

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jacqueline Marie Farry (Applicant)
AND Department of Labour (Respondent)
REPRESENTATIVES Jacqueline Farry In person
Jane Rushton, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 20 June 2005
DATE OF DETERMINATION 14 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jacqueline Farry is an employee/shareholder of Farry Productions Limited. She took unpaid parental leave from 1 August 2003 until 15 March 2004. She did not file an application for paid parental leave because she understood she was ineligible under the scheme. After learning she was eligible under the scheme Ms Farry filed an application for 12 weeks paid parental leave on 13 October 2004. This application was declined. Ms Farry requests the Authority waive the late application pursuant to section 68(1) of the Parental Leave and Employment Protection Act 1987 ("PLEPA") on the grounds of an irregularity.

[2] I convened a conference call with the parties to timetable an investigation meeting. The Department sought leave to file submissions prior to any scheduled investigation meeting and leave not to attend the investigation meeting. Leave was granted. An investigation meeting was duly held at which I received evidence from Ms Farry as to the circumstances surrounding the alleged irregularity and her request for relief.

The issue: is this an irregularity capable of waiver or amendment?

[3] On about 24 March 2003, during her pregnancy, Ms Farry contacted the Department of Labour Employment Relations Infoline ("the infoline") to inquire as to her eligibility to receive paid parental leave. She was preparing her paid parental leave application at the time and wished to clarify her eligibility. Ms Farry described her circumstances to the infoline employee with whom she spoke telling them she had set up her own business because of the nature of the industry she worked in. Ms Farry was told by the infoline employee she was ineligible for paid parental leave because she was considered to be self employed. On the basis of this information Ms Farry abandoned her paid parental leave application.

[4] On about 16 June 2004 Ms Farry meet with her accountant, Pam Fauvel, to prepare her

personal income tax records. Ms Fauvel asked why she had not applied for paid parental leave and Ms Farry replied she had been told she was ineligible. Ms Fauvel told Ms Farry she was eligible for paid parental leave because she was an employee/shareholder of Farry Productions Limited.

[5] On 13 October 2004 Ms Farry filed an application for paid parental leave with the IRD. Accompanying her application was a letter from her solicitor explaining the circumstances of the late filing of the application. On 9 November 2004 Ms Farry was advised in writing that her application for paid parental leave was declined because it had not been submitted and received by IRD prior to her return to work from parental leave. On 18 November 2004 Ms Farry sought a review of this decision by the Principal Labour Inspector and was advised by letter dated 22 December 2004 that such a review was beyond the scope of her role and that it would be appropriate for an application to be made pursuant to section 68 of the PLEPA. Ms Farry duly filed such an application.

[6] Acting outside the required timeframes is an irregularity for the purposes of section 68 of the PLEPA¹ and one which can be remedied by the Authority. It is undisputed Ms Farry did not file a paid parental leave application within the specified timeframe. There is no suggestion that Ms Farry does not otherwise qualify for paid parental leave. The Authority is able to grant relief in respect of an irregularity if it thinks it is reasonable to do so given the nature of irregularity, the good faith or otherwise of parties and any other matter it thinks proper².

[7] The Department has advised no detailed record of the information given to Ms Farry by the infoline exists but has confirmed what she says she was told is consistent with information given out by the infoline in 2003. I accept Ms Farry's evidence that she discarded her application for paid parental leave when she was told by the infoline that she was considered self employed and therefore ineligible under the scheme. Ms Farry relied on the information received from the infoline and it was reasonable for her to do so given the material received from the Department referred her to the infoline if she had any questions regarding her application for paid parental leave. I note also that the information given to Ms Farry by the infoline was unconditional and not accompanied with a suggestion that she file an application to determine her status.

[8] While I accept Ms Farry's eligibility for paid parental leave was not clarified until June 2004 I have some concern as to the delay of four months between Ms Farry receiving this advice from her accountant and the filing of the application form. However, this delay must be balanced with Ms Farry's early attempts to exercise her right to paid parental leave and her reliance on the information provided by the infoline which was reasonable in the circumstances.

Determination

[9] I therefore waive the irregularity and confirm Ms Farry's entitlement to a parental leave entitlement.

Costs

[10] Given the nature of the application costs are to lie where they fall.

Marija Urlich
Member of Employment Relations Authority

¹ *Lewis v Greene* (unreported, Shaw J, 28 July 2004, AC 7A/04)

²² Section 68(5) PLEPA