

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 244
5364663

BETWEEN MARIE HERMO JENSEN
 Applicant

A N D THE CHIEF EXECUTIVE
 OF THE DEPARTMENT OF
 LABOUR
 Respondent

Member of Authority: K J Anderson

Representatives: M Davidson, Advocate for Applicant
 I McColl, Advocate for Respondent

Investigation: On the papers

Date of Determination: 19 July 2012

DETERMINATION OF THE AUTHORITY

Application for review

[1] The applicant, Ms Marie Jensen, has made an application under s.71ZB of the Parental Leave and Employment Protection Act 1987 (the PLEP Act) for a review of a decision made by the Department of Labour that she is not entitled to parental leave payments; because she is not an “eligible employee” pursuant to s.71D(1)(c) of the PLEP Act. As an outcome of a conference call with the parties, it is agreed that the Authority should determine this application “on the papers”.

Background

[2] The background to this matter is unusual. Ms Jensen is a citizen of Norway but no longer resides there. However, she is employed by a Norwegian business and the employment remains intact, as evidenced by a copy of a *CONTINUATION OF EMPLOYMENT AGREEMENT* dated 17 October 2010.

[3] In a sworn affidavit, Ms Jensen attests that she has been granted permanent residence in New Zealand; she is married to a New Zealand citizen, jointly owns a house here, and now has a child who was born in New Zealand.

[4] On 26 August 2011, Ms Jensen made an application to Inland Revenue for paid parental leave. The “employer details” section of the standard application form informed that as of the date of the application, Ms Jensen had been employed by her Norwegian employer for more than eight years and that she worked for an average of 37.5 hours per week. Because Inland Revenue was unable to determine Ms Jensen’s eligibility for paid parental leave, she was informed, via a letter dated 6 September 2011, that her application had been referred to the Department of Labour (the DoL).

[5] Via a letter dated 11 October 2011, Ms Jensen was advised by the DoL that she was not eligible for paid parental leave. Ms Jensen was informed that:

The Parental Leave and Employment Protection Act 1987 sets out that to be eligible for parental leave, an employee must:

- (a) Have been employed by the same employer for the 12 months or six months immediately preceding the expected date of delivery of the child;
- (b) Have worked an average of 10 hours a week or more during this period; and
- (c) If they have been on a previous period of parental leave for another child, at least six months must have elapsed since the date they returned to work from their previous period of parental leave.

The Act also provides for up to 14 weeks of paid parental leave for an eligible employee.

In this regard, you are not able to meet the test of having worked an average of 10 hours a week, including one hour in every week or 40 hours in each month, in the six months immediately preceding the expected due date of the baby, as required by the Parental Leave and Employment Protection Act 1987. This means that you are **not eligible for parental leave**, as per the Parental Leave and Protection of Employment Act 1987, or for the taxpayer funded paid parental leave payment.

The decision relied on the application form submitted to Inland Revenue and your employment agreement (Norwegian and English translations). I have also had conversations with you on 4 October 2011 regarding your Inland Revenue number, and on 11 October 2011 regarding your employment with Stellarls Dans Teater. It is my understanding from perusing the employment agreement, and from the previously mentioned phone conversations that your employment with Stellarls Dans Teater is based on Norwegian legislation, as the

agreement refers to salary payment in Norwegian dollars and makes reference to Norwegian holiday law. Based on our latter conversation, wages are being paid to a Norwegian bank in Norwegian currency and tax is forwarded to the Norwegian government. It is also my understanding from this conversation that previously your employment was based in Norway and at some stage the location of your work was transferred to New Zealand. However, there are no indications that the jurisdiction that your agreement was based upon was transferred in this process. The above are indications that your employment is within the jurisdiction of Norway and not that of New Zealand.

It is the opinion of the Department of Labour that for an applicant to be eligible to paid parental leave they must be employed under the jurisdiction of New Zealand law and tax must be paid to the New Zealand government. Based upon the previously mentioned factors, it has been determined that this application falls outside this jurisdiction of New Zealand legislation, and that you are not eligible to receive the taxpayer funded paid parental leave payment.

Evidence in support of Ms Jensen's application

[6] On 1 November 2011, Mr Davidson, Ms Jensen's accountant (and now advocate) wrote to the DoL attaching a copy of Ms Jensen's 2011 IR3 tax return and the IRD assessment, showing that the return had been accepted and processed. Mr Davidson asked that the DoL note that:

Marie was required to return her overseas income of \$85,070.77 and pay tax on that income in New Zealand. Marie gets a credit for the tax that she has paid on the income in Norway (\$20,306.58). If she had not paid any tax or not enough tax then she would be fully taxed in New Zealand. Marie is a New Zealand tax resident and as such she is taxed on her worldwide income, IRD calculate tax on overseas income in accordance with New Zealand tax laws which are often different from the laws of other countries. Foreign income from overseas employment performed while living in New Zealand is taxed in New Zealand and since New Zealand has a double tax agreement with Norway, Marie is entitled to the lesser of the tax paid in Norway or the tax payable in New Zealand.

[7] Mr Davidson's letter also recorded:

Marie also started self employment teaching dance in New Zealand towards the end of the year and made a small loss (\$1,240). As discussed, Marie therefore requests under s.71ZB of the Parental Leave and Protection Act 1987 that you reconsider her application for paid parental leave on the grounds that Marie falls under the jurisdiction of New Zealand legislation and must pay tax on her worldwide income to the New Zealand government. She is bringing in overseas dollars to New Zealand.

[8] The Inland Revenue "*Individual tax return*" for the period 1 April 2010 to 31 March 2011 reveals that Ms Jensen was required to file a tax return with Inland

Revenue, albeit her income was derived from her Norwegian employment. Ms Jensen was entitled to a tax refund of \$26.44. The tax return also shows that Ms Jensen earned \$85,070.77 and paid overseas tax of \$20,306.58.

[9] Via her sworn affidavit, Ms Jensen attests that she was declined paid parental leave from Norway as she lives in New Zealand and intends to do so indefinitely. Ms Jensen says that the Norwegian Labour and Welfare Administration concluded that she was not eligible for paid parental leave due to having lived overseas for more than six months each year for two or more years. Also counting against her was that she had “personal reasons” for moving to New Zealand.

[10] The submissions for Ms Jensen allude to the fact that the PLEP Act does not say that the “employer” has to be a New Zealand employer. In summary, it is submitted for Ms Jensen that while she earns the substance of her income as the employee of a Norwegian entity, she works from and resides in New Zealand and has given birth to a child in New Zealand.

The position of the Department of Labour

[11] The reasons for the DoL concluding that Ms Jensen is not eligible to receive parental leave payments are largely set out in the original statement in reply and a further statement filed in response to Ms Jensen’s affidavit and submissions. In essence, the DoL says that Ms Jensen is not eligible for parental leave payments because she was not employed pursuant to New Zealand law. The DoL submits that Ms Jensen is not an employee for the purposes of s.7 of the PLEP Act. The DoL acknowledges that Ms Jensen paid tax to the New Zealand government by virtue of the New Zealand/Norway double taxation agreement, but says that Ms Jensen was employed under Norwegian law and hence was not an employee for the purposes of the PLEP Act or the Employment Relations Act 2000.

[12] To summarise, the DoL says that:

- (a) There must be an employment nexus between Ms Jensen and New Zealand and that “mere contribution” to public funds is insufficient;
- (b) The correct employment law applicable to Ms Jensen’s employment agreement is Norwegian law; and

- (c) Only employment agreements governed by New Zealand law are eligible for parental leave payments (all other criteria being met).

Analysis and conclusions

[13] Section 1A of the PLEP Act provides that the purpose of the Act is to:

- (a) Set minimum entitlements with respect to parental leave for male and female employees; and
- (b) Protect the rights of employees during pregnancy and parental leave; and
- (c) Entitle certain employees and self-employed persons to up to 14 weeks of paid parental leave.

[14] Under s.2 of the PLEP Act:

Employee has the meaning given to it in s.5 of the Employment Relations Act 2000 (the Act).

[15] The meaning of “employee” is actually set out at s.6 of the Act:

- (1) In this Act unless the context otherwise requires, **employee** –
 - (a) Means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) Includes –
 - (i) A homemaker; or
 - (ii) A person intending to work;

[16] Part 7A of the PLEP Act provides for payment for parental leave. Section 71A provides that:

The purpose of this Part is to entitle certain employees and self-employed persons to up to 14 weeks of parental leave payments out of public money when they take parental leave.

[17] And then relevant to Ms Jensen’s problem, s.71CA defines an eligible employee as:

- (1) In this Part **eligible employee** means –
 - (a) A female employee who meets the criteria of maternity leave for the child under s.7 or
 - (b) ...
 - (c) ...
 - (d) ...

[18] Under s.7 of the PLEP Act, the entitlement of a female employee to maternity leave is set out thus:

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 six months, -shall be entitled to maternity leave in accordance with this Act.

Is Ms Jensen an eligible employee?

[19] This matter has come to the Authority as an application under s.71ZB of the PLEP Act for a review of the decision made by the DoL that Ms Jensen was not an eligible employee under s.71CA of the Act. The DoL argues that Ms Jensen is not an employee for the purposes of s.7 of the PLEP Act.

While it is true that Ms Jensen is not employed by a New Zealand entity, there is nothing contained within s.7 or s.71CA of the PLEP Act that expressly (or impliedly) states that a “female employee” must be employed by a New Zealand entity. Ms Jensen has permanent residence in New Zealand. She jointly owns a property here and is married to a New Zealand citizen. And of course, her baby was born in New Zealand. Ms Jensen is subject to the New Zealand tax regime and presumably, spends her income here.

Determination

[20] On balance, I can see no good reason why Ms Jensen should not be considered to be an eligible employee under s.7 and s.71CA and s.71D(1)(c) of the PLEP Act. It follows that I find that Ms Jensen is an eligible employee under the provisions of the PLEP Act and hence she is entitled to up to 14 weeks of parental leave payments out of public money pursuant to the relevant provisions of Part 7A of the PLEP Act.

Costs: Given the nature of the matter before the Authority, it is appropriate that costs should lie where they fall.

K J Anderson
Member of the Employment Relations Authority