

ATTENTION IS DRAWN TO THE ORDER  
PROHIBITING PUBLICATION AT PARAGRAPH  
[26] OF THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 358/08  
5125409**

BETWEEN      N  
                         Applicant

AND              CHIEF EXECUTIVE OF THE  
                         DEPARTMENT OF LABOUR  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:          Applicant In Person  
                                 Alex Leulu for the Respondent

Investigation Meeting:      19 August 2008  
                                 24 September 2008

Determination:              23 October 2008

---

**DETERMINATION OF THE AUTHORITY**

---

**The application**

[1] The applicant Mrs N ("Ms N") applies under section 68 of the *Parental Leave and Employment Protection Act 1987* ("the Act") for relief from an irregularity.

[2] The respondent Chief Executive of the Department of Labour ("the Chief Executive") says that Mrs N is substantively ineligible for paid parental leave.

**The facts**

[3] Mrs N is employed by Fisher & Paykel Healthcare ("Fisher & Paykel") as a production assembler. She has been employed in that role since 20 June 2005.

[4] Mrs N's niece gave birth to a female child on 27 December 2006 ("the child"). The niece invited Mrs N and her husband to take over the parenting of the child but it was only in about February or March 2007 that they agreed to do so.

[5] Mrs N and her husband made application for an adoption order in respect of the child by an application signed 2 March 2007.

[6] While initially she said she had done so in February 2007, Mrs N revised that to say that in May 2007 she approached Fisher & Paykel human resources advisor Ms Dinah Lesoa ("Ms Lesoa"). Mrs N relies on her contemporaneous diary note to this effect. She gives sworn evidence that she advised Ms Lesoa "*I am adopting a child, I don't know how long its going to take, but I'm thinking of taking paid parental leave*". Mrs N says that Ms Lesoa then said to her "*Wait til the adoption orders is granted*". Mrs N says she accepted that advice and did nothing further about making application for parental leave or paid parental leave. Ms Lesoa gives evidence that she does not recall any such conversation with Mrs N.

[7] In December 2007, Mrs N's niece informed Mrs N she was returning to Samoa and she did so in February 2008.

[8] Mrs N and her husband were granted an adoption order by the Family Court in respect of the child in February 2008.

[9] Following the grant of the adoption order that same month, Mrs N approached Fisher & Paykel's human resource department to make application for both parental leave and payment for that leave. Mrs N was assisted by human resource adviser Ms Amy Shears ("Ms Shears"). Mrs N completed a Fisher & Paykel parental leave application form dated 14 March 2008 as well as an Inland Revenue *IR880 Paid Parental leave application* declared and dated 14 March 2008. Ms Shears had completed the employer declaration of the *IR880* and signed it on 25 February 2008.

[10] By letter dated 25 March 2008 Ms Shears wrote to Mrs N confirming her parental leave and the dates of it between 26 May 2008 until 22 May 2009.

[11] The Inland Revenue department wrote by letter dated 2 April 2008 to Mrs N advising that her application for paid parental leave had been referred to the Department of Labour because the Inland Revenue "*had been unable to determine [her] eligibility for PPL*".

[12] By letter dated 5 May 2008, the Chief Executive's delegate wrote to Mrs N and advised the Chief Executive's view that Mrs N was unable to satisfy the eligibility criteria for paid parental leave. It was the Chief Executive's view that Mrs N was ineligible because she did not commence maternity leave from the date on which she first assumed care of the child.

### The merits

[13] The Chief Executive through his delegate wrote:-

*As discussed the Inland Revenue referred your application for paid parental leave to this Department in order that we could clarify whether or not you were eligible to receive the taxpayer funded paid parental leave payment. This was due to the fact that it is now over 12 months since you assumed care of the baby with a view to adoption. This fact has an impact on whether an eligible employee is eligible to receive the taxpayer funded paid parental leave payment.*

*Following on from this, the Parental Leave & Employment Protection Act 1987, section 30, states that an eligible employee is not permitted to commence or continue any period of parental leave, in the case of adoption, after the first anniversary of the date on which the employee first assumed the care of the child with a view to adoption. This means that the baby you assumed care of, 27 December 2006, was over 1 year at the time you applied in February 2008 to commence paid parental leave, 26 May 2008.*

*Accordingly, based on the information received, it is my understanding that you are not able to satisfy the eligibility criteria for paid parental leave.*

[14] The Chief Executive was incorrect to assign the child's birth date of 27 December 2006 as the date Mrs N and her husband assumed care of the child. That was wrong because it is the view to adoption that is material. While the child may have been in their care since birth, it is the date that they resolved to adopt the child that is relevant. I fix that date according to the evidence given to the Authority as sometime in February or March 2007.

[15] On that basis, section 30 of the Act limits extended leave to the anniversary thereafter, i.e to February or March 2008. There is no entitlement to extended leave after that time. That section is this:-

*30. Termination of extended leave  
Notwithstanding anything contained in any other provision of this Act, no employee shall be entitled to commence or continue any period of extended leave under this Act after—*

- (a) *The date on which the child in respect of whom the extended leave is taken (other than a child to whom paragraph (b) of this section applies) attains the age of 12 months; or*
- (b) *In the case of an adopted child, the first anniversary of the date on which the employee first assumed the care of the child with a view to the adoption of that child by that employee, or by that employee and that employee's spouse or partner jointly; or*
- (c) *The date on which the employee ceases to have care of the child in respect of whom the extended leave is taken.*

[16] Section 10 of the Act provides that maternity leave shall begin in the case of adoption, on the date on which the employee first assumes (with a view to adoption) the care of the child. That section is this:-

- 10. Date of commencement of maternity leave*  
*Maternity leave shall begin—*
- (a) *On the date of confinement; or*
  - (b) *In the case of adoption, on the date on which the female employee first assumes (with a view to adoption by her or by her and her spouse or partner jointly) the care of the child; or*
  - (c) *On such earlier date—*
    - (i) *As is determined in accordance with section 11 or section 12 or section 13 of this Act; or*
    - (ii) *As is appointed by the employer pursuant to section 14 of this Act.*

[17] The error in this case is that the application for both parental leave and paid parental leave was assumed as commencing from the date of a final adoption order by the Family Court. The material date is actually the date from which care of the child is assumed with a view to adoption.

[18] Section 33 of the Act prescribes the notice requirements for adoptive parents applying for parental leave. They are strict requirements and a range of dates are prescribed reflecting the different ways a child is taken into care for adoption and significantly in this present case, the fact that care is commenced before a decision or resolve is reached to actually adopt a child. It is unfortunate that Mrs N was not aware or made aware of the correct and prescribed requirements.

[19] While those are the legalities, the reality is that Mrs N's employer following her submission of parental leave application form dated 14 March 2008, confirmed her entitlement to parental leave. It did not take any issue at all and confirmed Mrs N that her parental leave would commence from 26 May 2008 until 22 May 2008.

[20] So while Mrs N was granted parental leave by her employer she was not actually entitled to it at the time the application was made. But is she entitled to paid parental leave? Was she denied it by reason of an irregularity the consequences of which she should now be relieved of?.

[21] Ms Lesoa gives evidence that she "does not recall ever having a conversation" with Mrs N about parental leave. On balance, I am prepared to accept Mrs N's sworn evidence that she was informed by Ms Lesoa when she enquired of parental leave to wait until the adoption order was granted. The advice was incorrect and I accept that because of it, Mrs N did not make timely application for parental leave and payment for it.

[22] While Fisher & Paykel permitted Mrs N parental leave, I find it was not obliged to in accordance with the provisions of the Act.

[23] I do not consider Mrs N is entitled to paid parental leave because she did not take parental leave from her employment. I mean by that, she did not take maternity leave in accordance with section 10 of the Act and nor was she entitled to extended leave in accordance with section 30 of the Act. For these reasons, I conclude she was not entitled to paid parental leave for the purposes of section 71D of the Act.

[24] I consider there is no irregularity in this case in the nature of an application defective as to form. The problem here is far more fundamental. It is defective in substance. Accordingly, my view being that there is no irregularity, I have no discretion to exercise the Authority's powers under section 68 of the Act.

### The determination

[25] **There is no irregularity in this case. There will be no formal orders as sought by Mrs N.**

[26] However, in recognition of the sensitivities with respect to adoptions, I think it proper to order that Mrs N's name be prohibited from publication. I order that **Mrs N's name is prohibited from publication.**

### Costs

[27] In the event that costs are sought, Mr Leulu must submit a memorandum making a case for the same within 10 days of the date of this determination. I will make consequential directions in the event he does so.

Leon Robinson  
**Member of Employment Relations Authority**