



New Zealand Employment Relations Authority Decisions

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Jansen v Department of Labour CA142/10 (Christchurch) [2010] NZERA 628 (1 July 2010)

Last Updated: 5 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 142/10 5302914

BETWEEN RACHEL ELIZABETH

JANSEN Applicant

A N D DEPARTMENT OF LABOUR

Respondent

Member of Authority: Representatives:

Submissions Received:

Helen Doyle

The Applicant in Person

Alex Leulu, Counsel for Respondent

25 June 2010 from Applicant 18 June 2010 from Respondent

Determination:

1 July 2010

DETERMINATION OF THE AUTHORITY

The investigation process

[1] The Authority is asked under 71ZB of the [Parental Leave and Employment Protection Act 1987](#) (PLEPA), to review a decision by the Department of Labour about Rachel Jansen's entitlement to a parental leave payment. Rachel Jansen and Alex Leulu agreed that the Authority could deal with the matter on the papers already before it and additional written submissions that were timetabled. Submissions were duly received.

[2] The final paragraph containing the conclusion in Mr Leulu's submissions did not appear to reflect the circumstances of this case. Ms Jansen specifically noted this in her submissions to the Authority and I had the senior support officer raise this with Mr Leulu who confirmed that the paragraph was there by error. He has since provided another copy of the submissions identical to the earlier submission in every way except for the final conclusion which has been removed.

Employment relationship problem

[3] Rachel Jansen was working part time as a self-employed physiotherapist before the birth of her son on 3 April 2008. For completeness some of the documents received from the Department of Labour reflect the date of birth as 2 April 2008 but I have relied on the statement of problem and the facts set out that Ms Jansen provided stating her son was born on 3 April 2008. Nothing particular turns on that.

[4] Ms Jansen completed an application for paid parental leave and her accountant, as required, signed the form in March 2008. There is no dispute that these documents were therefore ready for submission to the Inland Revenue Department at or about the 3 April 2008.

[5] With the demands of two small children unfortunately Ms Jansen forgot to send the forms in to the Inland Revenue Department until August 2009. The application was declined on 27 August 2009 by the Inland Revenue Department on the basis that such application was required to be made before Ms Jansen returned to work and on the other grounds that her child was 12 months old.

[6] Ms Jansen wrote a letter asking for reconsideration of her application and the matter was then referred to the Department of Labour. An information officer, Margaret Dowling, reconsidered Ms Jansen's eligibility for parental leave payment. Ms Dowling wrote to Ms Jansen by letter dated 14 September 2009 and advised that she concluded, on the basis of information provided, that Ms Jansen was not entitled to receive paid parental leave.

[7] The first reason for this decision was that the application had not been received until well after Ms Jansen went on parental leave. Ms Dowling said therefore it was difficult to see how the absence of work could be within the definition of parental leave for self-employed person in [s 2](#) of the PLEPA as a period during which the self employed person *temporarily does not work because of the birth of a child*

[8] The second reason for the decision was that the paid parental leave application must be made before the date on which the self-employed person returns to work or the parental leave otherwise ends. Ms Dowling had been advised by Ms Jansen that she had returned to work on a casual basis in December 2008. Ms Jansen explained in the typewritten notes attached to her statement of problem that she had done some locum work for a colleague who was on holiday at that time.

[9] It is against that decision that Ms Jansen now applies to the Authority for review relating to her entitlement to a parental leave payment.

[10] Following the telephone conference with the Authority Ms Jansen confirmed that she had returned to some casual work averaging three to five hours on 30 March 2009.

Determination

[11] The Department was satisfied that Ms Jansen had taken parental leave under the PLEPA and in accordance with [s.71CB](#) of the PLEPA.

[12] Ms Jansen expressed some frustration in her submission to the Authority that her application was declined on the grounds that *too much time had passed* when there was nothing to that effect in the forms or in the rules.

[13] There are however requirements in the PLEPA about when such application is to be made.

[14] [Section 71I](#) of the PLEPA provides that a self-employed person is not entitled to a parental leave payment unless the self-employed person makes an application for payment in accordance with the section. Specifically in [s.71I\(2\)\(a\)](#), the application must be made before the date on which the self-employed person returns to work or the parental leave otherwise ends. [Sections 71K](#) and [s.71LA](#) refer to the start of the parental leave payments and the end of the parental leave payments for a self-employed person.

[15] I accept Mr Leulu's submission that this matter can be distinguished from the case of *Oliver v. Department of Labour* (15/1/09, Member Greg Wood, WA5/09). In that case, the application for paid parental leave had already been made and eligibility for paid parental leave payments already granted. Ms Oliver returned during her parental leave for one day but had not received the standard letter from Inland Revenue stating that entitlements would cease if any work had been undertaken. In this case, the application whilst completed had not been sent to the Inland Revenue

Department before Ms Jansen returned to work on a casual basis in December 2008 and in March 2009.

[16] The Department of Labour does have discretion under [s.71I\(a\)](#) of the PLEPA to approve irregular applications if there is an irregularity in an application for paid parental leave payments. Failing to make the application before the relevant date in terms of [s71I](#) is such an irregularity.

[17] In exercising its discretion to approve the making of a parental leave payment the department must have regard on the extent of the irregularity and whether the self-employed person has acted in good faith.

[18] I also accept Mr Leulu's submission that the intention of the Act is that paid parental leave should be available to be taken from employment which is current and would otherwise continue but for the pending birth of a child.

[19] In this case, there was a considerable length of time between the leave taken and the time the application for paid

parental leave was made. The leave commenced, Mr Leulu submits, on 28 February 2008. There was the birth on 3 April 2008. There were also two intervening matters before the application was made. The first was that Ms Jansen returned to work on a casual basis in December 2008 and then on a casual basis in March 2009. The application was then made in August 2009.

[20] These delays are considerable. The department accepted, as do I, that Ms Jansen is entitled to sympathy in relation to the reasons for the delay and recognition of the fact that the application was dated at or about the time of the birth of her child. I am not satisfied though when the length of time is considered and the return to work on two occasions before the application was made that the extent of the irregularity is reasonable.

[21] I therefore confirm the Department of Labour's decision in this case that Ms Jansen is not eligible for paid parental leave.

Costs

[22] There was no submission in relation to any costs by the department and I would not consider such an application to be appropriate in the current case.

Helen Doyle
Member of the Employment Relations Authority