Determination Number: AA219/06
File Numbers: AEA 1198/05 and 5032780

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Wendy Apaapa (Applicant)
AND	Whitehouse Entertainment Limited (Respondent)
REPRESENTATIVES	Jo Douglas, Counsel for Applicant Philip Kotze, Advocate for Respondent
MEMBER OF AUTHORITY	Dzintra King
INVESTIGATION MEETING	28 March 2006
WITNESS INTERVIEW	1 May 2006
DATE OF DETERMINATION	26 June 2006

DETERMINATION OF THE AUTHORITY

The Claims

There are two matters at issue: a claim that the Whitehouse Entertainment Limited has breached s.49 of the Parental Leave and Employment Protection Act 1987 (PLEPA) and a claim by the Whitehouse that Ms Wendy Apaapa conducted a private business during her employment without her employer's knowledge.

Ms Apaapa says that her employment has been terminated in breach of s.49 (1) (c); and, in the alternative, claims that she has a personal grievance because she has been unjustifiably dismissed. She also says that the respondent has breached the good faith provisions of the Employment Relations Act. The employer contends that there was a genuine redundancy situation and that the defences set out in ss.50, 51 and 52 apply.

Remedies for parental leave complaints lie under s 65 PLEPA. Ms Apaapa seeks:

- lost remuneration for 14 weeks from 1 December 2005 to 14 March 2006 at the rate of $951.58 gross weekly
- compensation of $15,000
- a penalty for the employer's failure to supply a written employment agreement
- a penalty for breach of the Parental Leave and Employment Protection Act

Notification Issues

Ms Apaapa commenced work with the respondent in June 2002. On 27 April 2005 she made an application for parental leave, the leave to start on 1 August 2005. She also applied for a week's annual leave so that her return date would be 14 November 2005. The notice was given three

months before the expected date of delivery. The employer does not dispute that that the requisite notice was given.

Mr Brian le Gros, the managing director, approved her leave application but did not fulfil the requirements of s.36 (1), which imposes an obligation upon the employer, within 21 days after the receipt of the employee's notice, to give the employee written notice stating whether the employee is entitled to take parental leave and, if she is not, the reasons why she is not entitled. There is also an obligation to state whether the employee's position can or cannot be kept open. If it cannot be kept open the employee is to be informed that she may dispute that contention; and she is to be informed of her rights and obligations and that the employer will give her preference for a period of 26 weeks after the date on which the parental leave ends.

Section 38 also imposes a notice obligation upon the employer, including a requirement to give notice, within 21 days of the beginning of the parental leave, of the date on which the parental leave will end and the date on which the employee is required to return to work. This notice obligation was not complied with either.

Section 39 imposes an obligation upon the employee to give notice no later than 21 days prior to the expiry of the parental leave stating that she will be returning to work. The employer denies that Ms Apaapa gave this notice. I find that she did; she faxed it to the employer's premises on 17 October. From the evidence I heard it is clear that the employer's systems were in a state of disorganisation. Furthermore, as soon the employer contended that notice had not been received Ms Apaapa offered to refax the notice. In fact, she made this offer twice and it was rejected both times.

Section 68 deals with non compliance with formal requirements. Section 68 (1) provides that:

> *An employer must not unreasonably refuse to allow an employee to exercise any rights and benefits in respect of parental leave or a parental leave payment that the employee would be entitled to exercise but for an irregularity.*

An "irregularity" includes "omitting to do something required by or under this Act" and the Employment Relations Authority may grant relief. Had I found that ms Apaapa had not given the notification this would not provided the employer with an excuse for terminating her employment. In Lewis v Greene [2004] 2 ERNZ 55 at 67 Shaw J stated that:

…, s68 is also indicative of a policy that procedural requirements in the Act are not intended to be applied so strictly that the protections afforded by the Act are denied by reason of irregularities.

In NZPSA v Rural Banking and Finance Corp [1989] 3 NZILR 350 at 356 Travis J stated:

> *The Act does not appear to provide any sanction for the breach by an employee of s.39 (1) and does not make such a breach a special defence for an employer relating to dismissal under ss.50, 51 and 52.*

The PLEPA

The long title of the Act states that it is "…To protect the rights of employees during pregnancy and parental leave." In Denley v Service Workers Union of Aotearoa (Inc) [1994] 1 ERNZ 863 Goddard CJ noted that parental leave rights are part of the minimum code of employment protections and as such should be interpreted proactive.

Fundamental to the Act is the presumption in ss40 and 41 that an employee's position can be kept open during periods of parental leave. In Manukau City Council v Auckland Local Authorities Officers' IUOW [1988] NZILR 747 at 750 Finnigan J said that:

> *.. if a question about the rights of a worker to parental leave comes before the Court the Court must presume in all situations that the employer has the ability to keep open the worker's position for the worker until the end of the period of leave. That is an obligation imposed upon the Court at the outset. It clearly gives the worker's rights predominance over those of the employer.*

If an employee on parental leave is dismissed s51 provides defences. Section 51 (b) provides a defence if:

> *… the employer terminated the employee's employment on account of a redundancy situation of such nature that there was no prospect of the employer being able to appoint the employee to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of the employee's parental leave;*

In Lewis v Greene Shaw J said that a redundancy situation was to be judged on statutory criteria which created a higher threshold than in a non-parental leave case. She also noted that an employee on parental leave had an inherent disadvantage if the business was reorganised in her absence; and that the policy of the PLEPA was to ensure that this was mitigated by proper notice and a stringent test for making an employee redundant whilst on parental leave.

Events at the White House during Ms Apaapa's period of leave

Due to legislative changes the employer had visits from the Labour Inspectorate. Mr Le Gros told me that his wife, who had become ill, had handled many of the administrative tasks and that in response to the need to discuss the employment status of some of the staff, the need to draw up employment contracts and satisfy legislative requirements regarding holiday pay he employed Mr Philip Kotze to assist him.

It is clear that Mr le Gros made no arrangements regarding Ms Apaapa's work during the period of her leave. Mr le Gros said that when employment contracts and job descriptions were being drawn up by Mr Kotze he did not include Ms Apaapa because he did not know if she was coming back. Had Mr le Gros fulfilled his legal obligations he would have known that unless he heard to the contrary he was to presume that she was returning – he had, after all, agreed that she could take parental leave and had not said that he could not keep the job open. Mr le Gros said he had doubts that she could do the job with a child.

Mr Kotze said he had no instructions regarding Ms Apaapa, that he "knew there was somebody but he had no details". As an HR professional Mr Kotze should have ascertained what the situation was regarding Ms Apaapa. Mr Kotze said the process took about three months and had been concluded by November. What ensued was that Ms Apaapa's work was apparently given to other staff members. I say "apparently" because despite the applicant asking which tasks had been given to whom, and similar questions from me during the investigation, the respondent was unable to provide that information.

Mr Kotze said he did not know what she did and Ms Apaapa's evidence was that when she returned to work she went into the office and there was work for her to do. There was no consultation with Ms Apaapa and she did not know job descriptions were being drawn up and jobs reorganised: she

was not there so she was invisible. If her work was absorbed that occurred solely because she was on parental leave and was not given the opportunity to comment on what was happening.

Ms Apaapa had texted Mr le Gros that she had had the baby and on Friday November 11 she went to the White House to show her baby to some of the staff and said she would be back the following Monday. This information was relayed to Mr le Gros.

12 November

On Saturday 12 November she received a phone call from Mr Kotze, someone she did not know or know of. He told her he was the human resources adviser and was helping Mr le Gros with employment contracts. He said he understood she had been into the White House on the Friday and asked whether she was intending to return to work. She said she was and he asked if she had notified the employer. She told him she had and gave him the number to which it had been faxed. She offered him a copy of the letter.

He said he would try to locate it. On the Sunday he phoned her at 9pm, said he could not find the letter and she again asked if he would like it refaxed. He declined and asked what she was going to do when she returned to work. She asked what he meant and he told her her duties had been absorbed by other people. He said he did not know what she did but other people were doing her duties.

He suggested they meet the following day to have a chat about the situation and they agreed to meet at 8.30am. Ms Apaapa said she would like Mr le Gros to be present. Mr Kotze said he gave her his telephone numbers and advised her to have someone with her at the meeting. Ms Apaapa said the numbers were not provided and that he did not tell her to have someone present. I prefer Ms Apaapa's evidence.

Apparently Mr Kotze had left messages for Ms Apaapa at 10pm on the Sunday and at 7.00 and 7.15 am on the Monday to say that the meting had been postponed. Ms Apaapa did not get the messages as she had switched the phone off so that the baby could sleep uninterrupted.

14 November

Before going to the coffee shop where the meeting was scheduled to be held Ms Apaapa went to her office and informed the cleaner and the receptionist that if anyone was looking for her she was at a meeting with Mr le Gros at the coffee shop. No-one showed up for the meeting. She tried Mr le Gros's mobile and left him a message. She then went to her White House office and asked if there were any messages for her. She did not have Mr Kotze's number and spoke with the cleaner who told her someone named Milan in the upstairs office would have it. She then tried to phone him several times but there was no answer.

When the meeting finally took place in the afternoon Ms Apaapa said it was very clear that it was not a chat about her position but a meeting about redundancy. Mr le Gros, Mr Kotze and Mr McGregor, a manager, were present and at the commencement of the meeting Mr le Gros took a business call from New Caledonia.

In the course of the meeting the mislaid fax was discussed. Ms Apaapa said Mr Kotze told her that the government made women into liars by offering them maternity leave and that all women said they were returning to work when they were not and that women went through the process knowing they never intended to return to work. She said she was shocked at this statement and asked if he was calling her a liar.

When I raised this with Mr Kotze he did not resile from the view expressed. He did, however, maintain that it was Mr le Gros who had made the remark and not him. I do not accept this evidence. Similar assertions appear in the Statement of Reply written by Mr Kotze and it was clear that the views expressed were those held by Mr Kotze. Furthermore, Mr le Gros would not have sufficient knowledge of the legislation nor the requisite degree of sophistry to enable him to form or express such a view. It was quite inappropriate for the employer to imply that Ms Apaapa was a liar.

The respondent does not deny that Ms Apaapa became upset during the meeting and burst into tears. The next day she faxed saying she was taking two days sick leave.

17 November

A further meeting was arranged for 17 November and she was again told that her duties had been absorbed by other staff and they talked about the possibility of redundancy. Mr Kotze and Mr McGregor were present but Mr le Gros was not.

Ms Apaapa's representative was not available for this meeting and Ms Apaapa said she had been advised to record the meeting.

After the meeting she spoke with Mr le Gros and she said he made it very clear that her job had gone and they talked about the possibility of some form of settlement. Ms Apaapa asked him to phone her the following day.

18 November

She did not hear from him and when she did get hold of him he said he was getting ready to go to a party and to call back in half an hour. When she did he said he was running late. She asked if he could think about things and call her on Monday. When she phoned on Monday she was told he was off site all day and he had thought she was going to phone him in the evening. He said if he called it would be late; she said she did not mind but received no telephone call.

21 November

Mr Kotze said he phoned Ms Apaapa to arrange a further meeting. She said she would get back to him. Ms Apaapa said Mr Kotze's call regarding another meeting surprised her as she had previously spoken to Mr le Gros and she suggested that Mr Kotze speak to him to find out where things were at. She did not agree to meet the following afternoon as she expected to hear further from either Mr le Gros or Mr Kotze.

Legal proceedings

By that stage, unsurprisingly, Ms Apaapa had decided that her problems were not being addressed and she contacted her lawyer to proceed with a grievance, which was raised with the employer on 22 November. On 23 November Mr Kotze replied saying her employment had not been terminated. Ms Fitzgibbon applied for urgent mediation as Mr Kotze had indicated the respondent would mediate. A mediation date of 8 December was obtained but by that stage the White House had, unwisely, decided not to participate in a mediation.

25 November

Mr Kotze indicated the employer wanted a further meeting to discuss the possibility of Ms Apaapa being made redundant.

28 November

Ms Apaapa met with them on 28 November accompanied by Ms Douglas. During the course of the meeting Ms Douglas asked a number of questions regarding the disappearance of Ms Apaapa's position and she also sought the time and wages records. Ms Douglas followed up with an email itemising the information sought. This was:

- *The steps taken to protect Wendy's position whilst she was on maternity leave;*
- *When and to whom, her duties were reallocated to other staff members;*
- *Any information, financial or otherwise, supporting the company's decision to disestablish her role;*
- *Wendy's personnel file, including documentation relating to her application for maternity leave, and her time and wages records showing holiday accrual.*

We request this information pursuant to section 4 (1A) (c)Employment Relations Act 2000.

The respondent did not answer the questions nor were the documents sought provided. The process followed by the employer was a façade and its behaviour towards Ms Apaapa was contumelious. Even if I had found that the purported redundancy process undertaken by the employer on Ms Apaapa's return to work was genuine, the failure to supply the information requested would have rendered the procedure unfair.

30 November

On 30 November the employer gave notice that the position was redundant. The letter was written by Mr le Gros, who had attended only one meeting with the applicant. He wrote that:

> *Your lawyer has asked for certain information pertaining to the redundancy. Our employment relations adviser, Philip Kotze, will be responding to that request, separately.*

Mr Kotze faxed Ms Douglas as follows:

> *When and to whom Wendy's duties were reallocated, as well as the reason for disestablishing the role, was explained to you during the meeting on 28 November 2005…. In the meantime I note that at their meeting on 14 November, Brian le Gros explained to Wendy in detail which of the existing staff had absorbed her work.*

Regrettably, these assertions were not accurate.

Decision

What is remarkable about this case is the total failure of the respondent to appreciate and understand the nature of the obligations imposed by the PLEPA. Mr le Gros and Mr Kotze both asked what they should have done. The answer is very simple: keep her job open. Mr Kotze wrote to Ms Douglas on 30 November saying:

> *We are not aware of any legislation requiring*

"steps (to be) … taken to protect Wendy's position whilst she was on maternity leave"

by her employer. If we are mistaken, we would appreciate your elucidation.

There was a total failure to consult with Ms Apaapa at the time the work was being reorganised; and this was not cured by the ostensible redundancy process the employer endeavoured to undertake when it discovered Ms Apaapa was returning to work. In Lewis v Greene Shaw J said the PLEPA created an assumption that an employee's interests would be paramount and that the obligation of the employer to conduct a fair process increased while she was on leave. There was a total abnegation of this responsibility by the employer. Ms Apaapa had no opportunity to comment on what was happening and no opportunity to influence it. In the circumstances it cannot be said the employer is able to satisfy the requirements of s51.

The respondent disestablished Ms Apaapa's position while she was on parental leave. There was no consideration given to the fact that she was still an employee and no attempt was made to consult her about the reorganisation of her position.

What is noteworthy about this case is that once the employer realised that Ms Apaapa was intending to return instead of acknowledging that it had terminated her employment during her period of parental leave, a belated and false redundancy process designed to give the appearance of legitimising the employer's actions was instituted. The sole effect of this was to add insult to injury.

Assertions such as "Wendy is attempting to frustrate the redundancy process" and claims that mediation was simply a delaying tactic did not assist matters at all. In his submissions Mr Kotze said the company could not get Ms Apaapa to participate in the discussions so the employer had no option but to commence redundancy proceedings.

The manner in which Ms Apaapa was treated was totally unsatisfactory. She received phone calls at home during the weekend from a person she did not know. Mr le Gros complained that she had not gone in to see him while she was on parental leave. He said "According to the club managers Wendy hadn't asked to see me or Scott, which left me angry." She was under no obligation to do that. Mr le Gros, however, had obligations of good faith towards Ms Apaapa as his employee and it noteworthy that he did not bother to telephone her himself nor did he make himself available for the meetings with her. I also accept her evidence that he prevaricated regarding getting in touch with her to negotiate a solution to the problem.

Mr Kotze endeavoured to blame Ms Apaapa for not having checked her phone messages prior to leaving for work on the Monday morning. Neither Mr Kotze nor Mr le Gros did her the courtesy of going to the coffee bar when she did not appear at the workplace nor did they leave a message for her at her workplace.

The whole process was conducted in bad faith by the employer. There was an ongoing assertion that her duties had been reallocated during her absence and at the same time there was an attempt to carry out a redundancy process on her return to work.

The employer breached the presumption in the Act that the job could be kept open. It took no steps to ensure that it was kept open and there appeared to be no comprehension of the legal requirement to do just that.

In Manukau City Council v Local Authorities Officers' IUOW [1988] NZILR 747 at 750 Finnigan J said:

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

The employer is in breach of the test for redundancy in the PLEPA and the redundancy was carried out in a unfair manner with no consultation. Given that the employee was not given the opportunity of the disappearance of the position (if indeed it did disappear) any resulting redundancy cannot be seen as genuine.

Claim by Employer

I interviewed Mr Teddy Lim who told me he did regular work on the White House's computers and had done so for approximately the last three years. Some of the work was regular and some was in response to particular situations.

Mr Lim told me he had been checking another computer upstairs and spoke to the new accountant who asked Mr Lim if he could have a look at Ms Apaapa's computer to see what could be done regarding her work on the website. This was in early November. When Mr Lim had a look he found there were two websites. Mr Lim said he did not know which was the company's and which was Ms Apaapa's. Mr Lim said he could not tell where the work had been originally been done or how long Ms Apaapa had spent doing it.

The employer claims that Ms Apaapa had breached her duty of trust and confidence by using the employer's computer and time to run her own business and that it had suffered financial loss as a result. The financial loss was not quantified.

The respondent produced a letter written to Mr le Gros by a person named Stacey. The letter refers to Ms Apaapa talking to the dancers and ladies about diets and selling them diet supplement pills. The letter is dated 30 March 2005. Mr le Gros made no mention of this to Ms Apaapa and did not indicate that he had any problem with it. This was prior to Ms Apaapa notifying Mr le Gros that she wished to take parental leave. Mr le Gros also knew that Ms Apaapa was selling clothing to the dancers and did nothing about this either. By his inaction Mr le Gros condoned these activities.

There was no evidence that Ms Apaapa's use of the internet had caused financial loss to the employer. The evidence was that she worked flexible hours which were often lengthy. Mr le Gros said in his evidence that her hours were flexible and that because of the nature of the business she was required to work early in the mornings and late at night. The company had no internet use policy and the business activity engaged in was not activity that was in competition with that of the employer.

Remedies

Ms Apaapa did not seek reinstatement. This is understandable given her cavalier treatment by her employer once the problem was brought to its attention.

Ms Apaapa produced evidence of her attempts to mitigate her loss by looking for other employment. The respondent is to pay her lost remuneration in the sum of $13,322.12. This is pursuant to s.65 (b) PLEPA.

Ms Apaapa gave evidence of the effect of the dismissal upon her and I am satisfied that she was deeply affected by it; and in a particularly vulnerable situation having a very young child to care for. The respondent is to pay her the sum of $15,000 pursuant to s.65 (c) PLEPA.

Penalties

The claim for a penalty for failure to supply an individual employment agreement was only raised in the applicant's closing submissions. I cannot therefore award a penalty. Neither can I award a penalty for a breach of the PLEPA. The remedy lies in compensation.

Costs

The applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum I reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority