

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 9  
5456516

BETWEEN            ERIN SANDBROOK  
                                 Applicant  
  
AND                    CORE TECHNOLOGY LIMITED  
                                 Respondent

Member of Authority:    P R Stapp  
  
Representatives:         David Gibson, support person for Applicant  
                                 Mike Andrews, Counsel for Respondent  
  
Investigation Meeting:    22 December 2014 at Palmerston North  
  
Determination:            2 February 2015

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Erin Sandbrook was employed full time by Core Technology Limited (Core) as a computer programmer/software developer. Her employment relationship problem is a claim that she was not able to return to work following maternity leave, when her manager refused to accept that he had agreed to her working reduced days and hours on a part time basis. It was agreed that his refusal to accept such an arrangement involved her raising a parental leave claim and an unjustified disadvantage personal grievance (14 July 2011). He denies that Ms Sandbrook wrote any letter in September 2010 to confirm any arrangement to change her employment. She says that she had no choice but to apply for extended leave first, despite wanting to return to work, and then she resigned on 26 August 2011 when she got a new job.

[2] Ms Sandbrook's claim was particularised in a written supplement dated 9 October 2014 to the statement of problem. This included claims of sexual

discrimination, unfair and unreasonable behaviour from the employer, that Ms Sandbrook had been denied flexible working arrangements, denied the opportunity to express breast milk in the workplace, that employer had condoned the manager's alleged lying and cheating and a constructive dismissal.

[3] Ms Sandbrook is seeking lost wages and compensation.

[4] Core denies all Ms Sandbrook's claims.

### **Issues**

[5] How are the claims under the Parental Leave and Employment Protection Act 1987 (PLEPA) and the Employment Relations Act 2000 (the Act) to be treated? In other words, is the matter to be treated as a parental leave complaint or a personal grievance?

[6] Was there any agreement to change Ms Sandbrook's job to a part time job?

[7] If there is a personal grievance/parental leave complaint, what remedies apply?

### **The facts**

[8] Core is a registered computer software company and employs about 30 to 40 employees. Ms Sandbrook started full time work at Core in 2008 in Palmerston North. She was the only woman in the Palmerston North office. She was a full time employee and reported to the Palmerston North manager, Mr Robbie McIntyre. The parties had a signed individual employment agreement dated 23 June 2008.

[9] Ms Sandbrook informed Mr McIntyre on 6 July 2010 that she had become pregnant. Her application for paid parental leave was signed off on 7 September 2010. She says that at about this time, Mr McIntyre agreed that she would work three days per week when she returned from parental leave and that he nodded his agreement. She says that in finalising the paperwork for the paid parental leave she handed Mr McIntyre a letter formalising their agreement. She says that they had a number of conversations over the next six months that included the three days' work per week arrangement and that she would be able to express milk for the child at work. She says that she regrets not keeping a copy of the letter, but believed the arrangement was in place. Mr McIntyre adamantly denies ever agreeing for her to

work fewer days on a part time basis instead of her full time job. He adamantly denies that Ms Sandbrook gave him a letter.

[10] Ms Sandbrook's parental leave commenced for 14 weeks from 24 December 2010. Her plan was to return to work on 2 May 2011. Ms Sandbrook says that she went into the office on 2 March 2011, but Core does not know the date or time that she went into the office, except to say that there was a chat that did occur at some early time in the year between Ms Sandbrook and Mr McIntyre.

[11] Next, Ms Sandbrook went into the office on or about 12 April 2011 to confirm her return to work under what she believed was the part time arrangement. She provided confirmation of her return to work in writing on 14 April 2011 involving what she believed had been agreed; that is, three days per week and all other terms and arrangements to be discussed. In the meantime, Mr McIntyre contacted Ms Janice Feutz, Core's Corporate Services Business Manager and outlined in a letter dated 12 April 2011 that Ms Sandbrook was requesting:

- (a) To work three days per week;
- (b) To be able to express milk and keep in a fridge at work;
- (c) To fix the days she worked;
- (d) Wanted to know if she would be paid for public holidays.

[12] On 18 April 2011, Ms Sandbrook, Ms Feutz and Mr McIntyre met where the dispute over whether or not there was any agreement on working three days per week became apparent. Ms Sandbrook got upset and was assisted in leaving by Ms Feutz. Nothing was resolved at the meeting, but Ms Feutz and Mr McIntyre were left to consider what they believed was a request and not an agreement on any of the matters.

[13] Between 19 April and 29 April 2011 a solution was found to the breastfeeding matter, but not on the issue of the fewer days to work and the days to be worked. It now emerges that Ms Sandbrook was also dissatisfied with the way in which Core approached the breastfeeding issue. She claims her agreement was given to the arrangement to breastfeed behind a screen in the office as it seemed to be the only alternative option available. Mr McIntyre confirmed in writing Core's requirements

for Ms Sandbrook to return to work in the full time position that was open to her following her parental leave.

[14] On 9 May 2011, there was another meeting that included Ms Sandbrook's partner, Mr David Gibson. Out of this meeting, Ms Sandbrook's position was that Mr McIntyre had changed his mind, that he did not have her letter confirming the changes in her days of work and there was a disagreement about what work would be involved in any arrangement other than the full time role. After the meeting, Ms Sandbrook felt that because of the situation she found herself in that she needed to extend her parental leave for no more than 52 weeks.

[15] On 20 May 2011, Mr Gibson and Ms Sandbrook wrote to Mr Shane Mercer, a Core director, complaining about how Ms Sandbrook was being treated and asking for action to put it right. He responded on 24 May 2011 confirming that his understanding was that Mr McIntyre was keeping her job open and that she would be welcome back when she returned. On 25 May 2011, Mr McIntyre offered Ms Sandbrook an extension to the period of maternity leave and confirmed that Ms Sandbrook's full time job would be kept open for when she decided to return. He further denied losing her letter. Mr Gibson responded in writing on behalf of Ms Sandbrook, (which Core objected to because of his language and allegations), and made some suggestions to make progress between the parties.

[16] On 14 July 2011, Ms Sandbrook raised, in writing, a parental leave complaint (under the PLEPA) and a personal grievance (under the Act). The facts and the remedies she claimed were outlined in an attached appendix to the letter. This involved some historical allegations that Core claimed were outside 90 days under the Act for raising personal grievances.

[17] Mr Mercer delegated the matter to Mr Stephen Goodier, Core's General Manager, and he suggested independent mediation and that he would review the matter. It does not appear that the suggestion for mediation was taken up and a request for information under the Privacy Act was made by Mr Gibson and Ms Sandbrook.

[18] Mr Goodier requested Mr McIntyre and Ms Feutz to provide their information and the matters they agreed with or not in Ms Sandbrook's appendix provided to Core in the letter dated 14 July 2011. Mr Goodier says he reviewed their feedback and

spoke with them both in regard to the matters where there were differences with Ms Sandbrook. He says he also spoke with a number of other employees, but there are no proper records of this, except for a short and succinct file note produced at the Authority's investigation meeting of two telephone calls he made on 3 August 2011 to two other employees. Mr Goodier made his findings including that although Ms Sandbrook had told a large number of people her understanding of the new agreement for part time work at Core, this was not proof that there had been any agreement with Mr McIntyre. He says he found no evidence of such an agreement. He says he found no evidence of Ms Sandbrook's letter being removed from her file. He says he found no grounds why it would have been removed and that Ms Sandbrook was not clear about what she had included in her letter and that she may have been confused with the application for paid parental leave form to the IRD.

[19] The matter has remained unresolved and since then Ms Sandbrook resigned on 26 August 2011 and has been able to obtain other work.

### **Determination**

[20] It is common ground that the essential element of Ms Sandbrook's claim based on the 14 July letter and the attached appendix is in time for raising a personal grievance. This matter relates to whether or there was an agreement for her to work fewer days and that she put this in a letter to Mr McIntyre. Ms Sandbrook accepts that she has not got the evidence to independently prove that the letter she says she handed to Mr McIntyre was removed by him from the file or that he destroyed or stole the letter. Ms Sandbrook and Mr McIntyre were both adamant of their positions, but unfortunately for Ms Sandbrook, without proof when there is some doubt about what happened, I have to accept that there was no arrangement properly confirmed. This is because her terms of employment were in writing for her full time position, and that Mr Mercer, Mr Goodier and Ms Feutz were not aware of any problem and any decision to vary the terms of her employment at the time. This means that there is not enough evidence to establish that there was a promise made for fewer days work.

[21] It is my finding that Core's position that it was Ms Sandbrook who requested fewer days work to be considered arose out of the dispute about the return to work arrangements between Ms Sandbrook and Mr McIntyre, once it became apparent that there was a disagreement, and not that Mr McIntyre had agreed to the arrangement. I am supported in this finding by the evidence that the parties had a dispute, that

negotiations were required on the scope and terms of the nature of the work and role Ms Sandbrook believed had been agreed and Mr Mercer's and Mr Goodier's consideration on what they believed was a request as to what the company could provide.

[22] Ms Sandbrook's explanation of her allegation against Mr McIntyre is that he subsequently learned that Core could not employ her part time in her role and he set out to cover his back by denying the existence of the letter that only he could have removed, as she had given it to him. First Ms Sandbrook's allegation implies some wrongdoing by Mr McIntyre to avoid any problems with Mr Mercer, Mr Goodier and Ms Feutz. That has certainly not been proved given the evidence from them, and indeed there is no suggestion that Messrs Goodier's, Mercer's and Ms Feutz's credibility is in question, I hold. I hold that they genuinely have responded to the situation as it has developed, first with Ms Feutz's attendance at the meeting, and second with Mr Mercer's and Mr Goodier's involvement. In this regard, Mr Goodier did provide to Mr Gibson and Ms Sandbrook, Mr McIntyre's and Ms Feutz's responses to her claims, but he gave it to them after he had made his decision based on Mr McIntyre's and Ms Feutz's reply. Also, Mr Goodier did not provide Mr Gibson and Ms Sandbrook with information that he gathered from other the employees. Mr Goodier made his decision in regard to his findings before any further opportunity for a response could be made by Ms Sandbrook and Mr Gibson. To this end, Mr Goodier's inquiry was unfair.

[23] Second, other than Ms Sandbrook's oral and written evidence there is no independent evidence to support her claims to reach a conclusion in regard to Mr McIntyre's credibility. Her claim that Mr McIntyre nodded agreement to accept her proposal could mean anything without witnesses, I hold. I do not have enough evidence to make a finding that Mr McIntyre has acted dishonestly and/or has lied about what happened. These are very serious allegations and as such the evidence has to be convincing as the allegations are grave, and the evidence fails to reach that test, I hold. Although Mr McIntyre could not remember various events and dates and details with his answers to questions this does not establish that he has not been telling the truth.

[24] Ms Sandbrook has been steadfast in her belief about what she says she believed had been agreed. I found her an impressive and genuine witness. Her

memory of the events was clear and she was very consistent. Her reasoning was well formulated and cogent. She believed there was an agreement (backed up by what she told other people) and that she wrote the letter. However, what she told other people is not sufficient proof of her claims. I hold that the evidence has not been enough to turn the balance given she accepted she did not have the evidence to prove that there was an actual agreement reached and proof of the existence of the letter. Mr Goodier raised the possibility that despite what Ms Sandbrook believes there could have been a mistake given that she says that she thinks that she handed her letter to Mr McIntyre at the same time as her paid parental leave form was completed, to explain the matter. Ms Sandbrook is adamant this was not the case and I can only conclude that whatever happened remains unexplained. Even if the letter did exist, it does not necessarily confirm any arrangements were put in place for fewer days to be worked. I accept that Mr Goodier investigated the matter as a parental leave complaint and made his findings accordingly and that the findings were open to a fair and reasonable employer. He did conduct a review to support this conclusion, and his conclusions were open to a fair and reasonable employer, except for the unfairness of not ensuring that Ms Sandbrook had an opportunity of a final reply before a decision was made.

[25] Mr Mercer was entitled to delegate the matter independently to Mr Goodier to review. Indeed there is no evidence to suggest that he was not independent. Also, I understand that Ms Sandbrook is not challenging his role in any procedural fault. It follows that the review, the meetings and Mr Goodier's findings and the agreement on the breast feeding arrangements do not support the historical claims for discrimination and unfair and unreasonable behaviour.

[26] As a matter of completeness, s.56 of the PLEPA makes the following provision:

- 56. Parental leave complaints**
- (1) *Where any employee alleges that the employee's employer –*
- (a) *Is not justified in stating, in the notice given to the employee under s.36, that the employee is not entitled to take any period of parental leave or that the employee's position cannot be kept open; or*
  - (b) *Has, in contravention of s.49(1), terminated the employee's employment or given the employee notice of terminating the employee's employment; or*
  - (c) *Has taken other action, or has omitted to do something, that affects, to the employee's disadvantage, the employee's rights and benefits in respect of parental leave or a parental leave payment; or*
  - (d) *Has exercised, without reasonable justification, the powers conferred on the employer by s.14 or s.16, -...*

[27] Also, for completeness, s.14 and s.16 of the PLEPA are provisions as to the right of the employer to appoint a date of commencement of maternity leave and ability to perform work respectively. These provisions are not applicable in the present matter. Section 49(1) of the PLEPA makes provision for the protection of employment in regard to dismissal by reason of pregnancy or parental leave being prohibited. These provisions do not apply in the present instance. The only possible section that applies is s 56(1) (c), but the only issue really is whether or not Core agreed to a change to Ms Sandbrook's employment to work fewer days to link to a right and benefit that was denied and causing disadvantage.

[28] Also, s 56(4) of the PLEPA reads as follows:

(4) *A parental leave complaint to which this section applies is not a personal grievance within the meaning of s.103 of the Employment Relations Act 2000.*

[29] I am not satisfied that the complaint raised by Ms Sandbrook in regard to a parental leave complaint satisfies the requirements of s56(1)(a), or 56 (1)(b), or 56(1)(c) or 56(1)(d) of the PLEPA. I have already indicated that any complaint about breast feeding facilities in the workplace was mitigated when Ms Sandbrook agreed to the option that was put in place. I accept that she found the negotiation of a breast feeding facility distressing when the company had to make some provision, and that she says she would have felt uncomfortable behind a screen in the office with all male employees working. This is not a complaint about a breach under the PLEPA, and there has been no claim for a penalty under the Employment Relations Act in the statement of problem. In the end a reasonable and practicable arrangement was mutually entered into as there was an agreement, this being the best of the options available in the workplace.

[30] The law only allows for one type of action to be pursued and remedies applied in regard to the appropriate action as to a parental leave complaint or a personal grievance. I am satisfied that Ms Sandbrook raised a personal grievance in regard to the employer's action, and I am satisfied this is the appropriate way to resolve the employment relationship problem because the statement of problem filed in the Authority is framed in that way. In this regard Ms Sandbrook not only has to establish that there was an unjustified action, but also that she was disadvantaged.

[31] Ms Sandbrook claims that she had to extend her maternity leave as there was no other option, to preserve the possibility of returning to work. This cannot be the basis of a claim as she has not proved that there was an agreement and arrangements to work fewer days.

[32] The next matter to be considered is whether Mr Goodier's omission to provide a right of reply to Ms Sandbrook in his procedure amounted to a disadvantage in Ms Sandbrook's employment and/or her terms and conditions of employment? Mr Goodier made his findings based on information available to him at the time and he reached a genuine finding, except that Ms Sandbrook did not have the opportunity to respond to Mr McIntyre's and Ms Feutz's replies and that Mr Goodier spoke to two other employees with their comments before his findings were made. His omission was unfair. However, Ms Sandbrook's employment was not affected to her disadvantage because her job was always open to her to return to at least on a full time basis while she was on leave because she has not been able to establish that there was a promise to work fewer days part time. Her decision to extend her leave was an option open to her under the PLEPA, and in the fullness of time she resigned for other employment to achieve her desired work life balance, rather than to return full time to Core. These have no causal link to Core's failure to be fair in regard to the fault found in Mr Goodier's procedure and it would not have changed the outcome.

[33] Prior to her resignation Ms Sandbrook was still employed and on extended parental leave. On the basis of there being no proved variation to work fewer days there is no causal link between her decision to resign and the earlier matters of her complaint. This is supported by Ms Sandbrook's decision to take up another job to meet her desire to balance work with bringing up her child that she could not do at Core, and the leaving arrangements were mutually sorted out with Core to enable notice and restraints in the employment agreement being waived. Any claim for a personal grievance on the grounds of constructive dismissal when she resigned is out of time. After 26 August 2011, there was no separate grievance raised by Ms Sandbrook within 90 days for a constructive dismissal until the statement of problem was filed. There has been no issue and no claims in regard to any extension of time to raise a personal grievance on constructive dismissal, and even in the situation where there are exceptional circumstances occasioning the delay, any extension of time would be unlikely having regard to the justice of the matter as a claim for constructive dismissal would likely to be unsuccessful.

[34] Ms Sandbrook's claims are dismissed.

[35] Costs are reserved, but I would suggest that both parties accept that this is an appropriate case for costs to lie where they fall.

P R Stapp  
Member of the Employment Relations Authority