

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 239
3090912

BETWEEN NICHE CONSULTING GROUP
LIMITED
Applicant

AND HELEN WALSH
Respondent

Member of Authority: Rachel Larmer

Representatives: Garry Pollak, counsel for the Applicant
Kate Henry, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further Information Received: 16 April 2020 from the Applicant
21 April 2020 from the Respondent
6 May 2020 from the Applicant
14 May 2020 from the Respondent
21 and 22 May 2020 from the Applicant

Date of Determination: 23 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Name of respondent

[1] Although the Statement of Problem in this matter was filed under the name “*Niche Recruitment Limited*” that entity’s name was changed to “*Niche Consulting Group Limited*.” The parties agreed that the second entity named employed Ms Walsh, so it was the correct respondent in this matter. The intituling therefore reflects that agreed change.

Parties

[2] The applicant, Niche Consulting Group Limited (Niche), is a small specialist legal recruitment business. It recruits staff primarily for the New Zealand legal industry.

[3] The respondent, Ms Helen Walsh, was employed by Niche from 28 May to 22 December 2018 and from 29 January 2019 to 14 June 2019.

Claim

[4] The parties have differing views about Ms Walsh's entitlements under the Parental Leave and Employment Protection Act 1987 (PLEPA). Niche applied to the Authority to determine the parties' rights and obligations arising from Ms Walsh's various parental leave related issues.

[5] Ms Walsh believed she was entitled to PLEPA entitlements, so she wanted to pursue parental leave complaints against Niche for its decision that she was not. Niche believed that Ms Walsh did not meet the threshold test for parental leave and had not raised parental leave complaints or personal grievance claims within the statutory time limits.

Offer of employment

[6] Niche said it does not discriminate against pregnant employees or working parents. Notwithstanding Niche's belief that Ms Walsh did not meet the threshold tests in the PLEPA, it nevertheless has offered Ms Walsh her job back on more than one occasion.

[7] Ms Walsh has rejected these offers to return to her former position, saying the relationship had broken down due to what she believed were Niche's breaches of the PLEPA.

[8] Niche has however been holding Ms Walsh's former position open for her, pending this determination on the parties' rights and obligations in case Ms Walsh's changed her mind about its offer.

Related Authority proceedings

[9] After Niche lodged its Statement of Problem in this matter on 7 February 2020, Ms Walsh then lodged her own Statement of Problem on 24 February 2020 under AEA 3093372. The determination in this matter should be read alongside the determination for AEA 3093372.¹

First period of employment - fixed term employment

[10] Ms Walsh could not be employed beyond the strict terms of her working visa because she was a new visitor to New Zealand, so had initially obtained a temporary work visa only. At the time Ms Walsh entered into her fixed term engagement with Niche she was not legally permitted to work in New Zealand beyond December 2018.

[11] The parties always knew that Ms Walsh would be returning to Ireland on completion of her fixed term engagement. However, it was unknown how long she would remain in Ireland or whether she would be returning to New Zealand at all.

[12] In line with her visa restrictions, Ms Walsh's fixed term employment was stated to expire on 22 December 2018. Ms Walsh's fixed term employment did in fact end on that date and she returned to Ireland, as anticipated. When the fixed term engagement ended on 22 December 2018 Ms Walsh was paid out her annual holiday pay.

Visa situation

[13] Ms Walsh's first visa was for 12 months from her first arrival in New Zealand. It permitted her to work during this 12 month period but she was also required to leave New Zealand before this first visa expired. Ms Walsh entered New Zealand in late 2017 and started working for Niche on 28 May 2018.

[14] While employed by Niche Ms Walsh sought an Essential Skills Work Visa. That was initially granted from 22 November 2018 to 22 December 2018, being the expiry date of her fixed term employment.

[15] However after Niche advised Immigration New Zealand (INZ) that it intended to offer Ms Walsh further employment, INZ granted Ms Walsh a three year work visa from 22

¹ *Walsh v Niche Consulting Group Limited* [2020] NZERA 240.

November 2018 to 22 November 2021. This visa was subject to the condition that Ms Walsh could only work as a Recruitment Consultant for Niche in Auckland.

Second period of employment – from 29 January 2020

[16] Before the expiry of the first fixed term engagement, Niche offered Ms Walsh further employment - if she decided to return to New Zealand from Ireland, and subject to her being granted a work visa for such employment in New Zealand from 2019 onward.

[17] Ms Walsh accepted that offer and she commenced her second period of employment with Niche on 29 January 2019. That second engagement ended on 14 June 2019.

Did Ms Walsh have continuous employment?

[18] Ms Walsh did not work for the 37 days between the end of the fixed term on 22 December 2018 and the beginning of her new engagement on 29 January 2019. However Ms Walsh claimed she had continuous employment with Niche from 28 May 2018 to 14 June 2019.

[19] Ms Walsh said she met the definition of employee in s 6(1)(b)(ii) of the Employment Relations Act 2000 (the Act) because she was “*a person intending to work*” over the period 22 December 2018 to 29 January 2019 because she had accepted her second period of employment before her first period of employment had ended.

[20] Niche said there was no continuous employment because there was a 37 day gap between the ending of her first period of employment on 22 December 2018 and the beginning of her second period of employment on 29 January 2019.

[21] The employment relationship did not continue over that 37 day period because Ms Walsh was not on approved leave (such as leave without pay or advance annual holiday) during that period. Nor did she undertake any work or receive any pay over that period.

Parental leave request declined

[22] In February 2019 Ms Walsh told Niche that she was pregnant. Her expected date of delivery (EDD) was 9 July 2019. Ms Walsh’s leaving date was extended twice at her request, so her second period of employment ended on 14 June 2019. Ms Walsh gave birth on her EDD - 9 July 2019.

[23] In February 2019 Ms Walsh requested parental leave and asked Niche if she would be paid under the government's parental leave scheme.

[24] Niche's Human Resources Manager and Ms Paula Watts, who was one of Niche's directors, together with Ms Walsh, contacted the Ministry of Business Innovation and Employment (MBIE) helpline to obtain advice on what Ms Walsh's entitlements were regarding her proposed parental leave.

[25] The advice from the MBIE helpline was that although Ms Walsh was not a permanent resident of New Zealand she was still entitled to "*parental leave payments*" (emphasis added) but was not entitled to "*parental leave*" under the PLEPA, because she did not meet the 6/12 month employment threshold test in the PLEPA.

[26] There is a difference between the parental leave payment threshold test in s 2BA(4) of the PLEPA (which Ms Walsh met) and the parental leave threshold test in s 2BA(1) of the PLEPA (that MBIE and Niche advised Ms Walsh she had not met).

[27] Niche completed the document IR880 (Paid Parental Leave Application), which recorded Ms Walsh's expected date of delivery as 9 July 2019. In response to a question on Form IR880 "*Are you resigning from employment instead of taking leave?*", Ms Walsh answered "*No*".

[28] Ms Walsh gave Form IR880 to Niche's HR Manager to complete the employer section on her behalf. Niche then advised Ms Walsh that she was not eligible to take parental leave as she did not have the six months' continuous service with Niche that was required by the threshold test in s 2BA of the PLEPA. Ms Walsh already knew that from her call with the MBIE helpline.

[29] Niche advised Ms Walsh that because she was not entitled to parental leave, Niche could not sign Form IR880 unless Ms Walsh ticked the box on the form saying she would be resigning from her employment. Ms Walsh ticked that box, and the box stating she would be returning to work, and then the parties signed Form IR880. Ms Walsh's application for parental leave payment was then granted.

[30] In April 2019 Niche asked Ms Walsh to submit her resignation. She refused to do so on the basis she was not resigning. She then received an email from the HR Manager saying:

For payroll purposes can you confirm that your last day with Niche is 17th May?
I'm sorry we can't hold your job open. As previously discussed with you, under the Parental Leave Act you do not qualify (sic) for your job to be held open.

[31] Niche formally declined Ms Walsh's parental leave application because she had not met the threshold requirements in the PLEPA to have her position held open for her. However it decided to informally hold her position open for her.

[32] At the time that decision was made Niche was engaged in exploring a confidential commercial opportunity, so did not want to commit the other entity that was involved in these discussions to a formal legal commitment under the PLEPA when the law did not require it.

[33] Although that business opportunity did not eventuate, it was subject to strict confidentiality obligations. That meant Niche was unable to disclose it to Ms Walsh or to discuss it with staff.

[34] It was the issues associated with the potential commercial opportunity that were at the forefront of Niche's thinking in terms of not wanting to commit under the PLEPA to providing Ms Walsh with her job back when it was not legally required to do so. That explained why Niche was prepared to informally hold Ms Walsh's position open for her to return to while formally declining to do so under the PLEPA.

[35] Niche therefore told Ms Walsh that it would consider her for new employment in or around June 2020, which was the date when she would be considering returning to work after the birth of her child.

[36] This informal offer to return to work was supported by Niche not acting to fill Ms Walsh's position, and by keeping her desk, work email and business cards ready for her in the expectation she would be returning to work after the birth of her child.

[37] During Ms Walsh's leaving function she was told in front of everyone that when she was ready to work, if she wanted to return to work, she just had to let Niche know if she wanted to return full time or part-time. That left the ball in Ms Walsh's court, so to speak, in terms of her return to work. Niche was clearly receptive to giving Ms Walsh her job back and it had informed her that it would consider either full or part-time work, based on her preference.

[38] Ms Walsh never asked to return to work and she has refused Niche's repeated offers to her to return to her former position.

Issues raised by Ms Walsh after her second period of employment ended

[39] Ms Walsh had a number of communications with Niche about bonus related issues from the time she left her employment on 14 June 2019 until she raised a personal grievance with Niche on 14 October 2019. This included threatening to file Authority proceedings regarding bonus related issues.

[40] However during this same time period Ms Walsh did not raise concerns about PLEPA related issues or her desire to return to work in mid-June 2020. There was also no suggestion made by Ms Walsh that she did not understand that if she wanted her job back she just had to ask.

[41] Ms Watts, joint owner and managing director of Niche, stated in her affidavit sworn on 21 May 2020 that if Ms Walsh had given any indication to Niche that she was concerned about her job being not held open, Ms Watts would have clarified to Ms Walsh that she was welcome to return to work, so she only had to indicate whether she wanted to do so on a full or part-time basis.

[42] The communications between the parties showed that Ms Walsh did not have any difficulty raising concerns with Niche or asserting her rights. Ms Walsh's failure to raise parental leave concerns/complaints when raising other issues with Niche suggested they were not of concern to her at that time.

PLEPA

[43] Under s 9 of PLEPA the Primary Carer Leave must be taken in one continuous period not exceeding 22 weeks. Section 10 of the PLEPA provides that Primary Carer Leave begins (for the purposes of this matter) on the date of confinement, which in this case was 9 July 2019.

[44] Section 23 of the PLEPA provides an entitlement to an employee to take "extended leave" of up to 26 weeks if they satisfied the six month employment test and of up to 52 weeks for an employee who satisfied the 12 month employment test.

[45] Section 56 of the PLEPA deals with parental leave complaints. It imposes time limits on raising a parental leave complaint, being the later of:

- (a) 26 weeks from the date on which the complaint arose; or
- (b) 26 weeks from the expected date of delivery of the child; or
- (c) After the expiration of eight weeks from any period of parental leave that is taken by the employee.

[46] Section 56(4) of the PLEPA expressly states that a parental leave complaint under s 56 of the PLEPA is not a personal grievance within the meaning of s 103 of the Employment Relations Act 2000 (the Act).

[47] Section 58(2) of the PLEPA sets out the matters that the Authority must consider when hearing and determining a parental leave complaint. That has occurred.

Human Rights Commission's involvement

[48] Ms Walsh alleged Niche had discriminated against her. Ms Watts said she was shocked and upset about receiving a Human Rights complaint. Niche was asked to attend a Human Rights Commission mediation, which it did. That did not resolve the matter.

[49] After Human Rights Commission mediation was unsuccessful, Ms Watts decided that the issue about whether or not Ms Walsh was entitled to parental leave under the PLEPA needed to be determined. Each party held a different view of their legal rights and obligations so their ongoing communications were unable to resolve that issue.

[50] Accordingly, Ms Watts instructed Mr Pollak to file this application for a declaration as to the parties' respective rights and obligations.

Issues

[51] The following issues are to be determined:

- (a) Did Ms Walsh meet the threshold employment test in s 2BA of the PLEPA?
- (b) Did Ms Walsh raise her parental leave complaints within time?
- (c) If not, should relief be granted to Ms Walsh under s 68 of the PLEPA to make parental leave complaints out of time?

- (d) What, if any, costs should be awarded to the successful party?

Did Ms Walsh meet the threshold employment test in s 2BA of the PLEPA?

[52] Ms Walsh was employed under a fixed term engagement from 28 May until 22 December 2018. Her employment ended on 22 December 2018 and she was paid out her holiday pay entitlements. After her fixed term engagement ended Ms Walsh went back to Ireland. When she left New Zealand it was uncertain if/when she would be returning.

[53] Prior to the end of Ms Walsh's fixed term engagement, Niche offered her further employment if she decided to return to New Zealand after her time in Ireland, subject to her being granted a work visa to work in New Zealand.

[54] Ms Walsh accepted Niche's offer, which also helped her get an extension to her work visa. Ms Walsh signed the new employment agreement in response to that offer prior to 12 December 2018.

[55] The parties agreed that Ms Walsh's first day of her next period of employment, if she decided to return from Ireland, would be 29 January 2019. She did return from Ireland, so started work again for Niche on 29 January 2019.

[56] Ms Walsh said she had met the 12 months employment test in s 2BA(1)(b) of the PLEPA, making her entitled to 22 weeks' primary carer leave and a further 30 weeks' extended leave in accordance with the PLEPA. Niche said Ms Walsh had been employed for less than six months when she left Niche to have her child, so she did not meet the threshold tests in the PLEPA.

[57] Section 2BA(1)(b) of the PLEPA states:

- (b) an employee meets the **12-month employment test** if the employee will have been employed by the same employer for at least an average of 10 hours a week in the 12 months immediately preceding the expected date of—
 - (i) delivery of the child (in the case of a child to be born to the employee or to the employee's spouse or partner); or ...

[58] Because Ms Walsh's EDD was 9 July 2019, the 12 months preceding that ran from 9 July 2018.

[59] Ms Walsh cannot have been employed by Niche for at least an average of 10 hours a week over the 12 month period 9 July 2018 to 9 July 2019 because there was a 37 day gap from 22 December 2018 to 29 January 2019.

[60] Ms Walsh did not do any work for Niche over that period. She was not on leave such as special leave, leave without pay, ACC leave, sick leave, bereavement leave, long service leave or any other sort of mutually agreed leave that would have enabled the employment relationship to have continued without Ms Walsh attending work.

[61] Ms Walsh was therefore unable to satisfy either the six month or the 12 month thresholds specified in s 2BA(1)(a) and (b) of the PLEPA. Ms Walsh was not continuously employed by Niche because she had two entirely separate periods of employment.

[62] Ms Walsh's claim that she had one continuous period of employment does not succeed. The fact she was paid out her Holiday Act 2003 (HA03) entitlements after her fixed term ended on 22 December 2018 was evidence that the employment relationship had, as a matter of fact, ended.

[63] Ms Walsh was not legally entitled to have had her holiday pay entitlements paid out under HA03 if the employment relationship had been continuous. If there had been continuous employment over the period 22 December 2018 to 29 January 2019 then Ms Walsh's holiday entitlements would have continued to have accrued. That did not occur, so it is evident that there had been a break in the employment, so there could not have been continuous service as she has claimed.

[64] Ms Walsh submitted that the threshold tests in the PLEPA did not require her to have had continuous employment with Niche because it did not state that in the tests, unlike s 63(1)(a) of the Holidays Act 2003 (HA03) that did include the word "*continuous*".

[65] That submission was not accepted. The PLEPA is structured around continuous service in terms of an employer's and an employee's obligations and rights. Not every employee is entitled to have her position held open and s 2BA(1) of the PLEPA specifies a threshold that must be met.

[66] Section 2BA(1) of the PLEPA requires an employee to have been employed by the same employer for an average of ten hours a week in the 6 or 12 months immediately preceding the expected date of delivery.

[67] For an employee to be in employment for the purposes of the PLEPA they must in fact, and in law, be employed. Ms Walsh cannot be said to have been in employment for an average of ten hours a week in the 6 or 12 months immediately preceding 9 July 2019 because there was a 37 day gap in her employment from 23 December 2018 to 28 January 2019.

[68] The definition of “*employee*” in s 2 of the PLEPA was the same as the definition of employee in s 6 of the Employment Relations Act 2000 (the Act), except for the purposes of assessing parental leave payments entitlements, which set out different criteria for meeting the definition of an “*employee*”.

[69] These two different definitions of employee in s 2 of the PLEPA establishes that the qualifying thresholds for parental leave and parental leave payments are different.

[70] The threshold for payments involves employment for any 26 of the 52 weeks immediately preceding the EDD. That definition for “*parental leave payments*” strongly implies that an employee who satisfies the “*parental leave*” threshold requires continuous employment. If that was not the case there would have been no need to emphasise that one definition of employee required employment for “*any*” 26 weeks while the other definition did not.

[71] If Ms Walsh had remained in continuous employment then she would not have been paid out her annual holiday entitlements at the end of her fixed term engagement. Niche’s payment of Ms Walsh’s HA03 entitlements that occurred at the end of her fixed term engagement was evidence that the first fixed term engagement, and therefore the employment relationship, had ended on 22 December 2018.

[72] Section 2BA(3) of the PLEPA states that s 72A applies if it is necessary to ascertain whether an employee will have been employed by the same employer for at least an average of ten hours a week during a six or 12 month period.

[73] Section 72A of the PLEPA sets out the eligibility criteria based on average hours of work and allows for periods of authorised leave. Section 72A(2)(a)-(f) of the PLEPA specifies

the types of leave an employee may take that enabled the employee to be treated as having been in the employment, despite being absent from work.

[74] None of these types of leave applied to Ms Walsh's situation because she was not on leave from 22 December 2018 to 29 January 2019. That meant Ms Walsh was unable to rely on s 72A(2) of the PLEAP to support her claim that she had 12 months' continuous employment.

[75] Section 72A(3) of the PLEPA explains how the hours that the employee would normally have been at work must be calculated. That is in accordance with the terms of the employee's employment agreement, or by reference to the employee's hours of work before any period of leave without pay began. However this did not help Ms Walsh because she had no contractual hours of work over the period 22 December 2018 to 29 January 2019, nor was she on leave without pay.

[76] Section 72A(4) of the PLEPA states that references to "*week*" means the employee's ordinary working week. Again Ms Walsh did not have any obligation to work at all for the five plus weeks over the period 22 December 2018 to 29 January 2019, so there were no "*ordinary working weeks*" over that period. That meant that the gap between her engagements by Niche cannot be included in the number of weeks Ms Walsh worked for the purposes of the s 2BA threshold tests.

[77] There was no legal obligation on Ms Walsh to be at work over the period 23 December 2018 to 28 January 2019, because her first employment relationship had ended. She was intending to travel to Ireland and her return was uncertain. There was no employment agreement that governed her hours of work over that period.

[78] Accordingly, there were no hours that she was available to work, or could have worked, or did in fact work. Ms Walsh was not on leave without pay over that period, rather it was a gap in her employment. The first period of employment had ended and the second period of employment had not yet started.

[79] Section 2A of the PLEPA deals with multiple employments generally. It states that:

An employee's entitlement to rights and benefits in respect of parental leave must be determined by treating each of the employee's employments separately, if the employee has more than 1 employment.

[80] Ms Walsh's submission that s 2A of the PLEPA related solely to employment that had occurred with different employers (such as school boards or district health boards) that were not the same employer did not succeed. Section 2A of the PLEPA expressly states that it applies to "*employments generally*" is to generally, not to the limited class of employers that Ms Walsh had identified.

[81] Section 2AB dealt with multiple employments by certain medical practitioners and s 2AC deal with multiple employments of teachers. It therefore follows that s 2A did not cover these medical practitioners or teachers. Schedule 1 of the PLEPA addressed employment where there were changes of employer. That did not apply to Ms Walsh as both her engagements were with Niche.

[82] Section 2A of the PLEPA applies in this case because Ms Walsh had more than one employment with Niche. The first period of employment started and ended in 2018. The second period of employment started and ended in 2019. These are two discrete and therefore distinct periods of employment.

[83] Section 2A of the PLEPA requires each period of employment that Ms Walsh had with Niche to be treated separately. This fundamentally undermined Ms Walsh's argument that she is entitled to view these two separate periods of employment as one continuous period of employment because she was "*a person intending to work*", as defined by s 6(1)(b)(ii) of the Act.

[84] It would have been open to the parties to have negotiated an arrangement so that Ms Walsh's first period of employment was extended from 22 December 2018 until her second work visa with Niche expired, with an agreement that she would be on unpaid leave from 23 December 2018 to 29 January 2019, that did not occur.

[85] The failure by the parties to take any steps to ensure the employment relationship continued over the disputed period signifies that the parties mutually intended for there to be a break/gap between the two periods of employment.

[86] Ms Walsh appeared to want to create an employment relationship where one did not actually exist for the sole purpose of obtaining rights under the PLEPA. Ms Walsh's submission that "*breaks in employment are irrelevant*" for the purposes of the 6 or 12 month

employment threshold test did not succeed because it was contrary to the express requirements of s 2A of the PLEPA.

[87] The Authority was not satisfied that Ms Walsh met the six and/or 12 month employment test in s 2BA of the PLEPA, meaning that the rights to 22 weeks' primary carer leave and a further 30 weeks' extended leave were not available to her.

[88] The Authority did not consider that any of the cases that Ms Walsh referred to the Authority were comparable. In *Grant v Department of Labour* the employee had been employed on a series of fixed term engagements.² Ms Grant successfully argued that despite her employment referring to a fixed term, she was not in fact or law actually a fixed term employee within the requirements of s 66(4) of the Act.

[89] The Authority in *Grant* held that Ms Grant had been in continuous employment so she succeeded in establishing eligibility for parental leave entitlements. The Authority concluded as a matter of fact that Ms Grant actually had continuous employment. That contrasts with the finding of fact in this matter, where the Authority concluded that Ms Walsh had two separate periods of employment with the same employer that were separated by a 37 day break.

[90] In *Petrowski v The Chief Executive of the Ministry of Business Innovation and Employment* the employee was a teacher who had been employed as a day-to-day reliever on fixed term engagements.³

[91] The Authority in *Petrowski* held that Ms Petrowski was eligible for parental leave because she had been in employment with the same employer on an ongoing basis. Again, that factual finding can be contrasted with the finding in this case that Ms Walsh had not in fact been in ongoing employment. The parties intended there to be a break in employment and that is what in fact occurred.

[92] In the *Grant* and *Petrowski* cases, both employees considered that they were in permanent ongoing employment and both Authority determinations confirmed that their view about that was correct.

² [2011] NZERA Auckland 226.

³ [2012] NZERA Wellington 132.

[93] The facts in this case established that Ms Walsh was not continuously employed by Niche. There was a five plus week gap between her two periods of employment. The first period of employment had come to an end and was properly treated by the parties as the end of that first employment relationship. The second engagement started in 2019 was treated by the parties as a new and different period of employment.

[94] Ms Walsh did not satisfy the threshold tests in s 2BA of the PLEAP so was not entitled to parental leave.

Did Ms Walsh raise her parental leave complaints within time?

[95] For the purposes of this matter, s 56(1) of the PLEPA required Ms Walsh to raise her parental leave complaint within twenty-six weeks from the date on which it arose (being 26 February 2019) or within twenty-six weeks of 9 July 2019, being the expected date of delivery of her child.

[96] Section 57(4) of the PLEPA states that a parental leave complaint is not a personal grievance within s 103 of the Act.

[97] Ms Walsh's personal grievance letter of 14 October 2019 was therefore not a parental leave complaint. She identified it as a personal grievance claim so s 56(4) of the PLEPA meant it was a personal grievance claim and not a parental leave complaint.

[98] All of the issues that Ms Walsh has identified as parental leave complaints occurred before her child was born. Niche informed Ms Walsh in writing on 26 February 2019 that she did not comply with the six or twelve-month employment test. That threshold was the criteria for being granted parental leave and the criteria for imposing a statutory obligation on Niche under the PLEPA to hold her position open for her to return to after she had finished her parental leave.

[99] Niche invited Ms Walsh to consider making an application for a "*negotiated carer's leave*". Niche also said that it would "*welcome an application from you [Ms Walsh] for a consultant position with us at the point at which she wished to return to paid employment.*" The door was clearly left open on an informal basis for Ms Walsh to elect to return to work.

[100] The written advice/information that MBIE sent to Ms Walsh and Niche on 26 February 2019 pointed out that there was a distinction between the eligibility criteria for the

parental leave payments from IRD, that did not require continuous employment, and parental leave, that did require six or 12 months' continuous employment.

[101] The information to Ms Walsh and Niche from MBIE's helpline on 26 February 2019 was that the parties were required to complete the declaration on page 4 of IR880, to confirm that Ms Walsh was eligible for the PLEPA entitlements she was seeking.

[102] Ms Walsh was informed that if Niche did not sign the declaration in circumstances where Ms Walsh met the eligibility criteria, then she would be able to make a parental leave complaint under s 56(1)(c) of the PLEPA. The MBIE helpline information also set out the requirements for making a request for "*negotiated carers leave*" under Part 3A of the PLEPA.

[103] Section 56(2)(b) of the PLEPA required Ms Walsh to have made parental leave complaints by 5 January 2020 at the latest, because that was twenty-six weeks from 9 July 2019, being the date her child was born. The first reference to a parental leave complaint was made by Ms Walsh's lawyer in a letter dated 31 January 2020, which was subsequently 'clarified' on 20 February 2020.

[104] Ms Walsh did not meet the timeframe requirements under s 56(2)(b) of the PLEPA, which was the latest of the three possible specified timeframes (dates) for making a parental leave complaint.

Should Ms Walsh be granted relief under s 68 of the PLEPA to make parental leave complaints out of time?

[105] Section 57(2) of the PLEPA requires an employee to submit a parental leave complaint to their immediate supervisor as soon as practicable after it arises, so the employer has an opportunity to remedy the cause for complaint, and if possible to resolve it as close as possible to when it arose.

[106] Ms Walsh knew by 26 February 2019 that Niche considered that she had not satisfied the s 2BA threshold employment test in the PLEPA, so there was a significant delay before she made her parental complaint about that on 31 January 2020.

[107] Section 68 of the PLEPA deals with non-compliance with formal requirements. A party may apply to the Authority for relief in respect of an "*irregularity*", as defined in s 68(2) of the Act.

[108] Section 69(4) of the PLEPA requires the Authority to grant relief to an employee in respect of a failure to comply with notice requirements, if the employee's failure to comply was in good faith and the non-compliance was reasonable in all the circumstances.

[109] Under s 68(5) of the PLEPA the Authority 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 and the good faith or otherwise of the parties and any other matters that are relevant.

[110] Ms Walsh had also been told by Niche and the MBIE helpline that she did not meet the threshold test for parental leave and she had sought advice from a Community Law Centre. She was therefore in a position to pursue parental leave complaints within time. The issue therefore is whether her failure to do so was in good faith and reasonable in all the circumstances.

[111] The Authority was not satisfied that Ms Walsh acted in good faith in terms of being "*active and constructive*" and "*responsive and communicative*", as required by the mutual good faith obligations in s 4(1A)(b) of the Act, regarding her parental leave concerns.

[112] Ms Walsh was told in February 2019 by the MBIE helpline, which confirmed its advice to her in writing, and by Niche, that she was not eligible for parental leave or to have her job held open because she had not met the threshold test. Ms Walsh also received advice from a Community Law Centre and engaged the Human Rights Commission regarding her parental leave concerns.

[113] The written advice Ms Walsh received from MBIE on 26 February 2019 set out her right to raise a parental leave complaint. The extensive delay in her doing so was not satisfactorily explained, particularly where she had raised other bonus related issues and had threatened to file proceedings related to bonus issues with the Authority.

[114] If Ms Walsh had raised a parental leave complaint promptly then it was very likely that her concerns would have been resolved, because Niche's expectation was that she would be returning to work and it would have facilitated that.

[115] If Niche had known that Ms Walsh had a problem it could have clarified to her that it was expecting her to return to work, so was informally continuing to keep her position open

for her to return to, even though it believed that she was not formally entitled to parental leave under the PLEPA.

[116] That position was communicated to Ms Walsh by Niche in February 2019 and June 2019 and again during the course of these proceedings. It was also repeated in Niche's Statement of Problem asking for a declaration regarding Ms Walsh's parental leave entitlements and again in Niche's closing submissions.

[117] Niche has not taken steps to fill Ms Walsh's position which remains vacant, pending the outcome of these proceedings. The Authority is therefore not satisfied that Ms Walsh's delay in raising parental leave complaints was reasonable in the circumstances.

[118] The merits of Ms Walsh's parental leave complaints, that her position was not kept open for her to return to under s 41 of the PLEAP and that she was dismissed for taking parental leave in breach of s 49(1) of the PLEPA, do not warrant relief being granted to her under s 68(6) of the PLEPA to pursue parental leave complaints out of time.

[119] Ms Walsh's claim of a breach of s 41 of the PLEPA cannot succeed. Ms Walsh was not entitled to have her position held open under the PLEAP. Despite that Niche has offered Ms Walsh her position back and to date it has continued to hold her position open for her to return to even though she had declined Niche's offers to return to work.

[120] Ms Walsh's claim of a breach of s 49(1) of the PLEAP also has no prospect of success. Ms Walsh left her employment to have her baby in circumstances where she was not entitled to parental leave.

[121] Section 49(2) of the PLEPA states that an employee is not dismissed by reason of pregnancy or parental leave if she left work without the employer's consent when she is not entitled to parental leave. Ms Walsh's claim that she was dismissed because she took parental leave therefore also has no prospect of success.

[122] It would not be an appropriate use of the parties' or the Authority's resources to enable Ms Walsh to pursue parental leave complaints out of time when her proposed claims do not have merit.

Note

[123] This determination has addressed the parental leave complaints Ms Walsh identified in her Statement in Reply dated 24 February 2020. The other parental leave complaint Ms Walsh made in her Statement of Problem (counterclaim) also lodged on 24 February 2020 (about mediation) has been addressed in *Walsh v Niche Consulting Group Limited*.⁴

What if any costs should be awarded?

[124] Niche as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible then Niche has fourteen days from the date of this determination to file a costs memorandum and Ms Walsh has fourteen days within which to respond.

[125] The Authority is likely to adopt its usual notional daily tariff-based approach to costs which is currently \$4,500 for the first day of an investigation meeting. The parties are therefore invited to identify any factors that they say should result in adjustments being made to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority

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Above n1.