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Isherwood v Insyn Limited (Christchurch) [2011] NZERA 931; [2011] NZERA Christchurch 95 (30 June 2011)

Last Updated: 24 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 95
5298712

BETWEEN BRIDGET ISHERWOOD Applicant

A N D INSYN LIMITED Respondent

Member of Authority: Helen Doyle

Representatives: Simon Graham, Counsel for Applicant

Angela Boniface, Counsel for Respondent

Investigation Meeting 10 May 2011

Submissions Received: 31 May 2011 from Applicants

2 June 2011 from Respondent

Date of Determination: 30 June 2011

DETERMINATION OF THE AUTHORITY

Parental leave complaint

[1] Bridget Isherwood was employed by Insyn Limited trading as Synergy Hair Group, as a part-time retail hair care assistant from in or about April 2006 in Christchurch. At the material time Ms Isherwood worked an average of 28 hours a week and was paid \$15.00 per hour. She was party to an individual employment agreement dated April 2006. Her employment agreement provided that her place of work could be at one of the following Malls in Christchurch; The Palms, Northlands and Riccarton or another site as advised.

[2] In or about late March 2009 Ms Isherwood took maternity leave and her baby was born on 25 April 2009. Until 16 April 2009 Ms Isherwood was paid out her holiday pay and then was in receipt of paid parental leave.

[3] Ms Isherwood said it was discussed and agreed between her and Mr Glading, the managing director and shareholder of Insyn Limited, that she would return to work on 13 July 2009, such date corresponding with the end of her paid parental leave. There was no formal notice given by Ms Isherwood under [s.31](#) of the [Parental Leave and Employment Protection Act 1987](#) (from hereon referred to as the Act).

[4] Ms Isherwood emailed Mr Glading prior to 13 July 2009 about returning to work, initially for a late night and then increasing her hours leading up to the Christmas period. Ms Isherwood said that Mr Glading's emailed response to her email regarding her return to work was vague and non-committal.

[5] Ms Isherwood decided to write a formal letter to Mr Glading indicating her intention to return to work under [s.39](#) of the

Act after the expiration of 21 days on

6 August 2009. There was no response to that letter. Mr Glading maintains that he never received the letter.

[6] In or about late August or early September 2009 Ms Isherwood was advised by a colleague that the Northlands franchise where she had predominantly been based had been sold and that a work colleague with whom she job shared had been made redundant. Ms Isherwood said that she then assumed her employment had been terminated and decided to seek legal advice.

[7] There was no further communication with Mr Glading until Ms Isherwood instructed Mr Graham in November 2009. Mr Graham wrote to a company Synergy Franchising Limited and asked that his letter be treated as notification of a personal grievance claim. Amongst other matters in the letter Mr Graham advised that there had been a failure to make any arrangements or provide any communications to Ms Isherwood to confirm when she is to restart her position and that Ms Isherwood can only assume that the company had unilaterally terminated her employment without any prior consultation or any valid reason. Mr Graham said that the company had five working days to provide consent to go to mediation.

[8] On 16 November 2009 Mr Glading responded to the letter and advised that he was away from the office from 17 November 2011 but would respond in writing within 15 working days.

[9] On 16 December 2009 Ms Boniface responded to Mr Graham and, amongst other matters, advised in her letter that there had been *absolutely no termination of*

Bridget's employment and further that the matter could be resolved without the need for mediation. She suggested in her letter the most appropriate course of action would be for Mr Glading and Ms Isherwood to meet with each other to make arrangements for her return to work as soon as possible.

[10] Christmas no doubt then intervened. Mr Glading telephoned Ms Isherwood on

29 January 2010 to see where things were at with respect to her returning to work. Ms Isherwood responded along the lines of *haven't you read my lawyers letter*. Mr Graham had in fact sent another letter dated 26 January 2010 that put the company on notice that Ms Isherwood was raising as an alternative a parental leave complaint. He again suggested mediation.

[11] The parties attended mediation but were unable to resolve the parental leave complaints.

[12] Although the statement of problem referred to either a parental leave complaint under the [Parental Leave and Employment Protection Act 1987](#) under [ss.56\(b\)](#) and (c) or a personal grievance claim under [ss.103\(1\)\(a\)](#) and (b) of the [Employment Relations Act 2000](#), both Mr Graham and Ms Boniface agreed in final submissions following the Authority investigation meeting that the matter be limited to a parental leave complaint under [ss.56\(b\)](#) and (c) of the [Parental Leave and Employment Protection Act 1987](#). Ms Boniface confirmed that there was no issue with the time within which the complaint was made – [s.56\(2\)](#) of the Act.

[13] By way of remedy Ms Isherwood seeks reimbursement of lost wages from July 2009 to April 2010 when she obtained other employment in the sum of \$15,120 gross. She also seeks compensation and a contribution towards her costs.

[14] Insyn Limited do not accept that it terminated Ms Isherwood's employment during her parental leave in contravention of [s.49\(1\)](#) of the Act or took any action to her disadvantage that affected her rights and benefits in respect of her parental leave.

The issues

[15] Both counsel helpfully agreed that the following were the issues to be determined by the Authority in making its decision:

- Was there agreement between Mr Glading and Ms Isherwood as to the period of maternity leave;
- Should the Authority waive the failure by Ms Isherwood to provide notice under [s.31](#) of the Act and confirm her right to take maternity leave;
- Did Ms Isherwood provide notification to Mr Glading that she was intending to return to work under [s.39](#) of the Act;
- Was Ms Isherwood's employment terminated;
- Were there unjustified actions causing disadvantage;
- If there are remedies to be awarded, then what are they and are there matters of mitigation?

Was there agreement between Mr Glading and Ms Isherwood as to the period of maternity leave

[16] There is a dispute as to whether there was clear agreement around the date Ms Isherwood intended to return to work after her maternity leave. Ms Isherwood in her written statement of evidence said that on becoming pregnant she was aware she was entitled to 14 weeks maternity leave and knew that she could also apply for extended leave for up to one year. She said that she advised Mr Glading that she wanted to take maternity leave for a period of 14 weeks and completed an Inland Revenue form for paid parental leave with his assistance that showed a date for her to return to work of 12 July 2009.

[17] Mr Glading said that he believed the reference in the paid parental leave form to 12 July 2009 was when the paid leave would end. He said that he erroneously believed that Ms Isherwood wanted 12 months leave and that he made an error because he thought that a woman had an automatic right to one year's maternity leave without requesting it. He said that he did not have a return date for Ms Isherwood in mind in 14 weeks.

[18] There was in this case an informal approach to the taking of leave. The application for paid parental leave is different from the notice requirements under [s.31](#) of the Act. I accept that Ms Isherwood was clear in her own mind about returning after 14 weeks maternity leave to the salon and indeed her email of 16 June 2009 that I shall come to supports that. There is also no reason for me not to conclude that Ms Isherwood genuinely believed she had conveyed that to Mr Glading. I am not however satisfied from the evidence that Mr Glading was clear about when Ms Isherwood was intending to return to work in the absence of formal written notice of the same. There is I find a real likelihood that he was confused about that. Whether or not there was clarity about a return date was overtaken to a degree in any event by the communications Ms Isherwood then sent about wanting to return.

Should the Authority waive the failure by Ms Isherwood to provide notice under [s.31](#) of the Act and confirm her right to take maternity leave

[19] The formal requirements under the Act for written notice from Ms Isherwood under [s.31](#) were not complied with. As a result, there was nothing in writing about the proposed date for commencement of leave and duration of her leave with a return date. The evidence did not support any medical documentation was supplied to Mr Glading. The only documentation in writing was the application for paid parental leave for the Inland Revenue Department.

[20] The Authority can grant relief under [s.68](#) of the Act for non-compliance with formal requirements if satisfied:

- That the employee's failure to comply with the notice requirement was in good faith;
- The extent to which the employee did or did not comply with the notice requirement was reasonable in all the circumstances of the case.

[21] Mr Glading said that he had always taken a relaxed approach to employees wanting to take parental leave. Although in the hairdressing business for many years as a manager, Mr Glading said he had never received a [s.31](#) notice from an employee wanting to take parental leave and that the normal conversation with many employees who were pregnant and wanting leave took the form of an informal chat. In his written evidence, Mr Glading said his standard conversation when staff take leave was

along the lines *See how you feel and we'll go from there*. He said that he appreciated as a family man that things can change after a child is born.

[22] In the circumstances of this case, the irregularity was not insignificant. Balanced against that though, there was informal notice given of maternity leave by Ms Isherwood and no issue about that informality was raised by Mr Glading. I am not satisfied that either party acted with a lack of good faith when Ms Isherwood's leave was discussed.

[23] I do grant relief and waive the failure on the part of Ms Isherwood to provide notice under [s.31](#) of the Act and in doing so I confirm her entitlement to parental leave.

Did Ms Isherwood provide notification to Mr Glading that she was intending to return to work under [s.39](#) of the Act;

[24] The first communication between Ms Isherwood and Mr Glading after she commenced her maternity leave was an email Ms Isherwood sent Mr Glading on

16 June 2009. The email on that date provided:

Hi Kelvyn

I called into the salon the other day to see when the next lot of rosters were due out, I was hoping I could be rostered on for a late night each week on the next lot of rosters starting the week of the 13th of July. This would be when my maternity leave ends. I am looking forward to getting back to work will be a nice change to focus on more than baby needs!! I would at this stage only wish to do 1 late night a week as I am still feeding Freya also I know that Haircare will be due to close around this time therefore there is reduced hours for everyone to have. Leading up to xmas I would be happy to gradually do more hours or if you need

someone for people who call in sick or on holiday. If you could email me back or give me a ring. (phone number provided).

Thanks Bridge

[25] On 29 June 2009 Mr Glading responded to the email, writing:

Mrng B

Hope all is well. Baby fine. Getting plenty of sleep ... LOL I'll ring later in the week.

Cheers

K

[26] Although Mr Glading said in the email he would telephone Ms Isherwood, he did not in fact do so. Mr Glading said in his written evidence that he became busy and took the email as an offer to help out or assist rather than Ms Isherwood returning to her previous role on hours that averaged 28 not 4 hours per week. He said that he took the reference to maternity leave ending to be the paid parental leave running out. Although he said he did not take the request as one for flexible hours he would not in any event have been able to accommodate such a small amount of hours because existing staff were still covering Ms Isherwood's role and with a small amount of hours he would have had to keep them on.

[27] On 5 August 2009 Ms Isherwood emailed Mr Glading

Hi Kelvyn

Just checking you hadn't forgotten me. Talk soon

Bridge

[28] Mr Glading responded on 5 August 2009 as follows:

Hi B No

Roster shifts bit messy at the moment.

We are treading carefully with the Re Location of HC. First week sales good.

We have some shifts but taking it carefully not to over staff the business.

You are welcome to pop in and see what shifts are there at the moment, but they are only tentative.

We've allowed 4 weeks to see what pattern emerges. Cheers

Kelvyn

[29] Ms Isherwood said that when she received that email she went straight into the

Salon to look at the rosters but no one seemed to know where they were. She said she

talked to two of the staff. She started to feel concerned and as she described it *fobbed off*.

[30] Ms Isherwood telephoned the Department of Labour information line and on explaining to them her issues she was advised to write a formal letter under [s.39](#) of the Act stating her intention to return to work. Ms Isherwood's [s 16](#) June email can also be taken as her expressing her intention to return to work based on her understanding that she would return to work after maternity leave on 13 July 2009 but for reduced hours leading up to Christmas. The contents of the email required appropriate communication from her employer and had there been that communication it would no doubt have become clear to Ms Isherwood that Mr Glading was unaware she intended to return on 13 July 2009.

[31] Ms Isherwood then sent to Mr Glading a letter dated 6 August 2009 that provided:

Dear Kelvyn:

I have e-mailed you twice from home and also from Northlands salon regarding my notice of returning to work after maternity leave

I Bridget Isherwood under [section 39](#) of [Parental Leave and Employment Protection Act 1987](#) give notice of coming back to work from parental leave.

This is my 21- day notice from this date the 6th August 2009. Sincerely,

[32] Ms Isherwood sent the letter to Mr Glading at his residential address. Mr Glading expressed some surprise about this as his home address is an unlisted address. It was established that Ms Isherwood's husband, Daniel, had looked up the company records to ascertain the owner of Insyn Limited and obtained the address through that method. Ms Isherwood described posting the letter at the Post Office but never received a response to the letter. Mr Glading denied ever receiving the letter and said that, had he done so, he would have contacted Ms Isherwood urgently about resuming work.

[33] I am required to determine on the balance of probabilities whether Mr Glading received the letter or not. In doing so, I have primarily had regard to Mr Glading's behaviour in terms of the emails sent by Ms Isherwood. Whilst Mr Glading took some time to respond to at least the first email, he did eventually do so. Mr Glading also responded to Mr Graham's letter of 11 November 2009 on 17 November to say he was away from the office but would respond within 15 working days. As it transpired, the response was sent a little outside of that timeframe from Ms Boniface on 16 December 2009 but nevertheless there was a response. I contrast this with a complete lack of response to the formal letter sent on 6 August 2009.

[34] I need to be satisfied that it is more likely than not that Mr Glading did receive that letter. His actions in terms of earlier communications when he responded even after some delay would support the probability that, for whatever reason, he did not receive the letter. I cannot be satisfied that he did. In conclusion therefore I do not find it likely that Mr Glading received the letter of 6 August 2009.

[35] Ms Isherwood said that she was unsure what to do when 21 days had expired and chose not to simply present at work at that time. There was then no further communication directly with Mr Glading until November 2009.

[36] Ms Isherwood did become aware of a meeting that was held with staff during which they were advised that the salon had been sold on 28 August 2009. She was telephoned by a colleague who advised her that her [the colleague's] position was redundant. Ms Isherwood said that she was amazed that Mr Glading had not telephoned her and felt embarrassed. Mr Glading said that, in advance of the meeting, he had tried to call Ms Isherwood on her telephone but there was no answer. Ms Isherwood said that she did not accept that because she had an answerphone on her telephone and a mobile phone. I agree with Ms Isherwood that there is little evidence before the Authority to support a real attempt to at least contact her prior to that meeting.

[37] Mr Glading said that he was astounded to receive the letter from Mr Graham in November 2010. He said that notwithstanding the sale of the Northlands franchise, Ms Isherwood would have still been employed as she was employed across all three stores, including The Palms and Riccarton in Christchurch. He said that there was work for her at the Riccarton salon and he was always intending to hold her position open for a year. He said that Ms Isherwood's part time skill set was at the top of the part time base and that not all the other staff were in the same skill set as her. Although Ms Isherwood said that a position identical to her own was advertised at the Riccarton store later that year, Mr Glading did not accept that it was identical in

nature. Ms Isherwood said that she started looking for another part time role in or about September 2009 but was not successful in achieving one until April 2010.

Parental leave complaints

[38] The Authority needs to consider whether, under [s.56\(1\)\(b\)](#) and (c) of the Act Insyn Limited, in contravention of [s.49\(1\)](#) of the Act, terminated Ms Isherwood's employment or gave her notice terminating her employment and/or took any action or has omitted to do something that affects to the employee's disadvantage the employee's rights and benefits in respect of the parental leave.

Was Ms Isherwood's employment terminated in contravention of [s.49\(1\)](#) of the

Act

[39] The material part of [s.49](#) provides that no employer shall terminate the employment of any employee during the employee's absence on parental leave. There are some special defences to that but this case does not require me to consider those. Whilst several of the cases that Mr Graham referred the Authority to in his final submissions were cases where it was clear that there had been a termination of employment this is not such a case. Insyn Limited does not accept that Ms Isherwood's employment was terminated and she, therefore, is required to satisfy the Authority that her employment was terminated.

[40] There is a presumption under [s.41](#) of the Act that an employee's position can be kept open until the end of the employee's parental leave. The email exchanges that I have set out earlier in June and August do not satisfy me that Ms Isherwood's employment was terminated. Although Mr Glading could be criticised for his communication at the time of the June and August emails it does not satisfy me that at that time there was a termination of Ms Isherwood's employment.

[41] I was not satisfied, for reasons I have set out earlier, that Mr Glading received the letter dated 6 August and therefore there was no contact between Mr Glading and Ms Isherwood between the 5 August 2009 email and Mr Graham's letter of 11 November 2009. When Ms Isherwood came to hear from another employee of the meeting about the sale of the store in late August 2009 she made no inquiries directly of Mr Glading about her own position. After Mr Graham's letter of 11 November

2009 it was confirmed that there had not been a termination of Ms Isherwood's

employment and there was a suggestion to meet to arrange a return to work as soon as possible.

[42] I am not satisfied, from the evidence, that Ms Isherwood's position was terminated and I accept that therefore there was no breach of [s.56\(1\)\(b\)](#) of the Act and no complaint therefore can lie in respect of that section.

Did Insyn Limited take any other action, or has omitted to do something to the employee's disadvantage that affects the employee's rights and benefits in respect of parental leave?

[43] [Brookers](#) Commentary on [s.56\(1\)\(c\)](#) of the Act is that it:

... would seem to cover the whole range of unjustified actions whether or not in relation to statutory leave rights.

[44] Ms Boniface submitted that Ms Isherwood is now estopped, having led Mr Glading to believe she was taking 12 months' parental leave, from claiming she was to return to work sooner. I am not satisfied, though, that such an argument is available in light of the contents of the 16 June 2009 email. Mr Glading did not communicate sufficiently with Ms Isherwood about that. At the very least, her email required a conversation either in person or by telephone so that he could be clear about the terms on which Ms Isherwood wanted to return to work. Such a conversation would also have made the duration of any leave clearer.

[45] I find that inadequacy of communication at that stage did affect Ms Isherwood's rights and benefits under the Act. Firstly, as set out there was no opportunity to resolve the lack of clarity around the duration of the leave. That could have been resolved at this early stage instead of in November 2010. Secondly if it was not possible for Ms Isherwood to return to work for fewer hours than she had been undertaking before she commenced her maternity leave she needed to be told that so she could consider her options.

[46] There is an omission in relation to a failure by Insyn Limited to properly notify Ms Isherwood of the redundancy meeting on 28 August 2009 at which staff were advised that the Northlands shop had been sold. Some employees at that time were made redundant, some transferred to the new employer and others employed elsewhere with Insyn Limited. Ms Isherwood was entitled as an employee on parental

leave to know what was happening in that regard and any decision would impact on her continued employment.

[47] The Employment Court judgment in *Lewis v. Greene* [\[2004\] NZEmpC 74](#); [\[2004\] 2 ERNZ 55](#) emphasised the need for an employee on parental leave to have an opportunity to be involved in a consultation process about redundancy in a meaningful way at least equal to those employees who remained at work.

[48] I find that in both of these regards, the complaint is made out in relation to [s.56\(c\)](#) of the [Parental Leave and Employment Protection Act 1987](#).

Remedies

[49] The Act provides for remedies in s.65 of the Act including, as asked for in this case, the reimbursement to an employee of a sum equal to the whole or any part of any wages lost by the employee and the payment to the employee of compensation.

Reimbursement for lost wages

[50] Ms Isherwood claims the sum of \$15,120.00 gross for reimbursement of lost wages being 36 weeks without work from July 2009 to April 2010 when she obtained new employment.

[51] Ms Boniface submits there was no refusal in this case to keep Ms Isherwood's position open but an assumption on her part that it would not be and that she failed to communicate with Mr Glading about that matter until 11 November 2009.

[52] Ms Isherwood, notwithstanding that she initially only wanted to work one shift of four hours a week in July 2009, gradually increasing those hours leading up to Christmas, claims reimbursement for the hours she was working before she took parental leave of 28. My understanding of the evidence about that was that she would have returned to her original hours if she had been directed to do so.

[53] The Authority has several issues to consider in terms of this remedy. The first is that Ms Isherwood wanted to return for fewer hours than she had been undertaking before she took her parental leave. Matters never progressed to the stage where

there was an agreement to a reduction of hours and I am not satisfied that I am able to now make an award based on reduced hours that may or may not have been agreed to. The

lack of proper communication at that time supports that an award of compensation is more appropriate.

[54] I have then turned my mind to whether Ms Isherwood should, notwithstanding her request for her return for one four hour shift, be reimbursed at the rate of 28 hours per week.

[55] Whilst I accept that Mr Glading could have communicated in a more satisfactory manner in response to the June 2009 email I find that Ms Isherwood's failure to communicate after 21 days from 6 August 2009 and after she came to know of the sale of the shop and her redundancy is also relevant. Ms Isherwood simply assumed that when the shop was sold her position had been made redundant. She did not telephone Mr Glading or send an email. Nothing then happened for about two and a half months.

[56] The Act makes it clear that it is desirable for complaints made by employees under the Act to be raised as soon as practicable so that, if possible, they can be resolved. The relationship between the parties is an ongoing one and one of the most important objects of the Act is to protect an employee's position whilst they are on parental leave. Obviously therefore it is important that issues be raised promptly so that they can be resolved as soon as possible. In this case following Mr Graham's letter of 11 November 2009 there was a response received that Ms Isherwood's employment had never been terminated and that she should meet with him and discuss a return to work as soon as possible. If Ms Isherwood had talked to or emailed Mr Glading earlier I am not satisfied that a different response would have been given. Even if there was to be reimbursement of wages, I would not have awarded lost wages beyond 17 December 2009 as an assessment of the evidence does not support such a return would be unreasonable.

[57] I am not satisfied that there is a basis for reimbursement for wages on the basis that Ms Isherwood would have returned to work for 28 hours per week but was prevented from doing so. I therefore find the remedies limited to compensation.

Compensation

[58] I heard from Ms Isherwood and her husband, Daniel Burgess, about the effect that the failure to secure a return to work had on her. Mr Burgess explained that Ms Isherwood had difficulty sleeping and that she was short with him and the children. Ms Isherwood said that she felt worthless and humiliated and somewhat embarrassed by the lack of communication. She said she would break down and cry for no reason.

[59] Mr Glading could not understand why Ms Isherwood should be awarded any amount for humiliation and distress. I do not accept that. It is clear that Ms Isherwood felt vulnerable in terms of her work as she was outside of the workplace and therefore reliant on Mr Glading to make sure that communication about matters that may impact on her continued employment were appropriate.

[60] Ms Isherwood felt fobbed off in terms of the original communication from Mr Glading and was distressed that she was not advised of the meeting around the redundancies. I do, as Ms Boniface submits, take into account that the humiliation could have been reduced if, after having been contacted by her colleague, she had telephoned Mr Glading to ascertain whether her position was safe or not. I accept that the submission is persuasive that Insyn Limited should not be responsible for at least prolonged distress between Ms Isherwood receiving a call from her colleague and being advised on 16 December that her position had in fact not been terminated.

[61] I am not persuaded that compensation in the circumstances of this case should be at the level Mr Graham submits it should. I have had regard to other cases however in the main they concern an actual termination and some other exacerbating factors that this case does not have.

[62] Taking all matters into consideration, I am of the view that an appropriate award for compensation is the sum of \$4,000.

[63] I order Insyn Limited to pay to Bridget Isherwood the sum of \$4,000 without deduction being compensation for humiliation and loss of dignity.

Parental leave information

[64] I was concerned to hear that Mr Glading, who has been in the hairdressing industry for many years, had never received a notice under s.31 from one of his employees in relation to parental leave and that arrangements have been made informally.

[65] I advised Mr Glading that I would ask if a Labour Inspector could provide some information to assist him and his employees about the rights and obligations under the [Parental Leave and Employment Protection Act 1987](#).

[66] The Senior Support Officer is therefore to provide a copy of this determination to the appropriate person at the Labour Inspectorate who will no doubt be able to provide some appropriate information to the company for its use and the use of the

employees.

Costs

[67] I reserve the issue of costs. I would encourage the parties to attempt to reach agreement, failing which Mr Graham has until 28 July 2011 to make submissions as to costs and Ms Boniface has until 11 August 2011 to respond to those submissions.

Helen Doyle

Member of the Employment Relations Authority

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