

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 240
3093372

BETWEEN HELEN WALSH
 Applicant

AND NICHE CONSULTING GROUP
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

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

Investigation Meeting: On the papers

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

Date of Determination: 23 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Helen Walsh, claimed that her employer, Niche Consulting Group Limited (Niche) unjustifiably denied her parental leave in breach of s 41 of the Parental Leave Employment Protection Act 1987 (PLEPA). Ms Walsh claimed that breach was a parental leave complaint within the meaning of s 56(1)(a) of the PLEPA.

[2] Ms Walsh also claimed that Niche had terminated her employment contrary to s 49(1)(a)(i) of the PLEPA. Ms Walsh claimed that breach was a parental leave complaint within the meaning of s 56(1)(b) of the PLEPA.

[3] Ms Walsh further claimed that Niche's refusal to attend voluntary mediation in October 2018 conducted via the Ministry of Business Innovation and Employment's (MBIE's) Mediation Service was a breach of s 64 of the PLEPA.

[4] Niche is a small recruiting business, primarily for the New Zealand legal industry. Ms Walsh is a solicitor from Ireland who was employed by Niche initially on a fixed term basis due to her visa restrictions. Her fixed term engagement expired on 22 December 2018.

[5] Ms Walsh returned to Ireland after her fixed term employment ended. However, before her fixed term engagement expired, Niche offered Ms Walsh permanent employment (subject to a new work visa being granted), that would commence on 29 January 2019. This offer was made to help Ms Walsh secure a work visa that extended past 22 December 2018.

[6] Ms Walsh accepted this offer of employment and around 12 December 2018 she signed a new employment agreement. Her work visa was extended by Immigration New Zealand to 22 November 2021, on the condition that she worked for Niche.

[7] Ms Walsh started her second period of employment with Niche on 29 January 2019. In February she informed Niche that she was pregnant. Ms Walsh sought parental leave entitlements under the Parental Leave and Employment Protection Act 1987 (PLEAP) and she asked Niche to hold her position open for her to return to in mid-June 2020.

[8] Niche and Ms Walsh together sought information and advice from MBIE's helpline about their PLEPA rights and obligations. MBIE informed the parties that because Ms Walsh's employment was due to end in mid-June 2019 and she was expected to give birth mid-July 2019, she was not entitled to parental leave because she did not satisfy the 6 or 12 months' threshold employment test. The parties were also informed that Ms Walsh was entitled to parental leave payments.

[9] On the basis of that information Niche formally declined to accept Ms Walsh's application for parental leave. That meant Niche advised Ms Walsh that it would not be formally holding her position open under the PLEPA for her to return to. However Niche also told Ms Walsh that informally it would consider her for new employment in or around mid-June 2020 if she wanted to return to work. All Ms Walsh had to do was advise Niche whether she wanted to return to her position on a full or part-time basis.

[10] Around the same time Ms Walsh had applied for parental leave entitlements, commercially sensitive and highly confidential discussions were also occurring between Niche and another unrelated entity regarding the future direction of their businesses. Those discussions were the reason Niche formally declined Ms Walsh parental leave under the PLEPA while informally informing her that it remained open to her returning to work.

[11] Niche did not want to commit to PLEPA obligations that it did not consider applied to Ms Walsh at that time given the uncertainty regarding potential changes to its business operations going forward.

[12] Niche's directors expected that Ms Walsh would want to return to work so Niche maintained her business email address, her desk at work and retained business cards for her. Niche has deliberately not filled her position and is awaiting the outcome of this matter before it moves to do so.

[13] Ms Paula Watts, joint owner and managing director of Niche, provided an affidavit dated 21 May 2020 which Vanessa Hopkins, the then Human Resource Manager for Niche, both told Ms Walsh that they were happy for her to come back to work if she wanted to do so, even though they were unable to formally hold her position open for her under the PLEPA.

[14] Niche has reiterated its offers to Ms Walsh to return but she has declined these offers because she considered that the relationship has soured as a result of her concerns.

[15] On 14 October 2019 Ms Walsh raised a "*personal grievance*" claiming that Niche was obliged to hold her position open for her and that she was entitled to compensation because she had been declined the right to return to her employment in June 2020.

[16] Niche disputed these claims and responded by advising Ms Walsh that her personal grievance was considerably out of time, being well outside the 90-day time period specified in s 114(1) of the Employment Relations Act 2000 (the Act).

[17] Ms Walsh has not sought leave under s 114(3) of the Act to raise a personal grievance claim out of time. The Authority therefore confirms that the personal grievance claims that Ms Walsh raised in her letter of 14 October 2019 are outside the statutory time limit.

[18] Because Niche has not consented to personal grievance claims being raised out of time, and Ms Walsh has been granted leave to enable her to do so, the Authority does not have jurisdiction to investigate the personal grievances raised in her 14 October 2019 letter.

[19] Ms Walsh made a complaint to the Human Rights Commission, which arranged mediation that took place on 3 or 4 February 2020. This mediation related to Ms Walsh's Human Rights Act 1993 complaint that Niche had discriminated against her by failing to hold her position open for her to return to. It was therefore not a personal grievance claim, over which the Authority has exclusive jurisdiction.

[20] Section 112(4) of the Employment Relations Act 2000 (the Act) precludes an employee who has made a Human Rights Act 1993 complaint from pursuing a personal grievance for the same subject matter of that complaint.

[21] That would apply to Ms Walsh if she subsequently sought to progress a personal grievance claim in the Authority for the same complaint she has already made to the Human Rights Commission.

[22] The Human Rights Commission mediation did not resolve the situation. The parties had differing views on whether or not Ms Walsh met the 12-month employment threshold test in s 2BA of the PLEPA.

[23] Niche therefore lodged its Statement of Problem with the Authority on 7 February 2020 in which Ms Walsh was the respondent asking the Authority to determine the PLEPA jurisdiction issues. Those issues were determined in at favour of Niche.¹ To briefly summarise, the Authority held that:

- (a) Ms Walsh was not entitled to parental leave because she did not satisfy the 12 months employment threshold test under s 2BA of the PLEPA;
- (b) Ms Walsh had not made her parental leave complaints within the 26 week time period required by s 56 of the PLEAP, so was out of time to do so; and
- (c) It was not reasonable or appropriate to grant Ms Walsh relief under s 68 of the PLEPA to pursue her parental leave complaints out of time.

¹ *Niche Consulting Group Limited v Walsh* [2020] NZERA 239.

[24] Ms Walsh lodged her Statement of Problem in respect of this matter in response to Niche lodging its Statement of Problem in matter AEA 3090912. The two matters are therefore related. Niche was the applicant in the first proceedings while Ms Walsh was the applicant in the second proceedings. Both determinations should be read together.

[25] Niche said that insofar as Ms Walsh's claims in her Statement of Problem were a parental leave claim, then that was effectively the substance of what Niche had previously requested the Authority to determine. Niche's position remained that Ms Walsh was out of time to raise parental leave complaints. The Authority held that Niche was correct about that.

[26] In her Statement of Problem Ms Walsh alleged she had been "*summarily dismissed*" by being declined parental leave and that she is "*and remains on parental leave*", that ended on or around 17 June 2020.

[27] Niche reiterated (again) in its Statement in Reply that Ms Walsh's position was still available and open to her, irrespective of the parties' differing views of their respective legal obligations and rights under the Act and PLEPA. Ms Walsh rejected that offer.

[28] The parties have attended MBIE mediation on their employment relationship problems, but that did not resolve their issues. The parties now require the Authority's determination to resolve their disputed claims.

[29] Niche was justified denying Ms Walsh parental leave because she did not satisfy the threshold test in s 2BA of the PLEPA. Niche therefore did not breach s 41 of the PLEPA, because Ms Walsh was not entitled to have her position held open for her.

[30] Ms Walsh's claim that Niche breached s 49(1) of the PLEAP by terminating her employment does not succeed. Ms Walsh's employment ended because she absented herself from work from 14 June 2019 onwards when she was not entitled to parental leave. Niche was therefore entitled under s 49(3) of the PLEPA to end her employment.

[31] The third claim Ms Walsh made in paragraph 1.3 of her Statement of Problem was that Niche breached s 64 of the PLEPA by failing to attend MBIE mediation when requested by her on 14 October 2019 to do so.

[32] That claim also does not succeed. The request to voluntarily attend mediation in 2018 regarding her 14 October 2019 personal grievance claim was declined by Niche because the

personal grievance claims were considerably out of time. Niche did not consent to grievances being raised out of time so it declined to attend voluntary mediation on the personal grievance claims.

[33] Niche attended Human Rights Commission mediation and MBIE mediation over the parental leave issues. Niche was not legally required to attend voluntary mediation in 2018 on the personal grievance claims.

[34] Niche's decision not to attend mediation on personal grievances claims was not a breach of its s 64 PLEPA duty to promote settlement of parental leave complaints, because at that time Ms Walsh had not made any parental leave complaints. Her parental leave complaints were not made until 30 January 2019. This claim does not succeed.

[35] Niche as the successful party is entitled to a contribution towards its actual legal costs. The parties are encouraged to resolve costs by agreement. If that does not occur, then Niche has 14 days within which to file costs memorandum and Ms Walsh has 14 days within which to file her costs memorandum.

[36] The Authority is likely to adopt its usual notional daily tariff based approach to assessing costs. The parties are therefore invited to identify any factors they say should result in adjustments being made to the notional daily tariff, which is currently \$4,500 per day.

Rachel Larmer
Member of the Employment Relations Authority