

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 96
5552308

BETWEEN JEANETTE MAREE WILLIAMSON
Applicant

A N D MINISTRY OF BUSINESS
INNOVATION & EMPLOYMENT
Respondent

Member of Authority: Helen Doyle

Representatives: Richard Power, Advocate for the Applicant
Catherine Milnes, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 20 May and 17 June 2015 from the Applicant
22 May 2015 from the Respondent

Date of Determination: 15 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jeanette Williamson has applied to the Authority under s.71ZB of the Parental Leave and Employment Protection Act 1987 (PLEPA) for a review of the decision made by the Ministry of Business Innovation & Employment (MBIE) about her parental leave payment.

[2] MBIE's decision making process in this case resulted in two decisions.

[3] The first was made by MBIE on 09 December 2014. It was that Ms Williamson was ineligible for parental leave payments because she returned to work as an employee in June 2014 ceasing to be self-employed for the purposes of parental leave before lodging her application on 10 October 2014.

[4] Section 71IA of the PLEPA enables MBIE to exercise its discretion and approve the making of a parental leave payment despite an irregularity in the application for paid parental leave.

[5] The discretion to approve irregular applications in s.71IA was not initially applied in reaching the decision of ineligibility on 9 December 2014. Mr Power, who is Ms Williamson's accountant, raised this and the matter was reconsidered by MBIE applying that provision and considering whether the delay in submitting the application was reasonable. The outcome was not altered for reasons provided in a letter from MBIE dated 23 February 2015.

[6] MBIE was of the view that *irregularity* is to be narrowly interpreted to include only minor discrepancies in the form of the application for payments. While accepted that the application was submitted in good faith MBIE concluded there were no extraneous circumstances which led to a four month delay between ceasing self-employment and receipt of the application. It was set out in the decision that it understood at first Ms Williamson was unsure whether she would be eligible for paid parental leave and then forgot about the matter until Mr Power asked her about it later. Based on this information MBIE did not consider the delay of four months to be a minor discrepancy.

[7] The application for review was made within 12 months after the date on which decisions were notified to Ms Williamson on 9 December 2014 and 23 February 2015 which is a requirement of s. 71ZB.

[8] By agreement with Mr Power and Ms Milnes during a telephone conference with the Authority the review is to be determined on the papers lodged with the Authority and submissions subsequently received.

Review of decision

[9] The Authority in reviewing the decision of MBIE that Ms Williamson was ineligible for parental leave payments is required to have regard to the requirements of s.71IA which contains the discretion to approve irregular applications.

[10] Section 71IA provides, amongst other matters:

- (1) *The department may approve the making of a parental leave payment to an employee or a self-employed person despite an irregularity in his or her application for the payment.*
- (2) *In deciding whether to approve the making of a parental leave payment under subsection (1), the department must have regard to –*
 - (a) *the extent of the irregularity (including whether the extent of the irregularity was reasonable in all of the circumstances); and*
 - (b) *whether the employee or self-employed person was acting in good faith.*

[11] *Irregularity* is defined in s.71IA(5)(a) as:

failing to make the application for payment before the relevant date in section 71I.

Background against which the decision by MBIE is to be reviewed

[12] Ms Williamson and her partner were for the 2013/2014 financial year variable sharemilkers for a dairy farm on the West Coast. This was their first contract. The dairy farm was a two-person shed and the budget prepared on the basis that they both would be working full time on the farm without the need for a staff member to be employed.

[13] Ms Williamson became pregnant unexpectedly and commenced her parental leave on 2 December 2013. Another person had to be employed to work on the farm. Ms Williamson's son was born on 18 January 2014. She returned to work as an employee for another company on 3 June 2014. Her application for paid parental leave was dated 10 October 2014 some four months later.

[14] It was accepted by MBIE that Ms Williamson fell within at the material time the definition of an eligible self-employed person for parental leave payments under s. 71CB of the PLEPA.

[15] Ms Williamson however failed to make the application for a parental leave payment before the relevant date in s 71I of the Act which provides in subsection (1) that a self-employed person is not entitled to a parental leave payment unless the person makes an application in accordance with the section. Materially section 71I

(2) (a) provides that the application must be made before the date on which the self-employed person returns to work or the parental leave otherwise ends.

[16] Mr Power has set out in his submissions a number of factors that he says led to a very stressful time in the Williamson household and the failure to give paid parental leave any consideration before the return to work.

[17] In his letter to MBIE dated 8 October 2014 asking the department to exercise its discretion and approve the irregular application Mr Power stated that Ms Williamson was initially unsure if she was eligible as she was not a PAYE employee and then forgot about it with everything going on in her life until asked again by her accountant.

[18] In submissions provided to the Authority Mr Power set out that what was stated in that letter was not totally correct. He elaborated in his submission on the stress Ms Williamson experienced at the time she became aware she was pregnant and that she gave no thought to the paid parental leave issue.

[19] That submission though seems inconsistent with the statement of problem signed by Ms Williamson which states that little thought was given to paid parental leave and what thought was given was that Ms Williamson was unsure if she was eligible because she was not a PAYE employee.

[20] I shall go on to set out some of the stressful factors Mr Power referred to.

[21] One of these was that the budget for the share milking contract did not allow for employing a staff member and it was necessary to find a suitable staff person and accommodation for that person. The owner of the farm was not helpful in assisting them even though the contract stated that the farm owner was required to provide accommodation.

[22] In December 2013 before Ms Williamson gave birth, she had completed the spring calving with her partner and the herd had just completed mating. Ms Power stated that this is the busiest time of the year for dairy farmers and they were both fatigued.

[23] Mr Power submits that consideration was simply not given to paid parental leave and refers to the time of the birth of her first child when she was an employee at

Landcorp and there was a standard procedure for staff members applying for paid parental leave which did not require more from Ms Williamson than a signature.

[24] Mr Power says that his contact with Ms Williamson and her partner was on 24 June 2014. Their company has a 31 May balance date and the purpose of the visit was the 2014 annual interview. He states that he reviewed and finalised the 2014 accounts on 24 September and telephoned Ms Williamson the following day about paid parental leave.

[25] The application for paid parental leave was made promptly thereafter following some clarification with MBIE.

Submissions of the applicant

[26] Mr Power submits that there is some confusion for self-employed people that should be taken into account. He submits that operating a business is *brutal and stressful* and that Ms Williamson has acted in good faith throughout the process but stress and fatigue impacted on the delay. He submits that when he became aware she had not applied for paid parental leave, he initiated the process for that to occur immediately.

[27] Mr Power submits that the *irregularity* was reasonable and when he became aware of the omission to make an application for paid parental leave he was very proactive in dealing with it.

Submissions of the respondent

[28] MBIE's view is that Ms Williamson is not entitled to paid parental leave under the PLEPA because she returned to work before applying for paid parental leave and her employment status changed upon her return.

[29] MBIE acknowledge that there was some stress for Ms Williamson, particularly at or about the time parental leave commenced. It submits that it is a difficult proposition to accept that she did not have sufficient time at all in the six month period from 2 December 2013 to 3 June 2014 to make an application.

[30] It submits that in all the circumstances of this matter, the extent of the irregularity being four months delay was not reasonable and that this is a situation where discretion should not be exercised to waive the *irregularity*.

[31] Reference was made to two other Authority cases in *Sian Andrea Mackintosh v. Department of Labour*¹ and *Rachel Elizabeth Jansen v. Department of Labour*.² These two cases involved making applications for paid parental leave following a return to work where the decision by the Department to decline paid parental leave was reviewed by the Authority but not reversed. The circumstances in both cases included stress to the applicants who were self-employed. The extent of the delay in *Mackintosh* is similar to this matter.

Determination

[32] I find that MBIE considered the extent of the period of delay of four months from when Ms Williamson returned to work and her application was made. MBIE concluded that the extent of the irregularity was not reasonable. It was accepted in the decision though that the application was made in good faith.

[33] I accept that Ms Williamson was under stress and suffering from fatigue and may not have given paid parental leave any, or at least, much thought. I also accept Ms Milnes submission that paid parental leave for those who are self-employed is not new having been an entitlement at the time Ms Williamson became eligible for over seven years. A telephone call or internet search before Ms Williamson commenced employment in early June 2014 would have confirmed her eligibility.

[34] Ms Williamson had also previously applied for parental leave. Mr Power submits that process was made easy for her as an employee but the application form for an employee has, as Ms Milne submits, instructions for self-employed people and a chart to assist then.

[35] I do accept that circumstances for those who are self-employed are often challenging and demanding as submitted by Mr Power and there can be a lack of knowledge about entitlements. This was a situation though where there was not only considerable delay in making the application for parental leave following a return to work but also a change in status from self-employed.

[36] I have considered all the circumstances in reviewing the decision of MBIE. There was stress for Ms Williamson but also a considerable delay in making the

¹ [2011] NZERA Auckland 221, Member Larmer

² ERA, Christchurch, CA142/10, Member Doyle

application after she returned to work. By the time the application was made Ms Williamson was no longer a self-employed person but an employee. Her status had changed.

[37] I do not find when I consider the circumstances set out above that the extent of the irregularity is reasonable.

[38] I therefore confirm the decision of MBIE in this case that Ms Williamson is not eligible for paid parental leave.

Costs

[39] MBIE do not seek an order for costs.

Helen Doyle
Member of the Employment Relations Authority