

Reference No. HRRT 014/2018

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN ZELINDA DORIA

PLAINTIFF

AND DIAMOND LASER MEDISPA TAUPO LIMITED

FIRST DEFENDANT

AND OLIVIA JANE BLAKENEY-WILLIAMS

SECOND DEFENDANT

AND RICHARD HUGH BLAKENEY-WILLIAMS

THIRD DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson

Dr SJ Hickey MNZM, Member

Mr RK Musuku, Member

REPRESENTATION:

Ms J Emerson for plaintiff

Ms K McDonald for defendants

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 20 November 2018

DECISION OF TRIBUNAL DISMISSING APPLICATION TO STRIKE OUT CLAIM¹

¹ [This decision is to be cited as *Doria v Diamond Laser Medispa Taupo Ltd (Strike-Out Application)* [2018] NZHRRT 50.]

[1] These proceedings for a breach of the Human Rights Act 1993 (HRA) were filed by Zelinda Doria on 21 March 2018. The defendants were Ms Doria's employers. The proceedings concern their alleged treatment of Ms Doria by reason of her pregnancy. By application filed on 25 May 2018, the defendants applied to have the proceedings struck out. The central issue in this decision is whether the Tribunal lacks jurisdiction to deal with the claim because it constitutes a parental leave complaint under the Parental Leave and Employment Protection Act 1987 (PLEPA).

Background

[2] Diamond Laser Medispa Taupo Limited (Diamond Laser) is a registered company operating as a beauty spa and skin clinic in Taupo.

[3] Olivia Blakeney-Williams is a shareholder and manager of Diamond Laser. Richard Blakeney-Williams is a director and shareholder of Diamond Laser.

[4] In January 2016, Ms Doria was employed by Diamond Laser as a beauty therapist.

[5] In mid-November 2016, Ms Doria informed Ms Blakeney-Williams that she was pregnant.

[6] By letter dated 28 November 2016, the defendants advised Ms Doria that she was required to commence parental leave on 29 November 2016. At the time, she was approximately seven weeks pregnant.

[7] On 4 April 2017, Ms Doria resigned from her employment with Diamond Laser.

[8] On 7 February 2018, Ms Doria complained to the Human Rights Commission that she had been discriminated against by Diamond Laser in her employment on the grounds of sex and family status. A mediation was held by the Commission that was unsuccessful. The Commission therefore closed its file.

[9] On 21 March 2018, Ms Doria filed proceedings at the Tribunal claiming that she was subjected to detriment in her employment by reason of her pregnancy in breach of the HRA, s 22(1)(c); that her employment was terminated by reason of her pregnancy, s 22(1)(c); or that she was required to resign by reason of her pregnancy, s 22(1)(d).

[10] On 26 April 2018, the defendants filed an objection to jurisdiction on the ground that the complaints identified in Ms Doria's claim fall within the definition of a parental leave complaint under PLEPA. PLEPA, s 58(2) provides that the Employment Relations Authority (ERA) is to hear and determine parental leave complaints referred by employees. The defendants contend that the Tribunal therefore lacks jurisdiction to deal with the matter.

Application to strike out claim

[11] On 25 May 2018, the defendants filed an application to strike out Ms Doria's claim against them on the ground that the Tribunal lacks jurisdiction to deal with it. On 6 July

2018, Ms Doria filed a notice of opposition. In accordance with a timetable set by the Tribunal, both parties subsequently filed affidavits and submissions.

The jurisdiction to strike out – principles

[12] In *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005 at [48], Wild J held that the Tribunal has a wide discretionary power to strike out or to dismiss a proceeding brought before it and the exercise of this power will be appropriate in situations similar to those contemplated by the High Court Rules, r 15.1. which provides:

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.
- (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
- (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court's inherent jurisdiction.

[13] The principles to be applied are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267. More recently, in *Couch v Attorney-General* [2008] NZSC 45, 3 NZLR 725, Elias CJ stated at [33] that it is inappropriate to strike out a claim summarily unless the court can be certain it cannot succeed and that particular care is required in areas where the law is confused or developing.

The position of the defendants

[14] PLEPA is the legislation which deals with the respective obligations of employers and employees in relation to parental leave. The defendants argue that Ms Doria's claim relates to their actions on and leading up to 28 November 2016, when Ms Doria was placed on parental leave. It is directly and essentially founded on her entitlements under PLEPA. Had she not been placed on parental leave, Ms Doria would have had no arguable claim of discrimination. It is submitted that regardless of which party's account of the facts is accepted, the claim still falls under the definition of a parental leave complaint in PLEPA, s 56(1) which provides as follows:

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 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
 - (b) has, in contravention of section 49(1), terminated the employee's employment or given the employee notice 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 section 14 or section 16,—

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.

[15] The defendants submit that the exercise of the right under PLEPA, s 14 to appoint an early start date to Ms Doria's parental leave is captured by s 56(1)(d), while the claim that Ms Doria's employment was terminated, or by their actions, the defendants subjected her to disadvantage is captured by s 56(1)(b) and (c). The claim is captured by s 56(1) and therefore is a parental leave complaint under PLEPA.

[16] PLEPA, s 58(1) provides that parental leave complaints may be referred to the ERA, and the Employment Relations Act, s 161 provides the ERA with exclusive jurisdiction in respect of PLEPA. Ms Doria's claim is therefore outside the jurisdiction of the Tribunal. The defendants distinguish parental leave complaints from personal grievances, where there is a choice of procedures under the HRA, s 79A.

The position of Ms Doria

[17] Ms Doria's position is that the strike-out application relies on disputed facts and points which are arguable in law and that her claim discloses a course of action which carries a real prospect of success. It is therefore inappropriate for it to be struck out.

[18] Ms Doria submits that her claim raises a complaint of discrimination by reason of sex (pregnancy) in employment and clearly falls within the jurisdiction of the Tribunal. It was the subject of a complaint received and assessed by the Commission pursuant to the HRA, s 76(2)(a). Therefore, Ms Doria is entitled to bring proceedings to the Tribunal in respect of it pursuant to the HRA, s 92B(1).

[19] Ms Doria disputes that her claim falls within the definition of a parental leave complaint under PLEPA as this definition does not capture her claim in its entirety. She claims that she was subjected to a range of detrimental treatment not captured by s 56(1) of PLEPA including the following:

[19.1] removing clients' ability to book with Ms Doria online;

[19.2] transferring extant client bookings with Ms Doria to other therapists;

[19.3] refusing to accept future client bookings with Ms Doria;

[19.4] pressuring Ms Doria by repeatedly asking for medical evidence of her pregnancy;

[19.5] requiring Ms Doria to take sick leave when she did not wish to; and

[19.6] removing or causing Ms Doria to be removed as an administrator of Diamond Laser's Facebook page.

[20] Ms Doria submits that while PLEPA establishes a procedure for pursuing parental leave complaints, it does not preclude her from seeking to enforce rights contained in other

enactments, in this case the HRA. Ms Doria relies on three ERA decisions in which the ERA confirmed jurisdiction to hear personal grievance claims which equally could have been brought as or given rise to parental leave complaints: *Blaker v Mainfreight Ltd* [2005] NZERA Auckland 404 at 5; *Harris v Benchmark Building Supplies Ltd* [2002] NZERA, Auckland 301 at 1; *Shead v TJS Farms Ltd* [2010] NZERA, 816 at [9].

[21] Ms Doria also relies on the Tribunal's decision in *Watson v Capital and Coast District Health Board* [2015] NZHRRT 27, where the Tribunal found that s 161(1) of the ERA, which provides the ERA with exclusive jurisdiction to make determinations about employment relationship problems, cannot be interpreted as encroaching on the jurisdiction of the Tribunal to hear claims over which it has jurisdiction. It is noted that the defendants dispute the interpretation placed on this decision by Ms Doria and, in reply submissions, advance an alternative view concerning its relevance to this dispute.

Assessment

[22] It is not clear that Ms Doria's claim is covered, in its entirety, by PLEPA and it appears arguable that it is not. The range of detrimental treatment she complains of, listed at [19] above, does not appear, on its face, to be covered by PLEPA, s 56(1), which is confined in its consideration of detriment in employment to actions or omissions that affect rights and benefits in respect of parental leave or a parental leave payment (s 56(1)(c)). While a complaint concerning an employer's exercise of the power to appoint the date of commencement of parental leave is undoubtedly covered by PLEPA, as is the termination of employment, it does not follow that other complaints, which involve allegations of discrimination on the ground of pregnancy, are so covered.

[23] The matters complained of by Ms Doria are matters which are within the jurisdiction of the Tribunal pursuant to the HRA. The fact that some of the treatment complained of can be characterised as a parental leave complaint does not preclude the Tribunal from considering the balance of her claim. With regards to the claim as a whole, it does not clearly follow that the fact that some parts of it could be characterised as a parental leave complaint, precludes the Tribunal from considering the entire claim which is otherwise clearly within its jurisdiction.

[24] The standard for strike out is high. We must be satisfied that the claim brought by Ms Doria is so clearly untenable that it cannot possibly succeed. In other words, that the lack of jurisdiction on the part of the Tribunal is clear. On the contrary, we consider that the issues raised require full consideration in the context of a substantive hearing. Setting aside the factual disputes between the parties, there are a number of arguable issues of statutory interpretation that require full enquiry. In this context, we decline to strike out the claim as whole. We also decline the invitation in the defendants' submissions in reply, to strike out the part of the claim relating to the defendant's exercise of powers conferred on it by s 14 of PLEPA.

Decision

[25] For the foregoing reasons, the decision of the Tribunal is that the application by the defendants to strike out the claims of Ms Doria is dismissed.

[26] The Secretary is directed to convene a teleconference so that directions can be given as may be necessary to allow the case to be set down for hearing.

[27] Costs are reserved.

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Ms MA Roche
Co-Chairperson

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Dr SJ Hickey MNZM
Member

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Mr RK Musuku
Member