for the reasons set out below I have dismissed Mr George's explanation that he thought Ms Blaker was requesting to return to work in June 2003 and that while there was no work available then (other than the night job) there a job for her to return to work in October 2003.

- The company's response to Ms Blaker's submission of grievance sent on 10 November to Ms Blaker's legal representative does not say that Mr George thought Ms Blaker was requesting to return to work earlier than her planned date of return (6 October 2003). This is the closest contemporaneous record of the company's position.
- Ms Blaker's understanding of her conversation with Mr George on 9 June is unequivocal. "*You have informed me that because of quietness at Chemcouriers that I no longer have role to return back to after my maternity leave*". This record was made by Ms Blaker immediately after the conversation with Mr George. Mr George read this letter just hours after the conversation had taken place. If Ms Blaker had got the wrong end of the stick he could have immediately informed her of that by advising her there had been a misunderstanding and that there would be a job for her on her return to work in October.

Mr George chose not to respond to put Ms Blaker right.

On the balance of probabilities, then, I find that Ms Blaker was dismissed on 9 June during a period of approved maternity leave.

The employer has not attempted to justify the dismissal by reference to any of the defences available to it under PLEPA or for any other reason.

## **Determination**

Ms Blaker was unjustifiably dismissed by the respondent employer and she has a personal grievance.

## **Remedies**

This dismissal was aggravated by the company's conduct throughout. A young woman who had recently given birth was summarily dismissed during a period of approved maternity leave. When Ms Blaker tried to confirm her status her claim was ignored cementing her belief she had been dismissed. Worse, when a submission of grievance was submitted to the company in accordance with Ms Blaker's contractual and statutory rights no substantive response was received for four months – which was then a month after Ms Blaker's planned return to work. Even when the claim was responded to it impliedly criticised Ms Blaker's work attitude and attendance.

This problem could have so easily been resolved by the company thus avoiding the uncertainty distress and financial loss suffered by applicant and her family in this matter. The failure by the company to act to address the applicant's concerns which she immediately raised and its ongoing dismissive attitude to its contractual and statutory responsibilities amount to nothing less than bad faith.

### Lost remuneration

The respondent is directed to reimburse the applicant for remuneration she has lost as a result of her grievance for a period commencing from 6 October 2003 (the date she expected to return to work) until the date of hearing of her claim on 25 November 2004. I reject the respondent's submission that Ms Blaker was required to mitigate her loss from 9 June 2003 onwards. Ms Blaker was on a period of approved maternity leave and I find she was entitled to use that time for the purpose for which it was approved. She was not required to attempt to mitigate her loss until the expiry of her maternity leave and I accept her evidence that she started searching for jobs in October 2003. There has been no failure on Ms Blaker's part to mitigate her loss.

Ms Blaker's part – time earnings will of course need to be deducted from the lost earnings to be paid to her under this head. If the parties cannot agree on the sum to be paid they may make submissions and I will determine the lost earnings payable.

### Compensation under s.123(c)(i)

The evidence of the distress this dismissal caused Ms Blaker (a relatively long-serving employee) was compelling. The respondent is directed to pay to the applicant the sum of \$10,000 to compensate her for the distress this grievance has caused her.

### **Costs**

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott  
Member of Employment Relations Authority