New Zealand Employment Relations Authority Decisions

Eder-Entwistle v Sixteen Eleven Limited (Christchurch) [2017] NZERA 1014; [2017] NZERA Christchurch 14 (25 January 2017)

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Last Updated: 6 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 14
3001971

BETWEEN ANTHEA JADE EDER- ENTWISTLE

Applicant

A N D SIXTEEN ELEVEN LIMITED Respondent

Member of Authority: David Appleton

Representatives: Peter McRae, Counsel for Applicant (*Ex parte*) Investigation Meeting: Determined by consideration of the papers, with written

and oral submissions provided on 23 January 2017. Date of Determination: 25 January 2017

DETERMINATION OF THE AUTHORITY

A. **The *ex parte* application by Ms Eder-Entwistle for interim reinstatement under s 55 of the Parental Leave and Employment Protection Act 1987 is granted on the conditions set out in this determination.**

B. Costs are reserved.

Employment relationship problem

[1] Ms Eder-Entwistle seeks interim reinstatement pursuant to s 55 of the Parental Leave and Employment Protection Act 1987 (the 1987 Act), together with permanent reinstatement, "including reasonable opportunity or flexibility to increased hours, over time", "reasonable compensation for the injury to feelings, hurt and humiliation I have suffered" and costs "of

not more than $1,000 plus GST for having to pursue interim order, and any other costs if matter has to go to an investigation meeting".

[2] The application for interim reinstatement was made pursuant to s 55 of the 1987 Act, which permits an employee who satisfies the conditions set out in that section to apply *ex parte* to the Authority for such an interim order. An *ex parte* application is made without notice to the respondent, and without the respondent being given an opportunity to be heard. Ms Eder-Entwistle presented a sworn affidavit to the Authority in support of her application dated 16 January 2017.

Should the Authority proceed on an *ex parte* basis?

[3] Within the context of the applications usually determined by the Authority, it is very unusual to dispose of a matter, even on an interim basis, without giving the respondent an opportunity to state their case and to give evidence (in affidavit form, when an interim matter is being determined). It is usually only in matters requiring great urgency that the Authority proceeds on an *ex parte* basis.1

[4] In considering whether to proceed with Ms Eder-Entwistle's application on an *ex parte* basis, it is important to understand, as a starting point, why s 55 of the 1987 Act expressly provides for such an application to be made. Section 55 of the 1987 Act originates in s 33 of the Maternity Leave and Employment Protection Act 1980 (the 1980 Act). The explanatory note to the 1980 Act does not explain why Parliament thought it necessary to allow *ex parte* applications. The explanatory notes to the Parental Leave and Employment Protection Bill and the subsequent amendment bills also do not contain any such explanations.

[5] There was also no direct reference in Hansard as to why the application for interim reinstatement may be made *ex parte*. However, a scrutiny of Hansard does provide some clues. From the introductory reading of the Maternity Leave and Employment Protection Bill

1979 ((5 December 1979) 427 NZPD 4459 appears the following:

The Bill provides for two alternative procedures to be available to a women other than a State employee who considers that she has been dismissed in breach of the Bill, or that she has some other complaint relating to rights and benefits under the Bill. The first is a complaint procedure intended to provide a quick and conciliatory settlement of any complaint by means of discussions between the female employee or her agent and her employer. This procedure can be followed through to the Arbitration Court if

1 See, for example, *X Limited v Y* [2015] NZERA Christchurch 202, a case involving the alleged misuse of confidential information.

necessary. The second procedure is a direct approach to the Arbitration Court for the settlement of the complaint. This procedure is to be followed if the parties are in an adversary situation and the complaint procedure would be clearly inappropriate.

[6] From the committee of the Whole House ((24 June 1980) 430 NZPD 944) appears the following statement:

The Bill makes provision for a female employee who is concerned that she might be disadvantaged by an employer if she seeks an interim decision to keep her job open. The clause has been left as it was in the original Bill. The matter can be taken to the Arbitration Court. It would be fair for me as chairman to reflect the views of all committee members that there is concern that this is not the most accessible way of gaining an interim order. On the other hand, committee members have worked diligently, but without success, to find a more accessible means of gaining interim orders, in the rare cases in which they will be needed. I am sure that committee members will say they have an open mind on that point, and if there was a better way of looking at it they would do so happily. However, after a diligent search, they have found no other way.

[7] From the second reading of the Maternity Leave and Employment Protection Bill

1979 ((2 December 1980) 436 NZPD 5511:

An interim order procedure will also be available temporarily to reinstate a woman whose employment has been terminated close to her expected date of delivery. That avoids her having to institute the maternity-leave complaints procedure at a particularly awkward time.

[8] From the first reading of the Parental Leave and Employment Protection Bill 1986 ((2

December 1986) 476 NZPD 5788:

Part VI provides remedies for employees who have complaints under the Bill. Those procedures are almost identical to the existing procedures in the maternity leave [sic] Act. They are designed to provide a quick resolution of conflict by means of discussions with the employer, with recourse to the Arbitration Court if necessary.

[9] The most telling statement is "The Bill makes provision for a female employee who is concerned that she might be disadvantaged by an employer if she seeks an interim decision to keep her job open." This seems to be a reference to the *ex parte* aspect of the section. It appears to state that applying *ex parte* provides a protection to a woman concerned at seeking an interim reinstatement order. The disadvantage being contemplated, presumably, is where an employer faced with an on notice application takes steps to create a redundancy situation, or otherwise causes the woman's post to be restructured.

[10] I note that s 55 of the 1987 Act does not state unequivocally that the application is to be made and determined on an *ex parte* basis. It is ambiguous in its expression, stating that the employee "may apply *ex parte* to the Employment Relations Authority for an interim order reinstating the employee..." The word "may" connotes a choice. However, that choice may apply to the making of the application itself, or doing so on an *ex parte* basis. There is no direct clues in the section as to what element of it is open to choice.

[11] Mindful of the potential prejudice to the respondent in proceeding *ex parte* I invited Mr McRae to provide submissions as to whether the Authority is obliged to determine the application under s 55 of the 1987 Act *ex parte*, and if not, whether it should in this case. Mr McRae's helpful and comprehensive submissions, prepared at short notice, may be summarised as follows:

a. Any order made by the Authority is only interim and is reversible;

b. The deliberate intention of Parliament was to make the process as accessible or easy as possible for otherwise vulnerable women, who might be still waiting to give birth or else be dealing with the earliest stages of motherhood and their babies'

care and development;

c. The express reference to an *ex parte* application creates a presumption that the Authority is to proceed on an *ex parte* basis. Otherwise, no mention would have been made to proceeding on an *ex parte* basis, as the Authority already has that power (now referred to in s 173(4) of the Employment Relations Act

2000 (the 2000 Act).

d. The normal rules requiring full candour in making an application *ex parte* should offer protection against an injustice being done to the respondent, as the applicant must disclose all relevant evidence including any that may go against her argument.

e. In only exceptional circumstances would an *ex parte* interim reinstatement order create injustice to a respondent.

f. Me Eder-Entwistle has provided a written undertaking in similar terms to that required under s 127(2) of the 2000 Act (although it is arguably not required under the 1987 Act).

[12] Normally, when deciding whether to proceed on an *ex parte* basis, the Authority will weigh the prejudice that would be suffered by the applicant in not doing so against the prejudice that would be suffered by the respondent in doing so. A genuine need for urgency is the usual reason that persuades the Authority to proceed *ex parte*.

[13] Whilst Ms Eder-Entwistle's counsel says that she has some concern that the longer the Authority takes to order her reinstatement, the more difficult it will be for her to return, that concern lies at the heart of every interim reinstatement application. Urgency is not, therefore, a special aspect of Ms Eder-Entwistle's application. Indeed, the need to address the dismissal of an employee protected by the 1987 Act is not inherently more urgent than the need to address the dismissal of any other employee protected by the 2000 Act. Therefore, parliament must have incorporated the *ex parte* aspect of the application for another reason than the need to proceed urgently.

[14] I am persuaded by the arguments of counsel in this case. I accept that the original intention of Parliament was to protect vulnerable women, who might be still waiting to give birth, or else be dealing with the earliest stages of motherhood and their babies' care and development. Such a group are inherently more vulnerable than the general cohort of workers protected from dismissal by the 2000 Act alone. I accept that Parliament intended for that protection to be afforded by way of an *ex parte* process.

[15] Therefore, I accept that the Authority is obliged to consider the application made by Ms Eder-Entwistle on an *ex parte* basis. The element of choice signalled by the word "may" in s 55 of the 1987 Act relates to the application itself, not the *ex parte* element.

[16] I will now set out the facts leading to her dismissal as presented by Ms Eder-Entwistle in her affidavit.

Background facts

[17] The respondent trades as the Hair and Beauty Boutique in Richmond. Ms Eder- Entwistle commenced employment with the respondent on 20 April 2015, as a salon assistant. She was employed as a permanent employee under the terms of an individual employment agreement to work 20 hours per week between Monday to Sunday. Ms Eder-Entwistle was originally going to become a hairdressing apprentice, but became pregnant in January 2016, at which time it was agreed between the parties that she would defer her apprenticeship.

[18] Ms Eder-Entwistle did not give the respondent formal parental leave notice in writing, setting out her due date or attaching a doctor's certificate. She says that she was never asked for any notice but did keep the two directors (Sue Shuttleworth and Emma Smith) fully informed about her expected delivery date. She also handed a completed paid parental leave form to one of the two directors.

[19] The Authority saw a letter from Inland Revenue to Ms Eder-Entwistle dated 2 July

2016 which stated that her weekly entitlement to paid parental leave would be for the period

15 August to 18 December 2016. The final payment would be made on 29 December 2016. In her affidavit, Ms Eder-Entwistle deposes that these dates were consistent with the notice given on the form that she gave to one or both directors.

[20] Ms Eder-Entwistle deposes that she did not give anything else in writing to the directors about when she intended to return from parental leave, but did discuss her likely return date twice with Ms Smith, on 25 August and 6 September 2016.

[21] Ms Eder-Entwistle's son was born on 30 August 2016. Ms Eder-Entwistle says she did not get any written notices or advice from her employers about her pregnancy or parental leave but did not realise that that was unusual. Ms Eder-Entwistle was absent on ACC prior to her parental leave starting, although this does not have a bearing on the matter to be considered by the Authority. However, Ms Eder-Entwistle deposes that Ms Shuttleworth said to her, during her absence on ACC, that her existing salon assistant employment agreement was expiring as she was not taking on an apprenticeship. Ms Eder-Entwistle says that she did not understand this comment as her employment agreement is open ended.

[22] An employee called Sue was employed shortly after Ms Eder-Entwistle went on parental leave. It appears that Sue was employed to cover for Ms Eder-Entwistle during her parental leave.

[23] On 12 December 2016 Ms Eder-Entwistle sent a text message to Ms Smith saying that her mother would be able to look after her son on Mondays and Thursday mornings once her paid maternity leave finished on 29 December. In the text message, Ms Eder-Entwistle asked Ms Smith when she wanted her to start. Ms Smith sent the following response:

Il have to sit down to have a look. Just because sue has asked me for more hours and Mondays have been really dead.

[24] Ms Eder-Entwistle responded by asking how soon Ms Smith would be able to let her know as her mother had changed her days at work to accommodate Ms Eder-Entwistle's desired hours. Ms Smith responded as follows:

You should of talked to me properly before she did that because things change all the time with the salon and wages. I had to cut Sues hours because it's been so dead so I can't turn around and offer the hours to you because She wouldn't be happy.

[25] The following text exchange then ensued between Ms Eder-Entwistle and Ms Smith:

Ms Eder-Entwistle: So there isn't any hours at all for me to come back to at all? I just need to know so I can try find something else if not, because we are going to struggle after paid maternity finishes. I must have missed understood about there being some hours for me with Monday and Thursday being a sure thing, baby brain lol.

Ms Smith: No not at this stage. There was hours for you but since sue has asked for more hours and the salon isn't is busy as it was before I can't over staff the salon or it will going under.

There maybe in the future but I can't promise anything sorry xx

Ms Smith : [13 December 2016] You realise you have holiday pay eh? $1100 and something.

[26] The individual "Sue" referred to in Ms Smith's texts is understood to be the person who took over from Ms Eder-Entwistle when she commenced her parental leave.

[27] On 21 December 2016, Mr McRae on behalf of Ms Eder-Entwistle, wrote a letter to Ms Smith and Ms Shuttleworth stating that Ms Eder-Entwistle had been entitled to have her position held open for her, that she had not been in a "key" position and that her position had not been made redundant. Mr McRae invited Ms Smith and Ms Shuttleworth to get in touch to discuss Ms Eder-Entwistle's position. No answer on behalf of the respondent has been provided by Mr McRae, from which I conclude that the respondent did not reply, at least in writing. It appears that the parties have been unable to agree a resolution to the problem.

[28] I accept that Mr McRae's letter dated 21 December 2016 constitutes a written parental leave complaint as provided for in ss 56 and 57 of the 1987 Act.

The relevant sections of the 1987 Act

[29] Before addressing Ms Eder-Entwistle's application in detail, I set out below the relevant sections of the 1987 Act:

49 Dismissal by reason of pregnancy or parental leave prohibited (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

(b) by reason of, in the case of any employee,—

(i) the employee indicating that the employee wishes to take parental leave under this Act or rights and benefits in the nature of parental leave under any provision other than this Act; or

(ii) the employee, or the employee's spouse or partner, becoming the primary carer in respect of a child; or

(c) during the employee's absence on parental leave or during the period of 26 weeks beginning with the day after the date on which any period of parental leave ends.

(2) It shall not be a contravention of subsection (1) for an employer to terminate the employment of an employee—

(a) with the employee's consent; or

(b) where solely on account of—

(i) the pregnancy of a female employee or the employee's spouse or partner; or

(ii) the employee becoming the primary carer in respect of a child,—

the employee absents himself or herself from work (other than with the agreement of the employee's employer or in accordance with section 13 or section 14) for any period which the employee is not entitled to take as leave by reason of any provision of this Act or any entitlement to parental leave contained in any provision other than this Act.

[30] The 1987 Act sets out special defences relating to dismissal:

50 Special defences relating to dismissal

Where—

(a) it is alleged in any proceedings under this Act that an employer has, in contravention of section 49(1), terminated the employment of an employee; and

(b) it is proved in those proceedings that the employer terminated the employee's employment either—

(i) during the employee's absence on parental leave; or

(ii) during the period of 26 weeks beginning with the day after the date on which any period of the employee's parental leave ended,—

the defences set out in sections 51 and 52 shall be available to the employer.

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; and

(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.

54 Dismissal for cause not affected

Nothing in this Act shall affect any right of an employer to dismiss an employee for a substantial reason not related to—

(a) the pregnancy of the employee or the pregnancy of the employee's spouse or partner; or

(b) the employee or the employee's spouse or partner becoming the primary carer in respect of a child; or

(c) the employee's rights under this Act.

[31] Section 55 of the 1987 Act provides as follows:

55 Interim order

(1) Where any employee alleges that the employee's employer has, within the preceding 2 months and in contravention of section 49(1), terminated the employee's employment or given the employee notice terminating the employee's employment, the employee may apply *ex parte* to the Employment Relations Authority for an interim order reinstating the employee in the employee's position or cancelling the notice terminating the employee's employment.

(2) Subject to subsection (3), every interim order made under subsection (1)

shall expire on a date to be specified in the order, being the later of—

(a) a date not later than 26 weeks after the date on which the order is made; or

(b) a date not later than 26 weeks after—

(i) the expected date of delivery of the child (in the case of a child born to the employee or to the employee's spouse or partner); or

(ii) the first date on which either the employee or the employee's spouse or partner becomes the primary carer in respect of the child (in any other case).

(3) An interim order made under subsection (1) may be renewed by the Employment Relations Authority from time to time on the *ex parte* application of the employee in whose favour it was made if the Employment Relations Authority is satisfied that the employee is taking reasonable steps to use the procedures available to the employee under sections 57 to 67.

(4) An officer of the Employment Relations Authority shall send a copy of the interim order and of every decision renewing the interim order to the employer by registered letter.

[32] It is relevant to also examine the notice requirements for a returning employee, as they were not fully complied with by either party.

39 Employee's notice in relation to return to work

(1) Every employee who is on parental leave and whose position is being kept open by the employer, shall, not later than 21 days before the date on which the employee's parental leave ends, give to the employer written

notice stating whether or not the employee will be returning to work at the end of the employee's parental leave.

(2) Where an employee chooses,—

(a) pursuant to section 45(1)(f), to return to work before the date on which the employee is required to return to work at the end of the parental leave; or

(b) pursuant to section 45(1)(g), to end any period of parental leave and begin the period of preference before the date on which the period of preference would otherwise begin,—

the employee shall give to the employer not less than 21 days' notice in writing of the date on which the employee intends to return to work or begin the period of preference, as the case may be.

(3) Subsection (1) does not apply if the employee's employment agreement requires the employee to give a longer period of notice of resignation to the employer.

[33] Sections 41 and 48 of the 1987 Act are also relevant:

41 Presumption that employee's position can be kept open in the case of other periods of parental leave

(1) Where an employee takes a period of parental leave (other than a period of parental leave referred to in section 40) the employer shall be presumed in any proceedings under this Act, to be able to keep open for the employee, until the end of the employee's parental leave, the employee's position in the employment of the employer unless the employer proves that the employee's position cannot be kept open—

(a) because a temporary replacement is not reasonably practicable due to the key position occupied within the employer's enterprise by the employee; or

(b) because of the occurrence of a redundancy situation.

(2) In determining whether or not a position is a key position for the purposes of subsection (1)(a), regard may be had, among other things, to—

(a) the size of the employer's enterprise; and

(b) the training period or skills required in the job.

(3) The reference in subsection (1) 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.

48 Workers employed to replace employees on parental leave

Where a temporary employee is employed to replace an employee who is on parental leave, the employer shall, before employing the temporary employee, inform the temporary employee in writing—

(a) that the temporary employee is being employed on a temporary basis in the place of an employee who is on parental leave; and

(b) that the employee may return to work, in accordance with section 45, before the date on which the employee is required to return to work at the end of the parental leave.

[34] Section 65 of the 1987 Act sets out the remedies available, and s 66 relates to the remedy of reinstatement, as follows.

65 Remedies

In the case of any alleged breach of any of the provisions of this Act, any decision made for the purposes of this Act may, if it includes a finding that any of the provisions of this Act have been breached by the employer, provide for any 1 or more of the following:

(a) the reinstatement of the employee in the employee's former position or in a position not less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of any wages lost by the employee:

(c) the payment to the employee of compensation by the employer.

66 Reinstatement

Where the remedy of reinstatement is provided by the Employment Relations Authority or the Employment Court, the employee must be reinstated immediately or on such date as is specified by the Employment Relations Authority or the Employment Court and, despite any appeal against the determination of the Employment Relations Authority or the Employment Court, the provisions for reinstatement remain in full force pending the determination of the appeal.

[35] Section 68 of the 1987 Act deals with non-compliance with formal requirements. It provides as follows:

68 Non-compliance with formal requirements

(1) An employer must not unreasonably refuse to allow an employee to exercise any rights and benefits in respect of parental leave or a parental leave payment that the employee would be entitled to exercise but for an irregularity.

(2) In this section, **irregularity** means—

(a) omitting to do something required by or under this Act or under the alternative provision under which the leave is taken; or

(b) doing something required by or under this Act or the alternative provision under which the leave is taken before or after the time when it is required to be done; or

(c) otherwise doing anything irregularly in matter of form.

(3) An employee, employer, or self-employed person, or a person acting on behalf of an employee, employer, or self-employed person, may apply to the Employment Relations Authority or the court for relief in respect of an irregularity.

(4) The Employment Relations Authority or the court must grant relief to an employee in respect of a failure to comply with the notice requirements of this Act or of the alternative provision under which the leave is taken if satisfied that—

(a) the employee's failure to comply with the notice requirements was in good faith; and

(b) the extent to which the employee did or did not comply with the notice requirements was reasonable in all of the circumstances of the case.

(5) The Employment Relations Authority or the court may grant relief in respect of any other irregularity if it thinks it is reasonable to do so, having regard to the nature of the irregularity, the good faith or otherwise of the parties, and any other matters it thinks proper.

(6) The Employment Relations Authority or the court may grant relief—

(a) by amending or waiving the irregularity, extending the time within which anything is to be or may be done, confirming the right of an employee or

self-employed person to exercise rights in respect of parental leave or a

parental leave payment (as applicable), or granting other relief as is reasonable:

(b) subject to terms, if any, that the Authority or the court, in the circumstances of each case, thinks fit.

The issues

[36] The following are the issues that have to be determined by the Authority:

a. Was Ms Eder-Entwistle dismissed contrary to the 1987 Act?

b. If so, should she be reinstated on an interim basis under the 1987 Act?

c. If so, what conditions, if any, should be imposed upon her reinstatement?

Was Ms Eder-Entwistle dismissed?

[37] In *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust2* the Employment Court examined the concept of a dismissal, and reviewed a number of authorities. The following, overlapping principles can be extracted:

a. Dismissal occurs at the initiative of the employer;

b. Dismissal involves an act of the employer which results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employment relationship;

c. It may not be necessary for the employer to intend the employment to end, but a termination at the initiative of the employer occurs if the cessation of the employment relationship is the probable consequence of the employer's conduct.

[38] When I review the text exchange between Ms Eder-Entwistle and Ms Smith, I note that Ms Smith stated “I can’t turn around and offer the hours to you because She [Sue] wouldn’t be happy”. In reply to Ms Eder-Entwistle’s question “So there isn’t any hours at all for me to come back to..?” Ms Smith replies “No not at this stage.....There maybe in the future but I can’t

promise anything sorry xx".

[39] This is a clear refusal by Ms Smith to allow Ms Eder-Entwistle to return to her position. Ms Smith is not suggesting in this text that Ms Eder-Entwistle's return should be delayed for a specified period, or that she cannot work the hours she requests. The most she

offers are unspecified hours, at some unspecified date in the future.

2 [2015] NZEmpC 89

[40] It is understood that the respondent's position is that Ms Eder-Entwistle had stated that she did not wish to return. However, there is no mention of this in the texts sent by Ms Smith to Ms Eder-Entwistle. This is also contradicted by Ms Eder-Entwistle's sworn affidavit.

[41] Section 41 of the 1987 Act creates a presumption that an employer will be able to keep open an employee's position until the end of that employee's parental leave, unless the employer proves that the employee's position cannot be kept open because:

a. a temporary replacement is not reasonably practicable due to the key position occupied within the employer's enterprise by the employee; or

b. because of the occurrence of a redundancy situation.

[42] I am satisfied that neither of these two situations apply in this case. Ms Eder- Entwistle is a salon assistant; clearly not a key worker in the respondent's enterprise. Secondly, there is no evidence that there is a redundancy situation. Ms Eder-Entwistle's position has seemingly been filled by the worker referred to as Sue, and so is not superfluous. Also, no consultation process has occurred with Ms Eder-Entwistle in respect of her position being made redundant, as is required under s 4 of the 2000 Act.

[43] Therefore, I am satisfied that Ms Smith's refusal to allow Ms Eder-Entwistle to return to her previous position at the end of her parental leave constituted a dismissal. Section

49(1)(c) of the 1987 Act has therefore been triggered, as the dismissal occurred during Ms

Eder-Entwistle's absence on parental leave.

Should Ms Eder-Entwistle be reinstated on an interim basis under the 1987 Act?

[44] When considering an application for interim reinstatement, the Authority must usually consider the following questions, and reach conclusions in respect of each on a balance of probabilities:

(a) Is there an arguable case?

(b) If there is an arguable case, is an adequate alternative remedy available to the applicant?

(c) If there is not an adequate alternative remedy available to the applicant, where does the balance of convenience lie? and

(d) What is the overall justice of the case?

[45] As will be seen below, I will consider whether the second, third and fourth limbs of this test are applicable in an application under s 55 of the 1987 Act.

Arguable case

[46] In Ms Eder-Entwistle's case, the respondent has a defence to the dismissal if it can prove that, inter alia, 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), it was unable to keep Ms Eder-Entwistle's position open3. However, it cannot do so, as Ms Eder-Entwistle was not in a key position, and there was no redundancy position, as I have already found.

[47] Therefore, the respondent has no special defence available to it. Also, on the face of it, there is no other reason for the dismissal that is not related to Ms Eder-Entwistle's rights under the 1987 Act4. The dismissal seems to have occurred because there are no hours available to be given to Ms Eder-Entwistle, because they have been taken by or promised to Sue.

[48] This reason is a reason related to Ms Eder-Entwistle's rights under the 1987 Act because Sue is apparently a temporary employee employed to replace Ms Eder-Entwistle during her parental leave. It may be that Sue will be unhappy to have Ms Eder-Entwistle return, but that is not a valid reason for not allowing her to do so. Section 48 of the 1987 Act requires an employer to inform the temporary worker in writing that, inter alia, she or he is being employed on a temporary basis. It appears that this did not occur.

[49] Thus far, it appears that Ms Eder-Entwistle has a strongly arguable case for being granted reinstatement on an interim basis. However, it is necessary to examine whether that conclusion is likely to be adversely affected by the fact that required notice was given of neither the start of the parental leave, nor the intended return to work.

[50] The relevant part of s 31 of the Act provides as follows:

31 Obligation to notify employer

3 S 51(a)(ii) of the 1987 Act

4 S 54 of the 1987 Act.

(1) An employee who wishes to take parental leave under this Act shall give written notice to the employee's employer of the employee's wish to take that leave.

(2) The notice under subsection (1) shall state the proposed date on which the employee wishes to commence leave, and the duration of the leave.

(3) If the employee wishes to take parental leave in respect of a child to be born to the employee or to the employee's spouse or partner, the notice under subsection (1)—

(a) shall be given at least 3 months before the expected date of delivery; and

(b) if given by a pregnant employee, shall be accompanied by a certificate from a medical practitioner or a midwife—

(i) certifying that the female employee is pregnant; and

(ii) stating the expected date of delivery;

[51] It is clear that Ms Eder-Entwistle did not give this notice to the respondent. It is also clear that she did not give full notice of her intention to return to work, as required under s 39 of the 1987 Act because she gave her notice later than 21 days before the date when the parental leave ended. She gave the notice 17 days before the date when the parental leave ended.

[52] Section 35 of the 1987 Act deals with the impact of a failure to give notice on an employee who wishes to take extended leave. That is not applicable in Ms Eder-Entwistle's case.

[53] Section 68(4) of the 1987 Act provides that the Authority must grant relief to an employee in respect of a failure to comply with the notice requirements of that Act if satisfied that:

a. the employee's failure to comply with the notice requirements was in good faith; and

b. the extent to which the employee did or did not comply with the notice requirements was reasonable in all of the circumstances of the case.

[54] With regard to the issue of good faith, Ms Eder-Entwistle's failure to provide notice in both cases was borne out of ignorance, she deposes. Whilst ignorance is

usually no defence to an allegation of a breach of a legal obligation, it does not show bad faith. I am therefore satisfied that the failure was in good faith.

[55] Ms Eder-Entwistle did not comply fully with s 31 of the 1987 Act in terms of the requirement to give notice of her intention to commence parental leave, save for completing an IR880 form. The failure appears to have been that she did not give three months' written notice (before the expected date of delivery) and did not attach a copy of a medical or midwife's certificate.

[56] Ms Eder-Entwistle does depose that she advised her employer orally of her pregnancy and the due date in February 2016. I accept this, as there is no evidence that the respondent did not accept that Ms Eder-Entwistle would go on parental leave.

[57] In all, I consider that the extent to which Ms Eder-Entwistle complied with the obligation under s 31 was reasonable.

[58] In respect to her failure to comply fully with the requirement under s 39, she gave her written notice by text four days late. This is not an excessive failure, and I do not consider it to be unreasonable in the circumstances, where the respondent itself failed to comply with the notice requirements under s 38 of the 1987 Act. These provide as follows;

38 Employer's notice in relation to return to work and preference for appointment

Within 21 days after the beginning of an employee's parental leave, the employer of the employee shall give to the employee written notice stating—

(a) the date on which the employee's parental leave will end; and

(b) either—

(i) where the employer is able to keep the employee's position open until the end of the employee's parental leave, the date on which, if the employee decides to return to work at the end of the parental leave, the employee will be required to return to work, being the date of the next working day after the date on which the employee's parental leave ends; or

(ii) in any other case, the period of 26 weeks during which the employer will give the employee preference over other applicants

for any position which is vacant and which is substantially similar to

the position held by the employee at the beginning of the employee's parental leave; and

(c) where paragraph (b)(i) applies, the employee's obligations under section

39; and

(d) the employee's rights under section 45.

[59] Indeed, if the respondent had complied with its duty under s 38, Ms Eder- Entwistle would have known far sooner that the respondent had concerns about keeping her position open, if that is the case. Furthermore, Ms Eder-Entwistle deposes that she discussed with the respondent her likely return date at least twice.

[60] In all the circumstances, I do not consider that Ms Eder-Entwistle's failures to give notice seriously undermine the strongly arguable case that she has to interim reinstatement.

If there is an arguable case, is an adequate alternative remedy available to the applicant?

[61] It is arguable that the Authority is not obliged to consider this limb of the usual test, as Ms Eder-Entwistle has statutory rights to return to work, having been on parental leave. The position is therefore different from the usual reinstatement applications that the Authority determines, where an employee has been dismissed, and must persuade the Authority that

reinstatement is both practicable and reasonable.5 This test is not present in the 1987 Act.

[62] Even if I am wrong, and I am required to consider this limb of the test, I consider (on the scant evidence available at this stage) that an alternative remedy is not likely to be adequate as Ms Eder-Entwistle has the care of a young baby, and is not likely to be able to find alternative employment that suits her needs for some time.

If there is not an adequate alternative remedy available to the applicant, where does the balance of convenience lie?

[63] Again, I believe that it is arguable that the Authority is not obliged to consider this limb of the test, again because of the obligation of the respondent to

5 Section 125(2) of the 2000 Act.

allow Ms Eder-Entwistle to return to work, except under narrow specified circumstances.

[64] However, if I am wrong, I am satisfied that the balance of convenience favours Ms Eder-Entwistle. Whilst the respondent may feel it has made commitments to Sue, as Sue was apparently recruited to cover for Ms Eder- Entwistle's parental leave, the respondent was obliged to inform Sue that her role was only temporary, pursuant to s 48 of the 1987 Act. Any obligations the respondent may have towards this temporary worker cannot, therefore, be allowed to undermine Ms Eder-Entwistle's rights.

[65] Those rights are clear and enshrined in statute. On the information currently available to me, I believe that the prejudice to Ms Eder-Entwistle in not being allowed to return to her role outweighs that which may be suffered by the respondent in having to take her back, as Ms Eder-Entwistle is a new mother who will find it difficult to find alternative suitable employment. The balance of convenience therefore favours Ms Eder-Entwistle.

Where does the overall justice lie?

[66] Once again, I believe that this limb of the test is not necessary when considering reinstatement under the 1987 Act. However, it is in any event clear to me that the overall justice favours reinstating Ms Eder-Entwistle. The respondent has not consulted with Ms Eder-Entwistle to tell her that her role has disappeared, or that it has otherwise restructured its business to abolish the need for the role. Ms Eder-Entwistle has made it clear, according to her sworn affidavit, that she told the respondent of her intention to return.

[67] Whilst Ms Eder-Entwistle deposes of "a very inappropriate voicemail message, and several very nasty texts" having been sent to her by Ms Shuttleworth, having heard the voicemail message and seen the texts, I would hesitate to characterise them in that way. However, it would not be appropriate to reinstate Ms Eder-Entwistle to her position if there were clear evidence that the relationship had broken down, or Ms Eder-Entwistle was demonstrating an attitude towards the respondent which was unconstructive or in bad faith.

[68] However, I do not see this from the evidence. A contentious matter exists between the parties, and that will lead to a strained relationship and stress. That is often the case in such matters, but does not necessarily mean that reinstatement is not appropriate. Once reinstated, the parties must be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".6 They will also be directed to participate in mediation in good faith.

Conclusion

[69] It is my finding on a balance of probabilities, having considered the evidence that is available to me, that the respondent has breached s 49 of the 1987 Act by dismissing Ms Eder-Entwistle without proper cause during her absence on parental leave.

[70] Having reached such a finding, I am satisfied that Ms Eder-Entwistle should be reinstated to the position of salon assistant on an interim basis pursuant to s 55 of the 1987 Act, such reinstatement to be in accordance with the terms of her individual employment agreement, and subject to the following conditions:

a. The reinstatement shall commence with effect from Monday 30

January 2017;

b. The Authority's interim order of reinstatement shall expire on Friday

28 July 2017;

c. The parties are to attend mediation in good faith to discuss and seek to agree the terms of Ms Eder-Entwistle's return to work; and

d. Ms Eder-Entwistle is not precluded from, nor exempted by these directions from making an application for flexible working under Part

6AA of the 2000 Act if she wishes to request a variation of her working arrangements.

[71] As noted above, I consider that the procedures for settlement of parental leave complaints referred to in s 57 of the 1987 Act have been triggered by Mr McRae's

letter of 21 December 2016. I remind the parties that s 64 of the 1987 Act provides

6 Section 4(1A)(b) of the 2000 Act.

that it is the duty of every party to a parental leave complaint to promote the settlement of the complaint under the procedures provided in that Act, and to abstain from any action that might impede the effective functioning of the procedures.

[72] I also note that the respondent's texts to Ms Eder-Entwistle suggest that it may be able to accommodate Ms Eder-Entwistle's request for working shorter hours than her employment agreement provides for. However, the Authority does not have enough information to justify the imposition of a requirement on the respondent to agree to any such request, and indeed, may not have the jurisdiction to do so at this stage.

[73] The Authority shall make arrangements for a case management telephone conference with both parties after Monday 30 January 2017 to discuss setting the matter down for a substantive investigation.

Order

[74] I order the respondent to reinstate Ms Eder-Entwistle to her position as salon assistant on an interim basis subject to the conditions set out above.

Costs

[75] Costs are reserved until the substantive matter has been disposed of.

David Appleton

Member of the Employment Relations Authority
