

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 360
3122632

BETWEEN LAURA PRIESTLEY
 Applicant

AND MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Mark Richards, representing the Applicant
 Oscar Upperton, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further 13, 16 and 18 June, and 23 July 2021 from the Applicant
evidence 27 May, 14 June, and 6 August 2021 from the Respondent

Determination: 12 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Laura Priestley, applied for paid parental leave on 24 September 2020 in accordance with the Parental Leave and Employment Protection Act 1987 (the PLEPA). The Inland Revenue Department (IRD) advised Ms Priestley on 28 September 2020 that it was unable to process her application and referred the application to the Ministry of Business, Innovation and Employment (MBIE).

[2] MBIE advised Ms Priestley on 12 October 2020 that she was not entitled to receive parental leave payments. While there is no dispute that Ms Priestley is the primary carer, she did not meet either the employed or self-employed parental leave threshold rest set out in s 2BA(4) of the Parental Leave and Employment Protection Act 1987 (PLEPA).

[3] Ms Priestley has applied to the Authority for a formal review of the decision.

Note

[4] The parties agreed to the Authority determining this issue ‘on the papers’ based on the Statements of Problem and in Reply and on submissions from the parties.

Background, submissions and analysis

[5] As set out in s 2BA of PLEPA 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:

(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 payment 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 spouse or partner); or

(ii) The first 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).

[6] Ms Priestley in the statement of problem set out that she had a mixture of employment and self-employment in the relevant 52 week period:

a) Employment for seven weeks for Tauranga City Council from 19 October 2019 to 9 December 2019 working 4 days (32 hours) a week;

b) Self-employment contracting for ten weeks from January to March 2020, working 20-30 hours a week; and

- c) Employment for 18 weeks for White Noise Workspace Limited from 15 June 2020 to 19 October 2020, working 20 hours a week.

[7] Ms Priestley stated that the opening of White Noise Workspace Limited was delayed due to the advent of Covid-19 and the shutdown in March 2020. She stated that: “If the pandemic did not force me to postpone my opening, I would have comfortably been within the 26 week employee threshold only”.

Applicant’s submissions 13 May 2021

[8] Ms Priestley is a shareholder and director of White Noise Workspace Limited. On 13 May 2021 it was submitted by Mr Mark Richards of Causeway Accounting Limited on behalf of Ms Priestley, that she derived income from White Noise Workspace Limited from her activities on behalf of it from 18 September 2019 until the arrival of her child.

[9] On that basis it is submitted that the income from self-employment therefore meets the parental leave payment threshold test in that Ms Priestley worked for 10 hours or more on her business activities during the 26 weeks prior to the delivery date.

[10] This submission is at variance with the information provided by Ms Priestley in the statement of problem that she commenced working for White Noise Workspace Limited from to 15 June 2020.

Respondent’s submissions 27 May 2021

[11] Mr Upperton on behalf of MBIE submits that following the submission from the applicant MBIE made an information request to IRD to ascertain the start date of Ms Priestley’s employment with White Noise Workspace Limited.

[12] IRD responded on 26 May 2021 advising that White Noise Workspace Limited was registered as an employer on 5 June 2020, with a start date of 8 June 2020, and that the employee Laura O’Donnell, also known as Laura Priestley, was registered as an employee on 15 June 2020.

[13] On that basis MBIE’s understanding of the facts is that Ms Priestley commenced her employment with White Noise Workspace Limited on 15 June 2020 and not earlier. It would not have been possible for Ms Priestley to be employed by White Noise Workspace Limited earlier than 5 June 2020 because it was not registered as an employer until 5 June 2020.

[14] In respect of the applicant’s submission that Ms Priestley derived income from White Noise Workspace Limited from the incorporation date of 18 September 2019, Mr Upperton

submits that the 26 week test under s 2BA of PLEPA concerns employment or self-employment, not income.

Applicant's further submissions 16 June 2021

[15] Mr Richards on behalf of Ms Priestley submitted in response to MBIE's submission that Ms Priestley undertook duties for White Noise Workspace Limited as a salaried shareholder employee deriving income by way of source deducted income, and additionally a director/shareholder employee, deriving income by way of shareholder salary. Both of these are forms of employment recognised by IRD and Ms Priestley was employed in both capacities by White Noise Workspace Limited since the incorporation of the company, being 18 September 2019.

[16] It is submitted that Ms Priestley met the 26 week threshold by her involvement with White House Workspace Limited and that she worked in excess of 20 hours per week since forming White Noise Workspace Limited.

[17] In support of this further submission Ms Priestley provided several documents including:

- (i) A copy of an employment agreement with White Noise Limited which recorded her commencement date as 5 June 2020; and
- (ii) Instagram posts screenshots dated 8 June 2020 and 10 June 2020 as evidence of her marketing work on behalf of White Noise Limited;

[18] In light of the further submissions counsel for MBIE has advised that it no longer opposes Ms Priestley's application to the Authority. Counsel also advises that had this further information as to Ms Priestley's commencement date with White Noise Limited been provided with Ms Priestley's initial application, it is likely the application would have been approved.

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

[19] An employee or a self-employed person may apply to the Authority for a review of the decision made by MBIE as to that person's entitlement to paid parental leave pursuant to s 71ZB of the PLEPA. The Authority has discretion to either: "confirm, modify, or reverse the decision of the department."¹

¹ Paid Parental Leave and Employment Protection Act 1987 s 71ZB(3).

[20] To be entitled to parental leave payments, a person must be an eligible employee or an eligible self-employed person.² 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.³

[21] There is no dispute that Ms Priestley is the primary carer in respect of her child. It appears from the further documentary evidence provided to the Authority and accepted by MBIE, that Ms Priestley meets the parental leave payment threshold test.⁴ As acknowledged by MBIE, had this information been provided in her initial application, Ms Priestley's application for paid parental leave would have been approved.

[22] On that basis, I consider it appropriate to exercise the Authority's discretion and to reverse the decision made by MBIE that Ms Priestley did not qualify for paid parental leave.

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

Costs

[24] Costs are reserved. Given the circumstances regarding the inaccuracy of the information initially supplied to both MBIE and the Authority by Ms Priestley, I consider that costs should lie where they fall.

[25] However 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

² Above n1, s 71D(1)(a).

³ Above n1, s71CA.

⁴ Above n1, s 2BA(4).