

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA98/08  
5095467

BETWEEN MEGAN THORPE  
Applicant  
AND BEIERSDORF AUSTRALIA  
LIMITED  
Respondent

Member of Authority: Philip Cheyne  
Representatives: David Burton, Counsel for Applicant  
Jol Bates, Counsel for Respondent  
Investigation Meeting: 7 May 2008 at Christchurch  
Determination: 10 July 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Megan Thorpe was employed full-time by Beiersdorf Australia Limited in August 2006. In October 2006, she discovered she was pregnant and took leave from March until July 2007. Both before and after the commencement of parental leave, there were communications between Ms Thorpe and Beiersdorf about her preference to work part time on her return from parental leave and her intention not to return to work full-time. However, Ms Thorpe never resumed either full-time or part-time work for Beiersdorf as the end of her parental leave. Beiersdorf says that Ms Thorpe resigned from her full-time position and no agreement had been reached about a part-time position. Ms Thorpe says that agreement was reached for her to work part time after the parental leave and she never resigned from her full-time position.

[2] Ms Thorpe's statement of problem describes her matter as a dismissal or an unjustified disadvantage. During the investigation meeting, I raised with the parties the possibility that the matter may be a parental leave complaint. Counsel for Beiersdorf acknowledged that he had foreseen that possibility. It was not suggested that any further evidence needed to be canvassed but it was agreed that both parties

would provide written submissions on that issue as well as the grievance claims. Those submissions are now to hand.

[3] To resolve this problem, it is necessary to review carefully the communications between Ms Thorpe and Beiersdorf surrounding her parental leave. There are some evidential disputes that must be resolved. Having done that, I will need to consider whether a grievance or parental leave complaint is established. First, I will outline the nature of Ms Thorpe's role and set out who was involved in relevant events.

### **Ms Thorpe's full-time role**

[4] Beiersdorf distributes branded personal health and skincare products in Australia and New Zealand to supermarkets, chemists and other retail outlets. Ms Thorpe was employed as a territory manager based in Christchurch covering some of Beiersdorf's sales channels within a defined geographical region covering part of Canterbury. She reported to a South Island regional manager, Stewart Clouston. He in turn reported to a national sales manager, Lesley Williams. Most of the relevant exchanges were between Ms Thorpe and Mr Clouston but Ms Thorpe also had some exchanges with Ms Williams.

[5] Beiersdorf in New Zealand principally employs full time staff. It has a commercial arms-length arrangement with a separate company which employs a number of part time and/or casual employees to meet Beiersdorf's business needs although none at the level of territory manager. Ms Thorpe was aware of this arrangement.

[6] Matthew Allnutt is Ms Thorpe's fiance. He lives and works in Timaru. He and Ms Thorpe were partners before Ms Thorpe was employed by Beiersdorf. Ms Thorpe's employment was based in Christchurch but her territory included South Canterbury. During her employment, Ms Thorpe generally spent three nights in Christchurch and four nights (including weekends) in Timaru. During her parental leave, Ms Thorpe shifted to live in Timaru with Mr Allnutt and she has lived there since the dispute arose.

### **Ms Thorpe's parental leave**

[7] The expected birth date for Ms Thorpe's baby was 17 April 2007. Ms Thorpe initially thought she was entitled to 12 months' parental leave but learned that her entitlement was to 14 weeks' leave because of her short service with Beiersdorf. There is a letter dated 2 January 2007 from Ms Thorpe to Beiersdorf requesting 14 weeks' parental leave commencing Friday 26 March 2007. There is also a letter from Ms Thorpe's midwife confirming 17 April as the expected date of birth. There is another form, partly completed by Ms Thorpe and partly by Mr Clouston, on Beiersdorf's standard leave application form.

[8] Mr Clouston responded to the parental leave request by a memo dated 23 January 2007 confirming maternity leave of 14 weeks from 26 March 2007 and saying ... *this 14 week period will mean that you will commence back into your role starting Monday 2nd July 2007 and you need to confirm this 21 days prior (before 11 June 2007).*

[9] Around the same time, Ms Thorpe had some discussions with Mr Clouston about the possibility of her working part time as a territory manager based in Timaru serving South Canterbury and Mid Canterbury after the end of her parental leave. Ms Thorpe prepared and presented a PowerPoint presentation outlining her proposal. Ms Thorpe's intention was not to return to work full time, but she wanted to continue her employment with Beiersdorf. It was nonetheless clear between Ms Thorpe and Mr Clouston that she was not resigning. Backing that up is an email from Mr Clouston to Ms Williams sent on 29 January 2007 that reads:

*I had a good chance to talk things through with Megan last week so I now fully understand where things are going.*

*If Megan resigns before her maternity leave date she is not entitled to receive the government supported paid maternity leave. Therefore Megan is not resigning but I can talk through this more offline if you wish.*

*All going well Megan's last day with us before heading away is 23rd March so we now have just under eight weeks in which to recruit. I have spoken with Ros and talked through the different options but we need to recruit to cover for this temporary position but we can indicate that it may result in full time employment within Beiersdorf.*

[10] At some point after 29 January 2007, Mr Clouston showed the PowerPoint presentation to Ms Williams. There followed a phone discussion between her and

Ms Thorpe, principally about other issues. There is some disagreement about what exactly was said by Ms Williams regarding the proposal. Ms Thorpe's evidence is that Ms Williams said *I told Stew let's make it happen*. Ms Williams' recalls saying *the proposal has legs absolutely*. I prefer Ms Thorpe's evidence on this point but the difference is not critical.

[11] Because of Ms Thorpe's indication that she did not intend to return to work full time in Christchurch and Beiersdorf's preference to appoint a permanent rather than a temporary replacement, Mr Clouston asked Ms Thorpe to write a letter confirming her intention. This was a requirement of Beiersdorf's HR people. Mr Clouston's evidence, which I accept, is that both he and Ms Williams requested the letter from Ms Thorpe and *we wanted this in place before we moved on to recruitment*. Ms Thorpe and Mr Clouston jointly drafted this letter on 7 March 2007 to his requirements. The letter reads:

*7 March 2007*

*Beiersdorf NZ Limited  
6 Fox Street  
Parnell  
AUCKLAND*

*To whom it may concern*

*It is my intention not to be returning to work with Beiersdorf full time after my maternity leave has ceased.*

*This is not an official resignation due to the Parental Leave Act so I am unable to make my position any clearer at this stage until after 2 April 2007.*

*If you have any questions or concerns please contact me on 021 379 523.*

*Kind regards,  
Megan Thorpe*

[12] Beiersdorf provides HR management support from Australia. They sent an email to Mr Clouston and Ms Williams on 7 March 2007 having received Ms Thorpe's letter faxed by Mr Clouston. Earlier, the HR manager had asked Mr Clouston to get Ms Thorpe to fill in a leave application form. Because of the fax, Mr Clouston had questioned whether that was still needed. It must have been still required as Mr Clouston arranged for Ms Thorpe to complete the Beiersdorf leave

application form mentioned earlier and he sent it to Australia after adding some information.

[13] As it transpired, Ms Thorpe's waters broke on 12 March 2007 and she was admitted to hospital where she gave birth and remained until 29 March 2007. During that time, Ms Thorpe had some phone discussions with Mr Clouston but it is not suggested that any agreement regarding a part time position arose as a result. To cover Ms Thorpe's earlier than anticipated departure from work, Mr Clouston added ticks to the leave application form indicating annual leave and sick leave, presumably to cover the period between 12 March and the scheduled commencement of the maternity leave on 23 March 2007. Despite the early confinement, Ms Thorpe's maternity leave should be taken as commencing on 23 March 2007.

[14] There were a number of phone calls from Mr Clouston to Ms Thorpe on 13 April, 14 April and 18 April. There is some disagreement in the evidence of Ms Thorpe and Mr Clouston about the content of these calls. First, it is common ground that Mr Clouston initially called Ms Thorpe. There was discussion about returning the mobile phone, other work-related property having been collected by the company earlier. There was also discussion about changes in work responsibilities for another territory manager. Ms Thorpe's part-time work proposal required some rearrangements along these lines, so she took from that information an affirmation of her proposal. What is controversial is whether there was a discussion about the part-time proposal and whether Mr Clouston actually said that they were going to proceed with it.

[15] Mr Clouston's evidence about these phone discussions was initially that no other matters were discussed except the return of the mobile phone and Ms Thorpe's health. In a further statement, having seen Ms Thorpe's evidence, Mr Clouston says that he informed her of her obligation to give three weeks' notice of an intention to return to her position. When questioned about this, Mr Clouston denied that there was a discussion with Ms Thorpe about the need for three weeks' notice; then later Mr Clouston said he could not recall there being such a discussion. These four versions are not consistent. Ms Thorpe's evidence is that there was discussion about her returning to work earlier and Mr Clouston said he would find out from HR what was required and get back to her, which he did to say that three weeks' notice in writing was required.

[16] The phone records establish that Ms Thorpe and Mr Clouston actually spoke to one another on 13 April and 18 April while the other calls were probably messages. That there were two substantive conversations is consistent with Ms Thorpe's evidence.

[17] From all this, I find that there was a discussion on 14 April about Ms Thorpe returning to work early, that Mr Clouston undertook to find out what was required and that he spoke to her again on 18 April to say that three weeks' written notice was necessary. By that time, however, Ms Thorpe had settled in her mind that she would take the full 14 weeks' parental leave rather than return to work early. I also accept her evidence that she told as much to Mr Clouston and that they discussed her preference to return on 16 July rather than 2 July to fit in better with the parental leave payment cycle. Mr Clouston acquiesced to this request. However, there was no explicit agreement about the part-time position.

[18] Nothing more of significance happened between Ms Thorpe and Mr Clouston until 13 June 2007 when she contacted him to arrange a meeting about her intended return to work. Mr Clouston deferred arranging that meeting possibly because of other work pressures but also because he was aware of the impending difficulty. He rang Ms Thorpe on 18 June and a meeting was arranged which eventually took place on 28 June 2007 in Christchurch. There is some dispute about what happened at this meeting. However, it is common ground that Mr Clouston confirmed that Beiersdorf would not be proceeding with the part-time position because of changing economic conditions. There was some debate between them about whether Beiersdorf was required to proceed with the part-time proposal and its effect on another employee. Mr Clouston told Ms Thorpe that her replacement based in Christchurch had been appointed permanently to the full-time role, meaning that there was no position for her to return to. The meeting ended with Mr Clouston saying he would get advice from HR and be back in contact with Ms Thorpe.

[19] Mr Clouston phoned Ms Thorpe on 29 June 2007. Again there is some conflict about precisely what was said but I prefer Ms Thorpe's recollection to the extent of that conflict. Mr Clouston told Ms Thorpe that Beiersdorf could not accommodate her part-time position and that there was no job for her. Ms Thorpe said that the position had been approved earlier and asked what had changed. That referred to their April phone conversation. Mr Clouston said he had been asked to

reduce staff costs. Some of the points from the day before were repeated. Ms Thorpe asked if she had been made redundant but Mr Clouston said *no*. Ms Thorpe insisted that she had not resigned and expected a position. Mr Clouston said that it was not an option. The call ended.

[20] Ms Thorpe received a memo dated 29 June 2007 from Mr Clouston. It reads:

*Hi Megan,*

*I thank you for your time on Thursday 28 June, it was great to catch up.*

*As discussed the business is changing very quickly and your original proposal that you presented in January of this year has had due consideration. Unfortunately this proposal does not suit the need of our business and so we are unable to support moving it forward.*

*We as a business appreciate the thought and effort that you have put into Beiersdorf and I am personally happy to support you as a referee in your future career path.*

*Kind regards,  
Stewart Clouston*

[21] By letter dated 16 July 2007, Ms Thorpe's representative raised her grievance as an unjustified dismissal or unjustified disadvantage. The letter says that Mr Clouston badgered Ms Thorpe to put in writing her intention not to return to work full time; that Mr Clouston and Ms Williams accepted Ms Thorpe's part time proposal; that a return to work date of 16 July 2007 was confirmed during the 20 April phone call; that Mr Clouston by phone told Ms Thorpe that he had to reduce staff numbers and intended to make her redundant; that they met on 29 June; there was a subsequent telephone call on 30 June, Ms Thorpe later receiving the 29 June memo. The memo is said to clearly imply Ms Thorpe's dismissal. There is criticism of the process and a claim that there is a breach of Ms Thorpe's right to return to the part time position or her existing position. There is a claim for compensation.

[22] Beiersdorf's solicitors replied on 30 July 2007. Reference is made to the parental leave approval letter dated 23 January but it is said that Ms Thorpe actually commenced her leave on 12 March giving 18 June as the date for a return to work. Mention is made of the part time work proposal which was presented and considered. Beiersdorf denied that it was ever accepted. The letter rejects the claim of badgering and refers to Ms Thorpe's written advice that it was not her intention to return to work full time after her parental leave. Issue is taken with the sequence of events and

substance of exchanges leading up to the 28 June meeting and the subsequent phone call and memo. The letter says that Beiersdorf considered but did not agree to the part time work proposal, that Ms Thorpe was not dismissed but chose not to give notice of her intention to return to her position having relocated to Timaru.

[23] Despite mediation, the problem was not resolved.

### **Did Ms Thorpe resign?**

[24] The applicable employment agreement required one month's notice of termination in writing. Ms Thorpe's written communication did not amount to a resignation. That is said explicitly by her in the 7 March 2007 letter. Her letter was understood not to be a resignation as evidenced by HR's email to Ms Williams and Mr Clouston on 7 March 2007. Ms Thorpe's oral communications were not understood to amount to a resignation either. That is clear from Mr Clouston's email of 29 January 2007. Mr Clouston also gave that evidence in response to a question.

[25] There is some suggestion by Mr Clouston that Ms Thorpe was, in effect, resigning by saying in April, then in June 2007, that she did not intend to return to her full time position. However, I do not accept that what was said by Ms Thorpe could amount to her resignation. Her comments were on the basis that there had been agreed a variation to her employment entitling her to work part time rather than full time. What Ms Thorpe made clear was that she wanted to continue to work for Beiersdorf rather than end her employment.

[26] The other point relevant to whether Ms Thorpe terminated her position are the mutual rights and obligations relating to parental leave. The employment agreement says that *parental leave shall be allowed in terms of the Parental Leave and Employment Protection Act 1987*. There is no dispute that Ms Thorpe was entitled to 14 weeks' maternity leave pursuant to ss.7 and 9 of the PLEP Act. Ms Thorpe gave notice of her wish to take leave. Section 36 of the Act required Beiersdorf to respond to that notice which was done on 23 January 2007. The memo from Mr Clouston does not explicitly state that Beiersdorf can keep open Ms Thorpe's position, but that is implicit in the text of the memo. Further, I infer that Beiersdorf certified to the Commissioner of Inland Revenue that Ms Thorpe qualified for parental leave and the date of her intended return, since Ms Thorpe actually received the statutory payments: see regulation 9 of the Parental Leave and Employment Protection Regulations 2002.

[27] While Ms Thorpe could have resigned, both she and Beiersdorf knew that a resignation would disentitle her to the paid parental leave. From the outset, Ms Thorpe made it clear to Beiersdorf that she intended to exercise her rights to paid parental leave, the first draft of her written notice specifically referring to paid leave. Everyone knew that to get the payment, Ms Thorpe could not resign and had to leave open her right to return to work. Her fax of 7 March 2007 makes exactly that point.

[28] From all this I conclude that Ms Thorpe did not resign or otherwise terminate her employment by any of these communications. She simply exercised her right to take parental leave and the law required Beiersdorf to keep her position open.

**Was a part-time position agreed?**

[29] There is no doubt that Mr Clouston and Ms Williams responded favourably to Ms Thorpe's proposal for a part time position but the question is whether there was agreement to vary the existing employment relationship. I find that the evidence falls short of establishing an agreement.

[30] Ms Thorpe did not assert that agreement was reached when the proposal was presented to Mr Clouston. She knew that it was not his role to agree to the proposal and that he would have to take it to his manager. While there is a finding that Ms Williams repeated to Ms Thorpe what she had said to Mr Clouston about the proposal, that is insufficient to establish an agreement. The essence of the comment to Mr Clouston was to progress arrangements so an agreement suitable to both parties could be concluded at some point in the future.

[31] Unfortunately, Beiersdorf did nothing to progress the proposal. The evidence of Ms Williams and Mr Clouston is to the effect that Ms Thorpe's proposal was given full consideration but was ultimately not accepted. That evidence significantly overstates the case. It may be that Mr Clouston gave some passing consideration to the proposal during his exchanges with Ms Thorpe before June 2007 but nothing was done by Beiersdorf to enable an agreement to be concluded. However, Beiersdorf's communications with Ms Thorpe left her thinking that there would be an agreement based on her proposal. In the meantime, business conditions changed to rule out the possibility of establishing a part-time position based in Timaru. It was Ms Thorpe's announcement of her intention to return to her employment in a part-time role that caused Beiersdorf to announce that no such role was available.

**Ms Thorpe's attempted return to work**

[32] There is a finding that Ms Thorpe told Mr Clouston in April 2007 that she would have to return to work on 16 July rather than 2 July to fit in with the parental leave payments. There is also the finding that Mr Clouston acquiesced to this request. Section 45(4) of the PLEP Act permits such agreement to take leave otherwise than by virtue of the Act.

[33] Strictly speaking, Ms Thorpe should have given Beiersdorf written notice of her intention to return to work not later than 21 days before the end of her maternity leave. Instead, she contacted Mr Clouston on 13 June and they eventually meet on 28 June. Ms Thorpe's lack of written notice amounts to an irregularity under the PLEP Act. The significant context of that irregularity is Beiersdorf's failure to fully comply with the s.36 notice requirement, Beiersdorf's failure to comply at all with the s.38 notice requirements, Ms Thorpe's mistaken belief that part time work had been agreed commencing 16 July 2007, and Mr Clouston deferring the follow up meeting until late June. In the circumstances, Ms Thorpe's irregularity should be remedied as permitted by the PLEP Act.

[34] The result is that Ms Thorpe must be regarded as entitled to return to her original position, Beiersdorf having an obligation to keep open that position for her. The sending away of Ms Thorpe communicated by the meeting on 28 June, the phone call on 29 June and the memo of 29 June 2007 amounts to a personal grievance of unjustified dismissal or unjustified disadvantage. This also amounts to a parental leave complaint as defined by s56(1)(c) of that Act. The problem is better analysed as a parental leave complaint because it concerns the rights and obligations under that statute. In doing this, I rely on s.160(3) of the Employment Relations Act 2000.

**Parental leave complaint**

[35] There is an argument by Beiersdorf that Ms Thorpe informed it that she had decided not to return to work at the end of her parental leave. This is a reference to s.46 of the PLEP Act which provides that the employment is deemed to have ended on the day leave commenced (subject to agreement to the contrary) where an employee informs the employer, before the end of the leave, that the employee has decided not to return to work at the end of the leave. However, that is not what happened here. What Ms Thorpe said in writing and orally was that it was her

intention not to return to work full time after the maternity leave. The evidence is clear that she conveyed an intention rather than a decision. Despite expressing her intention, Ms Thorpe was entitled to and did take parental leave that included Beiersdorf keeping open her position. Her communications on this subject with Beiersdorf after the leave started were to the effect that she intended to return to work but to a part time position. None of Ms Thorpe's communications amount to her *inform[ing] the employer, before the end of that period of parental leave, that the employee had decided not to return to work at the end of the period of parental leave ...*: see s.46 of the Act.

[36] I am referred to *Hughes v Metropolitan* (1877) 2 App Cas 43 regarding equitable estoppel. The principle of equitable estoppel is that a party will not be permitted to deny an assumption, belief or expectation it has allowed another to rely on where such a denial would be unconscionable: see *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA). There are a number of difficulties here with estoppel. The argument is based on Ms Thorpe's knowledge that Beiersdorf intended to recruit a permanent replacement to fill her position and that she did not raise any complaint at that time. However, if Ms Thorpe allowed Beiersdorf to act on a belief that she was not going to return to her full-time position, that was only because Beiersdorf caused her to believe that her part-time proposal had been or would be agreed. Nor would it be unconscionable for Ms Thorpe to change her mind about returning to work. Hers was a statutory right to return to work under legislation enacted for the purpose of protecting her rights during parental leave: see s.2 of the PLEP Act 1987.

[37] Although Beiersdorf originally told Ms Thorpe her position would be kept open, that presumption also arising under the PLEP Act, Beiersdorf failed to recognise Ms Thorpe's right to return to her position when she sought to resume her employment. In that way, Beiersdorf took or omitted action that disadvantageously affected Ms Thorpe's right and benefits under the PLEP Act. Ms Thorpe therefore has a parental leave complaint and is entitled to an assessment of appropriate remedies.

### **Remedies**

[38] Reinstatement is not sought.

[39] I am urged to assess compensation on the basis that Ms Thorpe lost remuneration either by way of the part-time position or her original full-time position. It is not appropriate to assess lost remuneration on the basis of the part-time proposal because there was never an agreement about that position. I also find that Ms Thorpe probably would not have returned to her full-time position based in Christchurch. Following Beiersdorf's failure to keep open her job Ms Thorpe sought only part-time work based in Timaru. That is what she was always probably going to do at the conclusion of her parental leave. It follows that any loss of remuneration is not attributable to Beiersdorf's breach of the PLEP Act so there cannot be any award.

[40] Beiersdorf submits that Ms Thorpe's failure to raise a parental leave complaint in March when she learnt of its intention to advertise for a permanent rather than a temporary replacement is relevant to assessing remedies. The finding above about lost remuneration answers part of the submission. As to the other part, it was for Beiersdorf to recognise and comply with its legal obligations. As explained above the equities of the situation do not relieve Beiersdorf of responsibility for its failure to do so.

[41] Section 65 of the PLAP Act provides for the remedy of compensation in addition to reinstatement and reimbursement. That must include compensation for non-pecuniary loss arising from the breach of an employee's statutory rights. Ms Thorpe clearly suffered distress, humiliation and injured feelings because of Beiersdorf's breach of her statutory rights. In particular, it was for Ms Thorpe to decide whether to return to work rather than having that decision taken away from her by Beiersdorf, as happened here. Her evidence is that she felt badly treated. There is evidence that her self confidence was significantly shaken by what happened as Ms Thorpe was unable to go through with an interview process for another (job share) position after this dispute arose. There is no reason to doubt Ms Thorpe's evidence about these effects. To remedy them I order Beiersdorf Australia Limited to pay Ms Thorpe compensation of \$7,500.00 pursuant to section 65(c) of the Parental Leave and Employment Protection Act 1987.

**Summary**

[42] Ms Thorpe has established a parental leave complaint.

[43] To remedy the effects caused by Beiersdorf's breach of the PLEP Act the company is to pay Ms Thorpe compensation of \$7,500.00.

[44] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority