

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Louise Irene Andrews (Applicant)
AND Department of Labour (Respondent)

REPRESENTATIVES Yvonne Bruorton for Applicant
Jenny Waterworth for Respondent

MEMBER OF AUTHORITY G J Wood

SUBMISSIONS RECEIVED 5 January 2005

**DATE OF
DETERMINATION** 26 January 2005

DETERMINATION OF THE AUTHORITY

1. The applicant, Ms Louise Andrews, is disputing the Department of Labour's decision that she is not able to retain the 12 weeks taxpayer funded paid parental leave payments already paid to her, as the Department of Inland Revenue did not receive her paid parental leave application until after she had returned back to work for the first time.
2. The parties have helpfully prepared an agreed statement of facts which I have utilised as follows, for the purpose of my determination. The applicant is a primary school teacher employed in a permanent position at Havelock North Intermediate School. Her employer is the Havelock North Intermediate Board of Trustees.
3. The applicant applied for parental leave in September 2003. It was agreed that the leave would commence at the end of the January 2004 term break (26 January).

4. At the time of application the applicant's employer did not provide any information about parental leave payments.
5. The applicant commenced parental leave on 26 January 2004.
6. The applicant's employer asked her to undertake some relief teaching at Havelock North Intermediate School on 19 February 2004, 23 February 2004 (half day), 24 February 2004 (half day), 8 March 2004, 12 March 2004 and 16 March 2004. The applicant did not receive any advice at this time indicating that the relief teaching would have an impact on her future parental leave payments.
7. On 6 and 7 May 2004 the applicant and a representative from her employer completed a Paid Parental Leave Application Form and forwarded it to the Department of Inland Revenue pursuant to s.71I of the Parental Leave and Employment Protection Act 1987 ("PLEPA").
8. In a letter dated 15 May 2004 Inland Revenue advised the applicant that her application for paid parental leave had been accepted. Her weekly entitlement before tax was \$334.75. It was to be paid for the period of 26 January to 18 April 2004 pursuant to s.71K of the PLEPA.
9. As the payment period had passed, the applicant received her parental leave payments in a lump sum payment of \$3,306.96 on 20 May 2004.
10. The letter from the Inland Revenue included the following statement:

"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 in 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 (e.g. for one day) or work from home while on parental leave."
11. The applicant's collective employment agreement requires her to give her employer one month's notice of her intention to return to work following parental leave. She has not done so.

12. On 22 June 2004 the applicant spoke with an employee of the Department of Labour and advised her that:
 - a. She had taken her parental leave early so that she would not be leaving a class part way through the year;
 - b. She had undertaken relieving work in February and March 2004;
 - c. She had not been aware of the implications of her returning to work after she had commenced parental leave until she received the letter from Inland Revenue accepting her application.
13. On 7 July 2004 the applicant again spoke with an employee of the Department of Labour and was advised:
 - a. Pursuant to s.71K of the PLEPA she was not entitled to paid parental leave payments because she had returned to work before Inland Revenue received her application for payments;
 - b. That she may have the option of applying to the Employment Relations Authority for relief under s.68(5) of the PLEPA.
14. In a letter to the applicant dated 9 July 2004 the applicant was informed that she was not entitled to paid parental leave as the Department of Inland Revenue had not received her paid parental application until after she had returned to work for the first time. The applicant was advised that she was not able to retain the parental leave payments.
15. On 15 July 2004 the Inland Revenue wrote to the applicant seeking repayment of the parental leave payments.
16. I do not intend to determine the issue of what constitutes a return to work under the Parental Leave and Employment Protection Act 1987 in terms of whether the Department of Labour is correct in its interpretation that return to any form of work whatsoever for any period of work whatsoever with the employer from whom the employee has taken parental leave, regardless of whether or not the employee returns to his or her former position, is correct. The reason for this is that I intend to deal with

the matter by way of reference to a different form of irregularity and for this purpose only it is assumed that Ms Andrews' relief teaching work did constitute a return to work.

17. In terms of the issue as to whether the failure to submit a paid parental leave application before Ms Andrews returned to work is an irregularity, the Department accepts that this is an irregularity and may be remedied by the Authority waiving the late filing of the application. I so determine on the basis of the parties' acceptance that Ms Andrews acted in good faith, as she was not aware of the effect of returning to work until after her application had been submitted.
18. I also accept that Ms Andrews' failure to provide written notice to her employer of her wish to take parental leave is an irregularity, which I remedy in accordance with s.68 of the Act.
19. I intend to address the substance of this application by evaluating the parties' actions as a whole. Perhaps because Ms Andrews never applied in writing for parental leave, her employer failed to comply with s.71T of the Act, which required it to notify her of the substance of the Act by giving her a notice in a form prescribed by the Department. Such notice would have clearly informed Ms Andrews of the Department's view that a return to work in any form for any period whatsoever would have meant that she would become ineligible for further parental leave payments. Had this irregularity not occurred and Ms Andrews been properly informed, I am sure that she would not have undertaken the relief teaching work she did, which may well have been in breach of her obligations under the Act.
20. It is therefore appropriate, I determine, to grant relief in respect of such an irregularity because it is reasonable to do so having regard to the nature of the irregularity (an omission by the employer), the good faith of Ms Andrews and the fact that had Ms Andrews been properly informed by her employer (as she would have been had the matter been processed properly), then she would not have "returned to work", assuming for the sake of argument her relief teaching constituted a return to work. Thus she is entitled to retain the parental leave payments already made to her.

21. I therefore determine that the applicant, Ms Louise Andrews, is entitled to retain the paid parental leave payments made to her, by way of relief ordered under s.65 of the Parental Leave and Employment Protection Act 1987.

G J Wood
Member of Employment Relations Authority