IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA616/2019
[2020] NZCA 437

BETWEEN	DIAMOND LASER MEDISPA TAUPO LIMITED First Appellant
	OLIVIA JANE BLAKENEY-WILLIAMS Second Appellant
	RICHARD HUGH BLAKENEY-WILLIAMS Third Appellant
AND	THE HUMAN RIGHTS REVIEW TRIBUNAL First Respondent
	ZELINDA DORIA Second Respondent

Hearing:	12 August 2020
Court:	French, Cooper and Collins JJ
Counsel:	G H J Brant for Appellants S R G Judd and E F Tait for Second Respondent
Judgment:	22 September 2020 at 9 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the second respondent costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] The appellants are facing a claim of discrimination in the Human Rights Review Tribunal at the suit of a former employee. They applied for an order striking out the claim for want of jurisdiction. The Tribunal dismissed the application,[1] prompting the appellants to seek judicial review in the High Court. The judicial review proceedings were dismissed by Grice J who held the Tribunal did have jurisdiction.[2]

[2] Dissatisfied with that outcome, the appellants now appeal the High Court decision. Their central contention is that the only cause of action available to the employee is to bring her claim as a parental leave complaint under the procedures contained in the Parental Leave and Employment Protection Act 1987 (the Parental Leave Act). That would in turn mean the only entity with jurisdiction to adjudicate on the claim is the Employment Relations Authority.

[3] The issues raised by the appeal involve the interaction of three statutes: the Human Rights Act 1993, the Parental Leave Act and the Employment Relations Act 2000.

Background

[4] Diamond Laser Medispa Taupo Ltd operates a beauty spa and skin clinic in Taupo. The second and third appellants Mr and Ms Blakeney-Williams have shares in the company. Ms Blakeney-Williams also manages the business and Mr Blakeney-Williams is a director.

[5] In January 2016, the company employed the second respondent Ms Doria as a full time beauty therapist. In or about mid November 2016, she advised Ms Blakeney-Williams that she was approximately five weeks pregnant.

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1 *Doria v Diamond Laser Medispa Taupo Ltd* [2018] NZHRRT 50 [Tribunal decision].

2 *Diamond Laser Medispa Taupo Ltd v Human Rights Review Tribunal* [2019] NZHC 2809, (2019) 17 NZELR 86.

Thereafter, according to Ms Doria, her employment conditions changed for the worse and eventually she was forced to resign.

[6] Ms Doria complained to the Human Rights Commission, alleging she had been discriminated against because of her pregnancy. The Office of Human Rights Proceedings subsequently lodged a claim on her behalf in the Tribunal.

[7] The statement of claim alleges that the appellants breached the Human Rights Act by subjecting Ms Doria to detrimental treatment and causing her to resign by reason of a prohibited ground of discrimination, namely her pregnancy.

[8] The statement of claim then goes on to allege specifically that the appellants:

(a) Required Ms Doria to take sick leave when she did not want to.

(b) Transferred her existing client bookings to other therapists.

(c) Refused to accept future client bookings for her.

(d) Pressured her by repeatedly asking for medical evidence of her pregnancy.

(e) Removed her as an administrator of the company's Facebook page.

(f) Reduced her hours as from January 2017 to accommodate a new therapist who would be replacing her in the New Year.

(g) Required her to commence her parental leave on 29 November 2016 against her wishes and without valid reason.

(h) Directed her not to enter the company's premises during her pregnancy.

(i) Between 29 November 2016 and 4 April 2017 corresponded with Ms Doria and her representative (her mother) in an intimidating and

insulting manner, suggesting she was dishonest and refusing her request to be paid her holiday pay.

(j) Left her with no choice but to resign on 4 April 2017.

[9] The remedies sought include damages of approximately $15,300 for lost income as well as damages of $100,000 for humiliation, loss of dignity and injury to feelings.

[10] Following service of the statement of claim, the appellants filed an appearance in the Tribunal under "protest of jurisdiction" and a detailed statement of reply. As regards the substance of the allegations, the appellants strongly deny any unjust treatment and say there were good reasons for the various steps they took including health and safety concerns about exposing a pregnant employee to chemicals used by beauty therapists. The appellants will further contend that at all times they acted in accordance with the Parental Leave Act.

[11] Obviously, the rights and wrongs of what took place are not for us to determine. Our sole task is to address the issue of whether the claim is within the jurisdiction of the Tribunal.

Arguments on appeal

[12] The first plank in the appellants' argument is that the allegations made in the claim bring it within the definition of a parental leave complaint under s 56(1) of the Parental Leave Act. That being so, Ms Doria, it is said, was obliged to follow the statutory procedures for settlement of parental leave complaints contained in that Act. Those procedures provide that if the parties or their representatives are unable to resolve the complaint, it may be referred to the Employment Relations Authority.[3]

[13] The second plank in the argument is that under s 161 of the Employment Relations Act, the Employment Relations Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. An employment

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3 Parental Leave and Employment Protection Act 1987 [Parental Leave Act], s 58.

relationship problem is defined as including a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship.[4] On any view of it, Ms Doria's claim concerns a problem relating to or arising out of her employment relationship and therefore is within the exclusive jurisdiction of the Authority.

[14] Significantly, for present purposes, one of the exceptions to the Authority's exclusive jurisdiction is that it does not have exclusive jurisdiction in relation to personal grievances based on a claim that the employee has been discriminated against in their employment. In such cases, the employee has a choice of procedure. They may, if the grievance is not otherwise resolved, apply to the Authority for resolution of the grievance or they may invoke the complaint procedures under the Human Rights Act.[5]

[15] This is said to be significant because on the face of it the alleged circumstances in this case would be capable of amounting to a personal grievance and so allow Ms Doria a choice of procedure were it not for a critical provision in the Parental Leave Act. The critical provision is s 56(4) which states that a parental leave complaint is not a personal grievance within the meaning of s 103 of the Employment Relations Act.

[16] Section 103 of the Employment Relations Act is the section which defines the types of claim which constitute personal grievances. The definition includes a claim that the employee has been discriminated against in the employee's employment.

[17] It follows, so the argument runs, that because a parental leave complaint is not a personal grievance by definition, it cannot therefore be by definition discrimination, discrimination being a species of personal grievance. In short when it comes to parental leave complaints there is no choice of procedure and thus no room for the involvement of the Tribunal.

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4 Employment Relations Act 2000, s 5.
5 Section 112; and Human Rights Act 1993, s 79A.

[18] And that, the appellants say, makes sense because a breach of the Parental Leave Act is not about distinguishing or differentiating between a pregnant employee and a non-pregnant employee.[6] The latter does not have any rights or entitlements under the Parental Leave Act. The essence of a parental leave complaint is not discrimination but a breach of what the Parental Leave Act mandates is to happen. There is no comparator.

[19] The appellants further support their interpretation by reference to the legislative history of the Parental Leave Act which, they say, shows a clear intention to create a distinct cause of action.

[20] It appears the second and third appellants consider themselves particularly prejudiced as a result of the claim being heard in the Tribunal because if the claim were determined under the Parental Leave Act it would only be the company who could be sued, not its shareholders or directors.

[21] Finally, we note that although the appellants' primary position is that all of Ms Doria's claim is within the definition of a parental leave complaint, their fall-back position is that even if part of a claim were within the definition, and part not, the complainant would need to split their claim.

Analysis

[22] The starting point is the Human Rights Act being the legislation which creates the Tribunal's jurisdiction.

[23] Sections 94 and 92B of the Human Rights Act relevantly provide that the functions of the Tribunal include adjudicating upon civil proceedings which arise from complaints alleging a breach of pt 2 of the Human Rights Act.

[24] Ms Doria's complaint was expressed to be made in reliance on pt 2 which deals with unlawful discrimination including discrimination in employment matters. The key section is s 22 and, in particular, in this case s 22(1)(c) and (d). Those are the

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[6] Though there are other types of primary carers under s 7(1) of the Parental Leave Act, the appellants' argument is made only in terms of pregnant employees.

two sub-sections on which the complaint and subsequent claim are founded. They provide:

> **22 Employment**
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> (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—
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> …
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> (c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
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> (d) to retire the employee, or to require or cause the employee to retire or resign,—
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> by reason of any of the prohibited grounds of discrimination.

[25] Under s 21(1)(a) the prohibited grounds of discrimination expressly include pregnancy and childbirth.

[26] Having regard to those provisions, we consider that at least on the face of it Ms Doria's claim clearly falls within s 22 and therefore by virtue of s 92B and 94 within the jurisdiction of the Tribunal. The substance of the complaint is that she was subjected to less favourable treatment than other employees because and only because of her pregnancy.

[27] We conclude there is nothing in the Human Rights Act itself which would preclude Ms Doria from bringing her claim under that Act. Her claim meets the pre-requisites.

[28] If the Tribunal's jurisdiction is excluded, the exclusion must therefore be found elsewhere either in the Parental Leave Act, the Employment Relations Act or both.

[29] The Parental Leave Act relevantly sets out minimum entitlements relating to parental leave for employees, the process by which a pregnant employee (or other primary carer) applies for parental leave and the process by which an employer

responds.[7] There are various notice requirements. One of the stated purposes of the Act is to protect the rights of employees during pregnancy and parental leave.[8] Consistent with that purpose, s 49 prohibits dismissal on the grounds of pregnancy.

[30] The three provisions which are central to the appellants' argument are contained in pt 7 which is headed "Remedies available to employees". According to the appellants, it is the combined effect of ss 56(1), 56(4) and 57(1) that ousts the Tribunal's jurisdiction. Section 56(1) and (4) state:

> **56 Parental leave complaints**
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> (1) Where any employee alleges that the employee's employer—
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> (a) is not justified in stating, in the notice given to the employee under section 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
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> (b) has, in contravention of section 49(1), terminated the employee's employment or given the employee notice terminating the employee's employment; or
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> (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
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> (d) has exercised, without reasonable justification, the powers conferred on the employer by section 14 or section 16,—
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> 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 sections 57 to 67.
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> …
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> (4) A parental leave complaint to which this section applies is not a personal grievance within the meaning of section 103 of the Employment Relations Act 2000.

[31] Contrary to the appellants' contention, we are not persuaded that all of Ms Doria's claim falls within the s 56 definition. That was also the view of the Tribunal and indeed the main basis on which it dismissed the strike out

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7 Parental Leave Act, ss 7–12.

8 Section 1A(b)

application.[9] Equally however there is no question in our view that at least a significant part of the claim does constitute a parental leave complaint as defined. Section 56(1)(d) for example refers to the exercise without reasonable justification of the powers conferred on the employer by s 14. Section 14 enables an employer to direct an early commencement date for leave if a pregnant employee is unable to perform her work to the safety of herself or others. And dismissals (which must include constructive dismissals) by reason of pregnancy are prohibited.

[32] As will become apparent, it makes no difference to our analysis whether all or part of the claim was within the definition of a parental leave complaint.

[33] We accept that a parental leave complaint is intended to be a distinct cause of action. However, that cannot be the end of the inquiry. The fact Ms Doria could have brought part or indeed all of her claim as a parental leave complaint does not necessarily equate to the fact it must be the only cause of action available to her. Concurrent or overlapping and even co-extensive causes of action with different remedies and procedural rules are a reasonably common feature of New Zealand law.

[34] In arguing that a parental leave complaint is the only cause of action available to Ms Doria, the appellants rely on the use of the word "shall" in the concluding phrase of s 56(1) "shall be a parental leave complaint".

[35] It is trite law that the word "shall" generally denotes something that is mandatory. However, in context, we consider that "shall" as it appears in s 56(1) is simply deployed for the purposes of definition. In other words, it should be construed as meaning "is". That is reinforced by the remainder of the same sentence which states that the employee *may* use in respect of that parental leave complaint the procedures provided in ss 57 to 67. The "may" is clearly intended to be permissive. It is not "must".

[36] We acknowledge the possible argument that "may" is used because there is still a choice — the choice between pursuing a claim and not pursuing any claim at all. The appellants derive support for that interpretation from s 57(1) which states that the

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9 Tribunal decision, above n 1, at [22].

"procedures for the settlement of a parental leave complaint shall be in accordance with this section and sections 58 to 67 [of the Parental Leave Act]".

[37] However, in our view, the provisions can be consistently read as simply meaning that if an employee elects to bring a parental leave complaint, then that cause of action must be processed under the Parental Leave Act's procedures and not the personal grievance procedures in the Employment Relations Act. The sections say nothing about claims of discrimination under pt 2 of the Human Rights Act.

[38] It is a cardinal principle of statutory interpretation that clear words are required before the courts will ascribe to Parliament an intention to take away existing rights.[10] If Parliament had intended to remove the right of an employee to make a complaint under the Human Rights Act about allegations of discrimination on the grounds of pregnancy against their employer, it is reasonable to expect it would have said so unambiguously by expressly referring to the Human Rights Act itself and not by the extraordinarily indirect and oblique method of a reference to the personal grievance jurisdiction. Rather than being intended to preclude an employee from pursuing any alternative cause of action under the Human Rights Act, the much more likely explanation for the existence of s 56(4) is that it was designed to avoid confusion regarding procedure.

[39] If Parliament had intended the result advocated by the appellants, it would also be reasonable to have expected a statement to that effect in the background legislative materials leading to the enactment of the Parental Leave Act. There is none.

[40] We also ask why would Parliament wish to restrict the scope of the relief available to an employee who claims discrimination in circumstances that may also amount to a parental leave complaint? The appellants suggest it was because the matters which constitute a parental leave complaint are matters best dealt with by the specialist employment entities and a process whereby there would be rights of

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[10] See for example *Cropp v Judicial Committee* [2008] NZSC 469, [2008] 3 NZLR 774 (SC) at [26]–[27] citing *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL) at 587–590; and *R v Secretary of the State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

appeal to this Court on questions of law.[11] However, conversely, it can be said that the Tribunal has special expertise in matters pertaining to unlawful discrimination and that there are rights of appeal from its decision to the High Court and this Court.[12]

[41] We conclude that Grice J was correct when she held that the Tribunal's jurisdiction in this case is not ousted by any provision of the Parental Leave Act or the Employment Relations Act. Which body has jurisdiction will be determined by which cause of action the employee elects to pursue. That conclusion is consistent with established principles of statutory interpretation, and international instruments underpinning the Human Rights Act.[13] It is also consistent with what case law there is.[14]

[42] That is not to say that the provisions of the Parental Leave Act will be irrelevant to the determination of Ms Doria's claim in the Tribunal. Far from it. That is because s 21B of the Human Rights Act states that an act or omission of any person or body is not unlawful under pt 2 if that act or omission is authorised or required by another enactment. As mentioned, the appellants' defence is that the actions they took were all in accordance with the Parental Leave Act.

Outcome

[43] The appeal is dismissed.

[44] As regards costs, the general principle is that costs should follow the event. However, the appellants argued that were they to lose the appeal, costs should not be awarded against them because Ms Doria is represented by the Office of the Human Rights Proceeding which is also funding her legal costs. The appellants consider the Office is unlawfully representing Ms Doria because it only has the power to represent

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11 Employment Relations Act, s 214.

12 Human Rights Act, ss 123–124.

13 The long title of the Act provides that it is an "Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights".

14 *Blaker v Mainfreight Ltd* ERA Auckland AA27/05, 28 January 2005 at 5; *Harris v Benchmark Building Supplies Ltd* ERA Auckland AA28/02, 14 February 2002 at 1; *Shead v TJS Farms Ltd* NZERA Auckland AA465/10, 29 October 2010 at [9]; *Lock v HL Group Ltd* [2014] ERA Auckland 83 at [42]–[45]; and *Lewis v Greene* [2004] 2 ERNZ 55 (EmpC) at [141]–[142].

complainants in proceedings before the Tribunal and appeals from the Tribunal, not judicial review proceedings.

[45] However, in the absence of an application to disqualify the Director from representing Ms Doria, we cannot take the matter any further. We were told that as occurs in the case of litigants who are legally aided, Ms Doria is required to reimburse the Director any costs awarded in her favour.

[46] The appellants are ordered to pay the second respondent costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
Stace Hammond, Hamilton for Appellants
Office of Human Rights Proceedings, Wellington for Respondent