

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 303
3125554

BETWEEN JADE CHALMERS
 Applicant

AND MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Alistair Miller, counsel for the Respondent

Investigation Meeting: On the papers

Agreed Statement of Facts 23 June 2021

Determination: 16 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Jade Chalmers, gave birth to her son on 6 September 2020. During the year prior to the birth, Ms Chalmers had worked:

- (i) 13 weeks as an employee for the University of Waikato, working an average of 35 – 40 hours per week;
- (ii) 16 further weeks as a self-employed contractor for a clinical psychologist, working an average of 10 – 15 hours per week.

[2] Ms Chalmers made three telephone calls to the Inland Revenue Department (IRD) during this period:

- in January 2020;
- on 13 February 2020; and
- on 9 July 2020.

[3] In each telephone call to the IRD, the latter two of which were recorded, Ms Chalmers explained that she had been working as an employee, and was about to become self-employed. She asked if that would affect her entitlements to paid parental leave under the Parental Leave and Employment Protection Act 1987 (the PLEPA).

[4] IRD advised Ms Chalmers that she could combine the two periods of work as both employed and as self-employed, to reach the parental leave payment threshold test.

[5] As a result of this advice, Ms Chalmers ceased her employment with the University of Waikato and became a self-employed contractor for part of the 26 weeks immediately prior to her delivery date. If Ms Chalmers had been advised that this would not meet the test for the parental leave payment threshold, she would have continued in her employment at the University of Waikato (which was ongoing).

[6] Ms Chalmers applied to the IRD for paid parental leave on 7 August 2020 in accordance with the PLEPA. However upon receipt of Ms Chalmers application the IRD wrote to her advising her that she did not qualify for paid parental leave because the test set out in the PLEPA did not allow her to combine her work from employment with her work as a self-employed contractor such as to meet the parental leave payment threshold test.

[7] The IRD apologised to Ms Chalmers for having provided her with the wrong advice in a letter dated 11 September 2020.

[8] Ms Chalmers subsequently applied to the Ministry of Business, Innovation and Employment (MBIE) requesting it to review the decision of the IRD. MBIE did so, and took the view that:

- (i) Ms Chalmers did not meet the parental leave payment threshold test set out in section 24BA(4) of the PLEPA as she had only been an employee for 13 weeks, not the 26 required, and she had only been self-employed for 16 weeks, not the 26 weeks required;
- (ii) As Ms Chalmers did not meet the relevant test, MBIE was not able to grant her parental leave payments.

[9] On 24 November 2020 Ms Chalmers filed a statement of problem in the Authority seeking a formal review of the decision.

[10] The parties agreed to the Authority determining this issue 'on the papers' based on the Statements of Problem and in Reply and the agreed statement of facts.

Should the Authority exercise its discretion to confirm, modify or reverse the decision of MBIE in the circumstances of this case?

[11] To be entitled to parental leave payments, a person must be an eligible employee or an eligible self-employed person.¹ As set out in s 71CA of the PLEPA, an ‘eligible employee’ is a person who is the primary carer of a child, and meets the parental leave payment threshold test.²

[12] There is no dispute that Ms Chalmers is the primary carer in respect of her son. However she does not meet the parental leave payment threshold test because of the combination of employment and self-employment.

[13] Section 2BA(4) of the PLEPA sets out that an employee must meet the parental leave payment threshold test which requires the employee to be employed for at least an average of 26 out of the 52 weeks immediately preceding the expected date of delivery of the child:

2BA Thresholds for entitlements

...

(4) In this Act, the following test is used to determine a person’s entitlement to parental leave entitlements (the **parental leave payment threshold test**):

- (a) An employee meets the parental leave threshold test if he or she will have been employed as an employee for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding –
 - (i) the expected date of delivery of the child (in the case of a child to be born to the person or his or her partner): or
 - (ii) the date on which the person, or his or her spouse or partner becomes the primary carer in respect of the child (in any other case)
- (b) a self-employed person meets the parental leave payment threshold test if he or she will have been self-employed for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding—
 - (i) the expected date of delivery of the child (in the case of a child to be born to the self-employed person or his or her spouse or partner); or
 - (ii) the first date on which the self-employed person, or his or her spouse or partner becomes the primary carer in respect of the child (in any other case).

[14] There is no provision in the PLEPA allowing a person to combine time worked as an employee with time worked as a self-employed person in circumstances where they would not meet either the requirements of subsection (a) or subsection (b) of s 2BA(4). As set out in s 2DA of the PLEPA:

¹ Above n1, s 71D(1)(a)

² Above n1, s71CA

2DA Concurrent employment and self-employment

(1) This section applies to a person who is an employee and a self-employed person.

(2) The person's entitlement to rights and benefits in respect of parental leave must be determined by treating the person's employment and self-employment separately.

[15] MBIE accepts and agrees that Ms Chalmers did seek advice from IRD regarding a potential change in her employment status, and that she received incorrect advice. However it has no statutory discretion to make payments to Ms Chalmers when she does not meet the threshold for payment as set out in the PLEPA.

[16] The Authority does have statutory discretion to make orders, pursuant to s 71ZB(3) of the PLEPA which gives the Authority the power to: "modify or reverse" any decision of MBIE.

[17] In this case Ms Chalmers relied on incorrect advice provided by a government department. I consider that Ms Chalmers acted reasonably in relying on that advice and that it would be inequitable in the circumstances in which the advice was incorrect for her to be denied parental leave payments.

[18] Accordingly I consider it appropriate to exercise the Authority's discretion and to reverse the decision made by MBIE that Ms Chalmers did not qualify for paid parental leave.

[19] MBIE should now take the necessary steps to ensure Ms Chalmers receives the parental leave payments due to her.

Costs

[20] Costs are reserved.

[21] If costs are sought and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Eleanor Robinson
Member of the Employment Relations Authority