Determination Number: CA 65/06
File Number: CEA 297/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Justine Dakers (Applicant)
AND	Dr Anthony Clifford Perry (Respondent)
REPRESENTATIVES	Phil Butler, Advocate for Applicant John Shingleton, Council for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	15 February 2006
DATE OF DETERMINATION	10 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, (Ms Dakers) contends that she has a parental leave complaint pursuant to s.56(1)(b) and (c) of the Parental Leave and Employment Protection Act 1987 (the Parental Leave Act) or in the alternative personal grievances pursuant to s.103(1)(a) and (b) of the Employment Relations Act 2000.

[2] Those contentions are denied by the respondent (Dr Perry). Dr Perry also contends that he is not Ms Dakers' employer; Dr Perry says that Ms Dakers was employed by the group of dentists in which he had his practice.

[3] Mediation was not able to be attempted because Dr Perry refused to participate.

[4] Dr Perry is, as I have just noted, a dentist practising with other dentists in Christchurch. Ms Dakers was Dr Perry's chairside assistant.

[5] The question of whether Dr Perry was, in truth, Ms Dakers' employer is a matter I must determine, but it is appropriate to deal first with a general sketch of the employment history.

[6] Ms Dakers had worked as a chairside assistant in the dental practice that Dr Perry was involved with from 13 June 1998 although it seems that Ms Dakers had not commenced working with Dr Perry until approximately October/November of 1999.

[7] Ms Dakers worked 40 hours a week in this role and was paid $15.37 per hour. Effective 22 November 2004, that rate of pay would have increased to $17.17 per hour.

[8] On 16 September 2003, Ms Dakers applied by letter for 12 months' maternity leave to commence on 14 November 2003. Ms Dakers gave as her return to work date 15 November 2004.

[9] There was no formal response to this request, but the evidence is clear from both parties that the application was approved although there is some dispute as to how long the application was approved for. Again, that is a matter that I will return to later.

[10] Jocelyn Vickery was to fill in for Ms Dakers while she was on maternity leave.

[11] During her maternity leave, on an occasional basis, Ms Dakers attended at the surgery partly for social reasons and partly to assist the surgery to train a receptionist.

[12] There seemed to have been various brief discussions during these visits and it was clear to Ms Dakers that Dr Perry's hours of work were continuing to reduce because he had not enjoyed robust health of recent times. Her evidence was that the reduction in Dr Perry's hours was no surprise to her as his health had not been good for some time, including in the period she left to go on parental leave.

[13] Ms Dakers' evidence was that the prospect of working less than 40 hours a week with Dr Perry suited her admirably because of the new responsibilities which she had with her new baby.

[14] On 5 October 2004, Ms Dakers attended at the surgery to discuss her return to work on 15 November 2004. She says that she spoke with Dr Perry and with Ms Vickery and that she got the impression, more from body language than what was said, that there were difficulties about her return to work.

[15] On 19 October 2004, Dr Perry rang Ms Dakers at home and in his evidence Dr Perry agreed that he said to Ms Dakers that he could not employ her because the job had disappeared. He went on to say that he was hoping that Ms Dakers would have taken an alternative role which had been tentatively offered by Dr Murray, one of Dr Perry's colleagues.

[16] Dr Perry said that his legal advice was that *the job was redundant so he could not take her* [Ms Dakers] *back.*

[17] The impression that this telephone conversation had on Ms Dakers was to make her think that she had been sacked. Her brief of evidence (which she stood by in questioning before me), said that after this telephone discussion she was *gobsmacked by this conversation and afterwards thought he* [Dr Perry] *had just sacked me.*

[18] The following day, Ms Dakers rang Dr Perry back. Ms Dakers says that she asked Dr Perry whether he was indeed sacking her and her recollection of events is that Dr Perry said that he was.

[19] There is no dispute that this second telephone conversation took place but there is dispute about what was said. Dr Perry denies confirming that he had sacked Ms Dakers although he does confirm her recollection that he had referred in the conversation to having obtained legal advice. What Dr Perry told me in answer to my question about what he said to Ms Dakers was as follows: *I had obtained legal advice that seeing the job description had changed dramatically I wasn't obliged to employ her*.

[20] Ms Dakers then sought mediation assistance from the Mediation Service of the Department of Labour and on 4 November 2004 was told by the Mediation Service that Dr Perry refused to attend and so they were unable to take the matter any further.

[21] Immediately prior to that, Ms Dakers says that she phoned Dr Perry on 27 October 2004 and told him that if the difficulty about her returning to the workplace was about the particular days that she wanted to work, she would gladly fit in with the days and hours that he was now working in order to accommodate that difference. Dr Perry has no recollection of having received that

telephone call and says in his evidence that had he received it, that would have resolved the matter to his satisfaction. However, that statement is frankly inconsistent with other evidence of Dr Perry to the effect that he was interested in trying to preserve the rights of Ms Vickery who had worked for the surgery for approximately 30 years and who he clearly felt some sense of obligation to.

[22] However, Ms Vickery had made it absolutely clear to Ms Dakers that she knew and understood that she (Ms Vickery) was only filling in for Ms Dakers while the latter was on maternity leave and that when Ms Dakers wished to return, Ms Vickery would relinquish the role that she had as Dr Perry's chairside assistant.

[23] It seems to follow that Dr Perry's apparent desire to protect Ms Vickery's interests was not necessarily congruent with what Ms Vickery was telling Ms Dakers.

[24] In any event, on 5 November 2004, Ms Dakers asked Dr Perry to give her the reasons for her being dismissed and Dr Perry sent her a copy of a letter that he had written to the Mediation Service, ostensibly to explain why he was not prepared to participate in mediation.

[25] Matters then proceeded by a somewhat circuitous route to the investigation meeting. During the process of getting the matter before the Authority, there were a number of occasions when Dr Perry's legal advisers indicated to Ms Dakers' representatives that an offer of settlement was forthcoming or that mediation or investigation would be unnecessary because the matter was capable of being resolved by agreement. Despite these statements which were conveyed in explicit terms in correspondence to Ms Dakers' representative, no settlement offers were forthcoming, nor were there any proposals to negotiate a resolution as had been suggested.

[26] In his evidence before the Authority, Dr Perry seemed puzzled by these exchanges suggesting the matter was to be settled and indicated that at no stage had his then representatives indicated to him that they were making those statements in his name. Indeed, Dr Perry gave unequivocal evidence that he had at no time authorised his then representatives to make any such settlement proposals.

[27] Dr Perry also claimed that he had not seen significant items of correspondence which were pivotal to the progressing of the matter until the preparations were being made for the Authority hearing and he was being advised by new counsel.

Issues

[28] A preliminary issue which was dealt with at the investigation meeting concerns the admissibility of a letter dated 3 November 2004 written by Dr Perry and addressed to the Mediation Service of the Department of Labour. The matter was dealt with orally by me at the investigation meeting but for the sake of completeness I need to refer to the matter and record the decision that I made.

[29] The other issues are germane to the employment relationship problem raised by Ms Dakers and can be variously described. For my purposes, I propose to deal with the issues under the following headings:

(a) Who was Ms Dakers' employer?

(b) The scheme of the Parental Leave Act

(c) Was Ms Dakers' dismissed?

(d) Is the section 51 defence available to Dr Perry?

(e) Remedies

Admissibility of evidence – the mediation letter

[30] By facsimile dated 13 February 2006 (two days before the investigation meeting), Mr Shingleton, counsel for Dr Perry, noted that he proposed to raise a question about the admissibility of the letter that his client wrote to the Mediation Service of the Department of Labour on 3 November 2004.

[31] At the commencement of the investigation meeting, I invited Mr Shingleton to address that issue and he then made his application for that letter to be excluded from the evidence before the Authority. That application was opposed by Mr Butler, the advocate for Ms Dakers, and I subsequently indicated to the parties that I proposed to admit the letter because I did not consider that it attracted the privilege to which Mr Shingleton referred.

[32] In the result, Mr Shingleton helpfully facilitated a brief discussion with his client, Dr Perry, the effect of which was that my ruling seemed to be accepted by Dr Perry as being reasonable in all the circumstances. I observe that Dr Perry's acceptance or apparent acceptance of my ruling was a function of the robust debate between the representatives and the Authority with respect to the issues.

[33] For the sake of completeness, I refer briefly to that debate now. Mr Shingleton's submission essentially was that, as the letter in question had been written by a party to the Mediation Service, it attracted the privilege attaching to documents written in contemplation of mediation and ought not therefore be disclosed in an open forum such as an investigation meeting of the Authority.

[34] Mr Butler, for Ms Dakers, pointed out that the document in question had, by Dr Perry's own hand, been subsequently provided to his client, Ms Dakers, as the response to Ms Dakers' request for the reasons she was dismissed from her employment and in consequence, even if privilege had existed, it had been waived by Dr Perry's own conduct.

[35] Mr Shingleton conceded that if his argument was sustained and the document was indeed privileged, then it followed that Dr Perry had not complied with the statutory obligation to give reasons for the dismissal when asked because the only reasons that he had provided were by way of a copy of the offending letter.

[36] In reaching the decision that the document was not privileged, I relied on two matters, the first and most important of which was the fact that Dr Perry had provided a copy of the letter to Ms Dakers without more. It seems to me to follow that, in those circumstances, even if there had been privilege attaching to the document in principle, that privilege must have been waived by Dr Perry's subsequent use of the document for an entirely separate purpose.

[37] I was also influenced by the conclusion that I reached, which I fancy may be more controversial, namely that the privilege as I understood the legal position attached to documents which were written in contemplation of a mediation. It seemed to me that in the particular factual circumstances of this case, this was a letter certainly written to the Mediation Service but could not in any sense be seen as a letter written in contemplation of mediation because the letter makes clear in the first paragraph that Dr Perry refuses to attend mediation. It follows that the very purpose of the letter is not in fact to advance a mediation but indeed to indicate why the party writing the letter did not consider mediation was appropriate for him to participate in.

Who is the employer?

[38] Before turning to examine the question proper, it is not inappropriate to ask whether the answer to this question matters. Ms Dakers thought she was employed by Dr Perry. Dr Perry initially did not raise the point, although by the time the matter came to the Authority for an investigation meeting, Dr Perry was arguing, through his new counsel, that he was not the employer and that the employer was the group of dentists practising together in a form of association, perhaps akin to but certainly not congruent with a partnership.

[39] If Dr Perry is in truth the employer, then he is correctly cited as the respondent in these proceedings. Even if he is not the employer, it seems to me very plain that the doctrine of the undisclosed principal allows Ms Dakers to bring her claim against Dr Perry as a representative of the undisclosed principal being the group of dentists which includes Dr Perry.

[40] The evidence about the nature of the employer goes both ways. There is a Deed of Association. The only copy made available to the Authority is marked draft but in the clause relating to employment, there appear to be two classes of staff contemplated. *Joint staff* may only be engaged, dismissed or have their terms and conditions of employment renegotiated by the unanimous consent of *the parties* and *the parties* are earlier defined as Drs Halliwell, Murray and Perry.

[41] Where such joint decisions are taken, they are to be minuted by all parties. That minuting process contemplated a minute book as a written record of decisions made at management meetings which were supposed to be held at least once a month.

[42] The clause relating to employment in the Deed of Association goes on to provide that there is no prohibition on individual parties (that is to say, any one of the dentists individually), making their own employment decisions in respect of staff employed *within their individual practice*.

[43] There was no evidence before the Authority that would confirm any joint employment decisions were made by the three parties to the Deed of Association but I observe that the absence of the correct documentation is not conclusive.

[44] Ms Dakers' own evidence is that she believed that she was employed by Dr Perry and there is some supporting evidence to suggest that the other chairside assistants (or at least some of them) might also have seen themselves as individually employed by a particular dentist.

[45] Ms Dakers clearly was influenced in her view (that she was employed exclusively by Dr Perry), by the apparent change in the structure of the practice in October/November 1999 when she commenced her association directly with Dr Perry. When she applied for parental leave, her letter of application is clearly marked for Dr Perry. Interestingly enough, she gave the letter of application to the practice manager who presumably is employed by all of the parties to the Deed of Association.

[46] Dr Prior, who was previously a dentist working in the practice, gave clear evidence that in his opinion the chairside assistants were employed by the individual dentists with whom they worked. Conversely, Dr Murray, one of the named parties to the Deed of Association, gave contrary evidence.

[47] Ms Dakers gave evidence that Ms Vickery (the chairside assistant who replaced her with Dr Perry while Ms Dakers was on maternity leave) had *resigned* from her employment with Dr Prior who left the practice about the time that Ms Dakers went on parental leave, and that

Ms Vickery was then able to work with Dr Perry. This evidence is contradicted by Ms Vickery's own evidence which was to the effect that she was employed by the practice.

[48] If Ms Dakers was not Dr Perry's employee then the answers given to questions by one of Dr Perry's professional colleagues make no sense at all.

[49] In answer to questions, Dr Murray (whose veracity I have no reason to doubt), said she was unaware there had been no formal meeting between Dr Perry and Ms Dakers about the alleged restructuring, unaware there had been no formal communication about the alleged restructuring, was not aware that Dr Perry had refused mediation and thought that … *what was happening was something between Dr Perry and Justine* (Ms Dakers).

[50] It is clear that Ms Dakers was paid by the practice rather than by the individual dentist who employed her, but that is not determinative of the employment relationship as Mr Butler rightly observes in his submissions; it is perfectly conceivable that such an arrangement would be entered into for administrative ease and that *each dentist is then billed for the associated costs*.

[51] On balance, I incline to the view that Ms Dakers was employed by Dr Perry and that for all practical purposes Dr Perry was her employer. I accept that the evidence is equivocal, but I am encouraged to reach this conclusion by the practical realities that Ms Dakers was effectively dealing with Dr Perry in respect of her departure from the workplace and her return to the workplace.

[52] Even if I am wrong about that, clearly it is still perfectly proper for Ms Dakers to direct her employment relationship problem to Dr Perry as the representative of the employing entity given that Dr Perry was the person from the employing entity who Ms Dakers had the direct working relationship with.

[53] Either way, I am not persuaded that any different consequences would flow were Dr Perry not to be held to be Ms Dakers' employer because of the effect of the doctrine of the undisclosed principal.

[54] In my opinion, the most likely explanation for the apparent confusion evidenced by many of the witnesses on this subject, including the two principal protagonists, is that some of the staff were in truth employed as a matter of practical reality by the individual dentist and some by the practice as a whole. Such a result is absolutely consistent with the express words of the Deed of Association which contemplates two classes of employment, one a joint class of employment and one an individual kind of employment.

[55] It would, for instance, be strange for a practice manager role, or a receptionist role, to be individually employed and one would expect that those jobs would be filled by employees who were jointly engaged.

[56] Conversely, the chairside assistants would, in the nature of things, develop close working relationships and bonds with the dentist for whom they worked directly.

[57] The fact that there are no records kept by the practice about joint decisions in respect of employment simply suggests that like many professional practices, record keeping in respect of staff matters maybe less of a priority than caring for the patients or clientele of the practice.

The scheme of the Parental Leave Act

[58] Before considering the factual matrix in the present case, it is necessary to briefly sketch the scheme of the statute.

[59] For our purposes, it starts with a rebuttable presumption in s.41 of the statute that the employer is able to keep open for the employee the position which the employee occupied at the point at which the employee went on parental leave.

[60] That presumption is able to be rebutted only because of either (a) the circumstance where a temporary replacement employee is not reasonably practicable; or (b) because a redundancy situation occurs.

[61] If an employee is dismissed during a period of parental leave, as is alleged here, then s.51 of the Act provides a defence based on the two legs of s.41 (a temporary replacement not being reasonably practicable or the occurrence of redundancy) provided that situation occurred after the employer's notice to the employee at the beginning of parental leave. Further, the existence or otherwise of the trigger event (temporary replacement not practicable or redundancy) must *be judged on statutory criteria which I conclude create a higher threshold for an employer to meet than in a non-parental leave case* to use the words Her Honour Judge Shaw used in the leading case of *Lewis v. Greene* AC 7A/04.

[62] It follows from this brief survey of the relevant statutory provisions that I am required to pose and answer a number of questions. I consider that the questions I need to consider are as follows:

- Was there a dismissal?
- Is the defence in s.51 available to the employer?
- Was there adequate consultation?

Was Ms Dakers dismissed?

[63] We recall that Ms Dakers' evidence, which is not challenged, was that she called into her workplace on 5 October 2004 to discuss a return to work and that she got an uneasy feeling from the discussion that she had with Ms Vickery and with Dr Perry.

[64] Dr Perry's evidence is that he rang Ms Dakers on 19 October and he agreed in answer to a question from me that he said he could not continue to employ Ms Dakers because the job had disappeared. He said to me that he felt he was not obliged to take her back and admitted that he could have used those very words.

[65] Ms Dakers felt that she had been fired as a consequence of that conversation and, at the suggestion of her partner, she rang Dr Perry the following morning to explore the position further. Ms Dakers says that Dr Perry reiterated to her in that second conversation that indeed she had been fired although Dr Perry denies that he said anything of the kind. What is clear, on Dr Perry's own evidence, is that he told Ms Dakers he had obtained legal advice that, seeing the job description had changed dramatically, he was not obliged to continue employing her.

[66] In my opinion, there is no doubt whatever that, whether Dr Perry used the word *dismissal* or the word *fired* or not, the only proper conclusion that Ms Dakers could have reached from the summation of these two telephone discussions was that her employment had ended, apparently as a consequence of her position having become redundant.

Is the section 51 defence available to Dr Perry?

[67] Mr Shingleton invites me to reach the conclusion that the nature of the position which Ms Dakers occupied prior to going on parental leave was significantly and substantially different

from any position which she might be offered with Dr Perry after the end of her parental leave and that in consequence, the position that she had occupied had in fact gone.

[68] This analysis relies on the evidence about the position that Ms Dakers left and in particular relies on the contention that, because Ms Dakers was employed for 40 hours a week when her parental leave started, that was the only position that she could legally aspire to at the end of her parental leave.

[69] I do not think that that is the position at all. Ms Dakers' own evidence was that in the period immediately prior to her going on parental leave, Dr Perry was reducing his hours as a consequence of less than robust health. Further, Ms Dakers is absolutely clear that she never had it in her contemplation that Dr Perry would be offering her a 40 hour week position to return to. Indeed, her evidence is clear that she sought a part-time position which, on Dr Perry's evidence, was the kind of position that he had to offer.

[70] In order for the employer to reach the bar constituted by s.51, it must satisfy the tribunal that there is no prospect of the employee being appointed to a position which was vacant and substantially similar to the position that the employee left.

[71] In order to assess the employer's conduct here, the Authority needs to consider first whether there was a vacant position for Ms Dakers to be appointed to. On the facts, the answer to that question would seem to be affirmative. Ms Vickery gave clear evidence that she understood she was moving into the position Ms Dakers had occupied prior to going on parental leave and Ms Vickery's evidence was clear that she understood she was in that position until Ms Dakers returned. Quite clearly, she was temporarily filling an otherwise vacant position to preserve the status quo.

[72] Accordingly, I find that there was indeed a vacant position which the employee could have been appointed to.

[73] Next, the Authority needs to consider whether there was a substantially similar position to the one that Ms Dakers had previously occupied. The test here is an objective one.

[74] The evidence is clear that the position that Ms Vickery was occupying was, with one exception, precisely the position which Ms Dakers had vacated. The only difference was that the hours that Ms Vickery was working were different from the hours that Ms Dakers had previously worked.

[75] However, Ms Dakers evidence (which I accept) was that she understood when she left the workplace that Dr Perry's hours were reducing as a consequence of his not keeping good health so the reduction in hours came as no surprise to her.

[76] Indeed, she welcomed the reduction in hours because with the new obligations that she had as a mother of a young baby, she did not wish to work a full span of hours.

[77] Finally, the Authority needs to consider whether there was in truth no prospect of the employee being appointed.

[78] As Judge Shaw makes clear in *Lewis* (supra) this is a high threshold.

[79] The evidence is overwhelming that there was every prospect that Ms Dakers could be appointed and had there been any semblance of consultation, an appointment would have followed.

[80] Indeed, even Dr Perry admits in his evidence that the only issue separating the parties was the question of what hours Ms Dakers could or would work but the complete absence of consultation meant that that was unable to be agreed.

[81] The policy of the statute places the employee's interests above those of the employer. It follows that if consultation is important in redundancy situations generally it is doubly important in parental leave situations.

[82] In those situations, the employee is by definition more vulnerable and the whole purpose of the statute is to try to redress that balance.

[83] It is clear that in the instant case, there was, in truth, no consultation at all. Dr Perry made his decision without any input whatever from Ms Dakers.

[84] In essence, as we have seen, Ms Dakers attended at the workplace on 5 October 2004 to talk about her return to work, Dr Perry rang her on 19 October to tell her that her job had disappeared and there was a return telephone call from Ms Dakers to Dr Perry on 20 October which confirmed the thrust of the telephone call the previous day.

[85] There was absolutely no opportunity provided by Dr Perry for Ms Dakers to engage with him in a discussion about the alleged redundancy situation. Dr Perry had plainly formed a view about the best outcome for him and Ms Dakers was not to be consulted at all.

[86] The difficulty for Dr Perry seems to have been his apparent willingness to prefer the interests of Ms Vickery at the expense of Ms Dakers, despite Ms Vickery's obvious understanding that she was simply relieving in the position until Ms Dakers returned. Dr Perry simply does not seem to have grasped at any point that, as Ms Dakers' employer (or as the representative of the employer), he had a statutory obligation to Ms Dakers which he was duty bound to fulfil subject only to the narrowest of exemptions.

Remedies

[87] Ms Dakers claims lost wages and compensation for the general hurt together with compensation for the loss of the benefit that would have accrued to Ms Dakers on and from 30 November 2004 when the hourly rate that the position she previously occupied went from $15.37 to $17.17 per hour.

[88] Given the findings that I have made, Ms Dakers is entitled to lost wages and I consider that these should be computed on the footing that, were there no breach by Dr Perry, Ms Dakers would have returned to her substantive position as at 15 November 2004 and shortly thereafter from 30 November 2004 commenced receipt of the increased hourly rate.

[89] I consider that Ms Dakers should receive those lost wages from the date of her return to Dr Perry's employment down to the end of April 2005, a period of five months or thereabouts less the sum that Ms Dakers earned from her new employment at The Warehouse.

[90] The amount generated by this calculation is a total of $9,162.17 being the $10,434.73 paid to Ms Vickery for the same period less the amount earned by Ms Dakers from her new employment.

[91] I need to deal with the claim by Dr Perry that Ms Dakers has not mitigated her loss and in particular has not sought alternative employment as a chairside assistant for another dentist.

[92] Ms Dakers' evidence, which I accept absolutely, was that she was devastated by her treatment by Dr Perry, not only by the dismissal but also by Dr Perry's behaviour after the dismissal, either of his own motion or through his then legal advisers. I refer here in particular to Dr Perry's adviser's claims that the matter was about to be the subject of a settlement offer and to the very ill-advised action of Dr Perry in suggesting to Ms Dakers that he would provide her a reference if she dropped her claim.

[93] I accept Ms Dakers' evidence that she was traumatised by what had happened to her and felt unable to go back into the sort of workplace where she felt she had been so humiliated. In all the circumstances, I am not persuaded that Ms Dakers could have done anything other than take the steps that she did to find alternative employment.

[94] I can only express the hope that the determination of this matter by the Authority will enable her to move on with her life in a more positive and happy fashion.

[95] On the matter of compensation, Ms Dakers seeks a substantial award of compensation, both for general hurt, humiliation and injury to feelings and in respect of the loss of the benefit of the higher rate of pay that she would have received had she been able to resume her role. I have given earnest consideration to this matter and reached the conclusion that a substantial award is appropriate, although not at the level perhaps that Ms Dakers is claiming. I direct that Dr Perry is to pay Ms Dakers the sum of $12,500 by way of compensation under s.65(b) of the Parental Leave and Employment Protection Act 1987.

Determination

[96] I have decided that Dr Perry has breached his obligations as an employer under the Parental Leave and Employment Protection Act 1987 and I direct that he is to pay to Ms Dakers the following sums:

(a) $12,500 under s.65(b) of the Act; and

(b) $9,162.17 gross as a contribution to Ms Dakers' lost wages.

Costs

[97] Costs are reserved.

James Crichton
Member of Employment Relations Authority