

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Nechia Tokona
AND Bridgeman Concrete Auckland Limited
REPRESENTATIVES David Fleming for Applicant
Gary Taylor for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 27 July 2006
SUBMISSIONS RECEIVED 4, 7 and 16 August 2006
DATE OF DETERMINATION 28 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Tokona has raised a complaint under section 14 of the Parental Leave and Employment Protection Act 1987. She says her former employer Bridgeman Concrete did not have reasonable justification to direct the commencement date of her maternity leave because suitable alternative work was available for her to perform when, due to her pregnancy, she unable to continue with her regular duties as a concrete truck driver.

[2] Bridgeman Concrete says its decision to direct Ms Tokona to commence her maternity leave was reasonably justified because no suitable alternative duties existed to offer Ms Tokona when she was no longer able to perform her regular duties.

[3] The Authority must consider whether Bridgeman Concrete exercised its powers under section 14 of the PLEPA with reasonable justification.

[4] Section 14 of the PLEP Act provides:

***Right of employer to appoint the date of commencement of maternity leave** – Where, by reason of pregnancy, a female employee is unable to perform her work to the safety of herself or others or is incapable of performing her work adequately, her employer, if no other suitable work is available, may, subject to section 9(2) of this Act, direct her to commence her maternity leave on such date as the employer appoints (including a date that is earlier, by more than 6 weeks, than the expected date of delivery).*

[5] The relevant subsection of Section 56(1)(d) of the PLEP Act provides:

***Parental leave complaints-** (1) Where any employee (not being a State employee) alleges that the employee's employer-*

...

(d) Has exercised, without reasonable justification, the powers conferred on the employer by section 14 or section 16 of this Act.-

that allegation shall be a parental leave complaint to which this section applies, and the employee may use, in respect of that parental leave complaint, the procedures provided in section 57 to 67 of this Act.

[6] Section 56(1)(d) of the PLEP Act sets out the test to apply to an assessment of the exercise of powers under section 14, that is, did the employer exercise the power to appoint

the commence date with reasonable justification. Such an assessment requires both an inquiry into the availability of suitable alternative duties and the reasonableness of the process used by the employer in reaching the decision to exercise the powers conferred on it by section 14 of the PLEP Act. The standards appropriate in this setting are not less than those applicable in a personal grievance setting¹.

Were suitable alternative duties available?

[7] Ms Tokona says alternative duties were available for her to perform after the sixth month of her pregnancy from which point her doctor had advised she must only perform light duties. Ms Tokona says these alternative duties were cleaning, learning to batch mix concrete, answering telephones and general administration duties like banking and data entry. Ms Tokona said these duties were available because they needed to be performed and she had carried them out during the first week following the sixth-month of her pregnancy.

[8] There is no dispute between the parties that from the sixth month of her pregnancy Ms Tokona was no longer able to perform her usual concrete truck driving duties. A concrete truck driver usually works alone and must routinely lift a 15 kilo shute.

[9] Simon Adam, the plant manager at the Bridgeman East Tāmaki site, where Ms Tokona was employed, said in evidence that during the week Ms Tokona worked alternative duties she was *"...simply lending Terii [Terii Mehau, the batcher] and me a hand with work we were well capable of performing"* and that during this period Ms Tokona *"...did not have enough to do to keep herself busy."* The evidence given by Ms Tokona did not contradict his evidence that essentially the alternative week's work involved "make-work" duties. The evidence was clear that Ms Tokona could not take over the batcher duties because, at this advanced stage of her pregnancy, it was not safe for her to climb a ladder to perform the slump test necessary for each concrete batch. Bridgeman Concrete did not employ an assistant batcher or a cleaner and the administration tasks performed were a normal part of Mr Adam and Mr Mehau's duties. I am not satisfied on the evidence received that among the duties performed by Ms Tokona during the alternative work week suitable alternative duties existed for Ms Tokona to perform from the sixth month of her pregnancy.

Reasonable justification?

[10] The next consideration is whether Bridgeman Concrete had reasonable justification to exercise its section 14 powers and direct Ms Tokona to commence her maternity leave early?

[11] Mr Adam said he considered the issue of alternative duties prior to Ms Tokona coming off the truck and discussed the issue with Mr Mehau and with the manager of Bridgeman Concrete's Papakura plant. The Papakura plant is the only other Bridgeman Concrete plant in Auckland. Mr Mehau told Ms Tokona that there was plenty of work for her to perform which lead Ms Tokona to believe her need for light duties from the sixth month of her pregnancy could be accommodated. Mr Adam also made inquiry of Ms Tokona's doctor who provided a further medical certificate confirming she was unable to perform heavy lifting after the sixth month of her pregnancy. Mr Adam said he had not had any discussion with Ms Tokona regarding what would happen when she came off the truck.

[12] Mr Adam said that during the alternative work week he decided *"...that there was no justification for keeping her [Ms Tokona] on and therefore asked her to commence her maternity leave early."* This meeting was convened in the staff lunch room. Mr Adam's advisor, Mr Taylor, was also present by telephone. At the meeting Mr Adam presented Ms Tokona with the IRD paid parental leave form with an early start date. Ms Tokona completed the form and submitted it to IRD the following day.

[13] Ms Tokona said she was very unhappy about being presented with the IRD form commencing her maternity leave early because she had planned to work until she was 7 ½

¹ *Mikkelson v Sky Network Television Limited* 9/1/98, Yvonne Oldfield (adjudicator), HT 1/98; *Horne v Air New Zealand Ltd* 28/3/01, WC Hodge (adjudicator), AT 34/01

months pregnant and planned to return to work 12 weeks later. Ms Tokona said she could not afford to commence her period of paid parental leave a month and a half early. Ms Tokona said she lodged the completed IRD form the following day because she understood she had to; her employer had directed her to commence maternity leave. On the following Monday, Ms Tokona consulted her union delegate, John Graham, who had just returned to work following a period of annual leave. Mr Graham contacted their union organiser who set up a meeting with Mr Adam the following day. The meeting considered the issue of whether there were any suitable alternative duties for Ms Tokona to perform. Mr Adam confirmed his decision that there were none. Ms Tokona subsequently filed a complaint under the PLEP Act within the statutory timeframe.

[14] Bridgeman Concrete did not discuss the alternative work trial with Ms Tokona or its concerns that the work was not sustainable. Ms Tokona did not have an opportunity to put forward any ideas she may have had as to alternative duties and did not have an opportunity to raise her understanding that alternatives duties would be made available to her. Further, Ms Tokona did not have an opportunity to seek advice prior to being advised of her employer's decision to direct her to commence her maternity leave. The meeting with Mr Adam and Mr Taylor did not amount to consultation. The purpose of the meeting was to advise of Mr Adam's decision to direct Ms Tokona to commence her maternity leave early. The meeting with Ms Tokona's union organiser did not remedy the failure to consult because the period of parental leave had commenced.

[15] The failure to consult with Ms Tokona over the availability of suitable alternative work was a serious departure from the conduct which could reasonably be expected of a fair employer in these circumstances. While I acknowledge Bridgeman Concrete took steps to consider the issue of suitable alternative work, as the directly affected party, Ms Tokona was entitled to have her views fairly considered. Having failed to discuss the issue with Ms Tokona and provide her with a fair opportunity to comment Bridgeman Concrete cannot reasonably justify its exercise of the section 14 power to direct Ms Tokona to commence maternity leave early.

Remedies

[16] By way of remedies Ms Tokona has claimed a period equivalent to five weeks wages calculated from the date she was directed to commence maternity leave to the date she intended to commence maternity leave. The basis for this claim is that because Ms Tokona was directed to commencement maternity leave five and a half weeks earlier than she intended she had a shortfall of five and a half weeks in paid leave and suffered hardship as a consequence. Information before the Authority suggests that Ms Tokona may have received a double payment for some of this period. I record that Ms Tokona has not sought a compensatory sum for hurt and humiliation consequence to the actions of Bridgeman Concrete or interest on the wages sought pursuant to section 65 of the PLEP Act.

[17] In the circumstances the issue of remedies is referred back to the parties to attempt to resolve. If they are unable to do so they have leave to put further evidence and submissions to the Authority to enable this issue to be determined.

Costs

[18] Costs are reserved.