

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 448
5352265

BETWEEN OLIVIA PRIETO
 Applicant

AND DEPARTMENT OF LABOUR
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Nicola Craig, Counsel for Applicant
 Alex Leulu, Advocate/Counsel for Respondent

Investigation Meeting: On the Papers

Submissions received: 30 August 2011 from Applicant

Determination: 18 October 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Olivia Prieto, applied for paid parental leave on 27 May 2011 in accordance with the Parental Leave and Employment Protection Act 1987 (“the PLEPA”). 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] Ms Prieto was advised by the Department by letter dated 13 July 2011 that she was: *“not eligible for parental leave or the taxpayer funded paid parental leave payment”*.

[3] Ms Prieto, 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 Amended Statements of Problem and in Reply and on submissions from the Applicant.

The Respondent confirmed that it had no further submissions than those contained in the Amended Statement in Reply.

Issues

[5] The issue for determination is whether Ms Prieto was an ‘eligible employee’ such that she was entitled to take parental leave under the PLEPA and consequently entitled to parental leave entitlements.

Background Facts

[6] Ms Prieto, a nurse, had worked for the Selwyn Street Medical Clinic in Christchurch for approximately three and a half years prior to February 2011.

[7] Ms Prieto said that she and her family were traumatised by the earthquakes in Christchurch and they had left Christchurch following the earthquake on 22 February 2011.

[8] On 24 February 2011 Ms Prieto approached a recruitment agency in connection with the obtainment of a nursing position in Auckland and was advised of a potential position with White Cross Healthcare Limited (“White Cross”)

[9] In early March 2011 White Cross had verbally offered Ms Prieto a position at its St Lukes clinic, and in an email dated 4 March 2011 advised Ms Prieto that it had requested the recruitment agency to check Ms Prieto’s references.

[10] On 8 March 2011 the recruitment agency advised Ms Prieto by telephone that White Cross were offering her employment at the St Lukes clinic. Ms Prieto said she had accepted this offer of employment at that time.

[11] On 16 March 2011 White Cross wrote to Ms Prieto. The letter was headed: “**Re: Letter of Engagement – Employment Agreement – Registered Nurse**” and stated:

*White Cross Healthcare Limited (“White Cross”) is pleased to offer you employment as a **Registered Nurse**. The terms of the employment agreement are as follows:*

1. Commencement

Your employment will start on 28 March 2011.

2. Hours of Work

This is a permanent part time position. Your normal working hours will be 48.5 and 39 worked on alternate roster fortnights including weekends. The days and times you work may change in subsequent rosters to meet the White Cross' needs

6. Complete Agreement

This letter, together with the enclosed employment agreement, and position description, forms part of this agreement. This agreement replaces all previous negotiations, communications, and commitments.

[12] Ms Prieto and her family moved to Auckland on 17 March 2011. On 21 March 2011 White Cross emailed Ms Prieto with the details of her Orientation day to be held on 28 March 2011.

[13] On 22 March 2011 Ms Prieto signed the written employment agreement at the recruitment agency's offices, and commenced her orientation on 28 March 2011.

[14] On 3 May 2011 Ms Prieto completed the employee section of an application for paid parental leave ("the application"). The application specified the commencement date of Ms Prieto's parental leave as 19 September 2011, and the expected due date for her child as the same date, 19 September 2011. The expected due date for Ms Prieto's child was confirmed through an Ultrasound Pregnancy report from the Christchurch Radiology Group dated March 2011.

Determination

The Law

[15] In order for Ms Prieto to be eligible for paid parental leave, she must be an 'eligible' employee pursuant to s 71D (c) of the PLEPA.

[16] An 'eligible' employee is defined in Section 7 of the PLEPA. Section 7 sets out the terms on which a female employee may be entitled to take parental leave:

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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 Ms Prieto 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 Ms Prieto was required to be an employee. Unless employed, Ms Prieto was not eligible to take parental leave in accordance with the PLEPA.

[18] The definition of ‘employee’ as set out in s 6 of the Employment Relations Act 2000 (“the Act”) includes¹: “*a person intending to work*”. Section 5 of the Act clarifies that a person intending to work “*means a person who has been offered, and accepted, work as an employee*”.

Employee status

[19] On 8 March 2011 Ms Prieto stated that she had verbally accepted the job offer made by White Cross as conveyed to her by the recruitment agency. I find that the recruitment agency was acting as the agent of White Cross in this matter.

[20] Ms Prieto claimed that at this point she was aware that she was being offered a position by White Cross at the St Lukes clinic on hours of 48.5 and 39 hours per fortnight.

[21] An agreement will be both binding and enforceable even if it is, and remains, unwritten. However the terms of that offer and acceptance can be the subject of dispute, and in Ms Prieto’s case, the hours of work are pivotal to the determination of her entitlement to paid parental leave.

[22] On 16 March 2011 White Cross set out in writing the agreed terms of employment. These written terms confirmed Ms Prieto’s hours of work at clause 2 as 48.5 and 39 worked as alternate roster fortnights. These hours exceed the required average of 10 hours a week specified in s 7 of the PLEPA

¹ At s6(b)(ii)

[23] At clause 6 the written terms clarify that the terms contained therein replace all previous understandings, although I note that the hours stated are in accordance with those claimed by Ms Prieto as being those she had verbally accepted on 8 March 2011.

[24] I find that although the verbal terms of offer and acceptance may have been vulnerable to dispute, the letter dated 16 March 2011 supports Ms Prieto's evidence as to the terms, and in particular, the hours which she had accepted in connection with the White Cross offer of employment.

[25] Although Ms Prieto did not sign this written offer letter dated 16 March 2011 until 22 March 2011, I find that Ms Prieto's acceptance of the offer of employment from White Cross took place on 8 March 2011, and that any ambiguity as to the terms of that offer, in particular, the hours of work, was resolved by the letter dated 16 March 2011.

[26] The Employment Court in *Harawira v Presbyterian Support Services*², a case heard under the Employment Contracts Act 1991, it was decided that a person who has been offered and accepted work was an employee, Judge Finnigan observing:³

Whether he had actually started the duties of the position or not Mr Harawira was, upon communication to him of the fact that he had been appointed, and he being still willing, within the definition of an "employee" in the Employment Contracts Act 1991 at s 2. He was by then a person intending to work which by the s 2 definition means a person who has been offered, and accepted, work.

[27] In *Tucker Wool Processors Ltd v Harrison*⁴ the Court of Appeal held on the facts that the word "employees" in Part II of the Employment Contracts Act 1991 included not only existing employees but prospective employees. Section 6 (b)(ii) of the Act now mirrors that of s2 of the Employment Contracts Act 1991.

[28] I find that Ms Prieto was by virtue of the definition contained in s 6 of the Act, an employee at 8 March 2011 when she accepted the verbal offer of employment from White Cross, the terms of which were confirmed in the letter of 16 March from White Cross. Ms Prieto therefore fulfilled the 6 month qualification period as set out in s 7 of the PLEPA.

² [1994] 2 ERNZ 281

³ Ibid at page 8

⁴ [1999] 1 ERNZ 894

Commencement of Employment

[29] It is not in dispute that Ms Prieto did not commence orientation and/or physically fulfilling her duties as an employee until 28 March 2011. I have considered whether s 7 of the PLEPA requires Ms Prieto to have actually physically worked for at least an average of 10 hours a week during the period of her employment.

[30] I find it is clear from case law and consistent with the statutory drafting that once there is offer and acceptance, the statutory definition of employee applies. I do not find from the wording of s7 of the PLEPA that it is necessary for the employee to have physically worked at least an average of 10 hours a week; what is requisite is that the employee: *“at the expected date of delivery, will have been in the employment of the same employer ... in the immediately preceding 6 months.*

[31] On the facts of this case I find that Ms Prieto was in the employment of White Cross for the 6 month period preceding her expected date of delivery on 19 September 2011 as she became an employee in accordance with s6 (b)(ii) of the Act by virtue of the verbal offer and acceptance on 8 March 2011.

Summary

[32] Having determined that Ms Prieto was an eligible employee for the reasons outlined above, Ms Prieto is entitled to take parental leave under the PLEPA and is to be paid parental leave in accordance with the PLEPA.

Eleanor Robinson
Member of the Employment Relations Authority