

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 221
5338767

BETWEEN SIAN ANDREA
 MACKINTOSH
 Applicant

AND DEPARTMENT OF LABOUR
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 Greg La Hood, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received 2 May 2001 from Applicant
 13 May 2011 from Respondent

Determination: 23 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Both parties agreed that the Authority could deal with this employment relationship problem on the papers. The parties were given an opportunity to file additional evidence and submissions before the matter was determined.

[2] Ms Sian Mackintosh is self employed. Under section 71I(1) of the Parental Leave and Employment Protection Act 1987 (the Act) a self employed person is not entitled to paid parental leave unless they make an application in accordance with that section.

[3] Section 71I(2)(a) of the Act required Ms Mackintosh to apply for paid parental leave before she returned to work.

[4] Ms Mackintosh applied on 4 March 2011 for paid parental leave to commence on 22 July 2010. Her baby was born on 23 July 2010 and she returned to work on 1 October 2010.

[5] The Department of Labour (the Department) has discretion under section 71IA of the Act to approve the payment of paid parental leave to a self employed person, despite an irregularity in their application for the payment. The failure to apply for paid parental leave before returning to work is an irregularity.¹

[6] However, the Department declined to exercise its discretion in Ms Mackintosh's favour because it did not consider the period of delay (seven and a half months after the birth of her child and over five months after her return to work) was reasonable in all the circumstances.

[7] Ms Mackintosh has applied to the Authority to review the Department's decision under section 71ZB of the Act. The Authority may confirm, modify, or reverse the Department's decision.²

Relevant Facts

[8] Ms Mackintosh works as a self-employed hairdresser. She was self employed when she commenced parental leave and when she returned to work after her short period of leave.

[9] Ms Mackintosh owns and operates a hairdressing business in Hamilton. She gave birth to her first child on 23 July 2010 and took leave from her work to care for her child. At the time Ms Mackintosh commenced leave, she intended to take 12 months' parental leave.

[10] Before commencing leave, Ms Mackintosh hired a worker to replace her as a senior hairdresser in her business whilst she was away from the business on parental leave. On 1 October 2010 the replacement worker was involved in a car accident. Initial indications were that the replacement worker would only be away from work for one week, but that turned in to two weeks, after which Ms Mackintosh was told the replacement worker would be unable to return to work at all.

¹ Section 71IA(5) of the Act

² Section 71ZB(3) of the Act

[11] As a result of the replacement worker's car accident, Ms Mackintosh returned to work (with her baby) to provide immediate cover for the business. This placed her under considerable stress and at the time she returned to work, Ms Mackintosh believed it was an interim arrangement for one week only. That did not turn out to be the case as her replacement worker did not return to work at all.

[12] After receiving advice that the replacement worker would not be returning to work at all, Ms Mackintosh returned to work, to her previous job as a self employed hairdresser at her own hair salon, permanently in order to keep her business afloat.

[13] At the same time she had to return to work, Ms Mackintosh also had to contend with serious relationship difficulties involving the father of her child, which included matters affecting her personal safety. That relationship broke down in November 2010 and her partner moved out of the home they had shared with their child.

[14] Ms Mackintosh stated that the unexpected chaos created by the replacement worker's accident and her serious relationship difficulties, combined with being the caregiver of a young baby meant she simply did not have time to apply for paid parental leave.

Relevant law

[15] There was no dispute that Ms Mackintosh is a person who was eligible under s.71CB of the Act for paid parental leave. However, under section 71I(1) of the Act, a self-employed person is not entitled to paid parental leave unless they make an application in accordance with that section.

[16] Section 71I(2)(a) of the Act states:

- (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 ...*

[17] Ms Mackintosh is not, prima facie, entitled to paid parental leave because she does not fall within the requirements of section 71I(2)(a) of the Act.

[18] The Department has the discretion under s.71IA of the Act to approve the making of paid parental leave to a self-employed person despite an irregularity in their application for parental leave payment. When exercising its discretion, the Department has to have

regard to the extent of the irregularity, including whether the extent of the irregularity was reasonable in all the circumstances and whether the self-employed person was acting in good faith.³

[19] In its submissions the Department submitted Ms Mackintosh had failed to comply with section 71I(2)(b) of the Act because she failed to lodge her application in the prescribed matter. I have not taken account of that submission because there was no evidence to support it; it had not been identified in the Statement in Reply; and Ms Mackintosh had not been previously been advised it was a ground for the Department declining to exercise its discretion to grant her paid parental leave.

[20] The Department also submitted Ms Mackintosh's delay in filing her application for a parental leave payment was significant and it did not consider this period of delay to be reasonable in all of the circumstances. This is the factor I considered when determining whether the Department's failure to exercise its discretion should be modified or reversed.

[21] The Department referred to two determinations of the Authority⁴ involving applications for paid parental leave where there had been several months delay by the applicants in filing their applications for parental leave payments. In both cases the Department declined to exercise its discretion to waive the irregularity, so paid parental leave was declined. The Department's decisions to decline paid parental leave were reviewed by the Authority in both cases, but not reversed.

[22] In *Jansen*⁵ the applicant, a part time self-employed physiotherapist, gave birth to her son on 3 April 2008. Ms Jansen had completed her application for paid parental leave and her accountant, as required, signed the form in March 2008. The forms were ready for submission to the Inland Revenue Department (IRD) on or about 3 April 2008 but, with the demands of two small children, Ms Jansen forgot to send the forms to the IRD until August 2009.

[23] Ms Jansen did some locum work for a colleague who was on holiday in December 2008 and she returned to casual work averaging 3-5 hours per week on 30 March 2009.

[24] The Authority held Ms Jansen's five month delay in making the parental leave application together with the return to work on two occasions (December 2008 and March

³ Section 71IA(2) of the Act

⁴ *Kerry Yvonne Clark v. Department of Labour* 20 December 2010, Member King, AA522/10 and *Rachel Elizabeth Jansen v. Department of Labour* 1 July 2010, Member Doyle, CA142/10

⁵ *Ibid* 3

2009) before her application was made meant that the Department's failure to exercise its discretion to approve the making of a parental leave payment should not be reversed.

[25] In *Clark*⁶ the applicant provided her parental leave application to Inland Revenue Department on 11 June 2010. She had commenced parental leave on 6 April 2009, gave birth on 8 April 2009, and returned to work in September 2009.

[26] Ms Clark had therefore returned to work before her application was received in June 2010. Ms Clark said she was unaware of the requirements around submitting her application and she had an ill child which distracted her from getting information to her accountant until 14 December 2009. Her accounts were not prepared until May 2010.

[27] Ms Clark gave her application for paid parental leave to her accountant before she gave birth to her daughter and she had left the accountant to fill in all relevant information. It was not returned to her, which meant she was not reminded about it, and the accountant did not file her application with IRD until May 2010. Ms Clark was unaware that it had to be returned to the IRD before she went back to work.

[28] The Authority concluded that the delay was not reasonable in all the circumstances and confirmed the Department's decision that Ms Clark was not eligible for paid parental leave.

Outcome

[29] Ms Mackintosh did not file her application for paid parental leave before she returned to work because her return to work was unexpected, and a direct result of the accident her replacement had been involved in. The delay in filing the application after her return to work was attributed to the combined pressure of returning to work with a young baby, her relationship issues, and subsequent relationship breakup.

[30] Whilst I have sympathy for the situation Ms Mackintosh found herself in, when compared with *Jansen* and *Clark*, I do not consider her delay in applying for paid parental leave was reasonable in all the circumstances.

[31] This is not a situation where there was a short delay after her unexpected return to work. Ms Mackintosh did not apply for paid parental leave for more than five months

⁶ Ibid 3

after her return to work. That considerable delay is a factor which weighs against granting her paid parental leave.

[32] I confirm the Department of Labour's decision that the delay was unreasonable and Ms Mackintosh is not eligible for paid parental leave.

[33] There will be no order for costs.

Rachel Larmer
Member of the Employment Relations Authority