

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 226
5332335**

BETWEEN CHERIE GRANT
 Applicant

AND DEPARTMENT OF LABOUR
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Sarah Blick, Counsel for Respondent

Investigation Meeting: On the Papers

Submissions received: 20 April 2011 from Applicant
 4 and 21 April 2011 from Respondent

Determination: 26 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mrs Cherie Grant, applied for paid parental leave in accordance with the Parental Leave and Employment Protection Act 1987 (“the PLEPA”) on 10 September 2010. Her application was referred by the Inland Revenue Department (“IRD”) to the Respondent, the Department of Labour (“the Department”) in order to clarify her eligibility for paid parental leave.

[2] Mrs Grant was advised by the Department by letter dated 11 November 2010 that she was: “**not eligible** for *parental leave or the taxpayer funded paid parental leave payment*”.

[3] Mrs Grant, as advised by the Department in that letter, has applied to the Authority for a review of that decision pursuant to s. 71ZB of the PLEPA.

[4] The parties agreed to the Authority determining this issue ‘on the papers’ based on the Statements of Problem and in Reply and on submissions from the parties.

Issues

[5] The issues for determination are:

- Whether Mrs Grant was an ‘eligible employee’ such that she was entitled to take parental leave under the PLEPA and consequently entitled to parental leave entitlements;
- Whether there was an irregularity in Mrs Grant’s application such that the Authority has the power to grant relief in respect of the irregularity pursuant to s 68(5) of the PLEPA.

Background Facts

[6] Mrs Grant was employed as a teacher at Tauwhare School (“the School”), and had been employed under a series of fixed term contracts for 6 years. Mrs Grant had not been employed for every term during those 6 years, due to having taken time off during the birth of her first 2 children; however during 2010 she had been employed for the first 3 terms of the academic year.

[7] Mrs Grant, who knew she was pregnant towards the beginning of 2010, had informed Ms Fiona Artis, Principal of the School, that she would be unable to complete the entire year due to her pregnancy.

[8] The expected date of delivery of Mrs Grant’s baby was 16 October 2010 as advised by Ms Grant on the ‘Paid Parental Leave Application for an employee’ form (“the Application Form”) which she had completed and submitted to the IRD. The Application Form was signed and dated by Ms Grant on 10 September 2010.

[9] The section of the application form entitled “*Employer to complete*” and which had been completed by Ms Artis, advised that Ms Grant’s parental leave commencement date was 24 September 2010, which was the end date of Term 3; and this was also the date which had been entered on the section of the form which stated: “*If the applicant is on a fixed-term agreement, enter the completion date of the agreement (if known)*”.

[10] The IRD subsequently referred the application to the Department. On 6 October 2010 Ms Caroline Turner, an employee of the Department, telephoned Mrs Grant and advised her of the referral from the IRD. Mrs Grant informed Ms Turner of her understanding, which was

that she was employed until the end of the school term which would have ended on or about 20 December 2010 i.e. at the end of Term 4, although there was not a signed employment agreement in respect of her employment for that term.

[11] The Department had received a letter in addition to the Application Form. The letter was signed by Ms Artis and dated 22 September 2010. Ms Artis wrote in the letter that :

Cherie Grant (MOE no 483087) has been employed at Tauwhare School as a support teacher in the junior area. Cherie's employment is board funded as we already exceed our staffing entitlement.

We have been unable to guarantee this position for more than a term at a time as it is totally dependent on the school roll at the time, the needs within the junior school and the available finances.

....

However, we were intending to employ her in term 4 once we received the staffing entitlement from the July roll return.

As Cherie is pregnant and due to have her baby we will need to appoint another teacher in this part-time fixed term role.

[12] On 27 October 2010 Ms Turner discussed the nature of Mrs Grant's employment with Ms Artis. Ms Artis confirmed to Ms Turner that, while there was not a fixed term agreement in writing, the intention of the parties had been that, had Mrs Grant not left to have her baby, Mrs Grant's fixed term employment would have ceased on 16 December 2010.

[13] On 29 October 2010 the Department received from Mrs Grant copies of her 'Pay Advice' in respect of her employment at the School and covering the pay periods between the dates of 28 July 2010 to 5 October 2010.

[14] On 5 November 2010 Ms Margaret Dowling, an employee of the Department, contacted Ms Artis who confirmed that Mrs Grant's first fixed term agreement in 2010 had ended on 2 July 2010, and her second fixed term had ended on 24 September 2010. In fact, I note it was Term 2 which had ended on 2 July 2010, and Term 3 which had ended on 24 September 2010.

[15] The reasons for the fixed term agreements had been explained by Ms Artis in her letter dated 22 September 2010. These were that the position was totally dependent on the school roll at the relevant time, the needs within the junior school and the available finances. The re-appointment of Mrs Grant's position each term was consequently dependent on the funding being allocated by the Ministry of Education, this being based on the above noted factors.

Determination

[16] Section 7 of the PLEPA sets out the terms on which a female employee may be entitled to take parental leave:

7

Entitlement of female employee to maternity leave

Except as otherwise provided in this Act, every female employee –

(a) who becomes pregnant; and

(b) who, at the expected date of delivery, will have been in the employment of the same employer for at least an average of 10 hours a week over –

(i) the immediately preceding 12 months; or

(ii) the immediately preceding 6 months, -

shall be entitled to maternity leave in accordance with this Act.

Was Mrs Grant was an ‘eligible employee’ such that she was entitled to take parental leave under the PLEPA and consequently entitled to parental leave entitlements?

[17] To be eligible for parental leave Mrs Grant was required to be an employee. Unless employed, Ms Grant was not eligible to take parental leave in accordance with the PLEPA.

[18] It is clear from Ms Artis’s letter of 22 September 2010 that the school had intended to employ Mrs Grant in Term 4. However this intention was dependent upon the funding allocation, Mrs Artis stating that: “*we were intending to employ her in term 4 once we received the staffing entitlement from the July roll return*”.

[19] Mrs Grant, who returned to work at the school at the beginning of Term 1 of 2011 on 1 February 2011, submitted that her employment was current in that she had taken Term 4 of 2010 as maternity leave, and had returned to work following the birth of her child.

[20] Mrs Grant was employed in Term 1 of 2010 subject to a fixed term agreement. The Letter of Offer of Appointment issued to Mrs Grant for Term 1 is headed “Fixed Term Position” and states:

If you accept this position please note that it is for a fixed term of Term 1.

The reason for your employment being of a fixed term nature and not permanent is that there is currently no allocation for a sixth teacher there. Once sufficient allocation is given by the Ministry of Education a fulltime position will become available and will be advertised and you will be encouraged to apply.

[21] The fixed term agreements between the School and Mrs Grant for Terms 2 and Term 3 of 2010, Term 3 of which ended on 24 September 2010, had not been reduced to writing in accordance with the requirement of section 66 (4) of the Employment Relations Act 2000 (“the Act”). However section 66 (5) makes it clear that this does not affect the validity of the agreement. It is noted that the effect of an employer not complying with s 66 (4) of the Act is only that, pursuant to s 66 (6) of the Act, the employer may not rely on any fixed term agreed:

- (a) *to end the employee’s employment if the employee elects, at any time, to treat that term as ineffective; or*
- (b) *as having been effective to end the employee’s employment, if the former employee elects to treat that term as ineffective.*

[22] Once an employee makes an election, the employer cannot rely on the fixed term to end the employment, which in effect becomes continuous from the date of the election.

[23] Mrs Grant made no election prior to 24 September 2010. Mrs Grant now submits that her employment was continuous from the commencement of Term 2 of 2010 on the basis that she was not supplied with written fixed term agreements for Terms 2 and 3 of 2010, and that she was temporarily absent during Term 4 of 2010 due to the birth of her third child.

Reasonable On-going Expectation of Employment

[24] Mrs Grant’s employment was intended to be fixed term due to the uncertain nature of the funding. However, provided the funding was made available, Ms Artis was clear that Mrs Grant, whom she held in high esteem as a teacher, would be offered continued employment.

[25] The funding allocation for the School was confirmed in January and July of each year. Ms Artis confirmed that the funding allocation for Term 4 of 2010 was known in July 2010, and the funding was available in August 2010.

[26] Both Ms Artis and Mrs Grant were aware that the funding for the teaching position held by Mrs Grant was available in August 2010. Ms Artis agreed that had Mrs Grant not have been pregnant, her employment would have continued into Term 4 of 2010. In actual

fact Ms Artis employed another teacher for that position for Term 4 only, due to Mrs Grant being unable to work that term due to the impending birth of her baby. In due course, Mrs Grant having had her baby, returned to work at the School at the beginning of term 1 of 2011.

[27] I find that Mrs Grant had what Chief Judge Goddard described in *ASTE v Central Institute of Technology*¹ an “ongoing expectation of employment” in Term 4 of 2010. In this situation I consider that Mrs Grant, at the expected date of delivery, was to be regarded as having continuous employment for Term 4 of 2010, such that she met the requirements of s7 PLEPA.

[28] On the basis of this ongoing expectation of employment, I determine that Ms Grant was an eligible employee for the purposes of s7 PLEPA and s 66 (6) of the Act, and thus eligible to take parental leave under the PLEPA.

Was there is an irregularity in Ms Grant’s application such that the Authority has the power to grant relief in respect of the irregularity pursuant to s 68(5) of the PLEPA?

[29] The Authority may grant relief pursuant to s 68 PLEPA in respect of an irregularity, which is defined in the PLEPA as:

- (a) *omitting to do something required by or under this Act or under the alternative provision under which the leave is take;*
or
- (b) *doing something required by or under this Act or the alternative provision under which the leave is taken before or after the time when it is required to be done; or*
- (c) *otherwise doing anything irregularly in matter of form.*

[30] The Department view is that there is no irregularity affecting Ms Grant’s application in respect of s 68 PLEPA.

[31] On the section of Mrs Grant’s application form for paid parental leave which was entitled “*Employer to complete*”, Ms Artis had crossed out 16.12.10 as the date when Mrs Grant’s fixed-term agreement was due to be completed, and had inserted 24.09.10

¹ [1991] 2 ERNZ 464

[32] Having found that Mrs Grant had a reasonable on-going expectation of employment in Term 4, I find that the date of 24.09.10 was not the correct date which should have been entered on that section of the form.

[33] I find that there had been some failure pertaining to the form in which the application for paid parental leave had been made, and that consequently there has been an irregularity for which the Authority may grant relief under s 68 PLEPA.

Summary

[34] Having determined that Mrs Grant was an eligible employee for the reasons outlined above, Mrs Grant is to be paid parental leave in accordance with the PLEPA.

Eleanor Robinson
Member of the Employment Relations Authority