

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

ERCA No. 05 of 2018

**BETWEEN** : **WESTERN BUILDERS LIMITED**

**APPELLANT**

**AND** : **SHOBNA PRASAD**

**RESPONDENT**

**BEFORE** : **M. Javed Mansoor, J**

**COUNSEL** : **Mr. N. Padarath for the appellant**  
**Mrs. R. Pranjivan and Ms. P. Singh for the respondent**

**Date of Hearing** : **31 October 2019**

**Date of Judgment** : **19 April 2023**

# JUDGMENT

EMPLOYMENT LAW      *Dismissal – Whether dismissal on the ground of pregnancy –  
Maternity leave – Sections 101 & 104 of the Employment Relations Act 2007*

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1. The issue in this appeal is whether the respondent was entitled to maternity pay notwithstanding the dismissal of her employment.
  
2. The respondent's services were terminated on 27 April 2010 on suspicion of theft. Thereupon, she lodged an employment grievance, which was partially resolved by mediation. The controversy relating to maternity leave was not resolved during mediation, and her grievance was referred to the Employment Relations Tribunal. By its determination dated 28 December 2017, the tribunal ruled that the respondent was entitled to maternity pay during confinement.
  
3. This appeal is against the tribunal's determination on the following grounds:
  - a. *"The Employment Tribunal erred in law in passing a decision by taking into account events taking place at the mediation;*
  
  - b. *The Employment Tribunal erred in law in the interpretation of Section 101 (4) of the Employment Relations Promulgation and erred in not taking in account Section 101 (1) which required the Grievor to give birth while "employed in a workplace";*
  
  - c. *The Employment Tribunal erred in law and in fact in making a finding that maternity leave was payable when there was no evidence of the date of the birth of the child and therefore no means of calculating the time that falls within the "3 months before the birth of the child";*
  
  - d. *The Employment Tribunal erred in law and in fact in saying that the Grievor was terminated because she was pregnant when there was no evidence of this before the Tribunal".*
  
4. At the hearing of the appeal, counsel for the appellant submitted that all outstanding issues concerning the respondent's dismissal were settled during mediation except for the question whether she was entitled to payment for

maternity leave. Counsel for the respondent agreed that maternity pay was the only outstanding matter before the tribunal.

5. The appellant submitted that the respondent's services were terminated for theft, and not due to pregnancy. The appellant conceded that the worker was in employment for a period exceeding 150 days prior to confinement, and would have been entitled to maternity leave if she had continued in employment and provided information in terms of the law. To be so entitled, the appellant submitted, it was a condition precedent to submit a medical certificate in terms of section 101 (1) & (4) of the Employment Relations Act. The appellant submitted that the respondent failed to submit a medical certificate in proof of her condition as required by law.
6. Counsel for the respondent submitted that the respondent's employment was terminated when she was seven months pregnant in breach of statutory provisions, and although the worker informed the appellant of her pregnancy, the respondent's employment was terminated before she could provide a medical certificate. The respondent submitted that it was not a pre-requisite to submit a medical certificate in order to receive paid leave, and that the statutory object was to protect women and ensure that they are not disadvantaged during pregnancy.

**Was the respondent dismissed on the ground of pregnancy?**

7. Letter dated 16 July 2010 from the chief mediator to the chief tribunal states that "the grievor has been paid her outstanding leave pay but the employer is refusing to pay the maternity pay/ allowance". The ER form 4 enclosed to the letter states, "The grievor has been paid her leave pay and is claiming maternity allowance/ pay as she was pregnant at the time of dismissal".
8. Therefore, the issue before the chief tribunal was whether the respondent was entitled to maternity pay. The tribunal's determination makes it clear that it dealt only with the aspect of maternity pay. In order to determine whether the respondent was entitled to maternity pay, the circumstances related to her dismissal must be considered in terms of the relevant provisions of law.

9. The respondent commenced employment on 9 August 2009. She was dismissed 8 months later on 27 April 2010. According to the respondent's birth notification details, her child was born on 24 June 2010, nearly two months after dismissal. At the time of giving birth, the respondent was not employed by the appellant.
10. The respondent's testimony is that the appellant's manager asked her "to go home" after she was allegedly caught stealing apples. At that point, she claims to have told her supervisor that she was pregnant and would be going on maternity leave. She told the tribunal that she informed her supervisor that she was pregnant and would be taking maternity leave even before the theft incident. Thereupon, she was asked to make an application with a medical certificate. When she approached the hospital for a medical certificate, she was told her pregnancy was not at a stage to be issued a medical certificate for maternity leave. These facts are taken from the chief tribunal's determination. The evidence is not easily discernible as the copy record made available to court on 16 March 2023 does not have a clear transcript of the respondent's evidence. Evidence was not led on behalf of the appellant.
11. The evidence is not clear as to when the worker informed the employer of her pregnancy. However, at the time of the respondent's dismissal, it is clear that the appellant did not have notice of pregnancy in terms of section 101 (1) of the Act. The respondent produced a medical certificate dated 7 June 2010 which states that the respondent is, "suffering from maternity leave for 84 days". Whatever that may mean, the certificate was issued more than a month after she ceased to be employed. It was issued exactly a month after she lodged an employment grievance.
12. The object of part 11 of the Employment Relations Act is to protect women and to ensure that they are not disadvantaged when taking maternity leave. Sections 101 and 104 of the Act are relevant for the present matter, and the chief tribunal has considered these provisions.
13. Section 101 (1) of the Employment Relations Act states:

“A woman employed in a workplace who expects to give birth is entitled to maternity leave and abstain from work for a period of 98 consecutive days subject to providing her employer with a certificate from a registered medical practitioner or registered nurse specifying the possible date of birth.”

Section 101 (2) states

“A woman is entitled to paid maternity leave as follows –

- a) For the first 3 births, to the normal remuneration she would have received as if she had been at work; and
- b) For the 4<sup>th</sup> and subsequent births, to half the normal remuneration she would have received as if she had been at work”.

Section 101 (3) states:

“The woman may proceed on maternity leave at any time before or after confinement provided that if she continues to work during the pre – confinement period she must produce a medical certificate that she is fit to work during that period.”

Section 101 (4) states:

“ If at any time during the 3 months immediately before the birth of her child, a woman was employed for a period of, or periods amounting in the aggregate to, not less than 150 days during the 9 months before the birth of her child, the woman is entitled to paid maternity leave as set out in subsection (2)”.

14. Having considered these provisions, the chief tribunal stated his conclusion in this way.

“Whilst doing the sum of the grievor’s employment under section 101 (4) of the ERP, I can see that she got pregnant shortly after commencing employment in 2009 and in that regard she would have worked more than the aggregate 150 days during the 9 months before the birth of the child.

Therefore, maternity allowance should be paid to the grievor, Ms. Shobna Prasad and in that connection all employers must know that no woman must be terminated from employment on the grounds of pregnancy and where a termination occurs while a woman is pregnant, the burden of disproving that the termination was related to that condition rests with the employer”.

15. Section 104 (1) states that no woman must be terminated from employment on the ground of pregnancy. Section 104 (2) provides that where a termination occurs while a woman is pregnant, the burden of disproving that the termination was related to that condition rests with the employer. The chief tribunal made reference to this provision. He stated:

“The grievor’s claim for maternity allowance was not paid and I do not think it was considered by the mediator, as otherwise the grievor had a very good case as she was pregnant and the onus was with the employer to prove that she was not terminated due to her pregnancy as provided for in section 104 (2) of the Employment Relations Act 2007”.

16. However, a plain reading of section 104 (1) suggests that the provision is not intended to prohibit all dismissals of a female worker during pregnancy. The prohibition is against termination of employment on the *ground of pregnancy*. The respondent’s statement makes it clear that she was not dismissed on account of pregnancy, of which she makes no mention. In her statement to the labour office given on 7 May 2010, the respondent said she was employed by the appellant as a cleaner from 9 August 2009 to 27 April 2010. The statement makes no reference to her pregnant condition. She said that the manager asked her to go home after she was accused of stealing an apple.
17. If a dismissal is not on the ground of pregnancy, it is not likely to lead to a finding that the dismissal was contrary to section 104 (1) of the Act. It is true that section 104 (2) casts the burden on the employer to disprove that termination was related to pregnancy. This requirement must be considered in the context of the facts of this case. In this regard, the respondent’s complaint to the labour office is material. In the first instance, the respondent did not allege that she was dismissed on the ground of pregnancy. The respondent’s statement says she was

dismissed on the allegation of theft. This is repeated in her evidence to the tribunal. There is also no clear denial of the accusation in her testimony. These facts suffice to satisfy court that the respondent's employment was not terminated on the ground of pregnancy. The tribunal itself did not make a finding that dismissal was on the ground of pregnancy. Nor is there a finding on whether or not the employer has shown that dismissal was not related to pregnancy. For these reasons, I hold that the respondent is not entitled to maternity pay post dismissal.

18. The appellant succeeds on its fourth ground of appeal.

**ORDER**

- A. The appeal is allowed, and the chief tribunal's determination dated 28 December 2017 is set aside.
- B. The parties will bear their own costs.

Delivered at **Suva** this 19<sup>th</sup> day of **April, 2023**.



M. Javed Mansoor  
Judge