

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 242/10
5154484**

BETWEEN JANENE PARLANE
 Applicant

AND RON DYKMAN LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Paul Farry, Counsel for Applicant
 Ron Dykman, Advocate for Respondent

Investigation Meeting: 20 August 2009, 16 March 2010

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

[1] The applicant Ms Janene Parlane (“Ms Parlane”) says she was unjustifiably dismissed. The respondent company Ron Dykman Limited (“the company”) denies the claim. Ms Parlane claims reimbursement, compensation and loss of paid parental leave. The parties were unable to resolve the problem between them by the use of mediation.

[2] Ms Parlane was employed by the company as a landscape gardener from 6 November 2007. It is accepted that the terms of the employment were recorded in a written individual employment agreement.

[3] Ms Parlane became pregnant in August 2008. She informed the company she was pregnant in October 2008. Ms Parlane indicated that she intended taking parental leave. Her expected delivery date was 16 June 2009. She expected to work until 5 May 2009 when she would have become eligible for paid parental leave after 34 weeks of pregnancy.

[4] The Authority finds that Ms Parlane and her foreman Mr Matthew Lees (“Mr Lees”) agreed that Ms Parlane would not perform heavy lifting work or chemical spraying.

[5] On 19 January 2009 the company’s director Mr Ron Dykman (“Mr Dykman”) sent this email to Ms Parlane:-

Hi Janene

I feel we need to discuss your position as to your intentions and your pregnancy. I understand Matthew has been trying to give you work to suit, clearly the job is very physical and there is very little ‘light’ work within our company. I would appreciate you calling in to discuss how you see your position and what your intentions are with regards to work over the next few months.

Please call me on xxx and let me know when it suits you to come in for a chat.

Regards

Ron

[6] The Authority finds that Mr Dykman called Ms Parlane and informed her that she was causing her supervisor problems in finding her light work. Ms Parlane says that Mr Dykman effectively asked her to consider resigning because she was causing problems because of her condition.

[7] On 28 January 2009 Ms Parlane was directed to attend a meeting with the company’s director Mr Dykman. At the meeting Mr Dykman handed Ms Parlane a letter advising that she was redundant effective immediately. The Authority find there was then discussion about Ms Parlane continuing to pursue an application for paid parental leave and the meeting ended on the basis that Ms Parlane would revert to Mr Dykman with a proposal in that regard by the following Friday.

[8] Ms Parlane contacted Mr Dykman subsequently and obtained his consent for more time. Ms Parlane did not revert to Mr Dykman herself but instructed her lawyers to do so. The lawyers wrote on her behalf to Mr Dykman by letter dated 25 February 2009 raising a personal grievance for unjustifiable dismissal as well as a parental leave complaint and seeking 14 weeks lost wages and compensation.

The merits

[9] The Authority finds that Ms Parlane was dismissed by Mr Dykman on 28 January 2009 when she was told that she was redundant effective immediately. The Authority finds that decision was not withdrawn. The Authority finds that Ms Parlane

did not abandon her employment. Indeed the statement in reply maintains that Ms Parlane was dismissed for redundancy.

[10] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[11] Ms Parlane was dismissed for redundancy. The evidence given by Mr Dykman and Mr Lees that there was discussion with Ms Parlane about potential redundancy is not accepted. The Authority prefers Ms Parlane's evidence. The Authority finds there was no consultation with Ms Parlane whatsoever.

[12] Although there is evidence presented to the Authority which suggests the company was not trading as profitably and there was a downturn in business, the Authority further finds that contrary to section 4(1A)(c) of the Act, Ms Parlane was not provided with access to information relevant to the continuation of her employment, about the decision and nor was she provided an opportunity to comment on the information to before the decision was made.

[13] I conclude that Ms Parlane was not dismissed because she was genuinely redundant. I prefer Ms Parlane's evidence in every respect. I conclude that Ms Parlane was simply dismissed because Mr Dykman regarded her as an inconvenience because she could not perform full duties as a result of her pregnancy.

[14] For the above reasons, it is the Authority's finding that the purported redundancy was neither commercially genuine nor carried out fairly and sensitively.

The determination

[15] The Authority finds that the dismissal does not meet the test of justification set out at section 103A of the Act. The company's actions and how it acted were not the actions of a fair and reasonable employer. **Ms Parlane was unjustifiably dismissed.**

She has a personal grievance for unjustifiable dismissal and she is entitled to remedies in settlement of it.

The resolution

[16] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Ms Parlane's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find that Ms Parlane did not contribute to the situation that led to the personal grievance.

Reimbursement

[17] Ms Parlane claims lost wages of 14 weeks and lost paid parental leave of a further 14 weeks. I regard that total sum of 28 weeks to be her actual loss. I am satisfied that Ms Parlane has lost remuneration as a result of the personal grievance I have found. Because I have found this was not a genuine redundancy I award her 14 weeks as reimbursement in the sum of \$10,080.00 gross wages. **I order Ron Dykman Limited to pay to Janene Parlane the sum of \$10,080.00 as reimbursement.**

Compensation

[18] I award Ms Parlane loss of paid parental leave in the sum of \$5,703.32 nett as compensation for the loss of a future benefit. **I order Ron Dykman Limited to pay to Janene Parlane the nett sum of \$5,703.22 as compensation for loss of future benefit.**

[19] I am satisfied that Ms Parlane has suffered hurt and humiliation, loss of dignity and injury to her feelings. I accept that Ms Parlane has suffered aggravated anxiety as a result of Mr Dykman's subsequent conduct. Having regard to her evidence, her length of service and the nature of her personal grievance I award Ms Parlane compensation of \$3,500.00. **I order Ron Dykman Limited to pay to Janene Parlane the sum of \$3,500.00 as compensation.**

Costs

[20] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Farry is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Dykman is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority