

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Christine Hull (Applicant)
AND The Department of Labour (Respondent)
REPRESENTATIVES Applicant in person
Natasha Szeto for respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 3 March 2006
DATE OF DETERMINATION 9 March 2006

DETERMINATION OF THE AUTHORITY

Application under the Parental Leave and Employment Protection Act 1987

[1] Ms Christine Hull has applied to the Authority under the Parental Leave and Employment Protection Act 1987 for relief to be granted in respect of a claimed irregularity in the application she has made for paid parental leave.

[2] Ms Hull's baby was born on 3 October 2005. Her last employer before the birth was Buckland School. She worked there for school terms 3 and 4 in 2004 and terms 1, 2 and 3 in 2005. That employment terminated at the end of the term 3 on 23 September 2005. She applied for paid parental leave from that date but was declined.

[3] Ms Hull's employment at Buckland School in 2004 and 2005 had been in what the school described as a "fixed term position." There were three engagements of that kind, the last ending on 23 September 2005.

[4] It seems from a letter of 15 August 2005 written by Buckland School to the IRD that the school supported Ms Hull's application for paid parental leave. The employer wrote in its letter, "if Christine had not been pregnant, her fixed term agreement would have been extended until the end of the year." The employer also wrote that there was a good possibility that her position would have been made permanent.

[5] In supporting the decision to decline Ms Hull paid parental leave, the Department of Labour has referred to provisions of the Act which require;

- a) that the period of employment is to "immediately" precede the expected date of birth (s.7(b)), and

- b) that parental leave is to cease being payable from the date on which fixed term employment ends (s.71L(3)(a)).

[6] Plainly in the circumstances of Ms Hull's employment these requirements make her ineligible for paid parental leave unless some form of relief is available. She seeks redress from the Authority under s.68(5) of the Act.

[7] The Department contends that the reasons for Ms Hull's ineligibility were not matters of "irregularity" as defined in s.68, that the Authority can grant relief in respect of. I agree. An irregularity arises under the Act where there has been some failure in relation to the form in which an application for paid parental leave is required to be made, or where there has been a failure to meet the time limits set for making application or a failure to take some step required by the Act. The parties entry into a fixed term employment and their reaching agreement as to a particular date on which that employment was to end, were not steps taken pursuant to the Act at all and were not matters of irregularity within the meaning of the Act. The application under s.68(5) must be declined on that basis.

[8] As discussed with Ms Hull and Ms Szeto for the Department, the Authority has given consideration to the right an employee has in certain circumstances to elect that a fixed term provision contained in an employment agreement be treated as ineffective. This election may be made under s.66(6) of the Employment Relations Act 2000 by an employee if the fixed term agreement does not state in writing the reasons for ending the employment in that way. Once that election is made the employer cannot rely on the fixed term to end the employment, which in effect becomes continuous or open ended from the time of the election, although the employment may still be terminated for any other lawful reason. And, if the employee has raised a grievance about the termination of the employment, the employer cannot rely on the fixed term as a response to that grievance.

[9] The form of the agreement entered into between Ms Hull and Buckland School in June 2005 comprised letters of offer and acceptance. They contain no statement of the reason why the position was a fixed term one. Although that reason was perfectly well known, because much earlier Ms Hull had advised the school of her pregnancy and expected date of delivery, s.66(4) of the Act nevertheless required the reason to be stated in writing. (The employment agreement recorded in the letters also lacks other information required by s.65 of the Employment Relations Act 2000 to be written in every agreement.)

[10] Although an election under s.66(6)(a) of the Employment Relations Act may be made "at any time," I do not consider that the election can be made after the fixed term employment has ended. Ms Hull now no longer has the status of an employee (with Buckland School) employed under a fixed term agreement, as s.66(6)(a) contemplates a person making an election will have. Also, as the employment agreement is no longer in existence there is nothing for an election to apply to. By clear implication the time for making an election is any time during the currency of the fixed term agreement and not after it has terminated. In any event there has been no election by Ms Hull and neither has she raised a grievance against her former employer Buckland School. Section 66(6) of the Employment Relations Act is therefore of no assistance to Ms Hull.

[11] Ms Hull raised with the Authority some concerns she has about the level of information she was given by the Department of Labour. On several occasions, including August 2005 when she was still employed by Buckland School, she spoke to officers of the Department about her eligibility for paid parental leave. She considers that had they better informed her of the options she had available, she could have asked her employer to extend her employment until the end of the school year in mid December. That would have added about 13 weeks, the statutory period of

entitlement to paid parental leave. The school's letter to the IRD shows that it probably would have readily met a request from her in that regard.

[12] This is not a matter that has been investigated, but even if the Authority was able to find a reasonable basis for Ms Hull's concerns about the information she was given by the Department of Labour, that would still not permit the Authority to disregard the relevant provisions of the Act or to rewrite the employment agreement she entered into with Buckland School.

[13] The intention of the Act is that paid parental leave should be available to be taken from employment which is current and which would otherwise continue but for the pending birth of a child. In this case, although only by a few days, the employment had ceased prior to the expected date of delivery and also the parties had not intended the employment to continue beyond the date fixed for the end of the third school term.

[14] Ms Hull may feel, and perhaps with some justification, that the law does not fully recognise the circumstances of employment of long term relieving school teachers who, for good financial and administrative reasons on the part of the school, often have their employment agreement fixed to the length of a particular school term. In this case it does seem that Ms Hull's employment agreement, either when it was entered into or during its currency, could readily have been structured without prejudice to her employer to achieve the wider purposes of the Act for Ms Hull by allowing her access to paid parental leave.

[15] I find that now that the employment has ceased there is nothing the Authority can do to revive it and change any of its terms. The relief required is outside the scope of s.68(5) of the Parental Leave and Employment Protection Act. Accordingly the application brought by Ms Hull must be declined by the Authority.