

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 215
3131698

BETWEEN	LAUREN EMILY HOOD Applicant
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Applicant in person Oscar Upperton, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and further Information Received:	28 April 2021 and 11 May 2021 from the Applicant 22 April 2021 and 10 May 2021 from the Respondent
Date of Determination:	20 May 2021

DETERMINATION OF THE AUTHORITY

- A. On review, the Ministry of Business, Innovation and Employment’s decision is confirmed and Lauren Hood is not eligible for parental leave payments.**
- B. Costs are reserved.**

Employment Relationship Problem

[1] Lauren Hood’s application for parental leave payments has been declined. She asks the Authority to review that decision.

[2] In the course of a case management conference with the parties on 22 April 2021 it was agreed this matter would be determined on the papers. In accordance with the agreement reached with the parties, Ms Hood provided a letter with supporting documentation and the Ministry of Business, Innovation and Employment (“MBIE”) provided submissions.

[3] On 10 May 2021, I asked the parties to confirm the total period of time Ms Hood had worked for her employer (outside of the period of 12 months before the due date) and whether the parties wished to comment on s 72A of the Parental Leave and Employment Protection Act 1987 (“the PLEPA”) which provides for periods of authorised leave to be counted for the purposes of the parental leave payment threshold test. I wanted to ensure that Ms Hood’s calculation of 14 weeks was correct and understand Ms Hood’s work history, both of which are relevant to this review on the papers. I received an email from Ms Hood and supplementary submissions from Oscar Upperton, counsel for MBIE.

The issues

[4] The issues requiring investigation and determination on review are:

- (a) Whether MBIE was correct in declining Ms Hood’s application for the parental leave payments and in not exercising its statutory discretion to approve irregular payments?
- (b) Whether the compassionate grounds advanced by Ms Hood, sufficient for the Authority to modify or reverse the decision of the department?

Background

[5] The relevant facts are not in dispute. Ms Hood was pregnant with an expected date of delivery of 16 May 2021. Ms Hood was employed by Bianca Lorenne Limited for 21 hours a week, from late 2019 to 23 August 2020, being a period of 14 weeks. Ms Hood has provided that her employment came to an end through no fault of her own when she was made redundant as part of a company restructure triggered by Covid-19. Ms Hood had worked for the same employer on and off for approximately 10 years.

[6] Ms Hood initially sought new employment and had secured two prospects for new roles but was unable to follow through because she became very unwell with hyperemesis gravidarum. A medical certificate was issued providing that Ms Hood was unable to work from the period 9 November 2020 to the date of delivery due to hyperemesis gravidarum.

[7] Ms Hood applied for parental leave payments and then requested a review of her circumstances. Her request for review was referred to MBIE from Inland Revenue (“IRD”). Ms Hood accepted that she did not meet the statutory threshold for eligibility being the specified period of employment in the year before the baby’s due date but asked that her application for parental leave payments be granted on compassionate grounds.

[8] On 25 January 2021, MBIE wrote to Ms Hood confirming that on review of her circumstances, she was not entitled to receive parental leave payments because she had not been employed for the requisite time period set out in s 2BA(4) of the PLEPA, being an average of 10 hours for 26 out of the 52 weeks preceding her expected date of delivery.

[9] In seeking review by the Authority of that decision, Ms Hood asks that the Authority take into account her personal circumstances. Last year was stressful with a restructure at work leading to redundancy, particularly as she had worked for the company several times over the last 10 years. Ms Hood and her partner also underwent fertility treatment for a very much longed for pregnancy. They have a nine year old son and have been trying to conceive for the last eight years. Ms Hood says that having to go through redundancy was “very detrimental” to her “physical and mental state and health”.

[10] Ms Hood advised that after the redundancy she had secured two prospects for new roles but she then became more unwell with hyperemesis gravidarum. This resulted in her being taken to an Emergency Department on two occasions with severe nausea and vomiting and weight loss.¹ She was on medication four hourly and had to attend hospital twice a week for intravenous fluids as treatment for dehydration. She was bedridden for approximately five weeks and the sickness did not subside until February 2021 and still reoccurs.

[11] Ms Hood states that because of the job loss, then the sickness and having to turn down new job prospects, she had no income and no way to make up the hours needed to complete the required 26 weeks of employment to be eligible for parental leave payments. Ms Hood also points out that by working 21 hours a week for 14 weeks she has in fact worked more hours in total than what the minimum test would require.²

¹ Discharge summary from Taranaki Base Hospital (14 October 2020).

² 10 hours x 26 weeks = 260 hours, 21 hours x 14 weeks = 294 hours.

[12] Ms Hood was facing an elective caesarean section due to pregnancy complications and the family has had to travel from New Plymouth to Wellington to the Maternal Fetal High Risk Medical Clinic for assessment. Ms Hood has provided they were also facing early delivery due to a further pregnancy complication called placenta accreta.

[13] Ms Hood says that she is distraught to have worked hard all her life and having worked up until when she possibly could, to be told she was not eligible for parental leave payments. She was told that she may be able to have her case considered on compassionate grounds.

Parental leave payments

[14] The PLEPA enables eligible individuals to receive parental leave payments and applications for parental leave payments are determined by the “department” which is MBIE.³

[15] Section 2BA(4) of the PLEPA sets out the “Parental leave payment threshold test”. In order to be eligible for parental leave payments, the employee must be an “eligible employee” as defined by section 71CA of the PLEPA. This requires that the person is the primary carer and that they have been employed (either as an employee or self-employed person) for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding the expected date of delivery.

[16] Under s 71ZB of the PLEPA, applications for parental leave payments can still be approved when there is an irregularity in the application but there must be particular regard given to the extent of the irregularity and whether the employee was acting in good faith. “Irregularity” is defined and includes making a late application or applying in a manner other than prescribed in the Regulations. There is a separate more general category, being an irregularity to do with matters of “form” (s71IA(5)).

[17] The specified irregularities do not apply to Ms Hood’s circumstances so MBIE would only be able to approve this application based on an irregularity of form and not substance. The terms form and substance have specific legal meanings.

³ Parental Leave and Employment Protection Act 1987, s 2.

[18] When an application for parental leave payments has been declined by the department, an employee can seek the assistance of the Authority to review a decision under s 71ZB of the PLEPA, which gives the Authority the power to confirm, modify or reverse the department's decision.

[19] The role of the Authority, set out in s 157(1) of the Employment Relations Act 2000 (the ERA), is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case without regard to technicalities. Section 157(3) of the ERA provides that the Authority must also act "as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with this Act, any regulations made under this Act or the relevant employment agreement".

Submissions

[20] Ms Hood asks that the Authority consider this review on compassionate grounds connected with the circumstances she found herself including a Covid-19 triggered redundancy and illness. As a person who has been in paid employment in New Zealand with the same company several times over the last 10 years, and consistently for the last two and a half years, her situation, she says, aligns with the intent of the parental leave payment scheme which includes a connection to a New Zealand employer, consistently paying tax in New Zealand and being in an employment relationship that is subject to New Zealand law.⁴

[21] Ms Hood thinks this situation is unfair and she plans to return to the workforce once the new baby is old enough as she enjoys working but receiving the parental leave payments would really help the family with all the necessary cost involved with a new born and beyond, particularly as she has been out of work since August 2019 with all of these issues that have been out of her control.

[22] I understand Ms Hood to be saying that "but for" her redundancy triggered by Covid-19 and then her health issues, she would have been able to work for the required amount of

⁴ MBIE's employment website (17 May 2021) <https://www.employment.govt.nz/leave-and-holidays/parental-leave/eligibility/>

time and therefore would have been eligible for the parental leave payment. Ms Hood also says that she meets the test if the qualifying period of employment is calculated in hours.

[23] MBIE's statement in reply states the reason for declining Ms Hood's application was that she had not been employed for the required amount of time set out in the statutory test for eligibility.

[24] MBIE does not contest that Ms Hood acted in good faith and also submits it only has discretion to approve irregular applications where the irregularity is a matter of form, such as making a late application or applying in a manner other than prescribed in the regulations. MBIE says it must apply the PLEPA as written and non-compliance with a statutory test for eligibility is a matter of substance rather than form so the ability to approve irregular payments under s 71ZB could not apply in Ms Hood's case.

[25] Mr Upperton provided helpful examples of previous Authority cases where the Authority had exercised its powers on review under s 71ZB(3) to confirm, reverse or modify decisions of the department. In the case of *Shah v Ministry of Business, Innovation and Employment*, the Authority confirmed the decision of the department (declining the application for parental leave payments) because although Ms Shah had been employed for the required length of time, for part of that time Ms Shah was employed in Australia.⁵

[26] In *Cook v Ministry of Business, Innovation and Employment*, the Authority modified the department's decision to decline Mr Cook's parental leave so that he was entitled to parental leave but only for the period he wasn't working. His parental leave application had been declined on the basis that he did not stop working on the date he became the primary caregiver.⁶

[27] In *Allcock v Ministry of Business, Innovation and Employment*, the Authority reversed the department's decision to decline Ms Allcock's application for parental leave payments, because although she had returned to work (and therefore disqualified herself for PLEPA entitlements) the Authority found she had only completed some administrative tasks which is allowed under the Act.⁷

⁵ *Shah v Ministry of Business, Innovation and Employment* [2020] NZERA 102.

⁶ *Cook v Ministry of Business, Innovation and Employment* [2019] NZERA 164.

⁷ *Allcock v Ministry of Business, Innovation and Employment* [2021] NZERA 105.

[28] On review of the material, I noted Ms Hood had recorded that she worked for Bianca Lorenne Limited for a period of 14 weeks “excluding holiday pay”. I asked the parties to comment on whether s 72A of the PLEPA might apply to ensure there were no periods of “authorised leave” that could be taken into account.

[29] Ms Hood replied by email confirming her final holiday pay was \$2005.34 which equates to 97 hours and at 20 hours a week this would amount to 4.85 weeks. She also confirmed that she had been employed continuously since October 2017 which was helpful for me in considering this matter in light of the intent and purpose of the PLEPA.

[30] Mr Upperton filed supplementary submissions where he correctly provides that the period of employment prior to the 52 weeks immediately preceding the due date was not relevant to MBIE’s consideration of this matter. He also submitted that s 72A of the PLEPA cannot apply in circumstances where an employee has been paid out their holiday pay after redundancy and in any event, even if 4.85 weeks could be added to Ms Hood’s total number of weeks worked, she is still under the required 26 weeks for eligibility.

Analysis and conclusion

Was MBIE correct in declining Ms Hood’s application for the parental leave payments and in not exercising its statutory discretion to approve irregular payments?

[31] There is no dispute that the intent of the government funded parental leave payment scheme is to support families while primary carers are not working and are caring for a new child.⁸ As Ms Hood correctly points out the criteria are focussed on a connection between an applicant and a New Zealand employer, an employment relationship that is subject to domestic employment law and paying tax in New Zealand. But these factors must be connected to the employment that the applicant is relying on to “qualify” for the payments.⁹ Working for the prescribed period of time is one of two qualifying thresholds for entitlement set out in the PLEPA.

⁸ The Parental Leave and Employment Protection (Paid Parental Leave) Amendment Bill 2001 (182-1).

⁹ Above n8.

[32] Ms Hood may well have pointed out an anomaly when she says she meets the test for time employed if it is calculated in hours, however, the test that Parliament enacted requires a minimum of both an average of 10 hours a week over the preceding 26 weeks before the delivery date. Changing the eligibility criteria set out in the PLEPA is a matter for Parliament in the same way that it has recently temporarily amended the parental leave rules to allow Covid-19 workers to return to work during their parental leave period in certain circumstances and not lose the protections and entitlements under the PLEPA.¹⁰

[33] As there is no dispute in the evidence that Ms Hood did not meet the parental leave threshold test, MBIE was correct in declining Ms Hood's application.

[34] An application that does not meet the statutory eligibility criteria is a substantial matter and does not relate to simply an issue of form with documentation or a matter of form. The Authority has declined to modify or reverse decisions on parental leave payments in circumstances where the applicant cannot meet the qualifying threshold set out in the statute despite the overall unfairness of the circumstances. In *Fairhall v Chief Executive of the Department of Labour*, Ms Fairhall did not meet the qualifying work period for eligibility because she resigned voluntarily due to ill health during the pregnancy.¹¹ In the case of *Nuku v Department of Labour* there had been a change in employer due to liquidation of a company and this was during the period when the legislation required that there be a continuous period of employment with one employer.¹² The Authority declined to modify or reverse the departments' decisions in both those cases.

[35] Therefore MBIE was also correct in not exercising its ability to approve irregular applications under s71ZB of the PLEPA because the irregularity was a matter of substance and not form.

Are the compassionate grounds advanced by Ms Hood, sufficient for the Authority to modify or reverse the decision of the department?

¹⁰ Parental Leave and Employment Protection Act 1987, s 30JD.

¹¹ *Fairhall v Chief Executive of the Department of Labour* [2010] NZERA Wellington 133/10.

¹² *Nuku v Department of Labour* [2009] NZERA Auckland 119/09.

[36] An example of the Authority exercising its equity and good conscience jurisdiction when reviewing entitlement to parental leave payments is the determination in the case of *Kerapa v Ministry of Business and Innovation and Employment*. In that case the circumstances were similar to Ms Hood's in that "but for" an intervening act, the applicant would have met the statutory test of continuous employment for the required length of time before her expected delivery date.¹³

[37] Ms Kerapa had changed employers during her pregnancy so could not meet the statutory threshold requirement which at that time was continuous employment with one employer for the defined period of time. Of note was that the new employment was the same role she had previously been placed as an ongoing temporary assignment through a recruiting agency. She had applied and was the successful candidate for the substantive role with the employer (rather than the recruiting agency).

[38] However, if Ms Kerapa's baby had been born 31 days later, she would have likely been entitled to the parental leave payment because a legislative amendment removing the need for continuous employment was about to come into force. MBIE had declined her entitlement to parental leave payments because while she had worked for the required length of time, she had changed employers during that period and although the legislation was going to change it had not yet changed. Ms Kerapa had also been given erroneous advice by IRD on three occasions during her pregnancy that she would still qualify for parental leave payments if she changed employers.

[39] In *Kerapa* the Authority found that the combined result of IRD's incorrect advice on more than one occasion and MBIE's decision to render Ms Kerapa ineligible for paid parental leave meant that she had suffered an injustice and reversed MBIE's decision under the Authority's equity and good conscience jurisdiction.¹⁴

[40] In another Authority decision, *Fitzek v Ministry of Business Innovation and Employment*, the applicant would have met the qualifying statutory time threshold had her employer not unjustifiably withheld available work and prematurely brought her employment

¹³ *Kerapa v Ministry of Business and Innovation and Employment* [2016] NZERA 41.

¹⁴ At [31].

to an end in circumstances that amounted to discrimination after she advised the employer of her pregnancy.¹⁵

[41] The Authority using its equitable jurisdiction found that “but for” Ms Fitzek’s employer’s poor behaviour (involving an unjustifiable dismissal and discrimination against her) it is more likely than not she would have worked an additional six weeks and brought herself within the time threshold for parental leave payments and reversed the department’s decision.¹⁶

[42] Ms Hood submits that “but for Covid-19” and her health it appears likely that she would have been continued working and would have been eligible. I find that both *Kerapa* and *Fitzek* are different from Ms Hood’s circumstances. In *Kerapa*, Parliament’s intention was clearly that it intended to change the criteria which would have removed the barrier to Ms Kerapa qualifying and it was indeed changing such that if Ms Kerapa’s due date had been 31 days later, she would have qualified. The incorrect advice from IRD was also a factor that was important in that decision.

[43] The significant difference arising in *Fitzek* is that the event that is relied on as the grounds that formed the basis for the Authority to reverse the decision of MBIE on review, stems from illegal actions by the employer. Ultimately I find Ms Hood’s situation to be different because there is no suggestion there was any issue with the employer’s actions. Ultimately employers are entitled to make people redundant when there is no work which was unfortunately a reality of the Covid-19 situation in New Zealand.

[44] Other than general fairness and compliance with spirit of the PLEPA, I did not receive submissions on why a Covid-19 triggered redundancy could be treated by the Authority in the same way as *Fitzek* and *Kerapa*.

[45] It is acknowledged that the scheme of the PLEPA was intended by Parliament to provide support to families of new babies and this appears to apply directly to Ms Hood and her family as they are preparing to welcome a very much wanted addition to their family. However, there is a threshold test for eligibility set out in the PLEPA. This means that

¹⁵ *Fitzek v Ministry of Business Innovation and Employment* [2021] NZERA 28.

¹⁶ At [21].

Parliament intended for parental leave payments to be available for those that met the test which sets out the minimum number of hours and over the minimum number of weeks that an applicant must be in employment during the pregnancy and unfortunately in this case Ms Hood does not meet that criteria.

[46] While I can understand the position Ms Hood and her family now find themselves in, I cannot find any legal basis that would allow the Authority to overlook the specified statutory requirement for eligibility in these circumstances. Therefore the grounds advanced by Ms Hood are not sufficient for the Authority to modify or reverse the decision of the department.

Conclusion

[47] In considering the overall circumstances of Ms Hood I find that she is not entitled to parental leave payments and the department's decision is confirmed.

[48] I have reserved costs, noting this is a matter which seems appropriate to have costs lie where they fall. However, should the Respondent wish to make an application for costs it should do so within 28 days of this determination.

Sarah Kennedy
Member of the Employment Relations Authority