IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 262
5517273

	BETWEEN	NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION First Applicant
	A N D	JOSEPHINE ANNE WEBB Second Applicant
	A N D	THE BOARD OF TRUSTEES OF OKAIHAU COLLEGE Respondent

Member of Authority:	James Crichton
Representatives:	Dzintra King, Advocate for the Applicants Richard Harrison, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	23 June & 28 July 2015 from the Applicant 29 June 2015 from the Respondent
Date of Determination:	1 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant parties (PPTA and/or Ms Webb) raise a dispute as to the application and interpretation of a clause in the Secondary Teachers' Collective Agreement (the agreement) entitled *"Leave for Sickness in the Home"*. The applicants say that Ms Webb has been disadvantaged because of the failure by the respondent Board to pay her correctly in accordance with that clause. The Board denies that PPTA and Ms Webb are entitled to the relief sought and disagrees with their interpretation of the relevant clause.

[2] Ms Webb who has taught at the College for over 25 years, applied for leave in May 2014 to assist her daughter who was about to have a baby. The daughter (Sophie) did not live with her mother and indeed lived in Auckland with her husband.

[3] Ms Webb's evidence is that she filled in the school's application form and ticked two boxes because she was uncertain about the nature of the leave that she was applying for and she annotated the form *"family leave some paid depending on circumstances of birth"*.

[4] In the result, Ms Webb was away from the College from 28 May 2014 until returning to duty on 11 June 2014.

[5] Ms Webb's evidence is that when she returned to work she *"discovered that the leave had been recorded as leave without pay"*. The effect of this was to cause Ms Webb to lose pay which she considered herself entitled to.

[6] Ms Webb gives evidence that other staff have been treated differently and indeed, in her own case, with her daughter's first baby, she was given leave for sickness in the home on pay and the circumstances were similar to the circumstances applying currently.

[7] Mr Alan Forgie is the Principal of the College. He accepts that other staff may have been given paid time off in similar situations but he says that they were not reliant on the clause that Ms Webb relies upon. Ms Webb's earlier experience with her daughter's first baby was before Mr Forgie became principal of the College.

[8] Mr Forgie is adamant that he has applied the clause correctly; he appears to rely on the clause's title which refers to sickness *"in the home"* and on the phrase *"who depends on the teacher for care"*.

[9] Dealing with each of these in turn, the first phrase that Mr Forgie seems to rely upon is contained in the clause's title. While the phrase *"in the home"* is not repeated anywhere in the body of the clause, when those words are married to the provision in the body of the clause which provides that the person needing care *"depends on the teacher for care"*, a picture emerges of a provision which, applying its ordinary natural meaning, would seem to deal with circumstances where the teacher was obliged to take care of a sick family member who lived with the teacher.

[10] Here, the College relies on the fact that Ms Webb's daughter, Sophie, has obviously long since left home, is a married woman with a husband, and living in another centre altogether, and that on any construction, pregnancy is not a sickness.

[11] Moreover, the College points out that Sophie's husband (who had a senior position with a multi-national telecommunications company), could properly have taken parental leave to help his wife after she gave birth. In effect, the College suggests that Okaihau College is being asked to subsidise a multi-national telco.

[12] It is clear to me that Sophie needed help; the birth was not straightforward and she became ill immediately afterwards. An experienced woman who had had children of her own and who had the benefit of the natural love and affection that a mother would have for a daughter, may well have been in the best position to assist. The question is not whether Ms Webb should have been discouraged from assisting her daughter but rather whether that assistance should have been provided at the cost of the College. The only way to properly answer that question is by a correct application of normal contractual interpretation rules when applied to the subject clause.

Issues

[13] It will be necessary for the Authority to consider the following questions:

(a) What kind of leave did Ms Webb apply for?

(b) What kind of leave did Okaihau College grant her?

(c) What application does clause 6.5.3 have?

(d) What remedies, if any, apply?

What sort of leave was applied for?

[14] It seems to be common ground that Ms Webb applied for leave without pay for the period from 28 May 2014 down to 11 June 2014. The school was told as part of that application that the reason for the requested leave was to attend the birth of Ms Webb's daughter's child.

[15] The application also included the legend *some paid depending on circumstances of birth.*

[16] There was no reference in the application for leave, to the provision which the applicant parties now rely upon, namely clause 6.5.3. That clause lies within a wider section 6.5 which is entitled *Leave for Family Reasons.*

[17] Because clause 6.5.3 is the centrepiece of the argument between the parties, I set it out in full now:

> *6.5.3* ***Leave for Sickness in the home***
>
> *(a) The employer may grant a teacher leave with pay as a charge against the teacher's sick leave entitlement when the teacher must be absent from work to care for a person who is sick or injured and who depends on the teacher for care.*
>
> *(b) Approval is not be given for absences during or in connection with the birth of a teacher's child. Such situations should be covered by leave granted under clauses 6.3.6, 6.3.8 or 6.8.*

[18] Once Ms Webb returned to Okaihau College on 11 June 2014, she asked the College's payroll officer to change the leave request to leave for sickness in the home. That request was passed by the payroll officer to the Principal, Mr Alan Forgie and it was his decision not to grant the change to the form of paid leave requested by Ms Webb, notwithstanding the efforts of the PPTA on her behalf.

[19] Mr Forgie's view was that it was perfectly proper for Ms Webb to seek time off to be with her daughter and that that was readily granted but that her circumstances did not fall within the terms of the clause relied upon and that the effect of what was proposed was to create an unreasonable impost on the College by a retrospective payment of leave.

What kind of leave was granted?

[20] As I have already made clear, the College granted Ms Webb leave without pay effectively because they took it that that was the leave that she was applying for. While, as I have noted in the previous section of this determination, Ms Webb also included the legend *some paid depending on circumstances of birth* that was not seen as changing the basic nature of the application and of course, there was no reference whatever in the original request for leave, to any particular provision in the operative collective employment agreement, let alone clause 6.5.3.

[21] It follows that the leave that was granted at the time was leave without pay and the subsequent request from Ms Webb, supported by PPTA, was for a retrospective change in the nature of the leave granted to paid leave in terms of clause 6.5.3.

What application does clause 6.5.3 have?

[22] While PPTA's submissions proceed on the footing that the clause ought to apply that view is resisted by the College. PPTA refer to the affidavits in support from Ms Webb and from the midwife both of which are evidence for the view that Ms Webb's daughter Sophie was ill after the birth and that of course is one of the building blocks required by the clause.

[23] But the second building block, that of dependence, is less readily able to be demonstrated. It is difficult to see how Sophie is dependent on her mother when she is an adult living remotely from her mother, is married and has been for some time and indeed has another child. While PPTA say that *dependency can vary according to circumstances* it seems to be drawing a long bow to suggest that in the particular factual matrix of this case, in any usual sense of the word *dependent*, Sophie is dependent on her mother.

[24] The College identify a number of criteria which they say must be met in order for a teacher to become eligible for the consideration of leave under the relevant provision. The first of these is that the teacher *must be absent*. This conveys a sense of a requirement, a mandatory element of the leave.

[25] The next is that the reason for the absence must be to care for someone, the third is that the person in need of care must be sick or injured and finally that the person who is sick or injured must be dependent on the teacher for care.

[26] According to the College, when those elements are applied to the factual matrix as we know them in the present case, it is apparent that the attempt to have the clause apply, is misguided.

[27] First of all, according to Ms Webb's affidavit, the principle duty that she performed while she was away was looking after her older grandchild, that is her daughter's first born who was neither sick nor injured. Nor, on any reasonable construction could Ms Webb's older grandchild be described as being dependent on

Ms Webb; she had a mother and a father with whom she lived and on whom she would in the normal course, be dependent.

[28] It is true that once the birth of the second grandchild had taken place, Ms Webb helped with the care of the new infant and with the new mother's issues around the care of the new baby. It is apparent on the affidavit evidence before me that there were genuine health issues with Sophie, Ms Webb's daughter, after the birth, and Ms Webb was well placed to deal with those.

[29] But even if the period of leave were to be analysed in that two-part way that I have foreshadowed above, (before the birth and after it), there are still difficulties with the application of the clause to the factual circumstances. It seems to me quite plain that for the period up until the birth of the new infant there could be no application at all of the clause because none of the elements required by clause 6.5.3 apply, based on the evidence of Ms Webb herself. There is no dependence, no sickness, and no requirement for Ms Webb to be the carer.

[30] Once the birth had occurred, and it is common cause that Sophie was ill afterwards, there is clearly sickness but it seems to me no requirement that Ms Webb be the carer even if it could be argued that she might have been the best carer, and fatally for the purposes of the application of the clause in my judgment, there is no sense in which Sophie was dependent on her mother for care. Sophie is and was a grown woman, married, living remotely from her mother having started her own family so it seems to do violence to the common use of language to say that she could be dependent on her mother.

[31] But even if that analysis is misconceived, all that the clause requires the College to do is to properly exercise its discretion and even if I were to find that Okaihau College ought to have considered the application of this clause to Ms Webb's situation, the only remedy I could offer Ms Webb and PPTA was a requirement that Okaihau College be directed to consider the matter anew without any guarantee that they would reach a conclusion that was any more favourable to Ms Webb.

[32] As submissions for the College correctly identify, *nothing in clause 6.5.3 creates a substantive right to be granted leave.*

[33] All that is required of the College is that it give reasonable consideration to the request and on the facts, that appears to have happened.

[34] PPTA say that the consideration of the request was not reasonable because there is no suggestion in the evidence that Mr Forgie spoke with Ms Webb. But why should he? The terms of the request were clear enough. Ms Webb had been granted leave without pay and retrospectively sought consideration of a particular kind of leave which she claims applied to her circumstances.

[35] It must be incumbent upon Ms Webb and PPTA to supply the College with the basis on which they sought to have the discretion exercised in Ms Webb's favour; presumably the information provided to the College to facilitate the exercise of the College's discretion was the best information that was available and it is difficult to see what more could have been achieved by Ms Webb being spoken to directly by Mr Forgie.

[36] Moreover, PPTA say that the College exercised its discretion using irrelevant considerations and therefore, it is said, the College did not exercise its discretion lawfully.

[37] The College denies that the exercise of its consideration in the matter was an unlawful exercise of its discretion. It maintains that fundamentally, Mr Forgie's consideration of the matter, and indeed his reconsideration of it at the request of PPTA, was based on a proper consideration of whether the effect of the clause was to convey a right for Ms Webb to enjoy paid leave in the circumstances, rather than unpaid leave.

[38] I am satisfied on the affidavit evidence before me that the question that exercised Mr Forgie's mind was whether the clause ought to respond to Ms Webb's circumstances or not.

[39] Certainly, Mr Forgie refers to a number of other matters which arguably are not front and centre in any consideration of the proper application of this clause.

[40] But it seems to me that he had considered the central issue of whether the clause applies or not, has been asked to reconsider that by PPTA, has done so, and it is difficult to conclude on that basis that he has not fairly and fully considered what he needs to.

What remedies if any apply?

[41] There are really two aspects to this question. The first is whether the particular remedies sought by PPTA concerning the application of clause 6.5.3 can be entertained, and the second is whether the personal grievance claim, which appeared definitively for the first time in PPTA's submissions in this matter, can proceed and if so on what terms.

[42] Dealing with the first aspect, I have already found that first, the factual circumstances that apply in the present case fall outside the ambit of clause 6.5.3. Moreover, even if I were persuaded that the College had made an incorrect judgment on the application of the clause, all that I could award by way of remedy is a requirement that the College consider the matter afresh, applying proper principles.

[43] But in the present case, I am satisfied that the College has applied appropriate considerations in reaching the decision it has so even that remedy is not available either.

[44] It is important to notice that the clause does not create an entitlement to a benefit as of right; what it creates is an entitlement to have such a benefit considered, using proper principles, but no more than that.

[45] The second issue is the raising of the personal grievance which was brought fulsomely to the notice of the College for the first time as part of the submissions. The PPTA say that the College always knew that there was a dispute on foot and that is enough because the College knew what the issues were and knew what it was that Ms Webb wanted to put matters right.

[46] I accept that if that were true those considerations might well constitute the proper raising of a personal grievance.

[47] But I do not consider that those elements are made out on the facts. Certainly it is the case that the complaint by Ms Webb has been clearly signalled but it quite wrong to say that the remedies that she seeks (inclusive of the personal grievance remedies) have been properly brought to the employer's attention. This is because the only remedy that the employer was aware of until the filing of the submissions by PPTA related to a course of remedial action designed to deal with Mr Webb's complaint about the College's treatment of her retrospective application for leave in

terms of clause 6.5.3. Nowhere was the College advised that Ms Webb also sought compensation until the filing of the amended statement of problem when the word *disadvantage* is included but only in passing and there is a reference there to compensation being sought.

[48] The whole point of the law relating to the raising of a personal grievance is that it is designed to provide a circumstance where the employer gets notification of all the information it needs in order that it can address the grievance at the earliest possible date and rectify it.

[49] Nothing in the present circumstance seems to fit that situation.

[50] Accordingly, my instinct is that, notwithstanding the case law that the PPTA seeks to rely upon, the belated inclusion of a personal grievance claim is nothing more than a make-weight and cannot be considered a proper raising of a grievance in accordance with the law.

[51] But even if that conclusion is not to be accepted, on any analysis it is difficult to see how Ms Webb has suffered an unjustified disadvantage. It is a truism that in order to prove an unjustified disadvantage, the applicant party has to demonstrate that she has suffered a disadvantage by reason of unjustified actions of her employer.

[52] In this case, while, if I had been persuaded that the College had dealt with Ms Webb's application improperly I could have concluded that Ms Webb had suffered a disadvantage by not getting a proper consideration of her application, that is not the position because I have not been persuaded of that.

Determination

[53] For reasons already advanced, I have not been persuaded that Ms Webb, (and the PPTA who pursued a case on her behalf), are entitled to any remedies.

Costs

[54] Costs are reserved.

James Crichton
Member of the Employment Relations Authority