

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 133/10  
5308922

BETWEEN ANNA LOUISE NUKU  
Applicant

AND DEPARTMENT OF LABOUR  
Respondent

Member of Authority: P R Stapp

Representatives: Anna Nuku in Person/Applicant  
Greg La Hood, Counsel for the Respondent

Investigation Meeting: On the papers by 28 July 2010

Determination: 19 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is an application from Ms Nuku to correct an irregularity under the Parental Leave Employment Protection Act when the Department of Labour denied her paid parental leave due to her not being employed by the same employer.

**Issue**

[2] The issue for the Authority to determine is whether there is an irregularity under the Parental Leave Employment Protection Act for Ms Nuku to be eligible for paid parental leave.

**The facts**

[3] From August 2006 until 29 December 2009, Ms Nuku was employed by Rapid Road Freighters Limited as a delivery driver, and she delivered freight under the banner *Parcel Express*. Rapid Road Freighters Limited went into liquidation on 29 December 2009.

[4] *Parcel Express* then contracted to J Mahony and Sons Limited from 29 December 2009. J Mahony and Sons Limited employed Ms Nuku as a driver and she commenced work on 30 December 2009 with that company at a depot in Hastings. J Mahony and Sons Limited went into liquidation on 17 March 2010.

[5] On 18 March 2010, Ms Nuku began employment with Freight Lines Limited. Freight Lines Limited took over the daily running and operations of J Mahony and Sons Limited at a depot in Napier. Freight Lines Limited employed Ms Nuku from 18 March 2010 to carry out deliveries but did not include delivering for *Parcel Express*. Her last day before taking parental leave was 18 June 2010.

[6] Ms Nuku has confirmed that Freight Lines Limited retained some of the customers of J Mahony and Sons Limited while it also took on several new customers. *Parcel Express*, the original *principal* involved with Rapid Road Freighters Limited and J Mahony and Sons Limited, did not contract to her current employer, Freight Lines Limited.

[7] Freight Lines Limited has supported Ms Nuku's application (letter dated 6 May 2010), but confirmed that her previous companies she worked for went into liquidation. However, there has been no information provided of any transfer of a *trade, business or undertaking* involved between the entities or that they were an associated employer.

## **The law**

[8] Section 7 of the Parental Leave Employment Protection Act (PLEPA) sets out the terms on which an employee may be entitled to take maternity (parental) leave. The section reads as follows:

### **7. Entitlement of female employee to maternity leave**

*Except as otherwise provided in this Act, every female employee –*

- (a) *who becomes pregnant; and*
- (b) *who, at the expected date of delivery, will have been in the employment of the same employer for at least an average of 10 hours a week over –*
  - (i) *the immediately preceding 12 months; or*
  - (ii) *the immediately preceding 6 months, -*

*shall be entitled to maternity leave in accordance with this Act.*

[9] Section 71D of the PLEPA makes provision for when an employee is entitled to a paid parental leave payment. The relevant provisions of section 71D read as follows:

**71D Entitlement to parental leave payment [[for employees]]**

- (1) *An employee is entitled to a parental leave payment under this Part if the employee –*
- (a) *has given written 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 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) *This section is subject to sections 71F-71IA (restrictions on parental leave payments and making an application for payment).*

[10] Section 71CA of the PLEPA defines who is an eligible employee. The applicable subsection that applies to Ms Nuku's circumstances is section 71CA(1)(a) which reads as follows:

- (1) *In this Part, eligible employee means –*
- (a) *a female employee who meets the criteria for maternity leave with a child under section 7; or*
  - ...

[11] Section 68 of the PLEPA provides for non-compliance with formal requirements. In other words, provides for the non compliance with formal requirements, which includes an irregularity. Section 68 reads as follows:

- (1) *An employer must not unreasonably refuse to allow an employee to exercise any rights and benefits in respect of parental leave or a parental leave payment that the employee would be entitled to exercise but for an irregularity.*
- (2) *In this section, irregularity means –*
- (a) *omitting to do something required by or under this Act or under the alternative provision under which the leave is taken; or*

- (b) *doing something required by or under this Act or the alternative provision under which the leave is taken 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 an employee, employer, or self-employed person, may apply to the Employment Relations Authority or the Court for relief in respect of an irregularity.*
- (4) *The Employment Relations Authority or the Court must grant relief to an employee in respect of a failure to comply with the notice requirements of this Act or of the alternative provision under which the leave is taken if satisfied that –*
  - (a) *the employee’s failure to comply with the notice requirements was in good faith; and*
  - (b) *the extent to which the employee did or did not comply with the notice requirements was reasonable in all of the circumstances of the case.*
- (5) *The Employment Relations Authority or the Court 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 or the Court may grant relief –*
  - (a) *by amending or waiving the irregularity, extending the time within which anything is to be or may be done, 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 or the Court, in the circumstances of each case, thinks fit.*

[12] Clause 1 of the Change of Employer schedule of the PLEPA is also relevant.

The schedule makes provision for:

### **Parental Leave and Employment Protection Act 1987**

#### ***Schedule Change of employer***

1. *If a trade or business or an undertaking (whether or not it is an undertaking established by or under an Act) is transferred from one person to another (whether before or after the date of the commencement of this Act), -*

- (a) *the period of employment of an employee in the trade or business or undertaking at the time of the transfer shall count as a period of employment with the transferee; and*
- (b) *the transfer shall not break the continuity of the period of employment of any employee in the trade or business or undertaking; and*
- (c) *any employer who employed an employee in the trade or business or undertaking at any time before the transfer and the transferee shall be deemed, in relation to the employee, to be the same employer.*

...

5. *If (whether before or after the commencement of this Act) an employee of an employer is taken into the employment of another employer who, at the time when the employee enters that other employer's employment is an associated employer of the first-mentioned employer, -*

- (a) *the employee's period of employment at that time shall count as a period of employment with the associated employer; and*
- (b) *the taking of the employee into the employment of the associated employer shall not break the continuity of the period of employment; and*
- (c) *the first-mentioned employer and the associated employer shall be deemed, in relation to the employee to be the same employer.*

6. *For the purposes of clause 5, any two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control, or if both are companies of which a third person (directly or indirectly) has control; and the expression "associated employer" shall be construed accordingly.*

### **Determination of the Authority**

[13] This is an unusual set of circumstances and circumstances outside Ms Nuku's control given that two of her employers went into liquidation. To her credit she was able to stay in full time employment. She had been doing the same job for four years. Unfortunately for Ms Nuku the provisions of the PLEPA do not include provision for a change of an employer when a company goes into liquidation.

[14] Ms Nuku was employed by different employers in the immediately preceding six months from her expected date of delivery. Under s.7 of the PLEPA, Ms Nuku would not be an eligible employee for the purposes of s.71CA. Also, Ms Nuku does

not meet the provisions of s.71D. The PLEPA requires employment with the same employer over the required time.

[15] The entities involved were not the same employer. Also there was no transfer of a *trade, business or undertaking* or any evidence that the entities involved were an associated employer to meet the requirements of Clause 1 of the Change of Employer schedule of the PLEPA.

[16] Under clause 1 of the Change of Employer schedule of the PLEPA, a *trade, business or undertaking* must be *transferred* from one entity to another. It is not the employee who has transferred from one employer to another. Parcel Express which contracted to the first two employers has no relationship with the third employer. There is no statutory, contractual or any legal *link* that would establish a *transfer* from one entity to another. The first two employers went into liquidation and the applicant's employment agreement would have terminated with those employers. New agreements would have had to have been started with each new entity. No other information exists to support the transfer of a *trade, business or undertaking*. In conclusion, clause 1 of the schedule does not apply.

[17] Also, clause 6 of the schedule cannot apply because Freight Lines Limited did not have any control in regard to the two previous entities in terms of clause 5 of the schedule to be an associated employer.

[18] For the above reasons, the applicant is not substantively entitled to parental leave as she was not in the employment of the same employer for at least an average of 10 hours a week over the immediately preceding six or 12 months from her expected date of delivery. This is a substantial matter and does not relate to simply an issue of form with documentation or a matter of form because Ms Nuku does not meet the requirements of s.7. Therefore s.68 of the PLEPA can not be used to correct an irregularity in Ms Nuku's circumstances. To do so would run counter to the requirements and public policy of the Act.

[19] I decline Ms Nuku's application.

[20] Should Ms Nuku be able to obtain any evidence in regard to the matters referred to in paragraphs [7] and [17] above, I am willing to reopen the investigation to give further consideration to such evidence subject to any reply from the Department.

P R Stapp  
Member of the Employment Relations Authority