

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Lisa Mary Isherwood (Applicant)  
**AND** Department of Labour (Respondent)  
**REPRESENTATIVES** Lisa Mary Isherwood In person  
Jenny Waterworth, for Respondent  
**MEMBER OF AUTHORITY** Vicki Campbell  
**INVESTIGATION MEETING** 3 June 2005  
**DATE OF DETERMINATION** 8 June 2005

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

Ms Lisa Isherwood worked for Rainbow Point Takeaways as its manager for two years. During this time the takeaway bar was owned by her partner Mr Andrew Thodsen. Mr Thodsen sold the business to Mon Soleil Limited on 16 February 2004. The name of the business changed to Burger Wisconsin Taupo. Ms Isherwood continued to work for the new employer as its manager. During 2004 Ms Isherwood became pregnant but did not apply for parental leave.

Mon Soleil Ltd sold its business in August 2004 as the business was losing money. The new owner, Mr David Young took over the business on 23 August 2004. Mr Young offered Ms Isherwood the manager's position for the new business. Unfortunately Ms Isherwood suffered ill health during her pregnancy and so she decided not to accept Mr Young's offer of a job.

Just prior to the change of ownership in August 2004 Ms Isherwood made a formal application to the Inland Revenue Department ("IRD") for paid parental leave. The application states the expected date of delivery of the baby as being 11 November 2004. In her application Ms Isherwood's then employer, Mon Soleil Limited, indicated that Ms Isherwood would have been working for Mon Soleil Limited for 8 1/2 months at the time of the birth of her baby. The application was not approved by the IRD on the basis that Ms Isherwood had not worked for her employer for twelve months as at the expected date of delivery of the baby.

On 5 October 2004, after Ms Isherwood had left her employment, she wrote to the IRD requesting a review of her application for paid parental leave. In her application for review Ms Isherwood outlined the history of her employment with the takeaway business and its various owners. The IRD forwarded this application on to the Department of Labour. The Department wrote to Ms Isherwood and advised her that she was not eligible for paid parental leave as she was no longer an employee, having turned down the offer of employment from Mr Young.

Ms Isherwood's baby was born on 29 October 2004.

Ms Isherwood has made an application under s.68(5) of the Parental Leave and Employment Protection Act 1987 for relief in respect of an irregularity in her application for paid parental leave.

The Department of Labour says Ms Isherwood is not eligible for paid parental leave on the ground that she was not employed as at the date of the birth of her baby and this is not an irregularity which can be remedied pursuant to s.68 of the Act.

The Authority has jurisdiction to determine this matter pursuant to s.161(1)(r) of the Employment Relations Act 2000.

The issue for determination is whether there is an irregularity in Ms Isherwood's application for paid parental leave which may be remedied by the Authority.

**Is there an irregularity in Ms Isherwood's application for paid parental leave which may be remedied by the Authority?**

Ms Isherwood has asked the Authority to grant relief in respect of an "irregularity" in her application for paid parental leave pursuant to s.68 of the Act. "Irregularity" is defined by the act to mean omitting to do something required by the Act, or omitting to act within the required timeframes or in the required form as required by the Act.

Schedule 1 of the Act provides for the employment of an employee to be continuous where there has been a change of ownership of a trade or business or undertaking and where the employee continues to be employed throughout the changes.

Ms Isherwood submitted that her employment was continuous pursuant to Schedule 1 of the Act. She says that her employment was for longer than the 12 months required by the Act and that she is therefore entitled to the paid leave pursuant to Part 7A of the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002 ("2002 Act").

The entitlement to paid parental leave is provided for in the 2002 Act as follows:

**71A Purpose**

*The purpose of this Part is to entitle certain employees to up to 12 weeks of parental leave payments out of public money when they take parental leave from their employment in respect of a child.*

**71D Entitlement to parental leave payment**

- (1) *An employee is entitled to a parental leave payment under this Part if the employee-*
- (a) *has given notice to his or her employer of his or her wish to take parental leave (either in accordance with this Act or with the alternative provision under which the leave is taken); and*
  - (b) *takes parental leave from his or her employment in respect of a child; and*
  - (c) *is an **eligible employee**.*
- (2) *an **eligible employee** is-*
- (a) *a female employee who meets the criteria for maternity leave for the child under section 7; ...*

Section 7 of the Act provides for entitlement for maternity leave to every female employee who becomes pregnant and who has been employed by the same employer for at least an average of 10 hours per week during the "...**immediately preceding 12 months...**" as at the expected date of delivery.

Ms Isherwood refused the offer of employment made to her by Mr Young in August 2004. Ms Isherwood was not employed at the expected date of delivery of her baby and is therefore not entitled to paid parental leave pursuant to section 71D of the Act.

I accept as correct, Ms Waterworth's submission, that s.68 of the Act limits the Authority's jurisdiction to remedying procedural "irregularities" which occur in the application for and processing of parental leave payments and does not extend to remedying Ms Isherwood's ineligibility for parental leave payments.

### **Costs**

Given the nature of this matter and the overall role of the Department of Labour in regard to its functions, I conclude that it is appropriate that costs should lie where they fall.

Vicki Campbell  
Member of Employment Relations Authority