

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 174/08  
5119731

BETWEEN

CARLA VAN WALEN  
Applicant

AND

DEPARTMENT OF LABOUR  
Respondent

Member of Authority: Robin Arthur

Representatives: Kevin van Walen for the Applicant  
Alex Leulu, Counsel for Respondent

Investigation Meeting: 9 May 2008 at Auckland

Determination: 12 May 2008

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**DETERMINATION OF THE AUTHORITY**

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[1] This matter concerns whether the redundancy of the Applicant shortly before her parental leave was due to start meant she was no longer employed by the date at which her leave was due to start and was therefore ineligible for paid parental leave (“PPL”).

[2] The Applicant seeks a review of a decision of the Department of Labour that she is not entitled to PPL. The review application is made under s71ZB of the Parental Leave and Employment Protection Act 1987 (“the Act”) which authorises the Authority to confirm, modify or reverse the decision of the department.

[3] The parties provided statements of problem and reply and written submissions in advance of the investigation meeting. At the meeting the Applicant provided some additional background information under oath and the representatives gave oral submissions.

## Facts

[4] The decision under review was advised to the Applicant by letter of 28 February 2008 from an information officer of the department. The officer told the Applicant that she was not eligible to receive PPL as her employment “*terminated*” on 18 February 2008, three weeks before her leave was scheduled to start on 10 March 2008. The officer wrote: “*This means that you do not have a position from which to take parental leave*”.

[5] The Applicant was employed by The Joneses Real Estate Limited (“the company”) from 14 August 2006 under the terms of an individual employment agreement. Her position as a customer service representative was full-time.

[6] The Applicant’s employment agreement included the following terms:

### ***Parental leave***

*5.15 You are entitled to leave as defined by the Parental Leave and Employment Protection Act 1987.*

...

### ***13. Termination & Suspension of Employment***

*13.1 The Employee or the Company may terminate this agreement by one month’s prior written notice, or at the Company’s discretion, by a payment in lieu of such notice. ... This clause will not prevent the Company from terminating the Employee’s employment without notice if it considers the Employee is guilty of serious misconduct which in the Company’s opinion justifies instant dismissal.*

*13.2 Where either party elects to terminate this contract on notice, the Company may continue to employ the Employee under the terms and conditions set out in this contract, but for all or part of the period of notice not require the Employee to attend work or carry out the Employee’s duties under this agreement. During any such period the Employee will continue to receive all remuneration and other entitlements under this agreement for the remaining balance of the notice period and will be bound by all other terms of this agreement.*

*13.3 The Company may terminate the Employee’s employment without notice at any time in the event of serious and wilful misconduct, serious non-observance of the terms of employment or serious neglect of duties, including without limitation an act of dishonesty or fraud, breach of confidentiality or failure to obey a lawful instruction of the Company.*

...

**Redundancy**

*141.1 In the event of the Employee's employment being terminated by the Company on grounds of redundancy, the Employee will be given one month's notice of termination or pay in lieu of notice. Redundancy compensation is not payable.*

...

[7] In July 2007 the Applicant became pregnant and in December 2007 applied for paid parental leave.

[8] Her application, also signed by a representative of the company, identified the expected due date of the child as 10 April 2008 with parental leave to start on 10 March 2008.

[9] An administrative oversight delayed the company completing and forwarding the application form to the Inland Revenue Department ("IRD"). Once IRD received the form in February 2008, it promptly processed the application and by letter dated 15 February 2008 advised the Applicant that her weekly entitlement of \$391.28, less tax and student loan deductions, would be paid for the period starting 10 March 2008 through to 15 June 2008.

[10] On 18 February 2008 the Applicant arrived at work to find that the office phone lines and computers were not working. Shortly after she and other staff were called to a meeting and told by the directors that the company was being put into voluntary liquidation. Companies Office records show liquidators were appointed by special resolution of the shareholders at 10.30am on 18 February 2008.

[11] At the staff meeting the Applicant was told her employment with the company had ceased and she would no longer be paid for any work done. On a voluntary basis the Applicant spent the rest of the day calling customers and clearing her desk. At the end of the day she left work.

[12] By letter of 22 February 2008 the liquidators advised the Applicant that her "*employment has now ceased with the company*" and that the liquidators accepted "*no personal liability for any agreement you have with the company for your employment*". It acknowledged any wages or holiday pay due to the Applicant at the date of liquidation ranked as a preferential claim.

[13] The Applicant was not owed any wages up to 18 February as her pay was up to date, having been paid the previous week. She was subsequently paid holiday pay of \$293.37 as a preferential claim but has not been able to get information on what period or how many days of annual leave that amount is said to be for.

[14] The liquidators also acknowledged that the Applicant had “*an unsecured claim for four weeks notice*”. However they advised, by letter of 6 March 2008, that it was unlikely there would be sufficient funds to meet that liability.

[15] The Applicant had promptly contacted IRD about her change in circumstances on 18 February 2008 and the matter was referred to the Department of Labour. By telephone a department officer told the Applicant that she would not receive PPL as she was no longer in employment and she no longer met the eligibility criteria. This decision of the department was confirmed to the Applicant by its letter of 28 February 2008 and the Applicant applied for this review.

## Legislation

[16] The Act confers a PLP entitlement only to an “*eligible employee*” (s71D). This term is defined in s71CA. In this case the Applicant’s eligibility depends on whether she was “*a female employee who meets the criteria for maternity leave for the child under section 7*”.

[17] Entitlement to maternity leave under s7 is provided to:

- 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 ...*

[18] Section 71L(1) provides that PLP ends on the earlier date of either the completion of 14 weeks or the employee returning to work or resigning from employment. Subsection (2) provides that payments will continue through either of those two periods despite the leave ending before that date because of various

circumstances, including “*if the employee’s employment is terminated due to redundancy*”. The effect of that latter provision is that an employee made redundant while on parental leave remains entitled to PLP through the full statutory 14 week period, even if there is no job to return to at the end of the total leave taken.

### **Issues**

[19] The specific issues for resolution in this review are when the Applicant’s employment ended and whether the ending of that employment made her ineligible for paid parental leave.

### **Submissions**

[20] The Applicant submitted that although in liquidation, the company was still obliged under the terms of her employment agreement to give her notice of the ending of her employment. This was confirmed by the liquidators acknowledging she had an unsecured claim for pay for the four week notice period.

[21] The effect of the notice period, in the Applicant’s submission, was that she remained in the employment of the company for a further month after she was told of the termination of her employment on 18 February 2008. That period of one month ran to 18 March, some eight days after her parental leave was scheduled to have begun on 10 March 2008.

[22] On that basis the Applicant’s submission was that she was still an eligible employee on 10 March. She then relied on the provisions of s71K that PLP was payable for a period beginning on the date of commencement of her parental leave. The PLP remained payable to her for 14 weeks because of the protection provided by s71L that payment would continue once started despite the fact the parental leave ended because her employment was terminated due to redundancy.

[23] The Respondent submitted that the Applicant, by ceasing work on 18 February 2008, was no longer employed by the time her parental leave was to start on 10 March and she had therefore ceased to be an eligible employee.

[24] She was, in the Respondent's submission, no longer "*in the employment of the same employer*" for the "*immediately preceding 12 months*" of her "*expected date of delivery*". Having fallen outside those requirements for entitlement to maternity leave under s7 of the Act, she did not meet the requirements of s71D for entitlement to PLP.

[25] Because the Applicant's leave had not commenced by 18 February, the Respondent also submitted the Applicant could not be protected by s71L.

[26] The Respondent relied on the following extract from an earlier decision of the Authority in *Hull v Department of Labour* (AA 68/06, 9 March 2006, Member Dumbleton) as expressing the applicable principle:

*The intention of the Act is that paid parental leave should be available to be taken from employment which is current and which would otherwise continue but for the pending birth of the child. In this case, although only by a few days, the employment had ceased prior to the expected date of delivery and also the parties had not intended the employment to continue beyond the date fixed for the end of the third school term.*

[27] On that basis the Respondent submitted the Applicant's employment had ceased both before the parental leave was due to be taken (10 March) and before the expected date of delivery (10 April). And, because of the liquidation of the company, no position was being held for the Applicant so it could not be said that the employment would have continued but for the pending birth of the child.

### **Determination**

[28] I am satisfied that the decision of the department that the Applicant is ineligible for PPL should be reversed. The Applicant is entitled to PPL for the period previously advised to her by IRD, that is from 10 March to 15 June 2008. I reach that conclusion for the following reasons.

[29] The extract cited from the Authority's determination in *Hull* accurately expressed the intention of the Act. That case is otherwise distinguishable as it concerned a fixed term employment agreement which had come to an end rather than an 'open ended' agreement of the type under which the Applicant was employed.

[30] On first impression the circumstances of the Applicant by 18 February no longer met the requirements of s7 for the employee to be “*in employment*” with the same employee right up to the end of the day “*immediately preceding*” the “*expected date of delivery*”.

[31] However two aspects must be considered before concluding whether the Applicant was then disentitled to PLP. The first aspect concerns the effect of ss 11 – 14 of the Act on how s7 should be read – that is reading that section in the context of the whole Act. The second aspect concerns the effect of the notice provisions in the Applicant’s employment agreement.

[32] Sections 11 to 14 provide for an employee, in various circumstances, to begin maternity leave earlier than the “*expected date of delivery*” referred to in s7. Section 12 applied in the present case – that is there was an agreement between the Applicant and the company that her maternity leave would start one month before the expected due date. That agreement was expressed in the PPL application signed by both the Applicant and a representative of the company and identifying her “*parental leave commencement date*” as being 10 March.

[33] In this context the references in s7 to whether the employee “*will have been ... in the employment*” must be read as anticipatory or prospective at both the time the application is made and the time when the actual leave – which may be some many weeks in advance of the expected delivery date – starts. It is not intended to apply retrospectively once leave has commenced earlier under the provisions of ss 11 to 14. That is consistent with the intention of the Act, as paraphrased in the extract from *Hull* referring to “*current employment*” at the time when the leave is taken.

[34] The question then turns to the second aspect, which is whether the Applicant’s employment was current at the time that the leave was due to start – that is 10 March – or had ceased on 18 February when she was laid off by the company.

[35] The Applicant’s employment agreement does not define redundancy but, as Mr Leulu accepted for the Respondent, this should be taken to refer to the commonly used definition of circumstances where the employment is terminated because the

employee is superfluous to the needs of the employer: *G N Hale & Son Limited v Wellington Caretakers IUOW* (1990) ERNZ Sel Cas 843, 848 (CA).

[36] The Applicant's dismissal on 18 February was clearly a redundancy. Her position was no longer needed once the company went into liquidation. Her employment agreement had an express provision for such circumstances – that she “*will be given one month's notice of termination or pay in lieu of notice*”. That term was not extinguished by the company's decision to put itself into liquidation.

[37] It is well settled law that the termination of employment must be taken from the expiry of an agreed period of notice or the expiry of an agreed period for which pay in lieu was given: *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA); *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413; and *Wilson & Horton Ltd v Stiffe* [2001] 1 ERNZ 296.

[38] Those cases consider the period for which employment continues to run in the context of the statutory 90-day period for lodging a personal grievance application. I see no reason the same principle regarding the effect of notice should not apply to timeframes in the statutory provision for parental leave.

[39] A similar conclusion is reached from looking at cases regarding the obligations on employees during a notice period not to work for a competitor: *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 (CA) applied in *Ongley Wilson Real Estate t/a Manawatu First National v Burrows (No 2)* [1998] 3 ERNZ 759; and *Waikanae Holdings (Gisborne) Limited v Smith* [2005] 1 ERNZ 267.

[40] The short point is that the employee is entitled to the benefit of the contractual notice period, even if it is not worked and paid for or paid in lieu. Here that applies to the circumstances of the Applicant so that her employment by the company ran for a further one month after being sent away on 18 February. On that basis she was expected to remain in “*current employment*” – to use the phrase from the *Hull* case – until at least 18 March and consequently was, I find, an eligible employee on 10 March for the purposes of s71CA and s71D of the Act.

[41] Under s71K(1) of the Act PLP was payable to the Applicant from 10 March as the date of commencement of her parental leave. Having begun leave on 10 March, she then had the benefit of the protection of s71L(2)(a) of the Act when her employment was terminated due to redundancy by virtue of the expiry of her notice on 18 March 2008. Under that provision her PLP should continue through to its scheduled expiry on 15 June 2008.

### **Observation**

[42] This particular matter for review has been resolved by the application of the uncontroversial notion that an employee's employment ends according to the terms of her or his written employment agreement, including the applicable notice period in the particular agreement.

[43] In similar cases where an applicant's employment is terminated shortly before the leave is due to start, inquiry should be made as to the terms of the applicant's employment agreement – including any applicable notice period – before deciding whether an applicant is within or outside the statutory criteria of eligibility.

[44] That does not however deal with the situations identified in some recent Authority determinations where a worker's employment is terminated before the commencement of parental leave: *Viegas v The Flower House Limited* (AA 193/07, 27 June 2007, Member Oldfield) at para [21] and *Green & Ors v Rendevous Hotels (NZ) Limited* (AA235/07, 6 August 2007, Member Ulrich) at [70]. The reach of the Act is not something that the Authority can alter. Whether an apparent gap in eligibility for paid parental leave is consistent with the policy underlying the Act is a matter for the department administering the Act to consider, and, ultimately, for Parliament to bridge should it wish to do so.

Robin Arthur  
Member of the Employment Relations Authority