

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 98/10
5299819

BETWEEN ELIZABETH MARY LE
 COMPTE
 Applicant

A N D DEPARTMENT OF LABOUR
 Respondent

Member of Authority: Philip Cheyne

Representatives: Luke Radich, Counsel for Applicant
 Alex Leulu, Counsel for Respondent

Investigation Meeting: On consideration of papers

Submissions Received: 16 April and 25 April 2010 from Applicant
 21 April 2010 from Respondent

Determination: 28 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Elizabeth Le Compte is employed at Marlborough Girls' College. Her problem is the Department of Labour's decision to end her eligibility for paid parental leave (PPL) on the basis that she had returned to work before the end of her 14 week entitlement to PPL.

[2] By agreement, this matter has been investigated by both parties providing submissions in writing based on an undisputed sequence of events.

What happened

[3] Mrs Le Compte has been employed at Marlborough Girls' College since 2006. She became pregnant and took one year's maternity leave starting at the beginning of

the 2010 school year. Mrs Le Compte was also entitled to paid parental leave so she filled in a PPL application form (IR880) in about September 2009 and left the form with the appropriate person at the College for it to be completed by her employer and forwarded to IRD.

[4] The precise date of the new school year was not known to Mrs Le Compte when she finished at the end of 2009 and she left it to the College Resource Manager to complete that part of the IR880 form as well as entering the other information required of the employer. The Manager wrote the date *28 January 2010* as the PPL start date, completed the remainder of the form, signed and dated it 8 January 2010 and posted it to IRD. It is unclear when the form was sent, but it was received by IRD on 11 February 2010.

[5] IRD then sent its usual acknowledgment letter to Mrs Le Compte. That letter is dated 12 February 2010. That will be the date when it was generated so it will have been sent that day or shortly afterwards. It reads (in part):

Your Paid Parental Leave application has now been processed and your weekly entitlement before tax is This will be paid for the period 28 January 2010 to 05 May 2010.

If you return to work or resign during this period, it is important that you let us know as your entitlement to Paid Parental Leave will end with either of these circumstances. Your entitlement will also end if you return to work for a short time to work on a casual basis, part time (limited hours), one-off basis (eg for one day) or work from home while on parental leave.

[6] On 5 February 2010, before the application was received by IRD, Mrs Le Compte worked for part of a day as a relief teacher at the College. That happened because the Assistant Principal responsible for staffing, being unable to find any other person to relieve, contacted Mrs Le Compte, explained the situation and asked if she would relieve on that day. Mrs Le Compte did so and was paid for her 3 hours work at the reliever's rate of pay. The Assistant Principal knew that Mrs Le Compte was on a year's maternity leave and would be available as a reliever later in the year but knew nothing of the application for paid parental leave. I infer that Mrs Le Compte did not appreciate that IRD and the Department of Labour would treat her as having returned to work as a result of her accommodating her employer's approach.

[7] Mrs Le Compte's daughter was born on 12 February 2010.

[8] After Mrs Le Compte received IRD's letter dated 12 February, she contacted the Department to tell them that she had worked for part of the day on 5 February. That was in response to the text of the letter set out above. The IRD referred the issue of Mrs Le Compte's further continued eligibility for PPL to the Department of Labour who, in a letter dated 4 March 2010, advised Mrs Le Compte of its decision that she was not eligible to receive PPL from 5 February because she had *returned to work* on that day.

The law

[9] It is accepted that Mrs Le Compte was eligible for PPL.

[10] Section 71I deals with applications for PPL. It provides:

71I(1) An employee or self-employed person is not entitled to a parental leave payment unless the employee or self-employed person makes an application for payment in accordance with the section.

71I(2) The application must –

- (a) be made before the date on which the employee or self-employed person returns to work or the parental leave otherwise ends; and*
- (b) be made in the manner prescribed in Regulations; and*
- (c) specify the matters, and be accompanied by the documents prescribed in Regulations; and*
- (d) state whether or not the employee or self-employed person wishes to transfer all or part of the entitlement under section 71E.*

[11] Sections 71K and 71L deal with the start and the end date of PPL. Under s.71K(1) PPL is payable to an employee for a period that begins on the earliest of the date the person commences their parental leave, the date of confinement or (in the case of adoption) the date the person assumes care of the child. Under s.71L(1) PPL ends on the earlier of 14 weeks after the commencement of parental leave or the date *he or she returns to work or resigns from his or her employment.*

[12] Under s.71U(1) an employee must give notice as prescribed in Regulations if during the period for which the employee is receiving PPL the employee returns to work or the fixed term employment ends or they resign.

[13] The meaning of an enactment must be ascertained from its text in the light of its purpose. As a major piece of social legislation, the Act, including the provisions relating to PPL, must be given a liberal interpretation (see *Denley v. Service Workers Union* [1994] 1 ERNZ 863. A purpose of the Parental Leave and Employment Protection Act 1987 (as amended) is to enable certain employees and self-employed persons up to 14 weeks of PPL.

[14] In *Oliver v Department of Labour* 15 January 2009, GJ Wood (member), WA 5/09 the Employment Relations Authority said this about the purpose of the legislation:

It is to provide pregnant women and mothers with young children with 14 weeks during which the State pays them in order to look after their children. It is clear from this that a return to work need not be a return to paid work, because the State does not want to be paying mothers to look after infants when they are working at the same time, whether on a paid or unpaid basis. In particular, it is easy to see how a parent might rort the system by taking the payments and working in an unpaid capacity in a family business, for instance. In normal circumstances it is appropriate to conclude that a person who returns to work, even for one day, has returned to work for the purposes of the legislation. The information provided by the Inland Revenue Department makes it abundantly clear that return to work for even one day will be sufficient to end the payments.

[15] In *Oliver* the employee ceased work on 12 September to commence their paid parental leave, but agreed to help out her employer on 17 September as a favour since the employer found himself short staffed. The employee had not received IRD's standard letter stating that her entitlements would terminate from the time she undertook work of any capacity. She attempted to speak to someone at IRD before doing the day's work but got no substantive response.

[16] Mrs Le Compte's situation is not dissimilar to the employee in *Oliver*. Before receiving formal advice from IRD about IRD's view of the effect of doing any work at all during the period of her PPL, Mrs Le Compte did a favour for her employer who was not able to find anyone else to cover a brief period of less than a day. In the present case, the work was done even before IRD had received Mrs Le Compte's application for paid parental leave.

[17] If the Department of Labour is correct, Mrs Le Compte will have returned to work during her PPL for the purposes of the Act on 5 February even though her application for PPL was received after that date. That produces the result applying

s.71I(1) and (2)(a) that Mrs Le Compte was not entitled to PPL because she did not apply before returning to work. Her application should have been declined. If Mrs Le Compte did not validly apply before returning to work, it is difficult to see how she could properly be regarded as entitled to PPL from 28 January 2010 so as to return to work early on 5 February 2010. All that tangle arose before the birth.

[18] For similar reasons as expressed in the *Oliver* case, I conclude that Mrs Le Compte's actions were not a deliberate return to work so as to disentitle her to PPL. For the Department it is pointed out that the notes that accompany the IR880 form refer to the IRD's and the Department's view of the effect of s.71L(1). However, since Mrs Le Compte had not received IRD's confirmation letter, I do not accept that she knew or ought to have known about the effect of her doing half a day's work. If she had known she would not have agreed to the request.

[19] As in *Oliver* the appropriate course is to grant the application for review and modify the Department of Labour's decision. Mrs Le Compte should be paid parental leave for a 14 week period, less one day, commencing on 6 February 2010, unless she returns to work within that time.

Costs

[20] There is an application for costs. In my view, costs should lie where they fall. The administrative action taken by the Department of Labour was in keeping with published information about which it reasonably felt there was no discretion. Mrs Le Compte will benefit from something of an indulgence so there is no justification in requiring the Department of Labour to contribute to her legal costs.

Philip Cheyne
Member of the Employment Relations Authority