

Babies and Bosses: An Examination of Section 41 of the Parental Leave and Employment Protection Act 1987

Pheroze Jagose*

Domestic and international considerations relevant to the Parental Leave and Employment Protection Act 1987 (hereafter the PLEP Act 1987 or the 1987 Act) justify and require the strict interpretation of the central provisions of that legislation. Section 41 of the 1987 Act, if it is to be interpreted so as to ensure its intended effect requires a four-step process to be successfully negotiated by an employer before the section's presumption, establishing the parent's right to return to work after parental leave, may be rebutted. The legislation does not anticipate a balancing of competing workplace interests but holds the worker's interest to be superior to that of his or her employer. Such a statutory imbalance explicitly recognises a worker's independent interest in his or her employment.

Introduction

Every mother is a working mother, but women as workers and as mothers have a long history of struggle in maintaining their rights in their productive and reproductive roles in society. Since the 1960s demographic and economic trends - demonstrating that the economic performance of women in the economy is substantial - have induced many countries, including New Zealand, to reorient social policies which reflect more clearly the needs of working women. Towards the end of the nineteenth and the beginning of the twentieth centuries, when the first laws to "protect" working women - mainly focusing on maternity - were introduced in various industrial countries, the number of working women outside the household was very low. Since that time, however, the participation of women in the workforce has grown at an extraordinary rate.

With that increased participation have grown substantial bodies of domestic and international legislation, policy and practice seeking to combat discrimination against women in the workforce. One of the most subversive forms of discrimination has been that against working mothers - discrimination based often on inherited and outmoded social customs, beliefs and values. Yet working mothers, as much as ever, need financial support and job security during all stages of reproduction - during pregnancy, confinement, nursing and childrearing.

* Pheroze Jagose is a labour lawyer

Since 1981 New Zealand has had legislation which seeks to afford working mothers at least some protection against that discrimination which would have the effect of removing women from the labour market for performing what is a social function for both the economy and society. The Maternity Leave and Employment Protection Act 1980 (hereafter the MLEP Act 1980 or the 1980 Act), by s.16, established a rebuttable presumption that women taking maternity leave would have their positions kept open for their return from that leave. A similar rebuttable presumption is now to be found in s.41 of the PLEP Act 1987¹ which repealed and replaced the 1980 Act and extended the provisions for leave and employment protection to both parents.

Despite the length of time they had formed part of the law of New Zealand, those provisions of the 1980 and 1987 Acts establishing the right to protection of employment during periods of maternity or parental leave had not been examined to any great degree until the *Manukau City Council*² and *Onehunga Borough Council*³ cases came before the Labour Court in the late 1980s. These two decisions make it plain that the employment protection provisions of the 1987 Act confer substantial rights on parents seeking to return to their employment at the end of their parental leave.⁴ This article seeks to examine what

¹ The 1987 Act provides for unpaid maternity, paternity and extended leave of absence from work - to be shared between the parents (where those parents have each been working for their employer for at least 10 hours a week for the 12 months prior to the expected date of birth of the child) of a natural or adopted child - of up to 52 weeks in total and protects the jobs of those parents while they are on such leave. The Act also provides a complex set of procedures required to be fulfilled in the application for parental leave and on the giving of notice of the intention to return from parental leave - see *Yock & Co v Northern Clerical, Administrative etc IUW* [1986] ACJ 356. Additionally, the Act provides a complaints procedure for challenging various aspects of non-compliance with the Act. The Act prohibits dismissals on the grounds of pregnancy or parental leave and a discretionary interim order for reinstatement of workers allegedly so dismissed is available so that such workers can continue work until their complaint is dealt with through the complaints procedures - see *Yap v Hogg Cook Holmes Cardiff Ltd* A 14/88 (minute, Labour Court, Auckland, Finnigan J, 18 June 1988). Where an award or agreement provides at least as favourable a parental leave package to the individual worker as the Act, the award or agreement provision will apply - see *New Zealand Bank Officers' IUW v ANZ Banking Group (New Zealand) Ltd* [1983] ACJ 803 and *Crothall Industries Ltd v Northern Hotel, Hospital, Restaurant etc IUW* [1986] ACJ 607.

² [1988] NZILR 747. The complainant held the position of Administration Officer in the Council's City Secretary's Department and was seconded to the Council's Community Activities Department. The position had a maximum salary of \$36,000 p.a. and was described in evidence as one of "middle management" and was found by the Court to be a "relatively senior position".

³ [1989] 1 NZILR 476 (also ALC 89/88, unreported interim decision, Labour Court, Auckland, Castle J, 17 August 1988). The complainant held the position of Children's Librarian in the Council's Public Library.

⁴ The *Onehunga Borough Council* case was taken under the Maternity Leave and Employment Protection Act 1980 while the *Manukau City Council* case was the first to be taken under the Parental Leave and Employment Protection Act 1987. However, since the employment protection aspects of both Acts are substantially similar with the latter Act merely being extended to both parents, both decisions are immediately pertinent to the employment protection provisions of the 1987 Act.

is, arguably, the most important part of the 1987 Act - the employment protection provision - in the light of those two decisions.

Protection of employment during parental leave

Section 41 of the PLEP Act 1987 reads:

41. Presumption that employee's position can be kept open in the case of other periods of parental leave - (1) Where an employee takes a period of parental leave (other than a period referred to in section 40 of this Act) the employer shall be presumed in any proceedings under this Act, to be able to keep open for the employee, until the end of the employee's parental leave, the employee's position in the employment of the employer unless the employer proves that the employee's position cannot be kept open -

(a) Because a temporary replacement is not reasonably practicable due to the key position occupied within the employer's enterprise by the employee; or

(b) Because of the occurrence of a redundancy situation.

(2) In determining whether or not a position is a key position for the purposes of subsection (1)(a) of this section, regard may be had, among other things, to -

(a) The size of the employer's enterprise; and

(b) The training period or skills required in the job.

(3) The reference in subsection (1) of this section to the employee's position in the employment of the employer shall be a reference to the position ordinarily held by the employee, and shall not include any position to which the employee was temporarily transferred under section 16 of this Act.

The PLEP 1987 at s.41, thus creates a presumption - in favour of a parent's right to return from parental leave to the position s/he held on taking that leave - rebuttable only (a) when the position held is made redundant;⁵ or (b) when the position held is a "key position" - and even though the position is a key position - a temporary replacement to take the place of the parent for the duration of that leave is "not reasonably practicable due to the key position occupied".

⁵ Redundancy is not defined in the PLEP Act 1987 Act. Redundancy was defined in the Labour Relations Act 1987 and the definition was carried over in s.176(5) of the Employment Contracts Act 1991. In *Auckland Provincial District Local Authorities' Officers' IUW v Waikato District Council* [1990] 3 NZILR 871, Travis J considered at page 881 that a "redundancy situation" in the 1987 Act could:

"... cover a situation where jobs are or will disappear because of a superfluity or excess of manpower, as distinct from circumstances in which the employment of an individual employee is terminated by reason of that individual being surplus to the requirements of the employer We therefore consider that the words "redundancy situation" can be construed as a reference to both a position becoming superfluous to an employer's needs, as well as the worker no longer being required."

The central thesis of this article is that s.41 of the 1987 Act requires a four-step process to be successfully negotiated by an employer before the presumption, establishing the parent's right to return to work after parental leave, is rebutted. Firstly, it is necessary for the employer to establish that the parent occupies a key position in the employer's enterprise. However, that of itself, will not be sufficient to disestablish a parent's right to return to work. Secondly, there must be present the further factor that a temporary replacement to take that parent's place would not be reasonably practicable. Thirdly, that temporary replacement must be not reasonably practicable because of some intrinsic quality of the key position which makes such temporary replacement "not reasonably practicable". And fourthly, that the test of "reasonable practicability" meets the legal definition of that term. In all other circumstances save that of redundancy - quite irrespective of the difficulties or operational inefficiencies experienced by the employer - the employer is obliged to keep the parent's position open for his or her return.

It is therefore apparent, even from this cursory interpretation of s.41 of the 1987 Act, that for the section to be given its intended effect and to meet its intended purpose, a strict interpretation is both warranted and required. This strict interpretation of the section is readily justified by a number of domestic and international considerations surrounding the introduction of the 1980 and 1987 Acts.

Policy considerations

The PLEP Act 1987 is an act to prescribe minimum entitlements with respect to parental leave for all workers and to protect the right of workers during both pregnancy and parental leave. That description of the Act comes from its long title and is important insofar as it denotes the double thrust of the legislation - towards both the provision of the leave and the protection of the parent's employment. It is, of course, the second aim of the legislation which is arguably the more important since the provision of leave without any right to return to work would effectively be the legislative provision of a right to dismiss pregnant workers and their partners.⁶

The double thrust of the legislation was also clearly understood by Parliament during the House's debate of the 1987 Act's progenitor, the Maternity Leave and Employment Protection Bill. The second reading of that Bill⁷ was moved by the Honourable David Thompson - the Acting Minister of Labour - who stated that:

⁶ This connection between the right to return to work after parental leave and the prohibition of dismissal on the grounds of pregnancy or parental leave is so close that in England, for example, the parental leave and employment protection provisions are contained in that country's Employment Protection (Consolidation) Act 1978 - the same legislation as establishes the industrial law concept of "unjustified dismissal" as contrasted to the common law's "wrongful dismissal". For a wide-ranging consideration of parental leave and employment protection internationally see "Protection of Working Mothers: An ILO Global Survey (1964-1984)", *Women At Work* 2/84 (ILO, Geneva, 1984).

⁷ [1980] NZPD 5510.

The objective of the Bill is to prescribe minimum requirements in respect of maternity leave and protection from dismissal by reason of pregnancy for all women.

The philosophy underpinning the Bill is based on the conviction that working women should be able to start a family without having to leave employment permanently or have their employment record severely disrupted.⁸

Similarly, the Honourable Aussie Malcolm, the member for Eden, summed up the reasons for which the Government had found it necessary to introduce the Bill. He stated that:

We would not have to do it if society were perfect, because what the Bill contains is self-evident. However, because there is still such a deep prejudice in our society against women, particularly child-bearing women, it is necessary for us to legislate a minimum standard - a minimum standard that I hope will be exceeded in practice in many instances.

We are saying that, regrettably, prejudice against women, and particularly against child bearing women, is so deeply ingrained in society that we are obliged to pass this small, complex Bill, with all its restrictions on people, to oblige employers to provide certain rights to pregnant women.⁹

By the enactment of the 1987 Act, Parliament extended the protection of the MLEP Act 1980 to both parents. Nevertheless, the purpose behind the introduction of the 1980 Act remains pertinent to every woman seeking to take parental leave and have her job kept open for her return from that leave. The policies, in opposition to the discrimination against women and, in particular, pregnant women in the workforce, and the position of working women seeking parental leave present a social purpose aspect to the interpretation of s.41 of the 1987 Act. That social purpose is to ensure that women's participation in and opportunities in the workforce are not limited by pregnancy or childbirth, insofar as women's pursuance of their maternity and parental needs interrupt their career progression or foreclose their career choices.

In very broad terms, Williamson J made extensive and generalised obiter comments on the social purpose behind the introduction of the MLEP Act 1980 in *New Zealand Bank Officers' IUW v ANZ Banking Group (New Zealand) Ltd*¹⁰. He stated that:

Over at least the last 100 years, there has been a definite trend towards improving the legal status of women and their everyday conditions of life. Broadly speaking, it is a trend towards social justice. The right to vote, to hold separate property, to equal pay for equal work, and the various other rights to be free from discrimination, are all matters of social justice. Maternity leave provisions must be viewed against that background. Those provisions are aimed at giving a female employee the right of choice to continue her employment career after an interruption for purposes of childbirth, early nurturing and to make arrangements for suitable continuing care of the child. Social justice is not achieved without cost or without changes to the existing order. An improved position for one person

⁸ *Ibid*, 5510-5511.

⁹ *Ibid*, 5519.

¹⁰ [1983] ACJ 803.

normally means some detriment to others by comparison with the situation prevailing before the change.

...
Present maternity leave provisions mean that the community has now accepted, to some degree, the social justice of a right of choice to continue an employment career. By comparison with the situation pertaining before the change some costs are to be met. For example, if an employee completing maternity leave resumes her employment career, those persons holding lower graded positions lose one chance of promotion and, at the end of the employment chain, one person hoping to commence employment with that employer will lose that chance. Looked at in broad terms, the delineation of maternity leave rights becomes a question of what costs and inconvenience are acceptable to meet this newly recognised application of the principles of social justice. The right of an employee completing maternity leave is not an absolute right. Her right is to be balanced against the employer's right to manage the business efficiently. The degree of recognition of the female employee's right is governed by considerations of the extent of disruption to the employer's business; and by the amount of cost to the employer; and, to a lesser degree, by the detriment to the other employees. The award provisions, and the provisions of the Act, are both attempts to reconcile these conflicting rights and interests.¹¹

It is clear that these statements are not necessary balances required to be made in the application of the 1987 Act. In the *Manukau City Council* case¹², Finnigan J stated:

[The] Court is bound in our view to reject a submission made by the employer that the Court must balance the rights which the employer has, for example to keep its work flowing smoothly, with the rights given to the worker by the Act. The rights of the worker are intended to outweigh the rights of the employer."¹³

and, indeed, Williamson J's own comments have been described by at least one commentator as "the bitter pill of social justice, judicially defined"¹⁴. Yet clearly the changing status and recognition of women in the workforce require substantial consideration when regard is had to the policy underlying the introduction of parental leave legislation.

Working women and childbirth

The purpose of the 1987 Act is also largely based on specific social factors which ought properly to be taken into account in any interpretation of the Act. As was stated by the Honourable David Thompson:

The philosophy underpinning the Bill is based on the conviction that working women should be able to start a family without having to leave work permanently or having their employment record seriously disrupted.¹⁵

¹¹ *Ibid*, 813-814.

¹² *Supra*, n 2.

¹³ *Ibid*, 750.

¹⁴ *Broadsheet*, December 1983, 19.

¹⁵ *Supra*, n 8.

A compilation of demographic data regarding working women and childbirth¹⁶ prepared by the Working Women's Resource Centre discloses substantial statistical validation for effective parental leave legislation. It is apparent from that compilation that an increasing number of women are entering the workforce.¹⁷ Most women have entered the labour market by the ages of 18 to 19.¹⁸ At the same time, childbearing is occurring later in women's lives. The average age of women at the birth of their first child has risen from 23.7 years in 1964 to 26 years in 1985.¹⁹ Most births now occur when the mother is between 25 to 29 years old.²⁰ Therefore, women spend more time in the workforce before giving birth (between six and eleven years) and have more time to develop an established career path.

At the same time, women are having fewer children²¹ and are completing childbearing at an earlier age - 75 percent of women born in 1910 completed their childbearing by the age of 34 while 75 percent of women born in 1945 completed their childbearing by the time they were 28 years old.²² According to one survey completed by Susan Shipley, the majority of women return to the workforce before their youngest child is one year old.²³

These statistics evidence the need to consider the career disruption which occurs with pregnancy and childbirth. This interruption frequently causes women to lose their jobs. Typically, on re-entering the workforce, these women must start at lower positions with lower pay. They lose the seniority necessary for promotion and for the establishment of job security during periods when the economy falters. The result of this discontinuity is that women's careers are perceived as being less valuable than men's. By eliminating the stereotype that the mother should give up her paid employment simply because she is the childbearer, maternity leave, coupled with the right to return to the mother's job, has the potential to interrupt this cycle.²⁴

¹⁶ Woodley, *Compilation of Demographic Data Regarding Working Women and Childbirth*, Working Women's Resource Centre, 1988.

¹⁷ Department of Statistics, *New Zealand Population Census 1981 and 1986*, Wellington. Since 1981, the percentage of women in paid employment has increased by 10-12 percent.

¹⁸ *Ibid.* 75 percent of women have entered the workforce by the time they are 18 or 19 years old.

¹⁹ Department of Statistics, *Vital Statistics*, Wellington, 1986.

²⁰ *Ibid.* There is a significant and corresponding dip in the representation of this age-group of women in the workforce.

²¹ Department of Statistics, *Demographic Trends*, Wellington, 1987. The fertility rate decreased from 4.19 children in 1962 to 1.93 children in 1985.

²² *Ibid.*

²³ Shipley, *Women's Employment and Unemployment*, 1982. The survey was in Palmerston North only - a city which has a substantially better than average number of childcare facilities.

²⁴ See Cicoria, "Pregnancy and Equality: A Precarious Alliance" (1987) 60 S Cal LR 1345.

Women's participation and opportunities in the workforce require that such participation and opportunities are not limited by pregnancy and childbirth. The PLEP Act 1987, when strictly interpreted so that the purpose of its enactment can be assured, is the mechanism by which such limitation can be prevented from occurring.

International recognition of the right to maternity and parental leave

The limitation which can occur to women's participation in and opportunities in the workforce by pregnancy and childbirth is also recognised by the international community. New Zealand's international legal obligations as regards parental leave and employment protection are such as require a strict interpretation of s.41 of the PLEP Act 1987 so as to ensure an interpretation consistent with those obligations.

Such reliance on New Zealand's international legal obligations is not novel. Indeed in *Van Gorkom v Attorney-General and Others*²⁵ - a case concerning the payment of removal expenses by the Education Department for transferred teachers where male teachers had the cost of all their household's removal expenses paid but female teachers had only their personal expenses met - an argument was raised that such payment of removal expenses (under the authority of sub-delegated legislation) was invalid on the ground of discrimination and the Supreme Court's attention was drawn to New Zealand's international legal obligations in the area of combatting discrimination. Of that argument, Cooke J stated that:

Reference to certain international documents, though not essential, is not out of place. The Universal Declaration of Human Rights, adopted and promulgated in 1948 by the General Assembly of the United Nations as a common standard of achievement, includes in Articles 2 and 23(2) statements that everyone is entitled to all the rights set forth in the declaration, without distinction of any kind . . .

Obviously these very general statements are not directed specifically to such narrow questions as removal expenses. Nor are they part of our domestic law. They represent goals towards which members of the United Nations are expected to work. But, in relation to certain social rights enunciated in the United Nations Universal Declaration of Human Rights, the opinion is expressed in 8 *Halsbury's Laws of England* (4th edition) para 844:

They may be regarded however as representing a legislative policy which might influence the courts in the interpretation of statute law.²⁶

Cooke J, again, when similarly confronted in the Court of Appeal by New Zealand's international legal obligations in *Ashby v Minister of Immigration*²⁷, referred to the dissenting judgment of Scarman LJ in *Ahmad v Inner London Education Authority*²⁸ where the learned Lord Justice had this to say:

²⁵ [1977] 1 NZLR 535.

²⁶ *Ibid*, 542-543.

²⁷ [1981] 1 NZLR 222.

²⁸ [1978] QB 36.

Today, therefore, we have to construe and apply section 30 [of the Education Act 1944 (UK)] not against the background of the law and society of 1944 but in a multi-racial society which has accepted international obligations and enacted statutes designed to eliminate discrimination on the grounds of race, religion, colour or sex. Further, it is no longer possible to argue that because the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations. They pay very serious regard to them: in particular they will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations."²⁹

Richardson J, also in *Ashby v Minister of Immigration*³⁰, similarly cited the above passage of Scarman LJ, saying that:

It has been increasingly recognised in recent years that, even though treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting legislation will do their best conformably with the subject matter and the policy of the legislation to see that their decisions are consistent with our international obligations.³¹

And all three judges in *Ashby*³² cited, with approval, the judgment of Diplock LJ in *Salomon v Commissioners of Customs and Excise*³³ where he stated:

Once the Government has legislated, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law . . .

One must not presume that Parliament intends to break an international convention merely because it does not say expressly that it is intending to observe it.³⁴

It is therefore apparent that any interpretation of the 1987 Act ought be consistent with New Zealand's international obligations as regards the subject matter of the Act. If anything, need to have regard for such consistency has increased rather than diminished with the passage of time. Cooke J in *Tavita v Minister of Immigration*³⁵, presented with an argument that international instruments could be ignored, stated:

²⁹ *Ibid*, 48.

³⁰ *Supra*, n.27.

³¹ *Ibid*, 229.

³² *Supra*, n.27.

³³ [1967] 2 QB 116.

³⁴ *Ibid*, 143.

³⁵ Unreported, CA 266/93, 17 December 1993.

That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing . . . [T]here must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution . . . [O]ur attention [was drawn] to the Balliol Statement of 1992, the full text of which appears in 67 ALJ 67, with its reference to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights.

. . .
A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute . . . does not mention international human rights norms or obligations . . . [they may freely be ignored].³⁶

New Zealand's international legal obligations as regards parental leave and, in particular, maternity leave are not insubstantial. There is a large body of United Nations and International Labour Organisation covenants, conventions and recommendations requiring that parental leave and employment protection be given as of right to workers with family responsibilities.

New Zealand has been a member state of the United Nations (UN) since the establishment of that body in 1948. New Zealand voted in favour of the UN's basic document of human rights, the Universal Declaration of Human Rights, which states in its preamble that member states affirm "their faith in the equal rights of men and women and of nations large and small". The principles of the Universal Declaration of Human Rights have been transformed by the United Nations into a number of covenants and conventions which establish legal obligations on each ratifying state. These obligations are at international law between a member state and the United Nations and must also be guaranteed by a member state to its citizens.

The International Covenant on Economic, Social and Cultural Rights 1966 was adopted unanimously by the General Assembly of the United Nations on 16 December 1966 and came into operation on 3 March 1976 after the required number of 35 member states had ratified it. New Zealand ratified the Covenant in December 1978 but made a reservation to its ratification relevant to the issue of maternity leave. That reservation states:

The Government of New Zealand reserves the right to postpone, in the economic circumstances foreseeable at the present time, the implementation of Article 10(2) as it relates to paid maternity leave with adequate social security benefits.

Article 10(1) and (2) of the Covenant states:

The state parties to the present covenant recognise that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

³⁶ *Ibid*, pp.14-16.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave with adequate social security benefits.

The final text of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women was approved by the General Assembly of the United Nations in December 1979. New Zealand ratified the Convention in December 1984. The Preamble of that Convention states:

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.

Article 11(2)(a) and (b) states:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances . . ."

By its ratification of these covenants, New Zealand has accepted the specific obligations under them. This includes making such changes in legislation and practice as are necessary to fulfil those obligations. The PLEP Act 1987 was enacted after New Zealand had ratified both the International Covenant of Economic, Social and Cultural Rights and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, and hence it is required to receive an interpretation not inconsistent with New Zealand's obligations under those documents. The later ratification of the "Women's Convention", in particular, has strengthened and endorsed the implication that a denial of parental leave for women (including the prevention of reinstatement after the period of parental leave) is a form of discrimination against women based on their sex. As a measure combatting such discrimination, the 1987 Act again requires an interpretation which achieves or furthers New Zealand's international legal obligations.

There have also been a substantial number of ILO Conventions and Recommendations regarding maternity and parental leave and employment protection which have come into force since 1921. By way of summary, those documents establish, as a right, maternity leave and the provision of job security for the duration of that leave. As Article 8(1) of the Declaration of Equality of Opportunity and Treatment of Women Workers, adopted at the 1975 International Labour Conference, states:

There shall be no discrimination against women workers on the grounds of pregnancy and childbirth and women bearing a child shall be protected from dismissal during the entire period of pregnancy and maternity leave. They shall have the right to resume their employment without loss of acquired rights.

When New Zealand's international legal obligations to ensure working women have those rights are compared with the provisions of the 1987 Act, it will become apparent that nothing but the strictest and most narrow interpretation of s.41 of the Parental Leave and Employment Protection Act 1987 will achieve an interpretation consistent with New Zealand's international legal obligations.

Section 41 of the PLEP Act 1987

This article began by giving a brief and strict interpretation of s.41 of the 1987 Act - an interpretation which is warranted and required by both policy and legal considerations. This article has continued to expand on those policy and legal considerations. It is now necessary to turn to a more in-depth analysis of s.41 of the Act.

In broad terms, s.41 establishes a presumption of a parent's right to return to work after taking parental leave. To rebut that presumption, an employer will have to prove four things:

- (a) Firstly, the employer will have to prove that the parent occupies a "key position" within the employer's enterprise. If the employer cannot so prove, the worker will be entitled to return to his or her position on the completion of parental leave.
- (b) Even if the employer can prove that the parent occupies a "key position", the employer will, secondly, have to further prove that a temporary replacement for the parent while on parental leave is "not reasonably practicable" in the ordinary meaning of that phrase. That, of itself, will not be sufficient to disentitle the parent from returning to his or her position since . . .
- (c) Thirdly, the employer will additionally have to prove that temporary replacement is not reasonably practicable, again in the ordinary meaning of that phrase, "due to the key position occupied within the employer's enterprise" by the parent.
- (d) Finally, even if the employer can prove that the parent is in a key position, that a temporary replacement is not reasonably practicable and not reasonably practicable by reason of the key position occupied, the employer will have to further show that the plea to the non-practicability of a temporary replacement due to the key position occupied accords with the legal definition of the phrase "reasonable practicability".

It therefore becomes necessary to define the meaning of both "key position" and "temporary replacement being not reasonably practicable".

For the purposes of s.41(1)(a) of the PLEP Act 1987, a "key position" is a position of such a crucial and pivotal nature to the efficient operation of the employer's enterprise that it is required to be filled on a permanent basis.

This definition is obtained from a careful analysis of Williamson J's obiter comments, in the *ANZ Bank* case³⁷, where he stated:

To say what is a key position, regard must be had to s.16(2)(a) and (b) and "other things". Looking broadly at Parliament's purpose, and the attainment of its objects, we think the presumption was intended to be irrebuttable in cases where persons with elementary skills were employed in large enterprises and hence did not occupy key positions. We think Parliament intended the test (of temporary replacement being not reasonably practicable) to be applied:

- (i) In small enterprises where a person with elementary skills might be said to occupy a key position in that enterprise and might have to be replaced on a permanent basis; and
- (ii) In all enterprises, including larger enterprises where only a fairly well trained or skilled person might be said to occupy a key position and might have to be replaced on a permanent basis."

(Underlining the author's.)

Simply because a person possesses vast skills and has undergone enormous periods of training will not be sufficient to say that the position held is a key position. Similarly, the size of the employer's enterprise is not decisive of any position within that enterprise being a key position. Those factors of skills and training required in the job (stressing the phrase "required in the job") and the size of the employer's enterprise need to be taken into consideration when deciding whether a position is a key position. But it is still necessary to decide for what purpose regard is to be had to those factors. According to Williamson J, the purpose for having regard to those factors is to see whether or not the position held needs to be "filled on a permanent basis" - permanent, that is, as opposed to temporary.

This seems to be a correct interpretation of the phrase "key position" - that it is a position of such a crucial and pivotal nature to the efficient operation of the employer's enterprise that it is required to be filled on a permanent basis. It seems correct for two reasons:

- (a) The first step of denying a parent his or her right to return to work after parental leave ought only be able to be taken in circumstances of extreme and established need by the employer - after all, the entire thrust of the 1987 Act, when considered in its domestic and international context, is to guarantee parents' job security and unimpaired career progression on their return from parental leave.
- (b) The only reason which will operate so as to destroy that entitlement is that a temporary replacement for the parent on parental leave is not reasonably practicable. It is necessary, in the scheme of the Act, to reach a position where an employer needs to be able to deny a parent his or her right to return and that need will only be acceptably demonstrated by the employer showing that the position held by the parent is required to be filled on a permanent basis - permanent, as was stated before, as opposed to temporary.

Even where an employer can show the position is required to be filled on a permanent basis, the 1987 Act expects of such an employer still greater flexibility in meeting the right

³⁷ *Supra*, n 10, 822.

of a parent to return to his or her position at the end of the parental leave. The Act requires the employer to further accept that, even though the position is required to be filled on a permanent basis, a temporary replacement will suffice until the parent returns from parental leave. It is only when the employer can show that a temporary replacement is not reasonably practicable - and not reasonably practicable due to some intrinsic quality of the position held - that the employer will be able to justifiably refuse to keep the parent's position open for his or her return.

It is considered that such a strict interpretation is justified. The importance - both socially and legally and in New Zealand and internationally - of the concept and right of parents and, in particular, of mothers to parental leave and employment protection has been discussed and justified elsewhere in this article. The concept of keeping a person's position open for socially acceptable reasons or while they fulfil socially desirable tasks is nothing new. Sick leave, annual leave, bereavement leave, tangihanga leave, time off work on "compo", sabbatical leave, study leave, family leave, and compassionate leave all find their places in various industrial documents and establish absolute rights on the worker taking the leave to have their job kept open for their return. Sections 4 and 5 of the Volunteers Employment Protection Act 1973 establish the absolute and unqualified right of workers to be granted leave of absence, to resume their employment and to be protected against dismissal for periods of "protected voluntary service or training" which may be up to three months of continuous leave. Similarly, in times of conscription, soldiers' positions were protected absolutely for their return from military service. Although these latter provisions have been established to ensure the country is adequately prepared in times of national emergency, there are some who would argue that the battle to ensure women's participation in and opportunities in the workforce is rapidly attaining a similar status.

Thus the exception to the general presumption that a parent's position will be kept open for his or her return from parental leave ought be strictly defined by limiting the "key position" definition to that which is contemplated by the overall scheme and policy of the 1987 Act. That being so, it now becomes necessary to define the issue of the "reasonable practicability" of a temporary replacement.

For the purposes of s.41(1)(a) of the PLEP 1987, the question of whether a temporary replacement is reasonably practicable requires a balancing process between the attainment of Parliament's objects in enacting the Act and the "cost" to an employer of implementing those objects.

Section 5(j) of the Acts Interpretation Act 1924, as that paragraph was paraphrased by McCarthy J when delivering the decision of the Court of Appeal in *R v Clayton*³⁸, requires:

... that in such circumstances, that is when the purpose is clear, the Courts must give it such fair, large and liberal construction as best ensures the attainment of the object of the legislation according to its true intent, meaning and spirit.

³⁸ [1973] 2 NZLR 211, 214.

Such an interpretation is clearly necessary of s.41 and of the 1987 Act as a whole. It is particularly relevant to the proper interpretation of the meaning of "reasonable practicability" because the definition of those words similarly require an understanding of the Act's true intent, meaning and spirit. When the words "reasonably practicable" are interpreted in a manner coherent with the direction given by s.5(j) of the Acts Interpretation Act 1924 that interpretation will be as strict as that otherwise urged by this article.

In *Porter v Bandridge*³⁹, a decision of the English Court of Appeal - a case also cited and noted by Williamson J in the *ANZ Bank* case⁴⁰, Ormrod LJ considered the different interpretations of the phrase "reasonably practicable". The facts involved the question of whether a complainant, who had failed to bring his complaint for unfair dismissal within the statutory time-limit, could establish that it was not reasonably practicable to bring the complaint within the time period. The case thus uses the phrase not in relation to a responsibility of an employer - as in the PLEP Act 1987 - but in relation to a time limit for starting proceedings by a worker. However, in the course of his judgment, Ormrod LJ provided a useful summary of the various judicial interpretations of the words "reasonably practicable" stating:

The phrase is one which parliamentary draughtsmen find useful, in various contexts, to express the intention of Parliament that the provision which it qualifies is not to be applied with the inflexibility of a mechanical or automatic process, but with due regard to the constraints to which human beings are subject. These, of course, vary according to both circumstances and subject matter. In consequence the meaning given to the words "reasonably practicable" varies with the context in which it is used. At one end of the spectrum are the cases relating to the statutory duties placed upon employers to take steps to protect their employees. There the phrase is strictly interpreted. Some distinction is recognised between "possible", "practicable" and "reasonably practicable", but the onus of proving that a precaution is not reasonably practicable is a heavy one. At the other end is s.25 of the Matrimonial Causes Act 1973 which requires the Court exercise its powers so as to place the parties "so far as is practicable" in the financial position in which they would have been if the marriage had not broken down. In that context its meaning is equivalent in ordinary language to "practical" i.e. it is taken to mean that the Court should do the best it can in the circumstances to achieve the virtually unattainable goal set by the Act."⁴¹

It is therefore necessary to consider some of those cases which relate to the statutory duties placed upon employers to take steps to protect their workers. Typically, such cases involve the application of various health and safety legislation in the furtherance of which employers are required to take certain precautions "where reasonably practicable". Thus s.49 of the Coal Mines Act 1911 (UK) required mine-owners to make secure the roof and sides of every travelling road and working place unless such was not reasonably practicable. In *Edwards v National Coal Board*⁴² Asquith LJ stated that:

³⁹ [1978] ICR 943.

⁴⁰ *Supra*, n.10, 823.

⁴¹ *Supra*, n 39, 951-952.

⁴² [1949] KB 704.

The onus was on the defendants to establish that it was not reasonably practicable in this case for them to have prevented a breach of s.49. "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice necessary for averting the risk (whether in money, time or trouble) is placed in the other; and if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus upon them."⁴³

In the same case Tucker LJ stated that:

It would, of course, always be relevant to show that for some reason peculiar to the particular place in question, the proposed method was not reasonably practicable. I do not hold the view that cost must necessarily always be excluded as an element to be weighed in the balance. In every case it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight given to the factor of cost.⁴⁴

The concentration, in these two statements, on the issue of risk is very important. It was risk to the workers that the Coal Mines Act 1911 was to legislate against or at least the Act was to ameliorate against the possibility of such risk. Both Lord Justices clearly recognise the need to balance the furtherance of the legislation against the "sacrifice" of the owners in providing that which the legislation requires. And Tucker LJ notes that, when the mischief which the Act is to prevent - the risk of injury or death to coalminers - is unlikely to arise, the greater chance of success has a claim to a relatively low level of impracticability. But when the Act's purpose is clearly attained by certain actions on the part of the mine-owner, only a very substantial claim as to the impracticability of providing those protections will be sufficient to obviate the mine-owner's obligations under the Act.

This matter was developed further in *Marshall v Gotham Co Ltd*⁴⁵ which concerned similar provisions in the Metalliferous Mines Act and Regulations. In the House of Lords, Lord Reid stated:

I turn to consider what was meant by precautions being "reasonably practicable". It was maintained for the appellant that this means no more than "practicable" and that it is enough to show that it was physically practicable to use the precautions and irrelevant to consider whether in the circumstances it would have been reasonable to do so. But, in my judgment, there may well be precautions which it is "practicable" but not "reasonably practicable" to take, and I think that follows from the decision of the Court of Appeal in *Edwards v National Coal Board*. I agree with what was said in that case by Asquith LJ (as he then was), and I do not find it helpful to consider whether this statutory duty is in every case the same as an employer's common law duty. I think it enough to say that if a precaution is practicable it must be taken unless in the whole of the circumstances that would be unreasonable. As men's lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable.⁴⁶

⁴³ *Ibid*, 712.

⁴⁴ *Ibid*, 710.

⁴⁵ [1954] AC 360.

⁴⁶ *Ibid*, 372-373.

In the same case, Lord Keith of Avonholm stated that:

It was no doubt a physical or engineering possibility for the mine owners in the present case to have carried out the precautions which were carried out after the accident. These might not have ensured absolute security. But I agree with my noble and learned friend, Lord Tucker, that if absolute security is not reasonably practicable that does not excuse the mine owner from taking those reasonably practicable steps that will give a lesser degree of security. But it is not the precautions in themselves which have to be reasonably practicable. It is the observance of those precautions that is required so far as may be reasonably practicable.⁴⁷

Three points arise out of this case:

- (a) Firstly, a precaution which is practicable must be taken unless unreasonable.
- (b) Secondly, the more a precaution is likely to fulfil the purpose of the legislation which embodies it, the less likely will a court find the provision of that precaution to be not reasonably practicable.
- (c) Thirdly, it is not the purpose of the legislation which is required to be reasonably practicable to achieve, but the means of providing for the achievement of that purpose.

Therefore, using this analysis in a consideration of s.41 of the PLEP Act 1987, it first becomes apparent that the purpose of the legislation, aside from that policy discussed earlier, insofar as s.41 is concerned, is that of employment protection for parents while on parental leave.

Secondly, the provision of a temporary replacement will absolutely achieve that purpose. The reasonable practicability of such provision of a temporary replacement imposes a very substantial onus on the employer.

As to the third point of the analysis, the specific terms of s.41 of the 1987 Act point to exactly what the legislation requires to be taken into consideration in assessing whether a temporary replacement is reasonably practicable. If s.41 of the Act stopped at the words "reasonably practicable", then an employer might be able to discharge the onus upon him or her by showing that, in all the circumstances, the means by which the employer might provide for the achievement of the purpose of the 1987 Act was not reasonably practicable - if, for example, the employer was able to show that, despite extensive attempts to find a temporary replacement, none were available. But, in the words of Williamson J in the *ANZ Bank* case⁴⁸, section 41 does not stop there. He states:

The presumption is not rebuttable on the sole ground that a temporary replacement is not reasonably practicable. There must be present the further element that such non-practicability must be due to the key position occupied.⁴⁹

⁴⁷ *Ibid*, 377.

⁴⁸ *Supra*, n.10.

⁴⁹ *Ibid*, 822.

Of this statement, Finnigan J in the *Manukau City Council* case⁵⁰, stated, "That obiter dictum is in our respectful view a correct statement of the law."⁵¹ His Honour interpreted the s.41 presumption and the circumstances of its rebuttal in strict terms:

The words of the statute in our opinion need to be approached with some care . . . It is readily apparent that the words "reasonably practicable" must be considered with the following words "due to the key position occupied" (emphasis supplied). While the proposition is accepted for present purposes that the worker's position was a "key position", it is necessary for the employer to establish that it was not reasonably practicable to put in a temporary replacement because of the key nature of the position.

[Section 41] provides that if a question about the rights of a worker to parental leave comes before the Court the Court must presume in all situations that the employer has the ability to keep open the worker's position for the worker until the end of the period of leave. That is the obligation imposed upon the Court at the outset. It clearly gives the worker's rights predominance over those of the employer. In order to ease the effects of that requirement, the Act provides at s.41(1) that it will not apply if "the employer proves that the employee's position cannot be kept open . . . because a temporary replacement is not reasonably practicable due to the key position occupied within the employer's enterprise by the employee". Obviously a crucial point is whether the position is a key position, but with that the employer must further establish that it is because of the nature of the position itself that a temporary replacement is not reasonably practicable. That narrows considerably the range of relief offered by the Act to employers. Further to that, the relief is not available "unless the employer proves . . .", that is, until the employer proves the necessary facts.

In other words, it is our view that once the facts giving rise to a period of parental leave arise a worker is entitled to such leave and the employer must honour that entitlement if application is made irrespective of cost or inconvenience; this is the requirement of ss.41(1) and 66(2) of the Act, and it remains so until . . . the employer has proved, i.e. has demonstrated or otherwise established, that the position is (i) a "key position" and that (ii) because of the nature of the position it is not reasonably practicable to entrust the duties of that position to a temporary replacement.⁵²

By this authority, by the authority of *Marshall v Gotham Co Ltd*⁵³, and by the words of s.41 of the Act themselves, employers must found their ability to discharge the onus upon them - to keep a parent's position open for his or her return from parental leave - on some intrinsic quality of the key position itself which makes a temporary replacement not reasonably practicable. It will not be sufficient simply for the employer to state or even to prove that no temporary replacement could be found or that other staffing requirements made the temporary replacement impracticable. As Finnigan J continued to say in the *Manukau City Council* case, "Difficulties encountered in finding a suitable temporary replacement are not relevant unless [those difficulties] arise out of the nature of the

⁵⁰ *Supra*, n.2.

⁵¹ *Ibid*, 752.

⁵² *Ibid*, 750-751.

⁵³ *Supra*, n.45.

position."⁵⁴ There must be something about the nature of the key position itself which makes such temporary replacement "not reasonably practicable".

To return to the decision of *Marshall v Gotham Co Ltd*⁵⁵, it was held therein that the more a precaution is likely to fulfil the purpose of the legislation which embodies it, the less likely is it that a Court will find the provision of that precaution to be not reasonably practicable. The provision of a temporary replacement will absolutely achieve the purpose of s.41 of the PLEP Act 1987 by affording parents employment protection while on parental leave. There is an extraordinarily high onus of proof on the part of employers seeking to discharge that onus - made even more stringent by the wording in the Act which requires that the onus be discharged only in relation to the non-practicability of a temporary replacement due to the key position held.

However, even if an employer can prove that the parent is in a key position, that a temporary replacement is not reasonably practicable and not reasonably practicable by reason of the key position occupied, the decision of the English Court of Appeal in *Edwards v National Coal Board*⁵⁶ makes it clear that there is a further consideration which is required to be proved by the employer before being able to rebut the presumption that the worker's position will be able to be kept open for the worker's return from parental leave. That further consideration, which will decide the reasonable practicability, in the above circumstances, of keeping the worker's position open, involves "a computation" weighing up the worker's rights to return to his or her position at the end of parental leave against the employer's right to have the position occupied on a permanent - as opposed to temporary - basis.

That computation will have to answer the questions: What is so crucial and pivotal about the position occupied by the worker that, by simply occupying that position, the worker has denied himself or herself any ability to return to the position at the completion of his or her parental leave? What is the interest of the employer in having that position occupied on a permanent basis - rather than on a temporary one - which is of such a weight that it outweighs the worker's statutory right to return to his or her work after completing parental leave?

Conclusion

Section 41 of the PLEP Act 1987 therefore requires that workers on parental leave have their positions kept open for their return from that leave in every circumstance, save that of redundancy, unless the employer can prove that (a) The position occupied by the worker is of such a crucial and pivotal nature to the efficient operation of the employer's enterprise that it is required to be filled on a permanent basis; and, despite that requirement (b) A

⁵⁴ *Supra*, n.2, 7.

⁵⁵ *Supra*, n.45.

⁵⁶ *Supra*, n.42.

temporary replacement is nonetheless not reasonably practicable because of the nature of that position; and (c) The claim of the employer to such non-practicability is such as outweighs the maintenance of the worker's right to return to his or her position at the end of a period of parental leave.

Social justice demands that employers, other workers, and society generally suffer such sacrifice as is necessary to ensure that the statutory right of parents to take parental leave and return to their positions at the end of that leave is met. Social justice and, more particularly, the terms of the PLEP Act 1987 demand that employers accept the difficulties and disruption presented by ensuring that the worker's right is met. By its decisions in the *Manukau City Council* and *Onehunga Borough Council* cases, the Labour Court has paid more than lip service to the principles and ideals of social justice. The Court has, in both decisions, clearly recognised and has been prepared to redress the fundamental inequalities existing in the relationships between workers and their employers - a relationship which:

. . . in its inception, is an act of submission, in its operation . . . a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment".⁵⁷

The Court has recognised that, under the PLEP Act 1987:

The rights of the worker are intended to outweigh the rights of the employer. The entire concept and effect of the Act is that in certain circumstances workers may demand leave as of right and that the employer must make arrangements, whatever the cost, to ensure that the right is not infringed.⁵⁸

At a time when employers are calling for labour market flexibility in seeking that workers comply with their demands, the Labour Court's decisions under the PLEP Act 1987 ought be applauded in recognising that a different type of labour market flexibility is required by workers of their employers and in requiring that, in certain circumstances, the will of the employer is to bend to the needs of the worker.

⁵⁷ Kahn-Freund, *Labour and the Law* (3rd ed.), 1984, (Davies and Freedland, eds), 18.

⁵⁸ *Supra*, n.2, 6.