

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 121
5347218

BETWEEN

KAREN MURPHY
Applicant

AND

STELLA TRAVEL SERVICES
(NZ) LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: T Fletcher, counsel for applicant
S Wilson, counsel for respondent

Investigation Meeting: 8 December 2011

Determination: 10 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Karen Murphy was employed in a senior IT position by Stella Travel Services (NZ) Limited (STS). On Ms Murphy's return from work after a period of parental leave in May 2011, STS was engaging in a redundancy process which culminated in the termination of Ms Murphy's employment shortly afterwards.

[2] In her statement of problem Ms Murphy says STS:

- (i) dismissed her unjustifiably;
- (ii) breached the Parental Leave and Employment Protection Act 1987 (PLEPA), including s 36 and s 41; and
- (iii) should pay penalties for breaches of the employment agreement and for breaches of the Employment Relations Act 2000, in particular for breaches of good faith.

[3] Reinstatement was sought, but was withdrawn prior to the investigation meeting. The allegation of breach of s 36 of the PLEPA, which concerns the employer's obligation to give notice, was also withdrawn. The allegation of breach of s 41, which concerns the obligation to keep a position open for a person on parental leave, remains.

[4] STS says the redundancy situation was genuine, it acted in good faith, and its actions were justified. It denies breaching the PLEPA, the employment agreement, or its duty of good faith.

Background

[5] Ms Murphy began her employment with Gullivers Pacific Limited (GPL) as an IT project manager in January 2007. After GPL became part of STS by amalgamation, STS became the employer party to the written employment agreement. In December 2009 Ms Murphy was promoted to the position of IT operations manager. For the purposes of this employment relationship problem nothing turns on the disputed matter of whether her position or job title at the relevant time was IT operations manager or general manager IT.

[6] According to her position description, Ms Murphy was responsible for the management and maintenance of all IT and telecommunication functions to all parts of the STS business in New Zealand, and for providing IT support and infrastructure alignment to STS Australia. Her duties included: managing IT staff and contractors; ensuring the successful operation of the group's IT infrastructure; providing service management for end users; managing the group's web presence; managing IT budgets; ensuring services, equipment and consumables were negotiated at the most competitive rates while maintaining standards; and overseeing and ensuring the implementation of end user software training.

[7] Ms Murphy reported directly to Kathryn Kennedy, the chief financial officer. At the relevant time two team leaders and a business analyst reported directly to Ms Murphy, with an additional 7 people reporting directly to the team leaders.

[8] Ms Murphy commenced a period of parental leave on 18 October 2010, and was to return to work on 30 May 2011.

[9] In Ms Murphy's absence her duties were to be covered by the team leaders, with Ms Kennedy providing oversight. No temporary replacement was engaged. During that time Ms Kennedy came to the view that the team leaders were able to carry out their work with minimal input from her, and believed she was able to gain valuable insight into the requirements of their positions. This caused her to question whether the additional layer of management in the form of Ms Murphy's position could be justified. She formulated a proposal to disestablish the position, and sought to begin the associated consultation process on Ms Murphy's return to work.

[10] To that end, on 17 May 2011 Ms Kennedy sent a text message to Ms Murphy asking her to telephone about her return to work. Ms Murphy duly telephoned Ms Kennedy on 18 May. Ms Kennedy explained that she would like to meet with Ms Murphy before 30 May, and suggested a place to meet.

[11] Ms Kennedy said in evidence that she intended the suggested meeting to be a preliminary meeting, where she would flag the start of a process and seek a more formal meeting to outline the details of her proposal. Ms Murphy thought it unusual that she had been approached as she was, so during the conversation she asked Ms Kennedy whether there was something she should be concerned about.

[12] According to Ms Murphy, Ms Kennedy replied that Ms Murphy's role had been disestablished, although she acknowledged that later in the conversation Ms Kennedy told her: *'it's just the beginning of the process'*. Ms Murphy said she could not wait to discuss the matter so she sought an earlier meeting. She also asked why the position was being disestablished only a week before her return to work, to which Ms Kennedy replied: *'no time is a good time'*.

[13] Ms Kennedy's evidence was that she sensed Ms Murphy felt panic, and that she was pressed into replying: *'we are looking to disestablish your role and I would like to talk to you about that.'* She denied that she informed Ms Murphy the position had been disestablished. She agreed she made a comment to the effect that *'no time is a good time'*, but not in the context alleged by Ms Murphy. Rather she sought to

recognise that there is never a good time to raise the possibility of redundancy with an employee.

[14] A meeting went ahead at the STS offices on 19 May. Ms Kennedy had prepared a letter, which was presented at the meeting, in which Ms Murphy was advised that a review of the IT department had been undertaken over the past few weeks with a view to optimising support services provided and taking into account cost efficiencies. A new structure was proposed and Ms Murphy's feedback was sought. The restructuring document attached to the letter showed the two team leaders reporting directly to the chief financial officer, and the 7 staff members reporting directly to the team leaders as before. The business analyst was to report to one of the team leaders. In effect it preserved the arrangement in force while Ms Murphy was on leave.

[15] Ms Murphy attended the meeting with her partner as her support person. When the letter and the restructuring documents were handed to Ms Murphy, Ms Kennedy made brief mention of current and future projects and explained that a further meeting would be sought to discuss Ms Murphy's feedback to the contents. Ms Murphy asked if there was any point in providing feedback because her position had already been disestablished. Ms Kennedy replied that the restructuring was a proposal only, and that feedback was important.

[16] A discussion followed during which, according to Ms Murphy's evidence, there was an exchange where she asked Ms Kennedy to confirm what she had been told the previous day in the following terms: *'on the phone yesterday you said my role had been disestablished – is this correct?'* to which Ms Kennedy replied: *'yes'*. Ms Kennedy's evidence was that she replied to Ms Murphy's question by denying that she told Ms Murphy the position was disestablished and declining to enter into a discussion that was a *'play on words'*.

[17] Since I found both Ms Murphy and Ms Kennedy to be credible witnesses, I accept that both genuinely believe their accounts as summarised above are correct. I resolve the conflict in their accounts by saying I find it likely that the expression Ms Kennedy used on 18 May was: *'we are looking to disestablish your position'*, and that to her *'looking to'* meant *'considering'* or *'have in mind'* in the sense that the matter

was at the proposal stage and a decision had not yet been made. I consider it likely Ms Murphy is so certain Ms Kennedy said the position had been disestablished because she heard the words 'looking to' as meaning 'intending to' in the sense that a decision to proceed had already been made and STS was acting to implement the decision. However I am reinforced in my view of Ms Kennedy's usage because at the same time and thereafter she consistently used the words 'proposal' or 'proposed', in circumstances which I do not consider amounted merely to an attempt to backtrack in order to cover a slip.

[18] In the light of that finding I consider it unlikely that, at the meeting on 19 May, the express words put to Ms Kennedy were that she had told Ms Murphy the previous day that the role had been disestablished, to which the express and immediate response was simply 'yes'. I consider it more likely that the quoted exchange was a synopsis of the conversation, based on what Ms Murphy heard but not the words actually used. To the extent that any debate began at the meeting about what exactly had been said or meant the day before, it was ended when Ms Kennedy declined to embark on a '*play on words*'.

[19] It was common ground that Ms Murphy asked for a copy of the IT department's budget for the next year. The request was declined at the time, although the material was later provided. There was a further brief discussion before Ms Murphy, who had become very upset, left the meeting.

[20] Ms Murphy sought legal advice. In a letter dated 23 May 2011 her solicitors set out her view that Ms Kennedy had told her on 18 May her position had been disestablished, and acknowledged that her response to the request for feedback was to question whether there was any point in providing it. The letter also recorded the refusal of the request for the IT budget. The letter went on to request further information to allow a meaningful response, including all information relevant to the review of Ms Murphy's position and a copy of the IT budget. It ended with a number of questions, including why the position was considered surplus, what would happen to Ms Murphy's duties, what other than cost-cutting was driving the proposal, and what redeployment opportunities were available.

[21] No response was available by the time Ms Murphy reported for work on 30 May 2011. While at work she observed a number of things which supported her view that her duties had already been taken over and her position had already disappeared. These included:

- discussion with the business analyst suggested he believed he was to continue to report to the person to whom he had reported in Ms Murphy's absence;
- there were no handover meetings with Ms Kennedy, and the two team leaders appeared to be continuing to report to Ms Kennedy;
- Ms Murphy had not been informed of resignations which had occurred while she was on leave;
- Ms Murphy's duties continued to be carried out by Ms Kennedy and the team leaders, Ms Murphy had limited access to network drives, and any issues were being escalated to Ms Kennedy;
- Ms Kennedy was said to have asked for a new desk to be set up for her a few days earlier, although a desk had already been available for her use during Ms Murphy's leave;
- the management team was unaware of the decision to disestablish Ms Murphy's position;
- the proposed structure appeared already to be in place;
- STS was doing well, with an increase in sales; and
- the team appeared to have less respect for Ms Murphy, and she felt everyone was carrying on as if she was not there.

[22] STS replied to the 23 May letter through its solicitors, in a letter dated 1 June 2011. The letter set out STS' view of the facts, including that the disestablishment of the position had been and remained a proposal. It explained that the proposal derived from Ms Kennedy's experience in covering the role, which had caused STS to question the need for it and in turn whether the salary cost was justified. It referred to the capacity of the team leaders, and the current lack of infrastructure projects either in progress or forecast. Attached to the letter was a list indicating who would take over each of Ms Murphy's various duties.

[23] Next the letter addressed the request for information, by providing the information subject to a requirement of confidentiality in respect of the budget

figures. It said there were no documents associated with the 'review' of the IT department because the matter was a proposal brought to Ms Murphy for her consideration. Complex financial or analytical study had not been considered necessary.

[24] Finally, the letter answered other questions in the 23 May letter including one about why Ms Murphy's access to email through her Blackberry had been disabled. The answer was that action was taken in October 2010 and, as explained to Ms Murphy at the time, was to ensure Ms Murphy was not troubled by work emails while on leave. A second question concerned the existence and content of an announcement to the IT staff, soon after the 19 May meeting, regarding a reorganisation. That question was answered by saying the staff had been advised of the proposal under discussion.

[25] By letter dated 2 June Ms Murphy's solicitors raised what was termed a personal grievance on the ground of breach of the PLEPA, and on the ground of unjustified disadvantage in respect of the: *'decision that has already been made by Stella Travel Services (STS) to terminate Ms Murphy's employment'*.

[26] The parties met again on 3 June 2011, with Ms Murphy's solicitor in attendance.

[27] The stated purpose of the meeting was to allow Ms Murphy to provide feedback. The feedback was that the process was a *'farce'* because, as Ms Kennedy had confirmed on 18 May, the decision had already been made.

[28] Ms Murphy also raised her observations of changes in the office since her return to work, as confirmation of her view. Ms Kennedy explained them on 3 June by saying they reflected arrangements that had been in place while Ms Murphy was on leave, or that they were based on inaccurate information. She also said in evidence that it was for Ms Murphy to take over the reins on her return. Regarding the budget, which Ms Murphy believed to have been prepared and signed off on the basis that her salary was not included, Ms Kennedy said that was an assumption which was not open to Ms Murphy. She said the budget had been presented to the board on 27 May as a group budget, not an IT budget.

[29] Save for reference to the possibility of embarking on without prejudice discussions, the meeting went no further.

[30] In a letter dated 10 June STS' solicitors responded to the matters raised in the 2 June letter, and went on to advise that STS was ready to make a decision on the proposal. They enquired whether a meeting was sought, or whether the decision could be provided in writing.

[31] The response was that no further meeting was sought and the decision could be conveyed in writing. Accordingly STS' solicitors conveyed the decision in a further letter dated 17 June 2011.

[32] The letter explained that the position of IT operations manager was considered surplus because the team leaders had the capacity to take over aspects of the role, the removal of a layer of management was efficient and cost effective, and no major capital expenditure or projects were forecast for IT. It advised that no suitable alternative position was available at the time and none was forecast for the period in which Ms Murphy had preference for re-employment under the PLEPA. Accordingly Ms Murphy's employment was terminated and she would not be required to work during her notice period.

[33] The parties' employment agreement addressed redundancy. It provided among other things for a period of notice or payment in lieu thereof in the case of redundancy, and set out a formula for calculating redundancy compensation. In addition to her other entitlements on termination, Ms Murphy received payments under these provisions.

Issues

[34] The issues for determination are:

- (i) was the termination of Ms Murphy's employment justified, in that the disestablishment of her position was imposed for genuine commercial reasons and followed proper consultation with her;

- (ii) did STS breach the PLEPA by disestablishing Ms Murphy's position while she was on parental leave;
- (iii) if Ms Murphy has a personal grievance, what remedies should she receive;
- (iv) if STS has breached the PLEPA or its good faith obligations under the Employment Relations Act, should a penalty be imposed.

Was the termination of Ms Murphy's position justified?

1. Whether the reasons for disestablishing the position were genuine

[35] It was submitted on behalf of Ms Murphy that the redundancy was not genuine because STS did not provide evidence to demonstrate the change to its business occurred after it had agreed to keep Ms Murphy's position open, and subsuming the employee's duties into other positions does not generate a genuine redundancy if the circumstances giving rise to the redundancy situation arose before the parental leave was granted.

[36] These submissions reflect the decision of the Employment Court in *Lewis v Greene*¹. Mrs Greene's duties were absorbed during her absence on parental leave into the duties carried out by another employee. Mr Lewis concluded Mrs Greene's position was surplus to his requirements and terminated her employment on the ground of redundancy prior to her return to work. The court found the overstaffing which gave rise to the redundancy situation in question existed and was known prior to the grant of leave. However in finding Mrs Greene's redundancy was not genuine the court concluded the main reason for making the position redundant was the extreme bad feeling between Mr Lewis and Mrs Greene before her leave began, and Mr Lewis' subsequent desire not to disturb the smooth running of the firm, as well as the likelihood that the redundancy situation existed before the parental leave was granted.²

¹ [2004] 2 ERNZ 55.

² At [72]

[37] In the absence of additional factors of the above kind I do not accept that, in order to demonstrate the genuineness of the redundancy, STS was obliged to demonstrate that any change in its business arose after the grant of leave was made. Without those factors the matter of the timing of the redundancy situation is more relevant to whether there was a breach of the PLEPA.

[38] In any event, unlike in *Lewis v Greene*, there was nothing to indicate there was already a redundancy situation affecting Ms Murphy's position prior to her grant of leave, and I find STS was not aware of any such situation at the time. That it decided against engaging a temporary replacement for Ms Murphy does not necessarily mean it was overstaffed and knew it. It is not unusual for an employer to decide to cover an employee's absence by deciding it could reallocate duties on a temporary basis rather than engage a temporary replacement.

[39] In addition, with reference to a passage in the Employment Court's decision in *Rolls v Wellington Gas Co* commenting on the usefulness of a paper trail when there is a question about the genuineness of a redundancy³, it was submitted that STS' failure to provide information in support of its decision suggests the redundancy was not genuine. Although I acknowledge that the existence of a paper trail may be an indicator of the genuineness of a redundancy, in itself the absence of a paper trail is not determinative.⁴

[40] When Ms Kennedy referred to a 'review' in her letter of 19 May, she was not referring to a documented and detailed strategic planning process of the kind sometimes seen when a large organisation undergoes a restructuring. She was referring largely to her own view that there may not be a need for Ms Murphy's position, and the steps she took to test that view. Although she explained her view at the 19 May meeting she was not obliged to, and did not document the steps she had taken in reaching it. On the present facts I do not find her failure to do so to be indicative of an absence of genuineness in her decision-making.

³ [1998] 3 ERNZ 116, 123

⁴ As the court noted in *Rolls*, there is no minimum requirement regarding the existence of a paper trail.

[41] I will return to the remainder of the information sought and provided when addressing the submissions on the consultation process. For present purposes I find nothing in that material indicates that the redundancy was other than genuine.

[42] Broadly, determining the genuineness of the redundancy requires an answer to whether the decision to declare a position redundant was made for genuine commercial reasons, or whether it was motivated by a wish to dispense with the employee's services for another reason. There was no suggestion that STS had an ulterior motive in dispensing with Ms Murphy's services.

[43] Accordingly STS submitted that the disestablishment of Ms Murphy's position was made for genuine commercial reasons, in particular that:

- having reviewed Ms Murphy's role against the existing capacity, it concluded that the team leader roles could adequately cover aspects of Ms Murphy's role;
- removing the extra layer of management created a more sustainable, efficient and cost-effective structure; and
- no major IT capital expenditure or IT projects were forecast.

[44] Those were the reasons for the decision to disestablish Ms Murphy's position. They were genuine commercial reasons and were not tainted by the existence of an ulterior motive.

2. Whether there was a proper consultation process

[45] STS' obligation as a fair and reasonable employer to deal with Ms Murphy in good faith included an obligation to consult with her about the disestablishment of her position⁵.

[46] Ms Murphy believes that obligation was not met, in particular because the decision to disestablish her position was made on or before 18 May and the subsequent consultation process was a sham.

⁵ *Simpson's Farms Ltd v Aberhart* [2006] ERNZ 825

[47] I have not accepted that Ms Murphy was told on 18 May that her position was already disestablished.

[48] As for Ms Murphy's observations on her return to work, there was no indication that any effort was made to manage the return as it should have been. I consider it likely that the staff continued as they had in the preceding months, with the additional uncertainty caused by the advice of the proposal to disestablish Ms Murphy's position. In the circumstances Ms Murphy was facing it was not enough to say that the responsibility for taking over the reins was hers. To Ms Murphy the proposed structure seemed already to be in place, because in practice that structure had been the one in place during the months of her leave.

[49] By the same token Ms Murphy's observations were made during the course only of the first few days after her return to work. An adjustment period would have been necessary in the best of circumstances. In Ms Murphy's sensitised state of mind, and because there was a need in any event to take some steps of her own re-establish relationships and lines of communication following her absence, she read more than was warranted into the uncertainties of those early days. In doing so she also made some unwarranted assumptions or was unnecessarily suspicious in respect of matters such as Ms Kennedy's desk, the resumption of her access to network drives, and why she was not advised of resignations occurring during her absence on leave.

[50] For these reasons I do not consider Ms Murphy's observations on her return to work support her view that her position had already been disestablished.

[51] Unfortunately Ms Murphy's certainty that she had been told her position was already disestablished led her to view the consultation process as a sham when that was not the case. It meant she did not participate in the process as she should have, rejecting STS' attempts to engage with her by responding that the attempted discussions were pointless or a farce.

[52] Because of this I do not accept the further submission that Ms Murphy was unable to provide appropriate or relevant feedback because she was not given clear and detailed information supporting the business reasons for disestablishing her

position. While I believe the proposal was not accompanied by sufficiently detailed information when it was discussed on 19 May - and Ms Murphy's request for information such as the IT budget should not have been refused - those matters were remedied in the subsequent correspondence when information requested was provided. There was no reason why Ms Murphy could not have sought more information if she wished. She could, for example, have asked for further details of forecast expenditure and projects if she sought to address STS' conclusions on those matters. Again, rather than engaging with STS, her response when information was provided to her was to maintain that the decision had already been made.

[53] Thus, while I have reservations about the nature of the information provided to Ms Murphy at the commencement of the consultation process, STS subsequently addressed the matter adequately in the light of Ms Murphy's refusal to engage.

3. Conclusion

[54] The Employment Court noted in *Lewis v Greene* that the case for unjustified dismissal needed to be considered in the context of the protections, rights and obligations provided in the PLEPA⁶. It found there were breaches of the PLEPA, and incorporated the findings in its overall conclusion that the making of Mrs Greene's position redundant was unjustified.⁷

[55] Although conclusions of the kind discussed in this section of this determination may be sufficient to reach a finding about the justification for a termination of employment on the ground of redundancy where no parental leave issues arise, I also take into account whether there was a breach of the PLEPA. For the reasons discussed in the next section I find there was a breach of s 41 of the PLEPA. On that ground I find Ms Murphy's dismissal was unjustified.

Did STS breach the PLEPA

1. Relevant provisions in the PLEPA

⁶ At [73]

⁷ At [138]

[56] Section 41 provides:

(1) Where an employee takes a period of parental leave ... 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) ...

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

Section 49 provides:

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

(a)...

(b)...

(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) ...

Section 50 provides:

Where –

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

(b) it is proved ... that the employer terminated the employee's employment either –

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

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

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

Section 51 provides:

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 –

...

(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 commencement of the employee's parental leave; ...

Section 52 provides:

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

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

(a) the matters set out in paragraphs (b) and (c) of section 51 of this Act; and

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

[57] Ms Murphy says the breaches of the PLEPA included breaches of:

(i) section 41, in that STS took no steps to keep her position open for the period of her parental leave; and

(ii) section 49 in that STS decided to disestablish her position while she was on parental leave, or alternatively that it did so in the period of 26 weeks beginning on the day after her return to work.

[58] Ms Murphy says the special defences available under s 51 or s 52 of the PLEPA are not available because the redundancy was not genuine or legal.

2. Did STS breach s 41?

[59] As noted in *Lewis v Greene* the PLEPA contemplates that a position will be kept open by temporary measures until the employee returns⁸. Thus the mere fact that other employees covered Ms Murphy's duties while she was on leave does not mean STS failed to keep her position open for her during that time. Temporary measures of that kind are permissible. However the court also said in *Lewis v Greene* that a redundancy situation arising under the PLEPA must be judged on criteria which create a higher threshold for an employer than in other cases.⁹

⁸ At [86]

⁹ At [85]

[60] The redundancy situation STS relies on occurred when the effect of Ms Murphy's absence led Ms Kennedy to question whether the position was necessary, then to identify business reasons why it was not and to propose that it be disestablished. The temporary reallocation of Ms Murphy's duties would effectively become permanent as a result.

[61] The observation that Ms Murphy's position was being covered adequately by the team leaders and Ms Kennedy herself is the kind of observation to which employees on long term absences are vulnerable. If they are not present and performing their duties, their place in and value to the workplace is not 'seen'. That is one reason for the presumption that the position of an employee on parental leave can be kept open.

[62] With reference to the presumption that Ms Murphy's position could be kept open, the wider business reasons for disestablishing Ms Murphy's position – namely current and projected workloads – are of a kind that would usually be applied to the whole of the IT department and an appropriate structure addressed in the process. That would include consideration of the appropriate allocation of duties between the team leaders and the manager, and whether those three positions in particular should be maintained in that form. A proposal about the future structure would be generated. In turn those affected would be consulted, and a decision on how to proceed would be reached.

[63] Instead there was no wider review of the staffing needs in the IT division against the background of the business needs of STS. Ms Murphy's position was the single focus and any review of staffing needs was prompted by and concerned it alone. I find that approach inconsistent with the obligation to protect the employment of a person on parental leave, or to keep the employee's position open. It is not sufficient to rebut the presumption that Ms Murphy's position could be kept open.

[64] That Ms Murphy's employment was not terminated until after her return to work does not affect this conclusion. The proposal to disestablish her position was formulated before her return, and a consultation process began before her return. Even if Ms Murphy's reaction to Ms Kennedy's initial approach affected the timing of the commencement of the consultation process, I do not consider preparing for a

redundancy process and commencing it promptly upon an employee's return to work amounts to keeping the employee's position open as contemplated by s 41.

3. Did STS breach s 49?

[65] The preceding finding is the one I have relied on for the purposes of Ms Murphy's personal grievance, but I make some further comments because there were detailed submissions on other aspects of the PLEPA.

[66] The first concerned s 49. Ms Murphy's employment was terminated after her return to work, by the letter dated 17 June 2011. Since the termination occurred within the period of 26 weeks beginning with the day after the date on which Ms Murphy's parental leave ended, it is within the prohibition in s 49(1)(c). STS was in breach of s 49(1)(c) unless the special defence contained in s 52 applied.

4. Does the special defence in s 52 apply

[67] I comment on s 52 to the limited extent that, on the premise that Ms Murphy's position had been disestablished, argument was directed on her behalf at STS's approach to identifying an alternative position.

[68] The special defence in s 52 applies if; -

- (i) Ms Murphy's employment was terminated on account of a redundancy situation that was of such a nature that there was no prospect of STS being able to appoint her to a vacant position which was substantially similar to her position; and
- (ii) STS was unable during the preference period to appoint Ms Murphy to a position which was vacant and substantially similar to her position

[69] In that I accept STS considered but was unable to identify an alternative position for Ms Murphy which was vacant, and no such position has since been identified, I do not accept the bare submission that STS failed to show there was no prospect of being able to appoint Ms Murphy to a vacant position which was substantially similar to her position. There was no such position. Further, there has

not been any suggestion that there was a prospect of appointing Ms Murphy to any of the positions which had absorbed her duties, or that any of those positions were substantially similar to her position.

[70] Similarly, regarding STS' obligations during the preference period, there has not been any suggestion that STS was able to appoint Ms Murphy to one of the positions which had absorbed her duties, or that any of the positions were substantially similar to her position. Nor do I have any reason to reject STS' evidence that there were no other vacant and substantially similar positions to which it could appoint Ms Murphy.

Remedies

1. Reimbursement of lost remuneration

[71] Ms Murphy seeks the reimbursement under s 123(1)(b) of the Employment Relations Act of remuneration lost as a result of her unjustified dismissal.

[72] She commenced a contracting position on 20 June 2011, and calculated her earnings from 20 June to the date of the investigation meeting as \$42,080. She said that over the same period at STS she would have received remuneration including benefits of \$59,624.98. The difference is \$17,544.98, which was the amount claimed.

[73] With a further deduction for the payment in lieu of notice which Ms Murphy received, the loss is \$8,406.52. That amount exceeds the amount of redundancy compensation Ms Murphy received, and I find as a result that she has suffered no loss of remuneration.

2. Compensation for injury to feelings

[74] Ms Murphy seeks \$20,000 under s 123(1)(c)(i) of the Act as compensation for the injury to her feelings caused by her unjustified dismissal.

[75] Although the circumstances caused her considerable distress, her refusal to engage with STS because of her view that the disestablishment of her position was a

fait accompli means I find Ms Murphy breached her own obligation to be responsive and communicative with her employer. She contributed to the circumstances of her personal grievance in a manner that warrants a reduction under s 124 of the Act in the remedy I would otherwise have awarded. The refusal was significant and I reduce the remedy by 50%.

[76] STS is therefore ordered to compensate Ms Murphy for injury to her feelings in the sum of \$7,500.

3. Compensation for loss of benefits

[77] Ms Murphy seeks \$20,000 under s 123(1)(c)(ii) of the Act in respect of her loss of stable permanent employment. Her claim was based on the fact that she had obtained work under a contractor's rather than an employment relationship, so she would lose access to entitlements such as holiday pay, sick pay, car parking and employer contributions to Kiwi saver.

[78] STS submitted that this was a duplication of the claim for the reimbursement of lost remuneration.

[79] The lack of access to holiday pay and sick pay tends to be compensated for by higher contract rates of pay, and in any event there was no basis on which to quantify any loss under those particular headings. Otherwise the claim for the reimbursement of lost remuneration incorporated reimbursement for lost benefits such as access to car parking, Kiwi saver and other benefits. Those losses were incorporated in the claim under s 123(1)(b) and have been addressed.

[80] Nothing remains to support the order sought under s 123(1)(c)(ii). There will be no order.

The claim for penalties

[81] Although the penalties sought were identified in the amended statement of problem as penalties for breach of the employment agreement and breach of s 4 of the Employment Relations Act, the breaches particularised in submissions were; -

- the notification on 18 May that Ms Murphy's position had been disestablished;
- carrying out a sham consultation process;
- failing to provide full and appropriate information on the decision to disestablish the position; and
- failing to keep the position open as agreed when parental leave was granted.

[82] These breaches were relied on in support of both the claims of breach of employment agreement and of breach of good faith.

[83] I have found against Ms Murphy in respect of the first three of the breaches alleged above, and there will be no order for a penalty. Orders for the payment of penalties would have been unlikely in any event, because the breaches were also grounds for the personal grievance and could be remedied in that context.¹⁰

[84] Although a breach of s 41 of the PLEPA was alleged in the amended statement of problem, in the context of the claim for penalties the failure to keep Ms Murphy's position open did not emerge as an allegation of breach of the employment agreement or of good faith until submissions were being made. While unfortunately it is common, that is not an acceptable way to address penalties. The allegation I address is that of breach of s 41, for which there is no penalty provision. I make no order.

Summary of orders

[85] STS is ordered to pay to Ms Murphy \$7,500 as compensation for the injury to feelings caused by the personal grievance.

Costs

[86] Costs are reserved.

[87] The parties are invited to agree on costs. If either party seeks an order for costs there shall be 28 days from the date of this determination in which to file and

¹⁰ *Xu v McIntosh* [2004] ERNZ 448, at [43]

serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority