IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 300
5454577

	BETWEEN	SHARON RICHARDSON Applicant
	A N D	DONALD BRUCE THOMAS Respondent
Member of Authority:	James Crichton	
Representatives:	Roland Samuels, Advocate for the Applicant Respondent in Person	
Investigation Meeting:	3 July 2014 at Auckland	
Date of Determination:	14 July 2014	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Richardson) alleges that she has suffered a personal grievance because of disadvantage caused to her by an unjustified action or actions of her employer (Mr Thomas). Mr Thomas denies the allegation.

[2] Properly speaking, this is a claim under the relevant provisions of the Parental Leave and Employment Protection Act 1987 (the 1987 Act) and because of a change in advocate, I was unable to establish from Ms Richardson why the claim was advanced as a personal grievance rather than in terms of the 1987 Act. For the avoidance of doubt, I will consider both causes of action in this determination.

[3] Ms Richardson was employed by Mr Thomas for approximately 16 months as a litigation support assistant. Mr Thomas is the principal of a small legal firm in West Auckland which effectively has three cells, a common law cell, a conveyancing cell and an estates and trusts cell.

[4] Ms Richardson was employed in the common law cell working to two lawyers in what both parties describe as a busy small practice.

[5] When Ms Richardson became pregnant, she told me in her evidence that she immediately disclosed that fact to Mr Thomas and to her work colleagues; the pregnancy was planned and she was delighted that she was pregnant.

[6] On 16 October 2013, Ms Richardson made a formal application for parental leave and there is dispute between the two protagonists as to the nature of a discussion they had at around the time of Ms Richardson's formal notification.

[7] According to Mr Thomas, Ms Richardson told him that she did not wish to return to the employment at the end of her parental leave and that factor determined his response. Moreover, when he indicated to Ms Richardson that her position would not be able to be kept open for her after her parental leave had ended, he got no negative comment from Ms Richardson and so continued to proceed on the basis that she did not wish to return to the employment. This impression remained until the receipt by Mr Thomas' firm, Thomas & Co, of Ms Richardson's letter of personal grievance dated 24 January 2014.

[8] A complicating factor in the understanding that Thomas & Co had of Ms Richardson's circumstances was their belief that Ms Richardson had indicated to Mrs Thomas, the office manager of the practice, that Ms Richardson intended to work for her husband after the completion of her parental leave.

[9] Dealing with that last point first, Ms Richardson acknowledges she had a conversation with Mrs Thomas about the possibility of her assisting her husband in his new business at the end of her parental leave but denies that she ever committed to working for her husband at the end of her parental leave.

[10] Furthermore, Ms Richardson denies ever telling anyone at Thomas & Co (including Mr and/or Mrs Thomas) that she did not wish to return to the employment at the end of her parental leave. She says that was always her wish and always her intention.

[11] Ms Richardson does concede however that she did not feel able to challenge Mr Thomas when he made clear that the firm could not keep her position open and she told me that she had sought professional advice soon after that discussion which

both parties think took place around 16 October 2013 when Ms Richardson formally sought parental leave.

[12] In particular, the difference between the two protagonists is that while Mr Thomas maintained that the two of them had a discussion about the matter, including whether Ms Richardson wanted to come back or not, Ms Richardson says that she simply handed Mr Thomas her letter and there was no more than a peremptory discussion at that point and no discussion at all when Mr Thomas gave her his response which is dated 30 October 2013.

[13] I am satisfied on the evidence I heard that, for whatever reason, Mr Thomas had formed the view that Ms Richardson did not wish to come back to the employment and that therefore, the decision that he took not to keep her job open would not create difficulties for her. He was quite plain in his evidence that had he known she wanted her job back, his attitude might well have been quite different.

[14] While Ms Richardson denied ever giving the impression that she did not wish to come back, I am satisfied on the evidence I heard that that was the message that Mr Thomas got. I cannot imagine why Mr Thomas would have given that evidence on oath if that was not his genuine belief; whether that evidence helps him in terms of the legal test which I must apply is a different question and one that I will return to later in this determination.

[15] What is certain is that Ms Richardson did not take any steps to quarrel with the decision that Mr Thomas had made (not to keep her job open) for some months and it was not until the personal grievance letter arrived that Mr Thomas was disabused of his conviction that Ms Richardson did not want to return to work after her parental leave.

[16] I confess to being puzzled by Ms Richardson's evidence that she consulted with her then advocate soon after the receipt by her of Thomas & Co's notification of 30 October 2013 given that no steps were taken by her, or on her behalf, until 24 January 2014. If the matter had been progressed urgently in say early November, the difficulties that are now apparent might have been avoided.

Issues

[17] As I have already intimated, the claim on Ms Richardson's behalf is somewhat misconceived in that it proceeds on the footing of a personal grievance rather than in terms of the particular provisions in the 1987 Act. It follows that I will need to consider both the cause of action pleaded and the cause of action available to Ms Richardson in terms of the 1987 Act.

[18] Then, I will need to consider the law on which Thomas & Co relies. In essence, the statute creates a presumption that an employee on parental leave will be able to return to their substantive role at the end of parental leave. That presumption may be rebutted if that outcome is *"not reasonably practicable"* because of the *"key position"* held by the employee.

[19] Accordingly, the Authority needs to consider the following questions:

(a) Does Ms Richardson have a personal grievance;

(b) Did Ms Richardson occupy a key position?

Does Ms Richardson have a personal grievance?

[20] Despite the evidence from Mr Thomas, confirmed by Ms Richardson, that there was no suggestion from her of any quarrel with Thomas & Co's decision until the receipt of the personal grievance letter dated 24 January 2014, it is apparent in a technical sense that a personal grievance was raised within time because it was raised within 90 days of the event complained of, namely Mr Thomas' notification to Ms Richardson by letter dated 30 October 2013 that her position would not be available to her at the end of her parental leave.

[21] However, given that Ms Richardson's complaint is with the terms of a response from her former employer under the 1987 Act, the proper claim to have made is a claim pursuant to the 1987 Act. There is a very clear procedure in that statute for such a claim and given that the Authority must apply the law derived from the 1987 Act and judicial pronouncements concerning that Act, to plead a personal grievance simply confuses the issue.

[22] Pursuant to s.122 of the Employment Relations Act 2000 (the 2000 Act), the Authority may make a finding that a personal grievance is of a type other than that

alleged. However, I am satisfied that that provision does not give me the power to make a finding that a claim for personal grievance (as in this case) can be amended by the Authority to be a claim for breach under the 1987 Act. That view of matters is supported by s.56(4) of the 1987 Act which is in the following terms:

> *(4) A parental leave complaint to which this section applies is not a personal grievance within the meaning of s.103 of the Employment Relations Act 2000.*

[23] However, s.68 of the 1987 Act confers on the Authority power to grant relief in the case of various specified irregularities. In particular, I refer to s.68(6) of the 1987 Act which seems to confer a broad discretion on the Authority to grant relief by, amongst other things, waiving any irregularity, confirming the ability of an employee to exercise rights in respect of parental leave or granting other relief as is reasonable subject to such terms as the Authority thinks fit.

[24] Amongst the decided cases in reliance on that or an earlier similar section in the legislation, is *Denley v. Service Workers' Union of Aotearoa Inc* [1994] 1 ERNZ 863 where Chief Judge Goddard said that the rights of an employee under the Act were not supposed to be defeated by technicalities and His Honour was critical of the then Employment Tribunal for dismissing the applicant's claim on the basis it was out of time, the Court saying that the Employment Tribunal ought to have decided the matter on its merits.

[25] Having reflected on the matter, I think the proper course for me to take in the present case is to proceed to consider Ms Richardson's claim as if it were a claim made under the 1987 Act rather than a purported personal grievance.

[26] However, if I am wrong in law in so directing myself, I observe that the remedies the Authority is able to grant under the 1987 Act are broadly on all fours with the remedies that the Authority is able to grant under the 2000 Act and so nothing turns on the outcome, assuming that Ms Richardson is successful.

[27] The short point is that Ms Richardson's claim, properly presented on her behalf, is not a claim for a personal grievance but is a claim for a breach of the Parental Leave and Employment Protection Act 1987 and it should have been argued as such.

[28] That said, the whole ethos of the 1987 Act is to provide an employment benefit for an affected employee which strongly favours protection of the employee's rights. The second purpose identified for the statute in s.1A is to protect the rights of employees during pregnancy and parental leave.

[29] I proceed then for the balance of this determination on the footing that the claim for personal grievance is misconceived and that this should be considered as a claim for relief under the 1987 Act and that I have power to amend the claim by reliance on s.68(6) of the 1987 Act.

Was Ms Richardson's position key?

[30] In Thomas & Co's notice to Ms Richardson dated 30 October 2013, issued in conformity with the provisions set out in the 1987 Act, they advised that the reason that her position was not able to be kept for her at the end of her parental leave was because she held a key position in the organisation and a temporary replacement was not reasonably practicable.

[31] These words are derived from s.41 of the 1987 Act which creates a rebuttable presumption where a position held by an employee who takes parental leave can be kept open. The essence of the decision that the Authority must make in the present case is whether that presumption in favour of Ms Richardson can be rebutted by the evidence from Thomas & Co.

[32] Thomas & Co say that their legal practice is unique in that, first the office is, to quote Mr Thomas himself, *"very tech savvy"* and second in the personal skill level of the staff and particularly the support staff which included the role that Ms Richardson formerly occupied.

[33] Dealing first of all with the technological ability, Mr Thomas told me that it was difficult to find temporary staff with the level of technological ability that the office required. In his view, the only way that the firm's interests could be protected was by having a permanent full time employee in the role who had been subjected to the in-house training regime over a period.

[34] As if to support the technological focus of the firm, Mr Thomas told me in his evidence that he had been asked to present seminars by the New Zealand Law Society

on what might loosely be called the paperless office, that is the concept that a law practice could be run without paper records, at least in part.

[35] While the practise of the law has moved inexorably towards electronic filing of documents in Courts and tribunals and in particular electronic registration of land titles and related instruments, at the moment anyway it is clear that for common lawyers, paper files are still required because of their obligation to have the material to refer to when they are appearing in Court.

[36] Notwithstanding that qualification, Mr Thomas' evidence was that, so far as it was possible, his office was as paperless as it was possible to get. More importantly for our purposes, Mr Thomas presented that situation as unusual, vis-á-vis other law offices of similar size.

[37] Ms Richardson quarrelled with Mr Thomas' assessment of the position; she thought that in her experience (she had worked for six years previously in a conveyancing role at another practice), what was happening at Thomas & Co in the direction of a paperless office was no different from what was happening in other law practices of similar size.

[38] The second aspect of the firm's uniqueness, according to Mr Thomas' evidence, was the personal skill level expected of support staff. Mr Thomas emphasised in his evidence to me that Thomas & Co sought the development of their people by requiring all staff, including support staff, to be authors in their own right and in particular to deal with clients on routine transactions. By way of example, he indicated that it was not sufficient for their purposes that a support staff member would simply take a client's message and have the lawyer ring back with the answer; rather, what was expected was that the support officer would actively engage with the client and provide the answer.

[39] Commenting directly on Ms Richardson's own performance in the role, Mr Thomas made plain that the firm was pleased with her development but that given the time she had worked with the firm, she still had further growing into the role to do. If that is right, that tends to support Mr Thomas' argument that a temporary person, however well versed in matters, would not be as satisfactory as someone who had been inculcated into their way of doing things, for longer.

[40] In the result, believing that Ms Richardson was not proposing to return to the employment at the end of her parental leave, Mr Thomas told me that the firm had made internal changes such that another support staff member who had just completed a legal executive qualification was moved from the estates team to the litigation team, thus taking over Ms Richardson's role and an office junior had been appointed in her stead.

[41] I note at this point that Ms Richardson's evidence about the person now filling what was her role was quite erroneous; in the personal grievance letter she referred to that person as *"the former receptionist of the firm, a person not even previously holding a legal secretary position"*. In fact, the person in question has a better qualification than Ms Richardson herself, that is she has a complete legal executive qualification whereas Ms Richardson does not.

[42] In seeking to apply the law as I understand it, I have considered the test proposed by Pheroze Jagose in his article on the point called *"Babies and bosses: An Examination of s.41 of the Parental Leave and Employment Protection Act 1987"* (1994) 19 NZJIR 131.

[43] In that article, Mr Jagose concludes that an employee is entitled to have their position kept open unless the employer can prove:

(a) That the position is of such a crucial and pivotal nature to the efficient operation of the business that it is required to be filled by a permanent appointment; and

(b) A temporary replacement is not reasonably practicable because of the nature; and

(c) The claim of non-practicability is such as to outweigh maintenance of the employee's position.

[44] I make the point first of all that Thomas & Co is a small law firm. I have already identified that it has three separate cells which, while there is contact between them, it would be fair to say they were to a large extent independent of one another. I think that the very size of the practice is a relevant consideration. As Judge Williamson observed in *New Zealand Bank Officers' IUOW v. ANZ Banking Group (NZ) Ltd* [1983] ACJ 803:

> *… we think the presumption was intended to be irrebuttable in cases where persons with elementary skills were employed in large enterprises and hence did not occupy key positions.*

[45] But the corollary must also be true that where persons with more than elementary skills are employed in small enterprises, they may well occupy key positions.

[46] I incline to the view that Ms Richardson's role in this small cell within a slightly larger but still small firm was a key position simply by virtue of the fact that she was effectively the single assistant for two common lawyers both of whom were busy practitioners. Based on the description offered by Mr Thomas about his expectations of the role, it would seem central to client service to have a person available to assist clients when one or both of the lawyers was in court, on the evidence a frequent occurrence.

[47] But that is not an end of it because even if the position Ms Richardson occupied was a key position, the next question is why Thomas & Co could not find a temporary person to fill Ms Richardson's duties while she was away on parental leave. After all, this is a very common situation. Positions are regularly advertised in all of the usual media for short term engagements because of the permanent occupant of the role being on parental leave. Why is it then that Thomas & Co could not fill the position temporarily?

[48] Mr Thomas told me that he was not satisfied that a temporary person would fit in to his particular work environment, both because of the technological sophistication of the office and because of the level of skill expected of such a person. In the latter connection, as I have already noted earlier in this determination, Mr Thomas told me that he expected a high level of engagement with clients from his support staff and that his experience with temporary staff had not been positive in that regard.

[49] Again, I am inclined to reach the conclusion that a temporary replacement is not reasonably practicable because of the nature of the position, and because of the firm's expectations of the position.

[50] That then leaves me to consider whether, looking at the totality of the evidence before me, the claim of non-practicability (a clumsy word but one that encapsulates the concept), is such as to outweigh the employee's continued access to the position after parental leave.

[51] Here, the Authority must balance the obvious legislative emphasis on the protection of the employee's position against the practical hurdles put up to a retention of the role for the particular employee by the employer. I conclude that the size of Thomas & Co and the importance of this role for the practice militate against a temporary replacement and I conclude that it is not reasonably practicable because of the key nature of the position formerly occupied by Ms Richardson for her role to be available to her again after the end of her parental leave.

[52] I must observe that I think it a shame that there was not a more accurate communication between the principal protagonists when the issue was first canvassed between them. I have already made clear that I am satisfied Mr Thomas genuinely believed that Ms Richardson was not wishing to come back to the employment and his evidence on oath was that that affected his disposition of the matter. Had he known that Ms Richardson wanted to come back, there may well have been some alternative arrangement able to be arrived at. Clearly, despite attempts to suggest otherwise, Mr Thomas was pleased with the work that Ms Richardson did and thought that she was continuing to develop well as an employee. It is a pity that that development could not have continued on some basis the parties may have been able to agree.

Determination

[53] I am satisfied for the reasons I have already advanced that there has been no breach of the Parental Leave and Employment Protection Act 1987.

[54] I regret that I am unable to assist Ms Richardson further.

Costs

[55] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority