

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 172
5332909

BETWEEN

SARAH METCALFE
Applicant

AND

THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
LABOUR
Respondent

Member of Authority: R A Monaghan

Representatives: S Kemp, counsel for applicant
G La Hood, counsel for respondent

Investigation meeting: On the papers

Agreed statement of facts received: 25 March 2011

Submissions received: 1 April 2011 from Applicant
5 April 2011 from Respondent

Determination: 28 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sarah Metcalfe applied for paid parental leave after her assumption of care of a child with a view to adoption. The Department of Labour (the Department) found she was ineligible for payment, and she has asked the Authority to review that decision.

[2] The Authority's jurisdiction to hear such a request is found in s 71ZB of the Parental Leave and Employment Protection Act 1987 (the Act), which reads:

- 1) *An employee or a self-employed person may apply to the Employment Relations Authority for a review of a decision made by the department relating to –*
 - (a) *the person's entitlement to a parental leave payment;*
 - (b) *...*
- 2) *An application for review must be made within 12 months after the date on which the decision is notified to the employee or self-employed person.*
- 3) *The Authority may confirm, modify, or reverse the decision of the department.*

[3] Ms Metcalfe was self-employed at the relevant time.

Preliminary matter

[4] The application for review first came before the Authority on the basis of Ms Metcalfe's expressed concerns that: the grounds given for the refusal to grant paid parental leave were unfair to self-employed adoptive parents; and her inability to obtain paid parental leave was discriminatory towards adoptive parents. When put that way the concerns appeared to be with the policy underlying the legislation, rather than the interpretation and application of the legislation itself. Accordingly it was not clear what, if any, matter within the jurisdiction of the Authority was being raised.

[5] The distinction and the difficulty arising were discussed with the parties, and the original application for review by the Authority was withdrawn. The application has been re-filed in a different form and without objection.

Issues

[6] The issues for determination were identified as:

- (a) whether Ms Metcalfe was ineligible for paid parental leave because she did not commence parental leave in terms of s 71K of the Act; and
- (b) whether Ms Metcalfe returned to work in circumstances which disentitled her to any payment; and
- (c) if the answer to either of the above is yes, whether the circumstances amounted to an irregularity for which the Authority may provide relief.

Background

[7] Ms Metcalfe had been working full time as a self-employed independent contractor for three years when, on 17 January 2010, she assumed the care of a child with a view to adopting him. She received 9 days' notice that she and her husband had been chosen as adoptive parents, and since she worked alone in her business she required time to arrange for and train a replacement. She was also unaware that as a self employed person she could be entitled to paid parental leave, so there was a delay before she became aware of the entitlement and took steps to pursue it.

[8] From 17 January to 16 March 2010 Ms Metcalfe continued to work part time, averaging approximately 7 – 8 hours per week. Her activities involved recruiting and training a replacement to allow her the time to care for the child, as well as some of the day to day business operation. She was paid for this work.

[9] From 16 March until early-mid May 2010 Ms Metcalfe carried out 2-3 hours work per week. She was paid for work done to 4 April 2010. She did not render any further invoices because of her receipt of advice that the work she undertook could be regarded as a return to work, which could in turn affect her parental leave entitlements.

[10] On 12 April 2010 Ms Metcalfe forwarded her application for paid parental leave to the Inland Revenue Department. She nominated a commencement date of 16 March 2010 for the paid parental leave. The IRD referred the application to the Department of Labour to clarify Ms Metcalfe's eligibility.

[11] By letter dated 3 May 2010 the Department of Labour advised Ms Metcalfe of its view that she did not cease work and commence paid parental leave on the date she assumed care of the child (17 January 2010). Instead she continued working until 16 March 2010 and sought to commence paid parental leave from that date. As the Department put it, this was a failure to comply with s 71K of the Act rendering Ms Metcalfe ineligible for paid parental leave.

[12] Ms Metcalfe seeks a review of that decision.

Statutory provisions

[13] ‘Parental leave’ is defined in s 2 of the Act as:

Parental leave –

- (a) *Means, for an employee, -*
 - (i) *Maternity leave to which the employee is entitled in accordance with this Act:*
 - (ii) *Partner’s/paternity leave to which the employee is entitled in accordance with this Act:*
 - (iii) *Extended leave to which the employee is entitled in accordance with this Act.*
- (b) *Means for a self-employed person, a period during which the self-employed person temporarily does not work because of the birth of a child or the assumption of care of a child by the person or the person’s spouse or partner (subject to s 71CD):*
- (c) ...

[14] Section 71DA sets out the entitlement to parental leave payments as follows:

- 1) *A self-employed person is entitled to a parental leave payment under this Part if the person is –*
 - (a) *an eligible self employed person; or*
 - (b) ...
 - (c) ...
- 2) *This section is subject to sections 71F to 71IA (restrictions on parental leave payments and making an application for payment)*

[15] Section 71CB defines ‘eligible self employed person’ as:

- 1) *In this part, eligible self-employed person means –*
 - (a)...
 - (b) *a self employed person who –*
 - (i) *assumes (with a view to adoption by that self employed person ...) the care of a child who is not more than 5 years of age; and*
 - (ii) *at the date on which he or she, with a view to adoption, first assumes the care of the child, will have been self employed for at least an average of 10 hours a week over the immediately preceding 12 months; and*
 - (iii) *takes parental leave from self-employment in respect of the child.*

[16] Section 71K identifies the commencement date for parental leave payments as:

1) A parental leave payment is payable to an employee for a period that begins on the date of commencement of his or her parental leave.

2) A parental leave payment is payable to a self-employed person for a period that begins on the earliest of –

(a) the date the person commences parental leave; or

(b) the date of confinement; or

(c) in the case of adoption, the date on which the person assumes (with a view to adoption by that person or by that person and that person's spouse or partner jointly) the care of the child.

[17] Section 71LA identifies the end of a paid parental leave period for self-employed persons as:

1) A parental leave payment is payable to a self-employed person for a period that ends on the earliest of –

(a) 14 weeks after the date of commencement of his or her parental leave; or

(b) the date on which the self-employed person returns to work;

(c) ...

[18] Section 71CD addresses what may amount to a return to work by a self-employed person, by providing:

In this Part, a self-employed person is not to be treated as having returned to work because he or she –

(a)...

(b)...

(c) carries out work in the nature of oversight or occasional administrative tasks in the business in which the person is self-employed.

[19] Section 68, sets out the Authority's ability to grant relief in respect of an irregularity as follows:

1) ...

2) In this section irregularity means –

(a) omitting to do something required by or under this Act ... ; or

(b) doing something required by or under this Act ... 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, employer, or self-employed person, or a person acting on behalf of.... a self-employed person may apply to the Employment Relations Authority ... for relief in respect of an irregularity.*
- 4) *[failure by employee to comply with notice period].*
- 5) *The Employment Relations Authority ... 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 ... may grant relief –*
 - (a) *by amending or waiving the irregularity ... confirming the right of an employee or self employed person to exercise rights in respect of parental leave or a parental leave payment (as applicable) or granting other relief as is reasonable:*
 - (b) *subject to terms, if any, that the Authority ... in the circumstances of each case, thinks fit.*

Whether s 71K meant there was no eligibility for parental leave payment

[20] Section 71DA of the Act says Ms Metcalfe is entitled to a parental leave payment if she is an ‘eligible self employed person’. She met the definition of ‘eligible self employed person’ set out in s 71CB(1)(b) in that she assumed the care of a child aged under 5 with a view to adoption, and met the requirements regarding the extent of her self employment up to that time. However all three parts of subsection (1)(b) must be met for the purposes of the definition. Subparagraph (iii) requires Ms Metcalfe to take parental leave in order to remain an ‘eligible self employed person’.

[21] The Department’s approach was that to qualify for payment Ms Metcalfe was obliged to take the leave at the point when she became entitled to commence it. Its reasoning was based on s 71K(2)(c), which it said identifies the date of commencement to an entitlement to payment as being the date of assumption of care of her child. The Department went on to say that the failure to commence parental leave at that time meant Ms Metcalfe was not entitled to a payment for parental leave.

[22] In support the Department cited a determination of the Authority in *N v Department of Labour*.¹ There the Authority found an adoptive mother who was an employee was not eligible for paid parental leave because she had not commenced maternity leave in accordance with s 10 of the Act, and she was not entitled to

¹ AA 358/08, 23 October 2008

extended leave at all. Section 10 specifies the date of commencement of maternity leave in respect of an adoption as being the date on which a female employee first assumes the care of the child with a view to adoption, or on such earlier date as is determined in accordance with the Act. N had started her parental leave considerably later than the date on which she assumed the care of her child.

[23] With more specific reference to s 71K, the Department submitted that for the only possible commencement date for Ms Metcalfe's parental leave must be the date on which the period of entitlement to payment commenced. That is because s 71K(2)(a) reflects the possibility of a commencement date earlier than the date of confinement so is not relevant in the case of adoption, and the date of confinement itself is not relevant either.

[24] The Department said there are policy reasons for this. In particular the intention of the Act is to provide an income for those unable to work and receive payment in the early days after the birth or assumption of care of a child, but not to allow people to obtain remuneration from their work as well as receiving publicly funded paid parental leave. Thus the scheme of the Act is very prescriptive in respect of the entitlements of employees, and the associated notice requirements, and there is nothing in the Act to warrant applying a different approach to the self-employed.

[25] The submissions in support of Ms Metcalfe were that the Act does allow a different approach to the self employed. The submissions began with paragraph (b) of the definition of 'parental leave' in s 2 of the Act, which refers to parental leave for self employed people. Such leave is defined as a period during which the self-employed person temporarily does not work because (for present purposes) of the assumption of care of a child. This approach does not accept that the only possible date on which the relevant period of leave could commence is the date of assumption of care of the child – rather the focus is on whether there was a temporary cessation of work because of the assumption of care of the child and when the cessation began.

[26] Ms Metcalfe said the definition is not comparable to the definition in paragraph (a) regarding employees. The submissions in support relied on the absence from the Act of any provisions comparable to s 10, and of any comparable notice requirements or 'markers' identifying the date of commencement of parental leave for

a self employed person. The only available 'marker' is that contained in (b) of the definition in s 2. That is, the self employed person ceases work temporarily because of the assumption of care of a child.

[27] Accordingly it was submitted that, provided there was a causal link between the temporary cessation of work and the assumption of care of a child, the cessation of work was capable of amounting to parental leave. The necessary causal link was present in Ms Metcalfe's circumstances. Her cessation of work, which occurred on 16 March, marked the commencement of a period of parental leave.

[28] For those reasons Ms Metcalfe says she met all three limbs of the definition of 'eligible self employed person' in s 71CB(1)(b).

[29] It was further submitted that since Ms Metcalfe was entitled to payment in that she was an eligible self employed person, the only question was one of when her parental leave commenced.

[30] At that point the reasoning faces the difficulty that s 71K identifies the date of commencement of an entitlement to payment as the earliest of the possible dates listed in the section. If Ms Metcalfe was entitled to payment as an 'eligible self-employed person', then the date on which she assumed the care of the child (17 January) must be the date on which any entitlement to payment commenced. In her circumstances that was the earliest of the dates listed in s 71K(2).

[31] However as at that date, according to her application for payment, Ms Metcalfe was not taking parental leave.

[32] This calls into question whether Ms Metcalfe was an 'eligible self employed person' at the time her entitlement to payment commenced. If she had not ceased work, she was not taking parental leave as defined in s 2. If she was not taking parental leave she did not meet s 71CB(1)(b)(iii), being the third of the requirements necessary to be an 'eligible self employed person'.

[33] Such an analysis does not allow for the commencement of parental leave at a date later than the date of assumption of care of the child. Section 71CB(1)(b)(iii) cannot be severed from the remainder of the section to support a different conclusion.

[34] Further, because any entitlement of Ms Metcalfe's to payment commenced on the date of assumption of care of the child, s 71LA(1)(a) - which addresses the end of parental leave payments - cannot entitle her to payment for the 14-week period commencing with a date which is after the date of assumption of care of the child. Such a conclusion would be inconsistent with s 71K.

[35] For these reasons I conclude that in Ms Metcalfe's circumstances the date of commencement of parental leave had to be same as the date of commencement of the entitlement to payment. Since no period of leave commenced on that date, there is no entitlement to paid parental leave.

Whether there was a return to work affecting eligibility

[36] The parties referred to s 71CD, which describes the level of activity which may be carried out without amounting to a return to work. The reference concerned a possible issue of whether Ms Metcalfe's activities after 17 January - or more particularly 16 March in the light of the date nominated for the commencement of paid parental leave - amounted to no more than oversight or occasional administrative tasks.

[37] Neither party has relied on an argument that Ms Metcalfe commenced a period of parental leave then returned to work, with implications for the continuation of an entitlement to payment under s 71LA(1)(b). The question has been whether she commenced a period of leave in respect of which an entitlement to payment also commenced. Accordingly it is not necessary to pursue any matter under s 71CD.

Whether s 68 provides relief

[38] Section 68(2) defines the scope of the irregularities which the Authority may address. It is interpreted to mean the relevant irregularities must be irregularities in form, and in particular that s 68(2) (a) and (b) must be read in the light of (c), which

refers to irregularities in matter of form. The meaning of ‘any other irregularity’ in s 68(5) must be read in the light of this definition. Accordingly s 68 has been applied overall to address irregularities in form, but not in substance.

[39] It was submitted on behalf of Ms Metcalfe that s 68 was included in the Act to provide the Authority with a discretion to waive or alter the strict requirements of the Act to prevent an unfair outcome or an injustice. If that is so, it is only to the extent that there is an irregularity in form. The section does not give the Authority a discretion to waive or alter the provisions of the Act in matters of substance.

[40] If Ms Metcalfe was ineligible to receive paid parental leave because the circumstances of her assumption of care of her son meant she was unable to commence parental leave within the parameters set out in the Act, that is a matter of substance and not one the Authority can address under s 68.

Costs

[41] Costs are reserved.

[42] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority