

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Tracy Gaye Burke (Applicant)
AND The Secretary of the Department of Labour (Respondent)
REPRESENTATIVES Tracy Burke In person
Renee Riddell-Garner, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 9 August 2005
DATE OF DETERMINATION 25 August 2005

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Tracey Burke (“Ms Burke”) applies to the Authority for relief under the *Parental Leave and Employment Protection Act 1987* (“the Act”). Ms Burke had made application for paid parental leave but that application was declined by the Inland Revenue Department because it was lodged after Ms Burke had returned to work.

[2] Ms Burke now asks the Authority to exercise its discretion under the Act in respect of an irregularity so that her application for paid parental leave can proceed.

The facts

[3] Ms Burke is a relieving teacher and is employed in that capacity at Orewa Primary School (“the school”). She had relieved at the school for three years prior to the birth of her child.

[4] Ms Burke was deemed unfit for work for the period of her pregnancy from 21 January 2004 until 15 June 2004. Her medical practitioner deemed her unfit because of severe morning sickness and lack of immunity to the rubella virus.

[5] In June 2004, Ms Burke telephoned the Department of Labour’s 0800 Infoline (“Infoline”) seeking information about paid parental leave. It is not disputed that Ms Burke was advised by Infoline that because she had not actually worked during her period of unfitness, she was not eligible to apply for paid parental leave. Ms Burke accepted that advice and did not make application for paid parental leave at that time.

[6] Ms Burke’s daughter was born on 17 September 2004. Ms Burke accepted work at the school on 14 & 18 October 2004.

[7] Ms Burke reflected upon her situation and on Monday 11 April 2005 she telephoned Infoline again. It was suggested that she obtain a medical certificate and a letter from the school to confirm her availability for work, had it not been for her medical unfitness.

[8] In that same discussion, Ms Burke was advised that it was not worthwhile making application for paid parental leave because she had returned to work in the 13 week period after her daughter was born.

[9] Understandably, Ms Burke was still not satisfied. She took the matter up with the Inland Revenue Department and was advised that she had a very good case as a result of misinformation from Infoline. She was further advised to make application to the Inland Revenue Department with a supporting letter, medical information and a testimonial from the school.

[10] Ms Burke and the school principal Mr Grant Fountain (“Principal Fountain”) completed an Inland Revenue Department Paid parental leave application form. Principal Fountain endorsed the application declaring Ms Burke’s 2 years 9 months employment and her average 10 hours per week of work at the school.

[11] Upon receipt of Ms Burke’s application in May this year, the Inland Revenue Department referred it to Infoline. Infoline wrote by letter dated 1 June 2005 advising Ms Burke was ineligible for paid parental leave by virtue of section 71I(2)(a) of the Act because she had returned to work before the period of leave had ended. Ms Burke says she would not have returned to work if she had been given correct information from Infoline.

[12] The letter further informed Ms Burke of the Authority’s discretion in respect of irregularities. The exercise of that discretion is now the subject of this application.

Discussion

[13] It is necessary to set out section 68 of the Act in its entirety:-

68. *Non-compliance with formal requirements*

- (1) *An employer must not unreasonably refuse to allow an employee to exercise any rights and benefits in respect of parental leave or a parental leave payment that the employee would be entitled to exercise but for an irregularity.*
- (2) *In this section, irregularity means—*
 - (a) *Omitting to do something required by or under this Act or under the alternative provision under which the leave is taken; or*
 - (b) *doing something required by or under this Act or the alternative provision under which the leave is taken before or after the time when it is required to be done; or*
 - (c) *Otherwise doing anything irregularly in matter of form.*
- (3) *An employee or an employer, or any person acting on behalf of an employee or employer, may apply to the Employment Relations Authority or the Court for relief in respect of an irregularity.*
- (4) *The Employment Relations Authority or the Court must grant relief to an employee in respect of a failure to comply with the notice requirements of this Act or of the alternative provision under which the leave is taken if satisfied that—*
 - (a) *the employee's failure to comply with the notice requirements was in good faith; and*
 - (b) *the extent to which the employee did or did not comply with the notice requirements was reasonable in all of the circumstances of the case.*

- (5) *The Employment Relations Authority or the Court may grant relief in respect of any other irregularity if it thinks it is reasonable to do so, having regard to the nature of the irregularity, the good faith or otherwise of the parties, and any other matters it thinks proper.*
- (6) *The Employment Relations Authority or the Court may grant relief—*
- (a) *by amending or waiving the irregularity, extending the time within which anything is to be or may be done, confirming the right of the employee to exercise rights and benefits in respect of parental leave or a parental leave payment, or granting any other relief as is reasonable:*
 - (b) *subject to terms, if any, that the Court, in the circumstances of each case, thinks fit.*

[14] Ms Burke seeks relief in respect of her application for paid parental leave which was filed out of time and because she returned to work before her parental leave had ended. She is entitled to relief in respect of an irregularity. What is the irregularity in this case? Ms Burke says she was given incorrect information from the Infoline and as a result did not make the necessary applications at all and without appreciating the consequences, accepting work soon after her daughter was born. That alleged incorrect information is alleged to be an irregularity from which she is entitled to relief.

[15] The matter is complicated beyond the application in respect of paid parental leave because section 71D(1)(b) requires that parental leave is actually taken before there is an entitlement to payment.

[16] The entitlement to parental leave payment is provided for at section 71D as follows:-

- (1) *An employee is entitled to a parental leave payment under this Part if the employee—*
 - (a) *has given written notice to his or her employer of his or her wish to take parental leave (either in accordance with this Act or with the alternative provision under which the leave is taken); and*
 - (b) *takes parental leave from his or her employment in respect of a child; and*
 - (c) *is an eligible employee.*
- (2) *An “eligible employee” is—*
 - (a) *a female employee who meets the criteria for maternity leave for the child under section 7; or*
 - (b) *an employee who meets the criteria for parental leave for the adopted child under section 8 or section 18 or section 24; or*
 - (c) *an employee to whom all or part of an entitlement to a parental leave payment is transferred under section 71E; or*
 - (d) *an employee who succeeds to all or part of an entitlement to a parental leave payment under section 39A.*
- (3) *Rights and benefits to non-statutory parental leave (and section 4) are ignored when considering whether a person is an eligible employee under this section.*
- (4) *This section is subject to sections 71F to 71I (restrictions on parental leave payments).]*

[17] Ms Burke did not make application for either parental leave itself or for payment in respect of any parental leave. She did not do either because of the incorrect information she says she was given. She did not make application for or give any of the notices required in respect of parental leave and she did not take any parental leave at all.

[18] Ms Burke actually now requires relief in respect of both the payment for parental leave and necessarily, the fact that she did not take any parental leave. Is it possible to cure the absence of any period of parental leave? Is that an irregularity? In the result it is not necessary for me to resolve that question.

[19] Ms Burke did not work during the period from 21 January 2004 until 15 June 2004. She is *prima facie* ineligible because of the qualifying criteria at section 72A of the Act. That section is as follows:-

72A. *Eligibility criteria based on average hours of work and allowing for periods of authorised leave—*

(1) *An employee is treated as being in the employment of the same employer for at least an average of 10 hours a week during a 12-month period if the employee is in the employment of that employer—*

- (a) *no less than an average of 10 hours a week during that period; and*
- (b) *either no less than 1 hour in every week during that period or no less than 40 hours in every month during that period.*

(2) *An employee is treated as being in the employment of an employer for an hour, despite being absent from work, if the employee would normally have been at work for that employer for that hour but is—*

- (a) *absent on leave with pay for that hour; or*
- (b) *on leave without pay (other than parental leave) with the employer's agreement for that hour; or*
- (c) *entitled to a payment of weekly compensation under the Injury Prevention, Rehabilitation, and Compensation Act 2001 for that hour; or*
- (d) *on protected voluntary service or training (within the meaning of the Volunteers Employment Protection Act 1973) for that hour; or*
- (e) *on maternity leave before the expected date of delivery of the child for that hour (except in a case to which section 6 refers); or*
- (f) *absent because of any other circumstances that are considered by a Labour Inspector not to disrupt the normal pattern of the employee's employment.*

(3) *The hours that the employee would normally have been at work must be calculated—*

- (a) *in accordance with the terms of the employee's employment; or*
- (b) *by reference to the employee's hours of work before any period of leave without pay began, in the case of a period of leave without pay that started longer than 12 months ago.*

(4) *Week means the employee's ordinary working week.*

[20] During that five month period of unfitness Ms Burke was not in the employment for either no less than one hour in **every** week or no less than 40 hours in **every** week. The emphasis is mine. It is clear that the employment must be consistent and frequent on a weekly basis.

[21] The employment is however deemed continuous in spite of absence from employment by the presence of any of the situations set out at section 72A(2). The Infoline advised Ms Burke that subclause (b) deems the period of her unfitness as an authorised absence not affecting continuous employment. That section provides an authorised absence where the employee is:-

- (b) *on leave without pay (other than parental leave) with the employer's agreement for that hour; or*

[22] I am unable to agree that Ms Burke's absence for her period of unfitness may legitimately and properly be characterised as "leave without pay". I say that because Ms Burke was a relief teacher. Her employment was a casual one. It is wrong to say that she was "on leave". She was simply unavailable to accept casual work.

[23] I consider it would be straining the ordinary and natural meaning of the words to find the period of unfitness constitutes leave. The words of the subclause (b) are clear on their face and admit of no other meaning.

[24] I note that while a relief teacher may conceivably satisfy the requirements under subclause (1) of section 72A, I do not consider the periods when the relief teacher is unavailable, come with the exceptions as authorised absences under subclause (2). In my view, subclause (2) is premised upon a continuous and permanent employment. That is to disqualify Ms Burke's relief position.

[25] My view is not altered by section 2AC of the Act which provides as follows:-

2AC Interpretation: multiple employments of teachers

(1) For the purposes of determining the entitlement of a teacher to rights and benefits in respect of parental leave and parental leave payment, if, during a 12-month period (or 6-month period as the case may be), the teacher is employed by more than 1 Board of Trustees to work in more than 1 State school or integrated school (whether concurrently or consecutively), those employments must be treated as 1 employment.

[26] That interpretation section certainly suggests that relief teachers, albeit those employed by multiple Boards of Trustees, are eligible for parental leave and payment. However, there is no provision in subclause (2) of section 72A for such relief teachers' absences or unavailability to be excused.

[27] Having reached this view, I am unable to say that Ms Burke was given incorrect advice or information from the Infoline, and it must follow then that there can be no finding of an irregularity for which to grant Ms Burke the relief she now seeks.

[28] While the Authority is empowered to cure irregularities as to the form of an application, there is no power to cure ineligibility. **Accordingly, the Authority is unable to assist Ms Burke.**

Leon Robinson
Member of Employment Relations Authority