

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 580
3149601

BETWEEN

EDWINA MABER
Applicant

AND

MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Rochelle Hill, counsel for the Respondent

Investigation: On the papers

Determination: 23 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Edwina Maber 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.¹ The Authority may confirm, modify or reverse the decision.

¹ Parental Leave and Employment Protection Act 1987 s 71ZB.

[3] Ms Maber and the Ministry agreed this review could be determined ‘on the papers’, comprising Ms Maber’s statement of problem, the Ministry’s statement in reply and correspondence from Inland Revenue about her application.

The statutory thresholds for entitlement to parental leave payments

[4] The restrictions set in the following two provisions of the Act were central to whether Ms Maber’s application for leave payments could have been approved:

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

Ms Maber’s situation

[5] Ms Maber’s first child was born on 29 September 2020, earlier than the expected due date. She used annual leave until 9 October 2020 then began her first paid parental leave period on 10 October 2020. This leave was due to finish on 9 April 2021. In mid-January 2021 Ms Maber found she was pregnant again. The expected due date for her second child was 23 August 2021 but she planned to use some annual leave around that time and wanted her second period of paid parental leave to then start from 6 September 2021.

[6] Checking the parental leave legislation early in 2021 Ms Maber realised she would need a six-month gap between the first and second parental leave periods. She also thought she might be needed back at her work in March to help with some end of year financial year tasks. Considering both factors she tried to “cut short” the parental

leave she was taking at the time and arrange a return to work on 6 March 2021. Her employer ended up not needing her help in March. Maternity leave cover for her was also still in place at work until April. This meant Ms Maber was not able to return to work until her original planned date after 9 April 2021.

[7] Ms Maber believed her plan for her second period of parental leave to start with taking some annual leave, from 16 August to 5 September 2021, and then not getting parental leave payments from 6 September 2021 onwards would provide the necessary six-month gap between when she had wanted her first period of leave to end, on 6 March 2021, and starting the second period on 6 September.

[8] Inland Revenue initially approved Ms Maber's application for a second period of paid parental leave from 6 September 2021 to 6 March 2022. However its letter of approval, on 25 May 2021, included the following qualification: "At the time you applied for paid parental leave you had not worked 26 weeks ... If you do not work 26 weeks before your expected due date, you must let us know ...". This was a reference to the payment threshold test at s 2BA(4) of the Act.

[9] On 24 August 2021 Ms Maber got another letter from Inland Revenue. This letter told her the paid parental leave had now been declined. It said:

When we approved your application we advised you that at that time you had not worked 26 weeks. We've now declined your application because you will not have worked long enough to be entitled to paid parental leave.

[10] In her application to the Authority for a review of that decision Ms Maber said she had told Inland Revenue she worked 28 weeks of the last 52 weeks up to the due date of her baby. She said Inland Revenue had told her there was not 26 weeks between the date of 6 March 2021, when she had wanted her last paid parental leave to end, and the expected due date of 23 August 2021. This appears correct as those dates span just over 24 weeks. However Ms Maber said her plans for annual leave from 23 August and having the paid parental leave payments starting on 6 September meant there would have been a period of just over 26 weeks since 6 March.

[11] Ms Maber's review application also said she had worked 28 weeks in the 52 weeks prior to her due date so she believed she had met the 12-month employment test set in s 2BA1(b) of the Act. This test requires the employee to have worked "at least an average of 10 hours a week" in the 12 months immediately preceding the expected

date of delivery of the child. It was not clear from what date Ms Maber made her calculation in order to say she had worked 28 weeks but she referred to 25 weeks in which she had worked at least 40 hours a week. It appeared from that reference those weeks had contributed to her calculation that she had worked an average of 10 hours a week over 28 weeks.

Ms Maber's proposed solution

[12] Ms Maber suggested her calculations had been complicated by her assumption that her plan to use annual leave at the end of her second pregnancy extended the start date of her entitlement to a second period of parental leave payments (that is six months after the previous payments stopped). To resolve any doubt over that point Ms Maber proposed the date of 6 March 2021 on which she had wanted to return to work could, instead, be deemed to be 22 February 2021. Making that suggested change would mean that there was 28 weeks from that deemed earlier date until when she wanted the second period of paid parental leave to start on 6 September 2021. This 28 weeks would include the three weeks' of annual leave she intended to take from 16 August to 5 September. Ms Maber also proposed paying back to Inland Revenue the paid parental leave payments she had received for the period from 22 February to 6 March 2021.

The Ministry's submissions

[13] The Ministry's submissions identified three issues arising for determination from Ms Maber's review application:

- (i) Did Ms Maber meet the eligibility threshold?
- (ii) Did sufficient time lapse between the first period of parental leave taken and the second period of parental leave sought?
- (iii) Could Ms Maber's first parental leave period be treated as ending on 6 March 2021 rather than 9 April 2021?

Below the eligibility threshold

[14] Because the expected due date for Ms Maber's second child was 23 August 2021 the 52-week period, for the purposes of the parental leave payment threshold test in s 2BA(4) of the Act, ran from 24 August 2020. Ms Maber said she had worked at least an average of 10 hours a week in 28 of those weeks. The Ministry submitted the information Ms Maber had provided seemed to show she worked only 25 weeks during the relevant period. Its submission was to the same effect as the calculation made earlier

in this determination that there was a period of just over 24 weeks between the date Ms Maber had hoped to return to work on 6 March 2021 and her expected due date of 23 August 2021. This meant that, as the Ministry submitted, Ms Maber had fallen short in meeting the threshold for entitlements to parental leave payments in s 2BA(4) of the Act. On that analysis the decision made by the Inland Revenue Officer in August 2021 was correct.

The six-month exclusion on subsequent parental leave payments

[15] The Ministry submitted Ms Maber was not eligible for parental leave payments in any event because her expected delivery date for the second child, on 23 August 2021, was about four-and-a-half months after her first paid parental leave payments had ended on 9 April 2021. This was clearly within the restriction on entitlements set in s 71F of the Act if fewer than six months had elapsed since the end of a person getting payments for an earlier child.

[16] From the information available in the statement of problem, statement in reply and correspondence from Inland Revenue it was not clear Ms Maber had in fact received parental leave payments up to 9 April as the Ministry submitted. However if the earlier date of 6 March was used, being when Ms Maber said she had arranged for her first period of leave to end, this was still a period of five-and-a-half months. This too was within the six-month restriction on getting subsequent payments.

[17] On either calculation, and even if the assessment about meeting the payment threshold test was wrong, Ms Maber had not cleared the hurdle which applied to parental leave payments for subsequent children.

No adjustments in dates

[18] The Ministry submitted the date Ms Maber returned to work ought to be taken as the date that Ms Maber actually did go back to work after the end of her first period of paid parental leave, this was after 9 April 2021 rather than the earlier date of 6 March when she made herself available for work but was not needed by her employer. I accept that submission. The provisions of the Act must apply to the facts as they were or are rather than, in light of subsequent events, how a person might have preferred they had been.

[19] And, as already described in this determination, accepting 6 March 2021 as the date on which payments stopped and Ms Maber sought to return to work did not resolve the problem with meeting the entitlement thresholds anyway. The period of just over 24 weeks between 6 March and 23 August 2021 still fell short.

[20] Ms Maber's proposed solution of deeming 22 February as the date for these purposes was not within the scope of the discretion provided to the public servants making decisions about parental leave entitlements. They have discretion to approve irregular applications. However the Act defines irregularities for that purpose as instances, for example, where a person does not make an application on a required date, fails to provide relevant documents or otherwise applies "irregularly in matter of form".² Ms Maber's suggestion about treating her return-to-work date as 22 February was a matter of substance, creating entitlements where none would otherwise exist, rather than a matter of form.

[21] Accordingly, I accept the Ministry's submission that the discretion to approve irregular applications could not appropriately have been exercised in this case to approve payments for the second period of paid parental leave.

The Authority's discretion

[22] While this determination has found the provisions of the Act were correctly applied by Inland Revenue and could not have appropriately been altered by use of the discretion to approve irregular applications, there was a further step for consideration. The Authority has its own discretion on review. It is wider than the statutory discretion provided to the public servants administering the Act. The Authority's discretion must, however, nevertheless be exercised on a principled basis having regard to the policy and purpose of the Act.

[23] 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.

² Parental Leave and Employment Protection Act 1987, s 711A.

[24] 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 not authorised by the criteria set in the Act.

[25] Ms Maber's application for review explained the paid parental leave payments she had expected to receive were sorely needed and depended on as the principal source of income for her family in the period she had hoped to get them. Implicit in her application was a sense that it was not fair to be denied payments for her second child. This was particularly so given she had made efforts, as soon as she realised a second baby was on the way, to sort out her leave and work affairs in a way that would enable her to meet the statutory requirements and get the second period of parental leave payments.

[26] While her disappointment about missing out was understandable, it is also clear that the limits on subsequent payments is an intended rather than accidental consequence of the criteria set in the Act for parental leave payments out of public money.³

[27] When paid parental leave was introduced in 2002 the restriction on taking parental leave for a subsequent child was set at 12 months after the end of the previous period.⁴ This restriction was reduced to six months in 2006, at the same time that paid parental leave was extended to self-employed people.⁵

[28] 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:⁶

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

³ Parental Leave and Employment Protection Act 1987, s 71A.

⁴ Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002.

⁵ Parental Leave and Employment Protection (Paid Parental Leave for Self-Employed Persons) Amendment Act 2006, s 27.

⁶ (6 December 2005) 628 NZPD 586–587.

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)

[29] During the second reading of that amending legislation the Minister also referred to the rationale for the six-month limit:⁷

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

[30] 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.

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

[32] 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.

Outcome

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

Robin Arthur
Member of the Employment Relations Authority

⁷ (2 May 2006) 630 NZPD 2614.