

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 5/09
5144095

BETWEEN

RUTH OLIVER
Applicant

AND

DEPARTMENT OF LABOUR
Respondent

Member of Authority: G J Wood

Representatives: Ruth Oliver on her own behalf
Alex Leulu for the Respondent

Investigation Meeting: By consideration of papers

Submissions Received: By 14 January 2009

Determination: 15 January 2009

DETERMINATION OF THE AUTHORITY

[1] Ms Ruth Oliver works in a periodontics and dental implant practice, known as Chapman Wong, to a Mr Morris Wong. She ceased employment on 12 September 2008 in order to take up 14 weeks paid parental leave under the Parental Leave and Employment Protection Act 1987. However, she agreed to help Mr Wong out on 17 September as a personal favour because Mr Wong found himself short-staffed. No arrangements for payment were made and Ms Oliver was unable to carry out any of her regular duties because of her pregnancy.

[2] Before she commenced work that day she rang Inland Revenue to inform them that she was going to work, as she was aware that doing so may have implications for her parental leave payments. She had not, however, received the standard letter stating that her entitlements would terminate from the time that she undertook work of any capacity. She did not receive any response from anyone in Inland Revenue until

1pm on that day, when she was told she ran the risk of having her payments terminated. The Department of Labour, which administers the scheme, later advised her that her parental leave expired on 17 September because she had *returned to work*. Section 71(1) of the Act states that parental leave payments are only payable for a period that ends when the employee returns to work. As Ms Oliver had returned to work on 17 September she was not entitled to any further payments. Ms Oliver has reviewed that decision with the Authority.

[3] The sole issue for determination is whether or not Ms Oliver's parental leave should have been terminated on 17 September because she had returned to work and, if not, what remedies she is entitled to.

[4] My determination has not had the benefit of legal submissions on the basis of what constitutes return to work because Ms Oliver represented herself, and the Department of Labour considered that it was not its role to make any submissions on this key issue.

[5] This is not an irregularity that may be dealt with under s.68 entitled *non-compliance with formal requirements*. A return to work does not come within the definition of irregularity. Instead the Authority's jurisdiction is limited to a review under s.71ZB of the Act.

[6] The purpose of the legislation is clear. It is to provide pregnant women and mothers with young children with 14 weeks during which the State pays them in order to look after their children. It is clear from this that a return to work need not be a return to paid work, because the State does not want to be paying mothers to look after infants when they are working at the same time, whether on a paid or unpaid basis. In particular, it is easy to see how a parent might rort the system by taking the payments and working in an unpaid capacity in a family business, for instance. In normal circumstances it is appropriate to conclude that a person who returns to work, even for one day, has returned to work for the purposes of the legislation. The information provided by the Inland Revenue Department makes it abundantly clear that return to work for even one day will be sufficient to end the payments.

[7] Ms Oliver, however, never received that information. She also sought to inform the Inland Revenue Department before commencing work what she intended to do. If she had received the correct information at the time, she may never have

done the day's work. This is not a case of Ms Oliver attempting to pull one over on Inland Revenue. Anyone acting in that capacity would rightly have their payments terminated on the date that they returned to work.

[8] In all the circumstances of this case, however, can it be said that Ms Oliver was returning to work for the purposes of the legislation? The Authority's powers are to confirm, modify or reverse a decision of the Department of Labour. That brings us back to the prior analysis.

[9] Clearly, whether a person has returned to work under the legislation is a matter of fact and degree depending on the particular circumstances of the case. While it is possible to argue that any work done by a person not in receipt of payment constitutes a return to work, there has to be some cut off point in reality. For instance, if someone happened to be passing their workplace and answered the phone while somebody took a break, I do not consider that that would constitute a return to work for the purposes of the legislation. In my assessment, the legislation requires a return to work be a deliberate action, in the sense that a claimant knew or ought to have known that their undertaking work would lead to their inability for and hence cancellation of their payments.

[10] In this case, at best it may be said that Ms Oliver intended to return to work for one day. As noted above, this would be sufficient to constitute a return to work for the purposes of the legislation in usual circumstances. In Ms Oliver's case I conclude her actions were demonstrably not a deliberate return to work in breach of the Act. She was not given the information telling her that any return to work, whatever the period, would lead to her payments being cancelled. Furthermore, she was let down by Inland Revenue when she sought information from it. One would expect officers of a department such as Inland Revenue to know, without the need to get advice, involving a delay of several hours, that if Ms Oliver did attend work, in whatever capacity, she would be returning to work. It is likely that had Ms Oliver been properly advised at the time she would not have attended work, whatever disruption that caused Mr Wong.

[11] In all the circumstances, an appropriate order in this case is to grant the review, but to modify the duration of Ms Oliver's parental leave. It would be inappropriate to grant Ms Oliver payment for the day she attended on Mr Wong's practice. The legislation does not envisage entitlement to a broken period of parental

leave, so it would be appropriate for Ms Oliver's payments to commence from the day after she went in to work for Mr Wong. I note in this context that while the departments give information about not returning to work to employee applicants, it would also be useful, if not already done, for employers to be explicitly dissuaded from suggesting to such employees that they return to work to help out in any capacity during the course of their parental leave payments.

[12] I therefore uphold Ms Oliver's review against the Department of Labour's decision to terminate her paid parental leave employment under the Act and order that she be paid for a 14 week period, less one day, commencing on 18 September 2008, unless she has returned to work within relevant period.

G J Wood
Member of the Employment Relations Authority