The MATERNITY LEAVE AND EMPLOYMENT PROTECTION ACT 1980 : IS IT WORTH RETENTION ?

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Legal Writing

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INTRODUCTION

In 1980 the Maternity Leave and Employment Protection Act was passed. The long title describes the Act as one designed to:

> prescribe minimum requirements with respect to maternity leave and to protect the rights of female employees during both pregnancy and maternity leave.

The philosophy underlying the Act has been characterised by the New Zealand Arbitration Court as a recognition that the legal status of women and their everyday conditions should be improved, according to the trend towards social justice.[1] Thus the Act's 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.[2]

However the Court points out that, because the provision of maternity leave to women employees involves some cost or change to the existing order, the employee's right to resume employment after maternity leave is not an absolute right. Her right must be balanced against the employer's right to manage the business efficiently. The degree of recognition of the female employee's right is therefore governed by considerations of the extent of disruption to the employer's business; by the amount of cost to the employer; and, to a lesser degree by the detriment to other employees.[3]

As yet, the Maternity Leave and Employment Protection Act has not been the subject of much judicial or academic scrutiny. Indeed only two judgments have dealt with some of the interpretation and policy issues raised by the Act, and writers have mainly concentrated on a comparison of the Act with overseas legislation or Industrial Awards.

Therefore it will be the task of this paper to determine the true extent of protection accorded to a woman applying for maternity leave under the Act. In particular the paper will examine whether interpretation, policy and operational issues have the effect of resulting in a balance unfavourable to the

pregnant employee.

In order to achieve this, relevant provisions of the Act will be analysed in detail. Specifically, the Act will be examined against the two judicial decisions (which will also be critically examined) and also current public and private sector awards studied by the writer. (Appendix One). The value of such a comparison is that it better enables the writer to assess the effectiveness and value of the Act, and helps determine whether in fact the Act should be retained or rather drafted afresh.

ANALYSIS OF PROVISIONS OF THE ACT

Determining Whether the Act Applies to a Particular Female Employee

Section 4 determines whether the Act applies to an employee or not. Because the Act only sets minimum standards it applies only in cases where the rights and benefits provided by any other provision[4] are in their overall effect, less favourable than those in the statute.

The section raises a number of issues, which have been dealt with by the Arbitration Court in the case New Zealand Bank Officers' Industrial Union of Workers v A.N.Z. Banking Group (NZ Ltd) Ltd.[5] Because this case provides guidelines as to interpretation in a number of sections, it is relevant to consider its facts and the Arbitration Court decision before going on to deal with the issues raised by section 4.

In the ANZ case, the woman employee Mrs Brown, had been employed by the respondent bank for seven years. At the time of pregnancy she occupied the position of securities clerk, grade III at a small branch in Kaitaia, which had a staff of ten people. On 27 April 1982 Mrs Brown applied for maternity leave pursuant to clause 20 of the award. The bank accepted her application without requiring any medical certificate.

On 11 June 1982 Mrs Brown received a reply from the bank informing her that she had been granted maternity leave but that it would be necessary to provide a permanent replacement for her and therefore her position would not be kept open, but she

would be given preference over other officers for the next nine months, for placement in a position similar to the one she presently occupied. Later the bank turned down a request by Mrs Brown that they reconsider the decision not to hold open her position.

Shortly after commencing maternity leave, Mrs Brown's union invoked the provisions of the Act so that the proceedings came before a complaint committee and then the Arbitration Court.

The Arbitration Court decided that the award rather than the Act applied in this case on the basis that the rights and benefits under the award were in their overall effect, more favourable to Mrs Brown than those in the Act. In particular the Court determined that the award provisions required the bank in this case to find a suitable temporary employee or a permanent staff replacement suitable for retransfer when, and if, Mrs Brown wished to return to work. The Court therefore found in Mrs Brown's favour and declared that she was entitled to resume work as from 9 June 1983.

The paper will now deal with the Court's interpretation of the issues raised by section 4.

The first issue is whether in reconciling a maternity provision[6] with the Act, the Court is bound to apply one to the exclusion of the other. The Arbitration Court held that a court is required under section 4 to do so. The section requires an assessment of the overall effect of the Act. "One package is picked in preference to the other package, rather than reading both documents together with any inconsistencies resolved by reference to a dominant document or by reference to the better of individual portions."[7]

It is submitted that this test, if adopted, must be qualified in situations where a collective agreement expressly draws attention to the provisions of the Act or states that the provisions of the Act shall apply where appropriate. In such cases it is clear that the Act must be read in conjunction with the collective agreement.[8]

The Court's approach to this section is clearly a practical one, as there could arise difficult and frequent issues of interpretation if one instrument did not apply to the exclusion of the other. However it is possible to interpret the statute as meaning that it is only in relation to a particular issue that the Act will not apply. This interpretation can be justified on the grounds that the section does not say that the whole of the Act shall not apply, merely that the Act shall not apply. This approach has the advantage of greater flexibility, however as stated before it could lead to more frequent litigation.

The second issue is in respect of who picks the package. It was argued by the union in the case that it is the female employee who has the right to choose which package applies, because of the words: "to that female employee" in section 4. This argument was rejected by Williamson J who said there was nothing in the Act which "gives the individual female employee an absolute right of election which has effect to bind her employer to her choice."[9] Therefore although the employee can make the initial decision as to which package is preferable, if the employer disputes this the Court will become the ultimate authority to settle the difference between the parties. The Court must settle the disagreement by comparing the two packages.[10] In making the comparison, what must be considered is the "overall effect" as it applies to "that female employee."[11]

The third issue is: with reference to what point of time is the comparison to be made?

The Court held that the comparison must be made as at the time of application for leave.[12]

It was felt that if the parties have to wait until all the events have happened before deciding which package applies, there would be considerable practical inconvenience and uncertainty.[13] In the normal case, a pregnant employee would initially make the choice and then apply under either the Act or another maternity provision. The employer would then either accept the chosen package or reject it. It is at that point that any dispute should be settled under the available procedures.[14]

The fourth issue deals with how the package is to be picked. This is perhaps the most important and controversial aspect of any maternity leave case. A detailed examination of how the Arbitration Court determined which factors were of greatest significance in choosing the package applied in the case, is therefore relevant.

The Union submitted that the Act was more favourable to Mrs Brown. In support of this they raised three points of difference between the award and the Act namely:

(i) Period of leave - award nine months, Act six months.

(ii) Period of notice of return to work - award one month, Act 21 days.

(iii) A definition of "substantially similar position" - the award provides one,[15] the Act does not.

The Court held that the last two points, as they affected Mrs Brown in 1982, were trivial and so discussed them no further. This view is probably correct. Instead the Court raised two other points of difference:

(vi) Period of preference if position not able to be kept open - the Act provides a period of 26 weeks.[16] (It should be noted that the Act does not clarify when this period starts. The Court held that it starts at the end of maternity leave). The award does not specifically give a period of preference. Its comparable provision is therefore "dependent upon the interpretation to be placed upon the date when the one month's notice of intention to resume work is to be given,"[17] and also upon the meaning of "subject to the availability of a position" in clause 20(b) of the award. (The Court held that the award is to be read as meaning that one month's notice must be given either before the maternity leave expires or within a reasonable time thereafter).

(v) Presumption that position can be kept open - the Act provides such a provision in section 16. The award contains no such provision but its comparable provision depends upon the interpretation of clause 20(b) "subject to availability of a position."

The Court found that the award was clearly much better on point (i) and, in light of their interpretation of clause 20(b) of the award, they considered that the Act was only slightly better on points (iv) and (v).[18] In overall effect, the Court thought that the benefit of the award under point (i) outweighed the possible advantages of the Act under points (iv) and (v). This was justified by arguing that a knowledgeable adviser would recommend an application under the award because nine months' leave is better than six months and further that an experienced and well regarded employee would get preference as a practical matter whether legally entitled to or not.[19] The final justification was that the presumption in section 16 was not likely to be other than a minor advantage to Mrs Brown having regard to her position and to her training and skills. It is unclear whether this statement would apply to others in analogous situations as the Court must approach each case with "a particular female employee in mind."[20]

An extremely important point was made about this analysis by the Court in a later stage of the judgement. There it was said by the Court, that if their interpretation of clause 20 was wrong, and in particular if the bank's right to make positions available or not was unrestricted and not subject to limited review by the Court, it would reverse the result of the assessment - and find that the Act is the better package overall.[21] This was on the grounds that the right of a female employee to resume work if she chooses to do so, is likely to be much more important to her than an extra three months' unpaid leave.[22]

In this writer's opinion there is no question that the right to resume work is <u>the</u> most important concern to a woman taking maternity leave. After all, there is a substantial risk in taking maternity leave at all if no job is guaranteed afterwards, no matter how much leave is given. Consequently, the writer submits that the right to resume work should be the foremost consideration in determining whether one package is preferable to the package offered under the Act.

Therefore, when applying this Arbitration Court judgment, caution must be taken to ensure that the judgment is read in its entirety. Otherwise, those who must apply the judgment may be misled into adopting the view that the length of leave was the decisive factor in the case. This is arguably not so, as the Court demonstrated in the later part of the judgment (although not clearly) that the right to resume work is likely to be the most important consideration in any maternity leave case.

Comment

As will become clear, the Act sets up a considerable number of opportunities for conflict. Section 4 undoubtedly provokes conflict right at the beginning when a woman decides to take maternity leave. Because the Arbitration Court has held that the Act in its entirety will not apply when a woman is entitled to rights and benefits provided by a collective instrument or individual employment contract which are in their overall effect more or as favourable than those in the statute, the female employee has to make a decision right from the beginning, which to proceed under.[23]

As has been pointed out in an article by Lindsay Rea:[24] the woman would face a very complicated process of decision because neither the awards nor the Act are written in language which is easy to understand.

The next problem raised by section 4 is that in every situation an employer can dispute the employee's choice of procedure,[25] which means that arbitration or court proceedings must be undertaken. This is hardly the ideal situation for a pregnant woman wanting maternity leave to have to face. This is even more so when it is considered that it took 18 months before Mrs Brown finally had the decision from the Arbitration Court. The Act certainly does not make maternity leave a comfortable time.[26]

Requirements to be Fulfilled Before Maternity Leave (or leave for adoption) will be Granted.

Sections 5 and 6 deal with entitlement to maternity leave. Under section 5 a female employee is entitled to maternity leave if she becomes pregnant, and will at the date of the expected delivery have been for the immediately preceding 18 months, in the employment of the same employer for at least 15 hours a week. Under section 6 a female employee is entitled to maternity leave if she assumes (with a view to adoption by her or by her and her husband jointly) the care of a child who is not more than 5 years of age and will have satisfied the same time and continuity requirements as in section 5 at the date on which she first assumes the care of the child. (It is necessary to look at the Schedule to this Act to determine whether a female employee has remained in the employment of the same employer during any period of time or whether a female employee has resumed service with the same employer).

It should be noted that most private sector award clauses are silent about eligibility for leave in cases of adoption. Michael Law suggests however that the wording of these clauses may implicitly provide for adoption and says that a test case would be interesting.[27]

The main problem with these provisions is the length of time that a woman must have been employed by the same employer before being entitled to maternity leave. Eighteen months is a long time - especially when compared with private and public sector awards. A comparison with the private awards studied shows that no qualifying period of service is required in nearly 45% of cases[28] - the remaining 55% of awards require only 12 or 6 months' service. Although one award requires 18 months' service, and another 3 years' service, both awards afford the worker better conditions than sections of the Act.[29] Public sector awards set two qualifying periods of service, however this is mainly designed at setting two different periods of leave. Hence if an employee has at least one years' service

she will be granted leave of up to 12 months. An employee with less than a years' service will be only granted up to six months' leave.

If a large number of private sector awards can set no period of qualifying service and the remaining public and private sector awards can offer leave after a maximum of 12 months' service, it is unnecessary for the Act to set such a high limit. More importantly, it may have the effect of denying a significant number of women the initial entitlement to protection under the Act, which in the majority of cases provides more protection than an award. Further, the International Labour Organisation Covenant and other international statements unanimously state or imply that maternity leave should be available to all working women regardless of service.[30]

Another unnecessary feature of this section is a reference to the number of hours a week that must have been worked before a woman can gain the protection of the Act. Private and public sector awards also say nothing about this point. What this suggests is that such criteria are yet another unnecessary and restrictive addition to an already limited Act.

Duration and Commencement of Maternity Leave

Under section 8 maternity leave is to be taken in one continuous period of 26 weeks.

Section 9 determines that the leave is to begin on either the date of confinement,[31] or in the case of adoption on the date on which the female employee first assumes the care of the child, or on an earlier date as determined in accordance with sections 10, 11, 12 and 13 of the Act.

Section 10 gives the woman employee power to begin maternity leave at a date which is earlier by not more than 6 weeks than the expected date of delivery. This is provided that the woman gives the employer not less than 21 days' notice in writing of the day on which she wishes her maternity leave to begin.

Section 11 gives the female employee and employer power to determine the commencement of maternity leave on any date before the date of confinement.

Under section 12, leave will commence early where a medical practitioner considers this is necessary. The doctor may give to the employee a written certificate specifying the date on which in his/her opinion, the employee should begin her maternity leave.

Section 13 enables the employer to appoint the date of commencement if the woman is unable to perform her work to the safety of herself or others, or is incapable of performing her work adequately because of pregnancy and further there is no other suitable work available.

It should be noted that under section 8 (2) the period of leave will be extended beyond the 26 week period if the employee commences early leave under sections 12 and 13. In these circumstances the female employee is entitled to take at least 20 weeks of her maternity leave after the expected date of delivery and so if necessary extend her maternity leave.

There are potential problems created by fixing a time when leave must commence; particularly as this may mean that a woman could end up with an extremely short period between the date of confinement and the date on which she must return to work (i.e. if section 8(2) does not apply). This issue will be of particular relevance where the employee or her child is suffering ill-health - and hence it can be seen that a strong need exists in the current Act for extension of leave on health grounds.

It should also be noted that, although most private sector awards[32] limit the leave to six months (nearly 81%)[33] as with the Act, most do not however stipulate when the leave must commence.

The possibility of dispute may arise where the employer is involved in the decision when to take leave. Situations may arise where it is uncertain whether both employer and employee decided about commencement of leave or whether the employer alone decided[34].

Cases can be envisaged where the employer suggests that the female employee should commence leave early because her work performance is not adequate, and the employee (reluctantly) acquiesces. Is this a situation where it can truly be said that the employer and employee have jointly agreed upon the commencement of leave? This issue is of significance because of the consequences for the amount of available leave. Only if the employer has appointed the date of commencement will an employee receive extended leave under section 8 (2), otherwise she will be limited to a total period of 26 weeks.

Notice requirements:

1. Under section 14, an application for maternity leave must be made in writing at least three months before the expected date of delivery. This does not apply in the case of adoption where much shorter notice is given by the parent. Notice of intention to adopt a child has to be given to the employer stating the date on which the woman first intends to assume the care of the child.

   This requirement is rather strict in two aspects: namely (1) that the application has to be in writing and (2) 3 months' notice has to be given. Of the private sector awards studied[35] only in three cases was a written application required by employees wishing to take leave. Further only 16% of awards required any sort of notice - with the vast majority of these requiring only 1 month's notice. It is interesting to note that only one award required 3 months' notice.

2. Section 15 requires that within 21 days of receiving the employee's application for leave the employer must give her written reply informing her:

   (a) whether or not she is entitled to leave;[36]

   (b) whether or not her position can be kept open;[37]

   (c) where her position cannot be kept open that she may dispute the employer's statement;

   (d) that where the position cannot be kept open, the employer will give her preference over other applicants for any vacant position which is

"substantially similar" during the 26 weeks after the leave period ends;

(e) of her rights concerning the date of commencement of leave[38] and her obligation to give her employer not less than 21 days written notice of the day on which she wishes to begin her maternity leave;[39]

(f) of her rights to end her leave early either with her employer's consent or where she suffers a miscarriage of her child or her child or the child she was to adopt is stillborn or dies, or her child is adopted.[40]

There is no mention in the Act of the amount of notice that should be given in the event of an early return to work. The New Zealand Employers Federation therefore recommends that the employer advise the woman in the above notice of the amount of notice personally required. They suggest that the period of notice should either relate to the period of notice required to terminate the employment of the temporary replacement (however again no guideline for this has been provided by the Act) or 21 days - as this is the normal notice requirement under the Act.

A significant issue raised by section 15 was brought to the writer's attention by the New Zealand Employers Federation handout - "Maternity Leave and Employment Protection Act 1980 - a guide for employers". In that handout there is a conspicuous absence of the requirement under this section to notify the employee that she may dispute the employer's statement that her position cannot be kept open. It is clear that the section requires this information to be in the notice[41] and accordingly the writer submits there should be repercussions for an employer who fails to do so - especially in situations where a female employee ends up falling prima facie beyond the scope of the Act, because she was unaware of her rights.

This could arise in the following situation: Mrs X applies for maternity leave under the Act. In the employer's

notice it is stated that Mrs X's job cannot be kept open, and the notice is silent as to Mrs X's right to dispute the employer's claim. Instead it merely informs her about the 26 week preference period. At the end of this period, Mrs X has been offered no position which is substantially similar to her former one and is informed that her employment has been terminated. It is then or at some later stage that Mrs X finds out that she could have contested her employer's statement that her position could not be kept open. Mrs X wonders whether she can now take proceedings - having already lost her job.

Under the Act in section 34 a complaint cannot be made either:

(a) after the expiration of 26 weeks from the date on which the subject matter of the complaint arose: or

(b) before the expiration of 20 weeks from either the expected date of delivery or in the case of adoption, the date on which the female employee (with a view to adoption) first assumed the care of the child - whichever is the later.

Action under section 34 must be brought under one of the grounds set out in paragraphs (a) - (d). These cover the situations where the employer : (a) is not justified in stating that the employee's position cannot be kept open; (b) has terminated the woman's employment or given her notice terminating her employment in contravention of section 27(1); (c) has taken other action that adversely affects her: (d) has exercised, without reasonable justification, the power conferred on the employer by section 13 or 24 of the Act.

Prima facie it would be open to the Court simply to say that it has no jurisdiction to hear the case because the time limit set by the Act has expired,[42] and further that the issue raised does not fall within any of the grounds in section 34.[43]

However, it is submitted that there is a strong possibility in a case such as this that the Court will exercise its discretion under section 44 to grant the employee a right to a hearing.

Section 44 applies to situations where something is "omitted to be done or cannot be done at the time required by or under [the] Act, or is done before or after that time, or is otherwise irregularly done in matter of form..." The Arbitration Court (or a complaint committee) is given power to deal with the issue in such manner or on such terms as it "thinks just."

In this case, an action has not been started within the time limit because of a faulty notice. This is arguably the kind of case where the Court should exercise its discretion to ignore the fact that the set time limit has not been complied with. More importantly it is the only way that the Act itself can be used to deter employers from not following the procedures laid down by the Act. No penalties are otherwise laid down for employers who do not follow the system - indeed all the penalties are directed at the pregnant employee.

It must be stressed that the Act places a duty on the employer to give the proper notice and so it is submitted that this section should be used whenever possible to compel employers to follow the prescribed procedure. This is particularly because such omissions must occur fairly regularly if the Employers Federation guide is being followed.

A final point to note is that an employer could also request under section 44 that the Court disregard the non-compliance with the notice requirement of the Act. However because the Court must deal with the issue in terms of what it "thinks just", it is submitted that the female employee's claim will be considered superior to that of the employer, particularly as it is the employee who has suffered the injustices.

3. Section 17 provides that within 21 days after the woman commences her leave the employer must send her a written notice stating:

(i) the date on which the leave will end; and

(ii) the date of the next working day, being the day she will be required to return to work, if her job is being held open for her; or

(iii) the 26 week preference period during which the employer will give her preference over other applicants for any vacant position which is substantially similar, if her job cannot be left open for her; and

(iv) where paragraph (ii) applies, her obligations under section 18 of the Act (to be dealt with next): and

(v) her rights under section 19 of the Act (this deals with early ending of maternity leave).

It should be noted that the Employers Federation guide has again omitted certain statements which must be made by the employer to fulfil the requirements of section 17. These are set out in the last two paragraphs and deal with the female employee's obligation to give notice under section 18 and the right of an employee to return to work early in certain situations under section 19.

The absence of both these notice requirements may again cause unnecessary disadvantage to the female employee. At least however, in the situation where the female employee's requirement to give notice is omitted, the employee can argue that section 44 should be applied to disregard her non-compliance. In the situation where an employee is not told that she could have returned to work early and the circumstances set out in section 19 arise, it is difficult to see what remedy, if any, the employee could get for loss of income, where she has remained at home for the entire 26 week period, not knowing that she could have returned to work early. In the writer's opinion, the female employee should be entitled to

some remedy, however there seems to be nothing in the Act which will entitle her to one.

4. Section 18 states that if the woman's job is being held for her she must notify her employer no later than 21 days before the end of her leave stating whether or not she will be returning to work. (Her employment will be considered to have terminated as from the day her maternity leave began, if she tells her employer she will not return to the job, or if she fails without good cause, to return to work at the end of her maternity leave : section 20).

It is interesting to note, that of the private sector awards not applying the provisions of the Act, nearly 40% require that the female employee give some notice of return to work. The most common requirements are for : (a) 1 month's notice (19 awards); (b) 2 weeks' notice (18 awards), and 2 months' notice (14 awards). However there are a notable number of awards which require notice of return at either 1 month or 2 months after the birth of the child (12 in total). Public sector awards require one months' notice of return to work.

Even though the awards, on the whole, set a longer period of notice of return than the Act, it must be considered that in the vast majority of awards, this will be the only notice that is required by the employee. Further, such notice requirements could also be affected by the time limit laid down for dismissing a replacement or re-organising staff...

5. Under section 19 a female employee may end her maternity leave and return to work earlier, or may begin her period of preference at an earlier date by giving the employer written notice:

(a) if she suffers a miscarriage or

(b) if her child is stillborn or dies, or

(c) if she has consented to the adoption of her child and some other person has custody of the child with a view to adoption, or

(d) if her employer consents .[44]

The consent of the employer can be made conditional on a medical certificate that the employee is fit to resume work.

There is no mention in the Act of the amount of notice that should be given in the event of an early return to work. Accordingly, the Employers Federation guide recommends that the employer advise the woman in the section 15 notice of the amount of notice personally required.[45]

Comment

The Act has laid down five separate occasions for which formal, written notice is required. Three of these five notices must be given by the woman employee.

Alexander Szakats has described these formal notice requirements as a "further drawback of the legislation in New Zealand."[46] As he says, a woman approaching her time of confinement and afterwards being left busy with an infant has enough to worry about without the further trouble of remembering the statutory period for notices.[47] In any case, giving written notices may be a routine task for an employer but for a woman performing factory or shop work before her maternity leave, it can be a difficult job.

Judith Reid, Secretary of the Auckland and Gisborne Shop Employees Union believes that most employees would in any event, be totally unaware of the procedures which must be followed to obtain maternity leave. She says that : "We do what we can to give our delegates and others the necessary information, but we do not have sufficient education resources to do the job properly."[48] It follows that in many situations it will only be a claim under section 44 which will help an employee who has not complied with the many notice requirements. Again this involves proceedings and unnecessary time and stress.

It is submitted that the Act should be brought into line with public and private sector awards. Accordingly, the only notice which should be required from the employee, is notice of return to work.

In terms of practicality, it is advisable that this notice should be given. However, whether it should be written or not is arguable, and although it would be preferable to be able to leave the employer and employee to work things out orally, a written notice could prove valuable as it provides non-rebuttable evidence of both parties' intentions.

What is Meant by a "Substantially Similar Position"

In cases under section 15 where it is stated that the employee's position cannot be kept open, the employer must give the employee preference over other applicants for any position which is vacant and which is substantially similar to the position held by her at the beginning of her maternity leave.

There are two potential problems caused by this paragraph. The first is the problem of interpreting the term "substantially similar" - as no definition has been provided in the statute. However this term, and similar terms, are used in some private and public awards, and the courts could use these as a guideline to determine what is meant. One award defines the term "substantially similar"as meaning:

(i) In the same location or at another location within reasonable commuting distance of the previous location, and

(ii) Involving responsibilities and prospects broadly comparable to those exercised or enjoyed in the previous position.[49]

Another award says a "similar position" is:
- at the equivalent salary and grading: and
- in the same location or other location in reasonable commuting distance, and -
- involving responsibilities broadly comparable to those exercised in her previous position.[50]

The lack of any statutory definition of "substantially similar" raises another situation where litigation or a dispute of some kind may occur. Such difficulties should not be present in an Act which is designed to foster the rights of pregnant employees,

as it makes the process long, drawn out and of course, unpleasant.

Perhaps a greater problem with the paragraph is that it gives employers (and particularly those in smaller enterprises) a lot of power during the 26 week waiting period to determine whether a "substantially similar" position will be offered. Thus if a woman on maternity leave was not wanted back in the enterprise, the employer could simply neglect to offer a position which is substantially similar to the woman's previous one, and therefore avoid the need to re-employ the woman. This is a potentially dangerous section. It may be up to the Courts therefore to place a firm burden of proof on the employer to show that a "substantially similar" position was in fact not available.

In What Circumstances will the Employee's Position be Kept Open

Section 16 is possibly the most important section in the Act. This is because there is a presumption in section 16 for the employer to hold a job open for a female employee who goes on maternity leave. Thus in every case the employer will have the onus of proving that a position cannot be kept open. This will be proved where:

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

(b) a redundancy situation occurs.

In determining whether or not a position is a key position, 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.

Section 16(1)(a)

In the ANZ case[51], the judge made some obiter comments about Section 16 - and particularly about the meaning of the term "key position". These comments are particularly important because the Court held that if the employee does not occupy a "key position" (and no redundancy situation has occurred) section

16(1)(a) creates an irrebuttable presumption that the position will be kept open.

It is first necessary to outline exactly what the Court found was the female employee's position in this case. Mrs Brown held the position of securities clerk grade III at a small branch of the ANZ bank in Kaitaia. The staff consisted of a branch manager, branch accountant, securities clerk and seven more junior officers.

In such a branch although the manager is responsible for all the activities of the branch, he is more directly concerned with customer relations and with the lending functions of the bank. In this latter function therefore his chief assistant is the securities clerk. The securities clerk will also undertake the accountant's duties within limits - the accountant is the second-ranking officer of the branch.

The Court found that, broadly speaking, the securities clerk is the third ranking officer of the branch who substitutes occasionally for the second ranking officer, and whose primary duties are undertaken with direct responsibility to the first ranking officer of the branch.

Judge Williamson started his discussion as to the meaning of the words "key position" by considering two possible but opposing interpretations. The first of these is that "everyone employed by the bank plays some part in completing it or holding it together and therefore occupies a key position".[52] The second states that "the key positions in a bank are those of its leading officers - the general manager, senior assistants to the general manager, experts with specialised knowledge such as head office divisional heads, area managers and branch managers".[53]

The union argued for the second, more restrictive interpretation, on the grounds that the bank's enterprise as a whole should be considered. The bank argued for a less restricted interpretation so that each unit of its organisation or activity, such as a branch, is the subject of assessment.[54] The Court eventually held in favour of the bank's approach. That decision was made on the basis that Parliament would not have intended the result under the

restrictive interpretation which would have meant in practice that every female employee occupying a position junior to that of the branch manager would have an absolute right to resume her position after maternity leave.[55]

The Court then went on to make some very important comments about the implications of adopting a less restrictive approach. The first of these is that when deciding whether a position is a key one or not, regard must be had to section 16 (2)(a) and (b) and "other things".[56]

The Court also said that they believed the presumption to be irrebuttable in cases where persons with elementary skills were employed in large enterprises and therefore did not occupy key positions.[57]

Finally the Court said that the "test" in determining whether a temporary replacement is reasonably practicable or not is:

(i) In small enterprises 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 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.[58].

Under these rules the Court found that Mrs Brown did occupy a key position in the employer's enterprise. Judge Williamson thought she was a skilled person who had received a lengthy period of training and that such training period and skills were required for her position.[59] The Court also made the point that even though other persons in the bank in New Zealand had similar skills and training they were not of any significance because the skills and training were needed by the bank in Kaitaia.

It should be noted that even if the position is a key one, the presumption could still fail to be rebutted if it is "reasonably practicable" to provide a temporary replacement (which it was in the case). An indication as the meaning of the words "reasonably practicable" is seen in the British case: Porter v Bandridge:[60]

> The meaning given to the words ... varies with the context in which it is used. At one end of the spectrum are cases relating to the statutory duties placed upon employers to take steps to protect their employees. There the phrase is strictly interpreted.[61]

This additional condition clearly acts to ensure that women requiring leave for maternity purposes are not easily dismissed - and this will be particularly so in large enterprises (such as banks). Indeed, Union Officials spoken to[62] indicated that employers, when challenged, all agreed to hold the positions of their employees open, rather than have to prove that it was not reasonably practicable to provide a temporary replacement. Further, if the availability of services offering temporary replacements continues to expand, the position may arise where it is comparatively easy in all enterprises to replace temporarily a woman requiring maternity leave. In such a situation it is submitted that it should only be in rare circumstances that a woman's position cannot be kept open.

Comment

The Court's interpretation of section 16(1)(a) and (2)(a)(b) raises some interesting issues.

The first issue concerns the Court's interpretation of the term: "regard may be had, among other things, to - ...", in section 16(2). In the ANZ case,[63] the Court stated that to say what is a key position, regard must be had to section 16(2)(a) and (b) and "other things".[64] This means that Court cannot fail to have regard to the factors set out in paragraphs (a) and (b).

The Employers Federation however, may see the subsection as carrying an interpretation different to that given by the Court. They state in their maternity leave guide that: "the phrase 'among other things' indicates that the employer is not precluded from advancing other grounds for the 'key' nature of the position."

It is accepted that this statement is ambiguous and could mean nothing more than that the employer is allowed to raise other grounds in addition to those in paragraphs (a) and (b). It is feasible however, that the Employers Federation interprets the subsection as meaning that it is possible merely to raise "other grounds" to show that a position is a key one. This interpretation is clearly a valid one as the wording is that regard may (rather than must) be had, among other things, to the factors set out in paragraphs (a) and (b).

The second issue concerns the overall effect of the Court's interpretation of the term "key position." It is submitted that Judge Williamson's statements (and particularly the "test" he lays down), have the effect of providing an immediate rebuttal of the prima facie presumption that the employee's position can be kept open for: women in any small enterprise (note: no indication is given as to what constitutes a small enterprise); professional women in all enterprises, and finally; any women who have undergone a fair amount of training - arguably this could apply to any bank teller, data input worker or even a machinist in some situations.

Indeed in many cases, unless a woman works for an enterprise in which it is "reasonably practicable" to provide a temporary replacement, she will only have a fragile chance that her position must be kept open. It is this writer's contention therefore, that the Court's interpretation is much too wide and arguably is not within the intention of Parliament as is said by the Court. Its effect is to exclude those women who are most likely to want to return to work (i.e. those with skills or training) - leaving protection only for those persons with elementary skills who are

employed in large enterprises, as the Court itself says.[65] It should be noted that this group typically has a high turnover and consists mainly of women who are not yet at child-bearing age, or older women whose children are old enough to look after themselves.[66]

It is interesting to consider that section 5(j) of the Acts Interpretation Act 1924 is used by the Court to arrive at its narrow interpretation of the term "key position." This section requires that an Act is given "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act." The Court's reference to the section is clearly appropriate, however it is this writer's submission that the Court has used it in a way that does not accord with the object of the Act. The Act is described in the title as one aimed to : (1) "prescribe minimum requirements with respect to maternity leave" and (2) "protect the rights of female employees during both pregnancy and maternity leave." Thus it is only in respect of such requirements as length of leave, amount of service, and availability of payment that the Act sets a minimum. For the protection of the rights of employees during both pregnancy and maternity leave, no minimum standard is required.

Accordingly, it is evident that the Act is meant to protect the rights of all women requiring maternity leave (except of course those who are protected by "better" awards or agreements), not just those lucky enough to be in sufficiently unskilled jobs in large enterprises. It is therefore submitted that the Court's interpretation of the term "key position" should not be adopted by future courts in its entirety. The obiter statements made by Judge Williamson need to be modified so that many more women employees fit within the presumption laid down in section 16.

Section 16(1)(b)

As stated previously, a woman's employment can be terminated if the employer proves that a redundancy situation has occured.

A maternity leave case recently decided by the Public Services Tribunal[67] provides some useful guidelines as to how a redundancy case will be dealt with.

In the case, the employee commenced approved maternity leave from the Ministry of Agriculture and Fisheries in January, 1982.

She had been employed there for about 10 years as a typist, and and of the three typists in the Department, she was second in seniority. On 16 July 1982 the Ministry advised that the position had been disestablished and hence there was no longer a position available for her. Eventually the case came before the Tribunal.

The Tribunal held that if there is a component which affects maternity leave in the establishment or disestablishment of positions, the Tribunal could look at that. The Tribunal analysed the facts, and the policy of the Ministry, and found that even if the Ministry had only needed two typists, had all three been working at the time of the action, either all three would have been kept on until a vacancy occurred naturally, or alternatively one position would have been treated as "over-scale" and one employee would have been relocated or redeployed. The Tribunal found that it was unlikely that one would be dismissed on the grounds of redundancy.

Accordingly, the Tribunal held that the decision came at the time when it did because of the opportunity afforded by the employee's maternity leave. They said that a position temporarily unoccupied because the holder is on maternity leave is protected (though not absolutely) and that the Ministry's decision had had the effect of partially denying the woman employee her rights. The woman (having already been given a position in another Department) received back-pay of $6,000.

The significance of this decision is that it shows that the courts will look very closely at all the relevant facts and circumstances to decide whether a redundancy situation has really occurred. It is clear that the decision to make an employee redundant whilst she is on maternity leave will be treated with some caution and suspicion. This approach recommends itself to the writer as it ensures greater protection for the employee on maternity leave.

A Comparison of Section 16 with Award Provisions

Unless an employer can be persuaded that it is reasonably practicable to provide a temporary replacement for a woman requiring maternity leave under section 16 (1)(a), the woman only has a fragile chance that there is a presumption that her position can be kept open.

Public sector awards are clearly superior to the Act in this respect. For example, the PSA award states that "as a general rule, departments are required to hold open the position occupied by a woman on maternity leave or to fill it on a temporary basis". The Health Service Personnel Commission award states that: "Subject to subclause (5) ..., an employee returning from maternity leave is entitled to resume work in the same position or in a similar position ...".

Private sector awards however generally provide less protection than the Act. Michael Law[68] has found that 67% of clauses effectively set the terms of re-engagement rather than provide maternity leave as such. Commonly used clauses simply read:

> Where a female employee has ceased employment for maternity purposes and is re-employed ..., or
>
> Provided the employer has a position available the worker shall be re-employed ... .

Law's researchers also found that re-employment was "probable" in 53.3% of cases and only "possible" in the remainder.[69] This indicates that a large number of employers do not believe that women taking leave for maternity purposes should have a right to return to work. It is clearly arguable that this attitude has to some extent influenced those drafting and interpreting the Act.

Acceptance of Employment Where the Position Has Not Been Held Open

Section 21 applies in situations where the employer is unable to hold open the woman's position for the 26 weeks of leave, and must instead, give her preference of employment for any substantially similar job that becomes vacant during the 26 weeks after her maternity leave ends. Under this section, the employee has 7 days from the date set by the employer to take up any position offered

to her - and this can be set at any time during the 26 week period after her maternity leave ends. If the woman fails without reasonable excuse to take up the position, her employment will be deemed to be at an end from the day on which her maternity leave began.

This section may result in obvious unfairness to a female employee. For a start, it is extremely anomalous that the employee must give three months' written notice to the employer of her intention to take maternity leave (which gives the employer ample time to arrange for a temporary replacement etc) yet the employee only gets seven days' notice (this does not even have to be written), in which she must actually decide whether she can afford or even wants to return to work, end a temporary job if she had one, organise childcare, and organise all the myriad other things that a woman with a young baby must do, or else she loses her job.[70] It is very difficult to see any justification for such a section, especially as the employee receives no remuneration at any stage during maternity leave.

A possible defence that could be raised by a woman who rejects the preferential employment, is that the position offered is not "substantially similar" to the position held at the beginning of leave. Rejection of the position would therefore be justified.[71] However it is likely that this defence will only be available in a few cases.

The Position of a Temporary Replacement

Section 26 deals with the situation where a temporary worker is engaged to replace a female employee on maternity leave. The section requires that the replacement must be told in writing before commencing the job that s/he has been hired on a temporary basis to replace a woman on maternity leave and further that the employee on leave may return earlier than the date required.

As Alexander Szakats has pointed out, the purpose of this provision is to negative any possible claim for wrongful or unjustified dismissal by the temporary worker.[72] Further it is interesting to note that the Act provides no period of notice before such a dismissal, hence it is arguable that the worker could be dismissed at short notice, or without any notice at all.[73] This is hardly a desirable situation.

Analysis of Provisions Protecting an Employee from Dismissal.

Under section 27, an employer is unable to dismiss a female employee either during her time off on maternity leave, or during the preference period following the leave, for any of the following reasons:

(i) because she was pregnant;
(ii) for health reasons, unless her health is materially affected by causes unrelated to pregnancy;
(iii) because she applied for maternity leave;
(iv) because she assumed the care of a child she or she and her husband jointly, intended to adopt.

It should be noted that dismissal for a substantial reason not related to the employee's pregnancy, adoption, or her rights under the Act, nevertheless remains within the employer's rights.[74]

Problems may arise under this section in cases where it is arguable that the employee actually was dismissed because of her pregnancy, or because of her health during pregnancy, but the employer says the dismissal was due to other reasons. This problem was dealt with in an English case[75] where the Court had to determine whether the woman was dismissed primarily because of her pregnancy, or whether in fact the dismissal was due to her absence for substantial periods due to health problems. Briefly the facts were as follows: The employee, a keypunch operator, was absent for health reasons for considerable periods in 1977 and 1978. Her absences disrupted the work of the department and on February 13, 1979, she was given a written warning that failure to improve her attendance record would lead the employers to consider her suitability as an employee. The employee was absent between March 30 and April 13, a medical certificate showed that she was

suffering from gastro-enteritis. On April 10 the employee's superior asked the employers to consider dismissing her. On April 11 the employee telephoned the employers to say that she was pregnant. On April 17 the employee was dismissed, and on a domestic appeal, that decision was confirmed. The employee complained to an industrial tribunal on the grounds of unfair dismissal, and it was found that the principal reason for her dismissal was pregnancy. This decision was appealed.

The Employment Appeal Tribunal held in favour of the employers. This was primarily because they were of the view that the employers had made a decision to dismiss the employee before it was known that she was pregnant.[76] They held that:

> It does not seem to us that the mere fact they they subsequently knew that this employee was pregnant, yet went ahead with an earlier decision to dismiss because of gastro-enteritis, can possibly be sufficient to show that she had been dismissed by reason of her pregnancy.[77]

Therefore before there can be a finding that an employer had dismissed an employee because she was pregnant, it is essential to show that the employer knew or believed that the employee was pregnant.[78]

This decision illustrates the potential difficulty a female employee could face in situations where pregnancy and dismissal occur at around about the same time. It appears that unless the employee can clearly prove that the decision to dismiss was taken at or after notice of her pregnancy, she will not be able to show that her dismissal was for this reason.

However situations may well arise where the employer has merely discussed the idea of dismissal (as arguably occurred in the case) and then gives actual notice of dismissal after the employee says that she is pregnant. It is submitted that there is a case for arguing that dismissal is indeed on the grounds of pregnancy, as the final decision to dismiss is not taken until after the fact of pregnancy becomes known to the employer. This issue is however one that ultimately only the Courts can decide.

Under section 27(1)(b), the employer cannot terminate the employment during the woman's absence on maternity leave or during the 26 weeks beginning with the day her maternity leave ends.

It should be noted that this paragraph is subject to the defences set out in sections 29 and 30. The effect of these defences on the efficacy and merit of section 27 will be dealt with later.

It is subsection (2) of section 27 that may cause the greatest problems in maternity leave situations. This subsection provides that subsection (1) will not be contravened if the employer terminates the woman's employment:

(a) with her consent; or

(b) where solely on account of her pregnancy or of her assuming with a view to adoption, the care of a child, she absents herself from work more than 6 weeks before the expected date of delivery or in the case of adoption, the date applicable under section 9(b) of the Act.

Before going on to consider the potential difficulties that may arise under this subsection it is relevant to note that under section 25 a pregnant employee is entitled to take a total of up to 10 days' special leave for reasons connected with her pregnancy. This leave is without pay and must be taken before the maternity leave. Therefore when considering the following fact situations which may give rise to dispute, it must be assumed that the woman has already used up her 10 days of special leave.

Fact Situation One:

The employee is having a number of problems with her pregnancy and so is put into hospital for observation for three weeks. This occurs at some stage prior to the six weeks before confinement. Does the employee thereby satisfy the ground of absenting herself from work more than six weeks before the expected date of delivery, solely on account of her pregnancy? She may well do on a strict interpretation of the Act, as the Act does not indicate whether the absence must directly precede and continue on into the six week period, or whether absence at any time will constitute grounds for dismissal. Thus the woman could return to work for some time, and still have her employment legally terminated.

Fact Situation Two:

The woman has a false alarm and is admitted to hospital more than 6 weeks before the expected date of delivery. She is discharged a few days later but does not return to work as the 6 week period has come into operation. Again this is a situation where it is arguable that the woman's actions will enable the employer to terminate her employment under section 27.

It is clearly undesirable that women employees can be dismissed in the above (and analogous) situations. However this could be avoided by classifying the woman's period of absence as one taken for health grounds. Such a classification falls beyond the words of the section, which allow dismissal only if the employee absents herself "solely on account of her pregnancy". Another solution would be to make specific provision in the Act for situations of this kind.

Disputes - the Burden of Proof

Section 28 deals with the burden of proof in any dispute situation. It evenly divides the burden between the employee and the employer. Firstly, the employee must prove that employment was terminated during maternity leave or during the 26 weeks after the end of the leave. Where the dismissal occurred during either of these periods the employer may prove special defences (in sections 29/30).

The Employer's Defences in the Event of Early Dismissal

Under section 29 where dismissal is proved to have taken place during maternity leave it will be a defence if the employer proves:

(a) that s/he was unable to keep the position open because
  (i) the position was a key one, and a temporary replacement was not reasonably practicable, or
  (ii) a redundancy situation has occurred; and
(b) that due to a redundancy situation no substantially similar position was available, and
(c) that the employee's seniority or superannuation rights were not prejudicially affected.

It is to be noted that in a redundancy situation the three factors in paragraphs (a)(ii); (b) and (c) must be present. This is shown by use of the connecting word "and".[79]

In case of dismissal during the 26 weeks period beginning with the day after the end of leave the employer similarly has to prove the matters (b) and (c) above, together with the fact that there was no possibility to appoint the employee to a vacant position substantially similar to that held by her at the beginning of the leave.[80]

The Arbitration Court will inquire fully into the matter, and will hear the parties and consider representations. It should be noted that the decision of the Court will be a final settlement on the parties.[81]

The problem with both these sections is that it enables the employer to dismiss the female employee in effect at any time after the child has been born (or adopted) - if any of the above factors can be proven. The Act however is supposed to secure 26 weeks of maternity leave and if no job is available a following 26 weeks of leave before employment can be terminated.

Thus the reality appears to be that an employee can be dismissed in even the first week or month of her maternity leave (or 26 weeks additional leave) on the grounds that a redundancy situation has occurred. Because the Act says nothing about the redundancy situation having to be current at the time when the employee is due to return to work, it is unlikely that the employee could argue that the dismissal was invalid on the grounds that no redundancy situation was present at the time when she was due to return. Thus it can be seen that the employee's protection whilst on leave is very fragile indeed.

Effectiveness of the Complaints Provisions

Under Section 34, an employee may make a "maternity leave complaint" and have it resolved through a formal complaint procedure if it falls within the following categories:

(a) the woman alleges the employer is not justified in saying her position cannot be held open for her.[82]

(b) The woman alleges that her employer has dismissed her, or given her notice of dismissal either before or after the delivery or adoption, for any of the reasons given in Section 27.

(c) The woman claims the employer has taken some action which adversely affects her maternity leave rights and benefits;

(d) The woman submits the employer has been unreasonable in using the right to either direct her to leave work early[83] or to transfer her to another job before she takes maternity leave.[84]

A complaint procedure must be commenced within 26 weeks after the cause of it arose or within 20 weeks before the expected date of delivery, whichever is the later.

Section 34 appears to give rise to a number of interpretation and practical problems.
The first problem is that the Act provides no definition as to what constitutes "the subject-matter of the complaint." This is clearly vital information as the Act has prescribed a strict time limit within which a complaint must be brought. The starting date therefore, is of great significance.

Examples of the date on which the subject-matter of the complaint may be argued to arise include: the date when the employer makes an oral statement that the employee's position cannot be kept open because the woman occupies a key position; the date when the employee receives a formal notice as required under section 15 that her job cannot be kept open; or the date on which the employee without notice discovers that she could have disputed the employer's statement that her job could not be kept open. Ultimately this matter must be settled by the courts or Parliament.

A second, related problem is that the time limit within which an action must be brought under the section is a comparatively short

one - especially in situations where the employee may be confused about her status (i.e. whether she is dismissed or not), or unsure about her rights of challenging the employer's assertion. It is hoped that where the employee fails to bring an action within the prescribed time limits because of such factors, the courts will exercise their discretion under section 44 to overcome the non-compliance. The courts could also interpret the words : "date on which the subject-matter of the complaint arose" so that they are broad enough to include the latest possible date upon which the cause of action can be said to have arisen.

The final problem is that the process through the complaint proceedings is likely to be lengthy and wearying. The ANZ case provides a good example of this point. For example, Mrs Brown was told in June that she could take maternity leave but could not have her job - but it took two months for her employer to reply to the union's correspondence, and it was not until November that the union could get a date for the first part of the hearing. The complaint was referred to the Arbitration Court in December, and it took six months to get a hearing date. Finally, when the Court heard the decision in May it did not reach a decision until October, meaning that the whole process took a total of 18 months to get through.[85] The trouble hardly seems worth it.

Prospect of Remuneration

Under section 7 an employer is not obliged to pay remuneration at any stage to an employee taking maternity leave, or the 26 weeks' preference leave.

The lack of any remuneration has been seen as one of the major defects of the New Zealand Act. Indeed, Alexander Szakats[86] contends that the greatest weakness of the New Zealand law lies in the "complete lack of providing any monetary benefits for the working mother either in form of a Social Welfare payment or continuation of wages."[87] Further, it is unlikely that the woman could apply for an unemployment benefit during maternity leave - and this is expecially if she has a working husband.[88] Thus some families will suffer unnecessary financial hardship whilst the working mother is on leave.

A comparison of the Act with awards shows that all public sector awards provide for some payment to cover part of maternity leave. Employees represented by the PSA for example will get an equivalent of 30 working days' leave on pay if they complete a further six months' service at the expiration of maternity leave.

In the private sector, a total of 21 awards provide for some kind of remuneration. These include 12 hospital documents which, like the Public Service, provide a lump sum of 30 days' pay after six months' work. Two awards contain provisions for one days pay for every one month's service; one up to a maximum of 60 days, the other to a maximum of 90 days. In addition at least 6 other documents allow paid leave which is debited against a worker's sick leave entitlement . Half of these however require at least six months' subsequent service before payment can be claimed.[89]

It is submitted that remuneration for employees on maternity leave is one of the most urgent changes required to be made to the existing Act. Already a substantial number of employees are entitled to some kind of payment under their awards, and thus it seems inequitable that the statute which is intended to prescribe minimum requirements with respect to maternity leave, can be allowed to provide for no payment at all. However, it must be left to Parliament to rectify this.

CONCLUSION

The task of this paper has been to determine whether the Maternity Leave and Employment Protection Act 1980 effectively protects the rights of women requiring maternity leave. Accordingly, the paper has identified interpretation, policy and operational issues raised in both the Act itself and the ANZ case, which indicate whether adequate protection is indeed guaranteed. A brief discussion of these issues will be undertaken by the writer, as they provide valuable guidelines in determining the Act should be retained in its current form - or rather, drafted afresh.

A number of significant interpretation issues have been identified. For example, it has been revealed that the Act contains several unclear terms, including "substantially similar"[91] and "the date on which the subject-matter of the complaint arose".[92] The presence of such terms has the effect of confusing the employee's position, and also increases the necessity for statutory or judicial intervention - should a dispute occur. Such problems could clearly be avoided by providing guidelines as to the construction of these terms in the Act's Interpretation section.

Other interpretation issues have been raised by the statements of Judge Williamson in the ANZ case.[93] The first of these arises out of his discussion of the factors which determine whether the Act or a collective agreement should apply under section 4. Thus, it has been noted that future courts will have to ensure that the judgment is read in its entirety, so that the Judge's later comments about the right to return to work being the most important consideration, are reflected. The second issue concerns Judge Williamson's narrow interpretation of the term "key position" - which has the effect of prima facie removing protection for those women who are most likely to want to return to work. It has been submitted in the paper that the Judge's interpretation is in fact contrary to the object of the Act, and hence should be amended.

Important policy issues have also been identified in the paper. For example, it has been noted that the Employers Federation handout on the Act does not advise employers of a number of important factors which must be included in the statutory notices. The absence of these factors has been shown to undermine and even damage the rights of the female employee. It has been observed however, that section 44 of the Act can be used by the courts in many cases, to both safeguard the rights of the employee and also sanction the employer. Nevertheless in the case where an employee is not advised that she can return to work early, there appears to be nothing in the Act which will either compensate her for any loss of income suffered, or punish the employer. Accordingly, it is submitted by the writer that the Act should provide sanctions against employers in such situations, if the notice requirements are to be retained.

Another policy issue raised in the paper concerns the lack of provision of any special leave for women[94] suffering health problems connected with pregnancy. Provision for such leave has been shown to be necessary : firstly to prolong the amount of leave actually available under sections 10-13; and secondly to prevent dismissal on the grounds that the employee has absented herself from work "solely on account of her pregnancy" under section 27(2)(b).

One of the most important policy issues discussed concerns the ineffectiveness of the Act to secure either the initial 26 weeks' maternity leave, or the 26 weeks' preference leave, because of the statutory defences to dismissal set out in sections 29 and 30. This state of affairs does not comport sufficiently with the object of the Act as expressed in the title, and hence sections 29 and 30 should at least be amended, if not repealed.

Yet another issue of some importance is centred on the lack of provision for remuneration under the Act. The paper has revealed that this is perceived as one of the major defects of the present Act, especially as all public sector and a number of private sector awards make some provision for payment.

A significant number of operational issues have been raised in the paper. For example, the fact that the woman employee is required to fulfil lengthy and strict time limits before she "qualifies" for maternity leave under the Act, may have the effect of pushing a significant number of women beyond the scope of the Act's protection. As has been demonstrated in the paper there are no such equivalents in either private or public sector awards and hence they appear to be unnecessary. Further even if the woman does"qualify" she will not have an absolute right to choose which maternity leave instrument she will proceed under. This means that the opportunity of dispute could arise every time a woman applies for maternity leave.

The Act provides for five written notices to be given, and this requirement has been identified as one of the major operational defects. A comparison with public and private sector awards shows that only one notice is required, and this is the employee's notice of her (wish to) return to work. Accordingly it is submitted that the other notice provisions should be repealed.

The lack of provision for a period of notice, before a temporary replacement can be dismissed has also been identified as an important operational issue raised by the Act. It has been shown that the Act should prescribe some notice requirement so that the replacement cannot be summarily dismissed. Similarly, section 21 should be altered so that a woman whose position has not been kept open receives substantially more notice than the seven days currently provided by the Act.

The above discussion of the various issues raised by the Act, has revealed that the Act is deficient in a significant number or respects. Although there are a number of positive aspects which to some extent mitigate the obvious balance of the Act against the employee[95], it is submitted that these are not sufficient to warrant the retention of the Act. Accordingly the writer submits that the current Act should be repealed and substantionally over-hauled.

Any new statute should be drafted so that it clearly balances in favour of the woman employee - particularly as it is her rights that are supposed to be protected. Any new statute should also be drafted to avoid the issues and problems raised under the present Act. The writer accordingly submits that a redrafted statute should include: the provision of some remuneration to women during leave; the removal of unnecessary interpretation problems; the clear indication that all women requiring leave should have a prima facie right to return to their position; the deletion of the many unnecessary notice and qualification requirements; the improvement of dispute procedures; and finally the extension of the Act to both parents.

Urgent reform of the Maternity Leave and Employment Protection Act 1980 is clearly required - as it is only through reform that the rights of women requiring maternity leave will be effectively protected.

Footnotes

1. New Zealand Bank Officers' Industrial Union of Workers v. A.N.Z. Banking Group (NZ Ltd) Ltd (1983) NZACJ 803 at 813.

2. Ibid, 813-4.

3. Ibid 814.

4. Provisions made by award, agreement, or contract of employment.

5. Supra n.1.

6. In a collective instrument.

7. Supra n. 1, 809.

8. Note: there were 15 awards which fitted within the above description.

9. Supra n.1, 810.

10. Idem.

11. Idem.

12. Ibid, 811.

13. Idem.

14. Idem.

15. Supra n.1. see p.806 for the definition of "substantially similar position".

16. See s.17 (b)(ii) of the Maternity Leave and Employment Protection Act 1980.

17. Supra n.1, 811.

18. Ibid, 812.

19. Idem.

20. Ibid, 810.

21. Ibid, 820-1.

22. Ibid, 821.

23. Supra n.1 : refer to word : "In the normal case, a pregnant employee would initially make the choice and apply under either the Act or her award." at p.811.

24. L.Rea "Maternity Leave Forever" Broadsheet, December 1983, p.7 at p.8.

25. Supra n.1, 810.

26. It should be noted that the provision of legal rights necessarily opens up the possibility for dispute and litigation, as this is the nature of the law.

27. M. Law "Maternity provisions in awards and agreements" Labour and Employment Gazette, March 1982, p.27.

28. Excluding those awards which apply the Act.

29. See the New Zealand Bank Officers' award (1982 New Zealand Awards, published and issued by the Department of Labour, p. 4610).

30. L. Sissons and M. Law "The hand that rocks the cradle...." Industrial Relations Review, March - April 1980, p.15, at p.16.

31. The equivalent English Act defines confinement as "the birth of a living child or the birth of a child whether living or dead after 28 weeks of pregnancy".

32. Excluding those awards which apply the Act.

33. Note: this figure includes awards which provide two different periods of leave.

34. Section 13.

35. Excluding those awards which apply the Act.

36. See sections 5 and 6.

37. Section 15

38. Sections 8-13.

39. Section 10

40. Section 19

41. Note the words:"prescribed form."

42. It is possible that the Courts could interpret the words "date on which the subject-matter of the complaint arose" as meaning the date on which Mrs X discovered that she could have brought an action to dispute the employer's claim. However it is felt that such an interpretation is unlikely.

43. It may be possible to argue that the employer has terminated Mrs X's employment because of pregnancy in breach of section 27(1). The employer would argue that her employment was actually terminated because there was no possibility of keeping her job open. If Mrs X can prove that this claim is false, the breach would be proved.

44. Section 19(1)

45. See discussion of this point under section 15.

46. A. Szakats "Maternity Leave Legislation : The Timidity of the New Zealand Approach"(1981) New Zealand Journal of Industrial Relations, p.11 at p.19.

47. Idem.

48. This was quoted from personal correspondence sent to the writer by Ms J. Reid, Secretary of the Auckland & Gisborne Shop Employees Union,on 1 May 1985.

49. Supra n.29.

50 From the PSA award.

51. Supra n.1.

52. Ibid, 821.

53. Ibid, 822.

54. Idem.

55. Idem.

56. Section 16(2)(a) deals with the size of the enterprise and s.16(2)(b) deals with the training period or skills required in the job.

57. Supra n.1, 822.

58. Idem.

59. Idem.

60. [1978] I.C.R. 943.

61. Ibid, 952.

62. The writer had telephone conversations with representatives from both the Bank Officers' and Clerical Workers' Unions.

63. Supra n.1.

64. Ibid, 822.

65. Idem.

66. Supra n.48.

67. New Zealand PSA v. State Services Commission (1984). Information regarding this case was provided by K. Kemp from the PSA.

68. Continuing Education Officer, University of Waikato.

69. Supra n.27, 28.

70. Supra n.30, 17.

71. A. Szakats (ed.) Mazengarb's Industrial Relations and Industrial Law in New Zealand (4 ed. Butterworths, Wellington, 1985) p. 912.

72. Supra n.46, 15.

73. Idem.

74. Section 33.

75. Del Monte Foods Ltd v. Mundon [1980] I.C.R. 694.

76. Ibid, 697.

77. Idem.

78. Idem.

79. Section 29.

80. Section 30.

81. A. Szakats Dismissal and Redundancy Procedures (Butterworths, Wellington, 1985) p.121. see also s. 40(3).

82. Sections 15 and 16.

83. Section 13.

84. Section 24.

85. Supra n.24.

86. Dr Jur, Dr Pol (Budapest), LLB (NZ), Emeritus Professor of Law, University of Otago, Associate of the Industrial Relations Centre, Victoria University of Wellington.

87. Supra n.46, 19.

88. Idem.

89. Compare this with the findings of M. Law referred to in footnote 27, at p.28.

90. Supra n.1.

91. See ss. 15 and 17.

92. See s.34.

93. Supra n.1.

94. or their babies.

95. For example the words : "a temporary replacement is not reasonably practicable" in section 16 can be used to hold women's positions open ; section 44 can be used to mitigate the effects of a woman's non-compliance with formal requirements particularly when this is caused by a fault of the employer; and lastly the courts will analyse any redundancy situation carefully when it affects maternity leave.

The paper has referred to the Employers Federation handout : "Maternity Leave and Employment Protection Act 1980 - a guide for employers", on a number of occasions. This can be found in "Employer" April 1981, Supplement.

Appendix One

A detailed knowledge of provisions in private and public sector awards was necessary so that a critical examination of the Act could be undertaken. Accordingly the writer studied:

(a) the 1982 New Zealand Awards (published and issued by the Department of Labour) and;

(b) public sector awards for: PSA members, Department of Education staff, Health Service Personnel Commission members.

The writer first sorted the awards into groups according to their similarity. Then the writer analysed the awards in more depth, determining such factors as: length of service; length of leave given; prospects of re-employment; provisions for payment; service entitlements; notice requirements; and the application of the Act. Percentages were then worked out.

It should be noted that the figures cited in the paper are those attained through the writer's study. The writer acknowledges that unavoidably some awards may have been missed. It is submitted however that this will not alter the validity of the findings as providing a basic guideline as to the types and predominance of provisions in awards.