

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 579  
3151226

BETWEEN                      EMMA WALWORTH  
Applicant

AND                              MINISTRY OF BUSINESS,  
INNOVATION AND  
EMPLOYMENT  
Respondent

Member of Authority:      Robin Arthur

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

Investigation:              On the papers

Determination:              23 December 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Emma Walworth sought a review of a decision that she was not entitled to parental leave payments in relation to the birth of her second child. The decision was made by an Inland Revenue officer exercising powers delegated by the chief executive of the Ministry of Business, Innovation and Employment (MBIE).

[2] The Parental Leave and Employment Protection Act 1987 (the Act) allows the Employment Relations Authority to review such decisions.<sup>1</sup> The Authority may confirm, modify or reverse the decision.

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<sup>1</sup> Parental Leave and Employment Protection Act 1987 s 71ZB.

[3] Ms Walworth had taken paid parental leave following the birth of her first child. That leave ended in February 2021. She sought further payments on the birth of her second child in August 2021.

[4] Inland Revenue declined Ms Walworth's application for the second period of leave because it was less than six months since her first paid parental leave entitlement ended.

[5] Ms Walworth's request for review also identified that she had worked for 23 weeks between ending the leave taken for her first child and starting leave for her second child. In those 23 weeks she had worked in a sales and marketing role in the business in which her husband was the managing director.

[6] To succeed in this review Ms Walworth had to overcome the following two requirements of the Act:

**2BA Threshold for entitlements**

...

(4) In this Act, the following test is used to determine a person's entitlement to parental leave payments (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

...

**71F Subsequent parental leave payments**

A person is not entitled to a parental leave payment in respect of a child if—

(a) fewer than 6 months have elapsed after the end of the period for which the person received a parental leave payment for another child; or

[7] Ms Walworth said there were two "extenuating circumstances" for why those provisions of s 2BA and s 71F should not be applied to deny her parental leave payments.

[8] Firstly, she said it seemed unjust to penalise her because she could not have achieved the threshold test of being back in paid employment for at least 26 weeks unless her second child had been born three weeks later.

[9] Secondly, her husband had become seriously ill, requiring extended treatment and surgery. This meant she was unable to return to any employment in the foreseeable future and he was unable to assist her as a full-time carer for their two infant children.

[10] Ms Walworth proposed “some middle ground” could be achieved by having parental leave payments to her end three weeks early “to balance out the shortfall in meeting the standard criteria”.

### **Investigation**

[11] Ms Walworth and the Ministry agreed this review could be determined ‘on the papers’. Those papers included Ms Walworth’s statement of problem, the Ministry’s statement in reply, and written submissions lodged by counsel for the Ministry.

[12] The Ministry submitted Ms Walworth was ineligible for paid parental leave payments because she had not met the 26-week work requirement in s 2BA(4) and was “caught” by the six-month restriction in s 71F. It acknowledged the difficulty of Ms Walworth’s circumstances but said the Ministry was bound to administer the Act within its terms.

[13] Section 71IA of the Act does provide a discretion to approve making parental leave payments to a person despite an “irregularity” in their application for payment. The word ‘irregularity’ is defined with examples, such as not applying by the right date or not providing all the necessary documents and “otherwise applying irregularly in matter of form”. The Ministry submitted Ms Walworth’s circumstances did not fall within the scope of that definition and, therefore, the administrative discretion could not be used to approve payments to her.

### **Evaluation**

[14] The Inland Revenue officer who declined Ms Walworth’s application correctly applied the provisions of s 2BA(4) and s 71F. Ms Walworth had not met the 26-week work threshold and the limit on subsequent parental leave payments within six months of receiving payment for another child.

[15] I accept the Ministry’s submission that it could not properly have exercised its discretion in the circumstances of Ms Walworth’s application to approve making payments to her anyway.

[16] The Authority's discretion on review is wider as it is not limited to the irregularities defined in the statutory discretion provided to the public servants administering the Act. The discretion must however be exercised on a principled basis having regard to the policy and purpose of the Act.

[17] The Act describes its purpose as setting minimum entitlements to parental leave, protecting the rights of employees during pregnancy and parental leave and to entitle "certain persons" to up to 26 weeks of parental leave payments. The "persons" entitled to those payments are employees and self-employed people who meet the threshold criteria set in the Act.

[18] Parliament has intended these provisions to better support parents and others who have assumed responsibility for the care of a child in providing that care in the earliest stage of the child's life. For that reason the Act's requirements should generally be interpreted generously, consistent with the interests of the individual families and the wider social benefits that result from that support being provided. However this does not give the public servants deciding applications, or the Authority reviewing those decisions, license to approve payments which do not meet the criteria set by the Act.

[19] Ms Walworth sought a review in her case because she felt it was unjust she would miss out on payments simply because the time between the birth of her two children meant the leave periods for them fell within the six-month limit. While her view is understandable, it is clear that was an intended rather than accidental consequence of the criteria set in the Act for parental leave payments out of public money.<sup>2</sup>

[20] When paid parental leave was introduced in 2002 the restriction on taking parental leave for another child was set at 12 months after the end of the previous period.<sup>3</sup> This was amended in 2006 to six months, at the same time that the paid parental leave provisions were extended to self-employed people.<sup>4</sup>

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<sup>2</sup> Parental Leave and Employment Protection Act 1987, s 71A. See also s 6.

<sup>3</sup> Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002.

<sup>4</sup> Parental Leave and Employment Protection (Paid Parental Leave for Self-Employed Persons) Amendment Act 2006, s 27.

[21] In introducing those legislative amendments to Parliament the Minister of Labour, the Hon Ruth Dyson, specifically referred to the reason for the limit on subsequent payments:<sup>5</sup>

The bill also provides that employees will become eligible for a second or subsequent period of parental leave and parental leave payments if the expected date of delivery or adoption is at least 6 months after the return to work from a previous period of parental leave, rather than 12 months as at present. This will extend eligibility for paid parental leave to a small number of employees. It also provides that self-employed women will be eligible for parental leave payments for second and subsequent children 6 months following previous parental leave payments. **It is important that these provisions are aligned with the minimum eligibility criteria for first-time mothers.** (emphasis added)

[22] During the second reading of that amending legislation the Minister also referred to the rationale for the six-month limit:<sup>6</sup>

This provides fairness between first-time parents and parents of subsequent children.

[23] Parliament clearly intended to limit the provision of payments to parents having second or further children relatively close to their earlier children. Such a limit inevitably meant some people would not qualify for the payments. It was a policy decision by Parliament at that time, unchanged since, for what and when it was prepared to pay out of the public purse.

[24] In the light of that clear intention of the statutory provision, the Authority's discretion could not be exercised to reach a different decision in Ms Walworth's case.

[25] The same rationale applies to the requirement to have worked 26 weeks prior to the leave period for which payments are sought. Denying leave payments for not having met that threshold test was consistent with the intention of the legislation that many but not all would qualify for the payments.

[26] The last aspect for consideration in this review was whether the statutory limits should be waived on compassionate grounds due to the illness of Ms Walworth's husband and the demands that placed on her and their family life.

[27] There is no provision in the Act for the temporal limitations on qualifying for payments to be reduced or waived due to illness. In considering that prospect in this review I did not identify any instances where the Authority had previously reversed or

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<sup>5</sup> (6 December 2005) 628 NZPD 586–587.

<sup>6</sup> (2 May 2006) 630 NZPD 2614.

modified a decision specifically on compassionate grounds related to illness in order to provide payments to a person who had not met the qualifying periods set in the Act.

[28] *Hood v MBIE* [2021] NZERA 215 is a recent instance where the Authority considered the same issue, involving illness of the mother, and compassionate grounds were not sufficient for such a change in that case.

[29] I reached the same conclusion in this review. Whatever support might be available to Ms Walworth or her family in the most difficult of times was not properly available through the Act. To do what she had asked in this review could only have been granted if Parliament had considered and decided amendments to the Act at it presently stands.

### **Outcome**

[30] For the reasons given, I confirm the decision to decline Ms Walworth's application for parental leave payments.

Robin Arthur  
Member of the Employment Relations Authority