

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 56/09
5077529**

BETWEEN RUSSIA FA'ALILI
 Applicant

AND ALLIED WORK FORCE LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Mark Tolich, Counsel for Applicant
 Anne Paterson, Counsel for Respondent

Investigation Meeting: 14 October 2008

Submissions Received: 17 October 2008
 22 October 2008
 24 October 2008

Determination: 19 February 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Miss Russia Fa'alili ("Ms Fa'alili") seeks formal orders from the Authority in settlement of an alleged parental leave complaint. Allied Work Force Limited ("Allied") denies Ms Fa'alili has a parental leave complaint.

[2] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[3] Allied supplies casual labour hire services to various work sectors.

[4] Miss Fa'alili commenced employment with Allied in 2003. She was appointed a branch manager at Penrose in April 2005. The terms of Ms Fa'alili's employment were recorded in a written individual employment agreement ("the IEA").

- [5] In March 2006 Miss Fa'alili learned she was pregnant.
- [6] From 7 April 2006 Ms Fa'alili took one months sick leave due to illness associated with her pregnancy.
- [7] Ms Fa'alili completed an application for paid parental leave dated 10 April 2006.
- [8] By email of 27 April 2006, Allied informed its staff of Ms Fa'alili's replacement while she was on maternity leave.
- [9] Ms Fa'alili wrote to Allied's general manager northern region Mr Gordon McMahon ("Mr McMahon") by letter dated 2 May 2006 as follows:-

Unfortunately I am still quite ill with my pregnancy and it doesn't seem to be easing up as I get closer to my 3 month mark. To make it easier on the company, I have decided to go on the 12 month maternity leave as of Monday 8th May. I apologise for any inconvenience this may cause but appreciate that you understand, the health of my baby and myself come first. I will keep you informed of any progress and look forward to when I can return to work. Thank you for understanding.

- [10] Ms Fa'alili was granted parental leave by Allied to commence as from 8 May 2006.
- [11] On 14 May 2006 Ms Fa'alili suffered a miscarriage. She and her partner resolved that she would return to her work at Allied.
- [12] Ms Fa'alili telephoned Allied's human resources manager Mr Gregory MacDonald ("Mr MacDonald") on 22 May 2006 to arrange to meet with him to discuss her return to work following her miscarriage.
- [13] I make the following findings as to the discussion that took place on 23 May 2006. I find Ms Fa'alili and Mr MacDonald met at café near the Allied head office. I reject Mr MacDonald's evidence that Ms Fa'alili said she did not wish to return to her role as Penrose branch manager. I reject his evidence that Ms Fa'alili said she did not wish to work for Allied anymore.

[14] I prefer Ms Fa'alili's evidence that she asked if she could return to her job but initially on reduced hours. I find Mr MacDonald told Ms Fa'alili she could not work reduced hours because that would not be fair to the other branch managers who were still working 12 hours shifts. I find Mr MacDonald told Ms Fa'alili that due to her having commenced parental leave earlier, Allied had had to reshuffle. He said that the Penrose branch was in survival mode and that to put Ms Fa'alili back into the branch as manager and change the temporary appointment's position would cause more disruption. I find MacDonald said Ms Fa'alili could not go back to her former position as the Penrose branch manager but she could return to work on small projects on the same salary. Ms Fa'alili did not commit herself and said she would think the situation over. Ms Fa'alili casually said she may not be working after Christmas as she and her partner were expecting to have a baby. They agreed to meet again.

[15] Ms Fa'alili met Mr MacDonald and Allied's south Auckland area manager Mr Terry Edgecumbe ("Mr Edgecumbe") at Allied's Penrose head office on 26 May 2006. Ms Fa'alili was not offered a return to her former position. The parties could not agree as to what role Ms Fa'alili could perform but she reluctantly said she would return to work on small projects. Mr Edgecumbe said he did not wish to give her that option anymore because she might not be there after Christmas. The meeting ended with Mr MacDonald undertaking to find a role which gave Ms Fa'alili reduced hours doing special projects. He told Ms Fa'alili he would write something up when she returned to work on 6 June 2006.

[16] On 6 June 2006 Ms Fa'alili arrived for work at 8.30am. Mr MacDonald presented Ms Fa'alili with a fixed term employment agreement showing Ms Fa'alili as "Projects Coordinator". I accept Ms Fa'alili's evidence this was the first time the document was presented to her. I find Mr MacDonald did not explain the document to Ms Fa'alili nor did he give her an opportunity to take advice about the fixed term employment agreement. Both parties signed the fixed term employment agreement.

[17] Ms Fa'alili's service with Allied ended on 31 August 2006 in accordance with the expiry date of the fixed term employment agreement.

The merits

[18] The fixed term agreement employed Ms Fa'alili from 6 June 2006 until 31 August 2006.

[19] Ms Fa'alili tells the Authority that at the time she signed the fixed term employment agreement she was not in the correct frame of mind. She says she was not in a position to make completely rational decisions.

[20] Ms Fa'alili says she was traumatised by her miscarriage. Indeed she could not maintain her composure as she recounted her experience to the Authority. It is certainly most likely because of her circumstances that Ms Fa'alili was not best placed to protect her own interests. An email she wrote to Mr MacDonald on 16 June 2006 suggests Ms Fa'alili was in a delicate state:-

Just thought I should let you know, after everything you did for me while I was away and coming back of course. I e-mailed Gordon yesterday, to let him know that I was interested in running the Airport branch. You're probably thinking what is wrong with me and I'm confusing you now but ... the last couple of days talking with various people and my partner of course ... I see a lot of potential and new challenges in running the Airport branch. I know its back to 12 hours but talking about it with Vaga, my partner, we both agreed that it should be fine. I know I said I'll only stay until the end of the year but I've seriously thought about it and I'm willing to stay and give it a go ... and I will give it my best. Of course I know they probably have other people in mind but that's okay too ... I'd never know unless I tried ... so yeah ... do you think I'm crazy?

[21] Ms Fa'alili appears to have failed to appreciate the limited tenure of her employment that she had committed herself to only days before. She tells the Authority she was "under the assumption there would be something else after that".

[22] When Allied granted her parental leave, Ms Fa'alili was entitled to have her employment protected. By section 41 of the *Parental Leave and Employment Protection Act 1987* ("PLEPA") Ms Fa'alili was entitled to a presumption that Allied would keep open her employment. Additionally, by section 45 of the PLEPA, Ms Fa'alili was entitled, because she had suffered a miscarriage, to end the period of parental leave she had been granted. The statutory suspension of her employment would then end.

[23] I accept that Ms Fa'alili made a statement that she may not stay after Christmas. But that was many months away and until then she was entitled to continuing

employment until she herself decided that did not suit her. As well, she was suffering considerable trauma. Sensitivity and caution were required as she considered her future. Allied ought to have appreciated this dynamic.

[24] I find that Allied had no appreciation of Ms Fa'alili's statutory entitlement to choose to end her parental leave consequent upon her miscarriage.

[25] I find Allied failed to keep open Ms Fa'alili's employment as Penrose branch manager because Mr MacDonald told her she could not return. I find that Ms Fa'alili's position as Penrose branch manager still existed as at 23 May 2006 and was being carried out by a temporary replacement. I also find that Allied failed to honour Ms Fa'alili's statutory right to end her parental leave because of her miscarriage. Allied's actions were in breach of the PLEPA. It was unfair and unlawful of Allied not to permit Ms Fa'alili to return to work to her protected employment, after her miscarriage.

[26] Regrettably, Allied's improper action did not end with those breaches. I find it was unfair and contrary to the statutory duty of good faith for Allied to have put in front of Ms Fa'alili the Project Coordinator fixed term employment agreement. In the particular circumstances it was improper of Allied to present Ms Fa'alili with that legal document with the expectation that she execute it immediately. In presenting that document as it did, Allied did not extend Ms Fa'alili an opportunity to take advice about the document before she signed it. I find too that Allied did not advise Ms Fa'alili of when or how her employment was to end and the reasons for her employment ending in that way.

[27] I find that Allied terminated Ms Fa'alili's employment as branch manager when Mr MacDonald told her she could not return to Penrose and her job there.

[28] By letter dated 1 November 2006 Ms Fa'alili's solicitors submitted a parental leave complaint on her behalf. The essence of the complaint is an alleged failure by Allied to protect Ms Fa'alili's employment when she sought to return. Additionally, it was said the engagement of Ms Fa'alili on a fixed term employment was a further failure to protect her employment.

[29] A failure to comply with stringent requirements around fixed term employment agreements leaves the employee free to treat any such fixed term provision as ineffective. In practical terms that means the employment apparently fixed term, continues indefinitely. This is not what Ms Fa'alili pursues however.

[30] Rather, Ms Fa'alili challenges Allied's failure to keep open and protect her employment as Penrose branch manager when she sought to return to work on 23 May 2006.

The determination

[31] I reject entirely Allied's defence that Ms Fa'alili consented to the termination of her role as Penrose branch manager. Allied told Ms Fa'alili she could not return to that position.

[32] I find Allied regarded Ms Fa'alili's pregnancy and her leave as an inconvenience - causing disruption and requiring reshuffling. I find it did not suit Allied to have Ms Fa'alili return to the Penrose branch. Allied acted to remove Ms Fa'alili from her employment as Penrose branch manager.

[33] It is established to my satisfaction that Allied did not keep open Ms Fa'alili's employment and it failed to protect her employment. This failure constitutes a fundamental breach of the PLEPA. **Accordingly, I determine that Ms Fa'alili has a parental leave complaint. She is entitled to remedies in settlement of that complaint.**

The resolution

Reimbursement

[34] I am satisfied that Ms Fa'alili has lost income as a result of the parental leave complaint I have found. She secured alternative employment as from late October 2006. She claims the sum of \$8,307.62 as lost income in respect of the period when she was not employed together with the difference between her salary with Allied and her new employment. She is worthy of the amount she claims. I award her the gross sum of \$8,307.62 as reimbursement. **I order Allied Work Force Limited to pay to Russia Fa'alili the gross sum of \$8,307.62 as reimbursement pursuant to section 65(b) of the Parental Leave and Employment Protection Act 1987.**

Compensation

[35] I am satisfied that Ms Fa'alili has suffered hurt and humiliation, embarrassment and loss of dignity because of the parental leave complaint I have found. There is no doubt that Ms Fa'alili suffered considerable trauma when she suffered the miscarriage of her first child. But quite apart from that, I accept that as a result of Allied's breach of the PLEPA, she suffered further and considerable stress and injury to her feelings. She describes Allied's actions as insensitive. That is a description I agree with. It ought to have been apparent to Allied that Ms Fa'alili was unwell and likely not in a position to make significant decisions. It failed to protect her employment and was unsympathetic when she sought to return working less than 12 hour days. I also note Allied's initial refusal to mediate and its subsequent lack of co-operation to arrange mediation. I accept these actions caused Ms Fa'alili stress and trauma. An award of compensation is not made to punish Allied. Rather, it is made in recognition of the effects of Allied's wrongful and unlawful actions on Ms Fa'alili. Ms Fa'alili claims \$12,000.00 as compensation. Having regard to her length of service, her evidence and the nature of the parental leave complaint, I award her \$8,000.00. **I order Allied Work Force Limited to pay to Russia Fa'alili the sum of \$8,000.00 as compensation pursuant to section 65(c) of the *Parental Leave and Employment Protection Act 1987*.**

Costs

[36] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Tolich is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Paterson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.