

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 576
3152081

BETWEEN NATALIE ALYCE STIRLING
Applicant

AND MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Peter Fuiava

Representatives: Applicant in person
Jessica Ellison, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 15 December 2021 from Respondent

Determination: 22 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Natalie Stirling applies to the Employment Relations Authority for a review of Inland Revenue's (IR) decision to decline her application for paid parental leave under the Parental Leave and Employment Protection Act 1987 (the Act). For the reasons that follow, the Authority reverses the decline decision of the Ministry of Business, Innovation and Employment (MBIE) and orders it to take the necessary steps to ensure that Ms Stirling receives her parental leave entitlements as soon as practicable.

The facts

[2] The facts are not in dispute. On 25 May 2021, Ms Stirling's child was born. In the year prior to her daughter's birth, Ms Stirling worked as a self-employed contractor for a couple of months before working as an employee for approximately 24 or 25

weeks thereafter. To qualify for paid parental leave as an employee, Ms Stirling needed to have been employed for a minimum of 26 weeks under the Act.¹

[3] The entitlement thresholds for paid parental leave are set out in s 2BA(4) of the Act, which requires:

- (a) An employee to have been employed for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding the expected date of delivery of the child;²
- (b) A self-employed person to have been self-employed for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding the expected date of delivery of the child.³

[4] Ms Stirling contacted IR to inquire whether she could combine the period of her self-employment (two months approximately) with her period of employment (24 to 25 weeks approximately) in order to meet the 26-week threshold to qualify for paid parental leave. She had been advised by her midwife to finish her work earlier than she had originally planned due to unexpected complications with her pregnancy.

[5] Ms Stirling was advised by IR on 23 February 2021 that such a combination was possible. However, unbeknownst to her, the advice was incorrect as there is no provision in the Act which allows a person to combine time worked as a self-employed person with time worked as an employee in circumstances where they would not have met either of the requirements.⁴

[6] Relying on IR's incorrect advice, Ms Stirling resigned from her employment earlier than she could have thinking (mistakenly), she could make up the one to two week shortfall by relying on her earlier period of self-employment.

[7] Ms Stirling subsequently lodged her application for paid parental leave on 29 March 2021. However, the application was declined by IR in a letter dated 25 May

¹ Parental Leave and Employment Protection Act 1987, s 2BA(4).

² Section 2BA(4)(a).

³ Section 2BA(4)(b).

⁴ Section 2AD.

2021. The basis of the decline was that Ms Stirling had not worked the required 26-week threshold to qualify.

[8] Ms Stirling submitted an online complaint with IR and MBIE. In response to her complaint, IR admitted in an email (24 June 2021) to Ms Stirling that it had given her incorrect advice however, even so, it was unable to change its decision because it had been confirmed as correct by MBIE before the final decision was made. If Ms Stirling wished to review the matter further, she would need to apply to the Authority for a formal review.

[9] Ms Stirling says that had she been given the correct information from IR, she would have pushed her body through the extra two weeks with her now former employer in order to meet the 26-week threshold to qualify for parental leave as an employee.

Discussion

[10] MBIE accepts and agrees with Ms Stirling that she was incorrectly advised by IR, and relying on that advice, she resigned from her employment one to two weeks earlier than she should have.

[11] MBIE says that the referral it received before IR declined Ms Stirling's application for paid parental leave did not disclose the fact that it had given her incorrect advice. Even now, MBIE lacks the power to remedy the situation because its ability to approve "irregular applications" under section 71IA of the Act does not extend to the present situation.

[12] The present case is on all fours with the Authority's earlier decision in *Chalmers v MBIE* [2021] NZERA 303. Section 71ZB of the Act affords the Authority a discretion to grant relief. The section relevantly states:

71ZB Review of department's decisions about parental leave payment

- (1) An employee or a self-employed person may apply to the Employment Relations Authority for a review of a decision made by the department relating to—
 - (a) the person's entitlement to a parental leave payment:
 - ...

- (2) An application for review must be made within 12 months after the date on which the decision is notified to the employee or self-employed person.
- (3) The Authority may confirm, modify, or reverse the decision of the department.

[13] Ms Stirling's application for a parental leave entitlement was declined by IR on 25 May 2021. She lodged proceedings in the Authority on 5 October 2021, well within time.

[14] This was a situation outside of Ms Stirling's control. Unbeknownst to her, she received incorrect advice by IR which she reasonably relied on and acted upon to her detriment. Had she been given the correct advice at the material time, she would have most probably worked the one to two weeks needed to qualify for a parental leave payment.

[15] It was submitted that the Authority's discretion to "confirm, modify, or reverse the decision" under s 71ZB extends to decisions made by IR in its delegated capacity in performing all functions and powers under the Act on MBIE's behalf. I note that IR is not a party to the proceedings and MBIE is ultimately responsible for the Act's administration. Further, the relationship between MBIE and IR is one of principal and agent. Responsibility rests with MBIE.

[16] Accordingly, I consider it appropriate to exercise the Authority's discretion and to reverse the decision made by MBIE that Ms Stirling did not qualify for paid parental leave. MBIE should now take the necessary steps to ensure that Ms Stirling receives the parental leave payments due to her as soon as practicable.

Expenses

[17] Ms Stirling paid a filing fee of \$71.56 to lodge her Statement of Problem with the Authority. She can reasonably recover this amount from MBIE which is to be paid by 4 pm Tuesday 18 January 2022.

Costs

[18] Costs are reserved. If costs are sought and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs by

4 pm Tuesday 18 January 2022. 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.

[19] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Peter Fuiava
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].