

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 115
3043272

BETWEEN ANNA-MARIE NEWMAN
Applicant

AND CHIEF EXECUTIVE,
MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Michele Ryan
Representatives: Applicant in Person
I Murray Counsel for the Respondent
Investigation Meeting On the papers
Submissions: 28 November 2018 on behalf of the Respondent
Determination: 18 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 9 October 2018 Ms Anne-Marie Newman was advised that her application for paid parental leave (PPL) was declined on the basis that that she “*had returned to work*” before the application was made.¹ The decision was affirmed by the Ministry of Business, Innovation and Employment (MBIE) on 8 November 2018.²

[2] In a statement of problem lodged with the Authority on 15 November 2018 Ms Newman asks the Authority to review the decision and make an order that she receive PPL.

¹ By letter sent by the Inland Revenue Department.

² Email dated 8 November 2018.

[3] With the parties' agreement, the question as to whether Ms Newman is entitled to PPL has been determined on the pleadings sent with accompanying documents. Ms Newman was not required to supply additional information. Counsel on behalf of MBIE provided brief submissions.

Background

[4] The facts of this matter are not in dispute.

[5] On 9 July 2018 Ms Newman and her husband were approached by Oranga Tamariki – Ministry for Vulnerable Children, and advised they were being considered, amongst others, as caregivers for a 6 month old child.

[6] On 13 July 2018 the Newmans were informed the biological mother of the child had chosen them to care for the child.

[7] The process to ready both child and prospective parents towards permanent care began on 17 July 2018.

[8] The child was put into the Newman's care on 28 July 2018.

[9] Ms Newman took 7 days' annual leave to look after the child, at which point her entitlement was exhausted. Her mother helpfully stepped in to assist with childcare and Ms Newman resumed working whilst awaiting documentation from Oranga Tamariki necessary for her application for paid parental leave. Confirmation of the placement was issued on 5 September 2018.

[10] The Newmans immediately gave notice to their respective employers of an intention to take parental leave (consecutively) so as to bond with their child. The information required to support the application for PPL was completed on 1 October 2018 and sent to the Inland Revenue Department the next day. As noted, the application was declined.

The legisAnalysis

[11] It is useful to set out relevant provisions of the Parental Leave and Employment Protection Act 1987 (the Act) as follows.

[12] Section 31 requires an employee who wishes to take parental leave under the Act to give written notice to the employee's employer of the employee's wish to take

leave.³ Where the employee intends to be the primary carer of a child to whom the employee or the employee's spouse or partner did not give birth, the notice requirements are set out at s 33 as follows:

- (b) ...
be given at least 14 days before the employee ... intends to become the primary carer in respect of the child; and
- (c) be accompanied by any evidence that is prescribed in regulations.

[13] Regulation 6(2) sets out types of certifying documents that satisfy the evidential requirement that must accompany the notice to the employer (and an application for PPL). Included in these is a letter from Oranga Tamariki confirming the date the employee "*became or will become*" the child's primary carer.

[14] Parental leave includes primary carer leave (s 2).

[15] Section 7 defines who may be a "primary carer" and includes, at s 7(1)(c) "*a person, other than the biological mother or her spouse or partner, who takes permanent primary responsibility for the care, development, and upbringing for a child who is under the age of 6 years ...*".

[16] If 2 or more persons meet the definition of "primary carer" those persons must jointly nominate which one of them is the primary carer and the nominated person is entitled to primary carer leave (s 7(2)). The Act sets out examples as to who may (or may not) be a primary carer. The determinative feature of a primary carer appears to be that s/he assumes permanent primary responsibility for the child's upbringing. A grandparent who minds a child every day while the parents work is not a primary carer.

[17] Section 10 provides:

10 Date of commencement of primary carer leave

Primary carer leave begins-

- (a) in the case of child born to the employee, on the date of confinement; or
- (b) in any other case, on the date on which the employee becomes the primary carer in respect of the child; or ...

[18] Primary carer leave must be taken in one continuous period (s 9(1)).

[19] Section 71I concerns applications for PPL.

³ Section 31(2)

71I Entitlement to parental leave payments

- (1) *A person is not entitled to a paid parental leave payment unless he or she makes an application in accordance with the section.*
- (2) *The application must-*
- (a) *be made by the employee or self-employed person before the earliest of the following:*
 - (i) ***the date on which the person returns to work:****
 - (ii) ...
 - (iii) *the date that is the first anniversary on which either the person or the person's spouse or partner became the primary carer in respect of the child (in any other case).*
- ... **the emphasis is mine*

[20] Parental leave payments end on the date on which the employee returns to work (s 71L).

Analysis

[21] The Ministry refers to s 71I as providing the basis for its decision. Its position is that Ms Newman commenced primary carer leave on the date the child came into her permanent care. Having commenced primary carer leave, it says Ms Newman was required, in accordance with s 71I(2)(a), to apply for PPL before she “return[ed] to work”.

[22] Examining first the phrase “returns to work” I note prior to amendments to the Act in 2016⁴ the material portion of s 71I(2)(a) stated “*the application must be made before the date on which the employee returns to work or the parental leave otherwise ends...*” No explanation for the modification to wording is recorded in the parliamentary debates,⁵ however, introductory notes to the Amendment Bill⁶ advise the changes were made to “update terminology”. Taking into account the surrounding text I am satisfied that the context in which an employee “returns to work” remains, and that the “return” is from having taken parental leave.

[23] It could be said Ms Newman never left work from which to return, having not applied for parental leave – a matter to which I shall return - but applying the strict wording of s 10 to Ms Newman’s circumstances, the statutorily prescribed

⁴ The Parental Leave and Employment Protection Amendment Act 2016

⁵ As recorded in Hansard

⁶ Employment Standards Legislation Bill

commencement of her primary carer leave began when the Newman's nominated her to be the primary carer of the child. Her attendance at her work place, for full-time work after the commencement of primary care leave, constitutes a "return to work" for the purposes of the legislation.

[24] Ms Newman accepts she did not apply for parental leave payments before she returned to work. It follows that Ms Newman is not entitled to PPL.

[25] The Ministry acknowledges that Ms Newman's omission falls under s 71IA which, amongst other matters, defines a failure to make the application for payment before the relevant date in s 71I, as an irregularity.

[26] Section 68 of the Act confers on the Authority power to grant relief in respect of any irregularity which it thinks it is reasonable to do so, having regard to the nature of the irregularity, the good faith of the parties, and any other matters it thinks proper.

[27] I have no doubt Ms Newman sought to comply with the provisions of the Act in good faith. The omission to apply for PPL earlier was hampered by the delay in receiving the certifying documentation necessary to apply for parental leave. She had no control over the timing of that matter.

[28] It is also notable that s 10 is silent regarding the requirements on an employee to provide notice to an employer but I am satisfied that s 10 presupposes that the notice criteria provisions at s 33 are able to be properly satisfied *before* primary carer leave begins. The notice provisions would be redundant otherwise. The ability for Ms Newman to give 14 days' notice to her employer of her intention to take parental leave and provide the appropriate supporting documentation required by the Regulations did not crystalize until more than 6 weeks after the date on which her primary care leave was required to begin. Compliance with both s 10 and s 33 was simply unachievable in the circumstances of the matter.

Relief

[29] Pursuant to s 68(6) I am satisfied this is a case where relief should be granted.

[30] Ms Newman is to inform the Inland Revenue Department as soon as is reasonably practicable of the date her primary carer leave begins and is entitled to parental leave payments for up to 22 weeks following that date unless she returns to

work earlier and/or a portion of that entitlement is transferred to her husband when, or if, he takes Partner's leave.

Michele Ryan
Member of the Employment Relations Authority