

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 240
3133860

BETWEEN RAPHAELA KEMP
 Applicant

AND MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Toli Sagaga, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further 30 April 2021 from the Respondent
evidence

Determination: 03 June 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Raphaela Kemp, applied for paid parental leave on 22 January 2021 in accordance with the Parental Leave and Employment Protection Act 1987 (the PLEPA). The Inland Revenue Department (IRD) wrote to Ms Kemp on 26 January 2021 advising her that her application was unsuccessful because she had not worked sufficient hours to qualify for paid parental leave.

[2] The IRD also advised Ms Kemp that she could apply to the Authority for a formal review of the decision.

[3] The Ministry of Business, Innovation and Employment (MBIE) confirmed the IRD advice that Ms Kemp had not worked enough hours to be eligible for paid parental leave.

[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 respondent.

Background

[5] Ms Kemp was employed by Real Journeys Limited (Real Journeys), a tourist focused company operating in Doubtful Sound, on a fixed term contract from 22 September 2019 until 24 May 2019.

[6] Ms Kemp had become pregnant with her first child whilst working on a fixed term contract with Real Journeys Limited and on 20 November 2020, she gave birth to her son.

[7] Ms Kemp had been advised by Real Journeys that her fixed term employment position would be terminated on 30 April 2020. This was earlier than anticipated by the parties and was the result of New Zealand entering into a level 4 lockdown as a result of Covid-19 which in turn had caused the early finish to the tourist season for Real Journeys.

[8] Ms Kemp applied for paid parental leave on 16 January 2021, but this was declined by MBIE on 22 January 2021. This was on the basis that she had not met the parental leave payment threshold.

[9] Ms Kemp has applied to the Authority to reverse the decision of MBIE.

[10] 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

[11] As set out in s 2BA of the 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 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 partner): or
 - (ii) the 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).

[12] Ms Kemp only worked for 23 weeks within the relevant 52 week period because she worked from Wednesday 20 November 2019 to Thursday 30 April 2020 in the period 20

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

November 2019 to 20 November 2020. This means that she does not meet the parental leave payment threshold test.

[13] Ms Kemp accepts that she does not meet the 26 week threshold, and seeks that her application be reconsidered in light of the Covid-19 situation.

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

[14] 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

[15] There is no dispute that Ms Kemp is the primary carer in respect of her son. However she does not meet the parental leave payment threshold test because she was employed for less than 26 weeks.

[16] Ms Sagaga submits that MBIE has discretion to approve irregular applications pursuant to s 71IA of PLEPA where the irregularity is as defined in that section, that is for matters of form.

[17] However Ms Kemp’s situation is not a matter a matter of form but of substance. Her failure to complete the 26 week period which would have enabled her to meet both limbs of the eligible employee criteria was due to circumstances beyond her control. In other words, ‘but for’ Covid-19 which forced the early finish of the tourism business in which she was employed, completion of her fixed term employment would have enabled her to complete the requisite 26 week period.

[18] Failing to meet the parental leave payment threshold test is not a matter of irregularity but of substance and falls within the Authority’s discretion.

Analysis of cases in which the Authority’s discretion has been exercised.

[19] The Authority has exercised its discretion to confirm, modify, or reverse the decision of MBIE in *Kerapa v Ministry of Business, Innovation and Employment*⁴

² Above n1, s 71D(1)(a)

³ Above n1, s71CA

⁴ *Kerapa v Ministry of Business, Innovation and Employment* [2016] NZERA 41

[20] In that case Ms Kerapa changed employment during her pregnancy and so could not meet the statutory threshold requirement. However the new employment was the same role in which she had previously been placed as ongoing temporary employment by a recruitment agency and she had subsequently had applied for, and been appointed to, the substantive role but with the employer rather than the recruitment agency.

[21] MBIE had declined Ms Kerapa's entitlement to parental leave entitlements because the legislative amendment to remove the need for continuous employment, which was anticipated 31 days after her baby was born, had not yet passed.

[22] The Authority took into consideration the fact the amendments to PLEPA came into effect on 1 April 2016, the date on which Ms Kerapa's baby was born. The amendments meant that a female employee became eligible for parental leave even if she had not been working for only one employer during the preceding six months. This would have applied to Ms Kerapa had she remained in the same job but employed by the recruitment agency

[23] In addition that Ms Kerapa had been given erroneous advice by the IRD on three occasions during her pregnancy to the effect that if she changed employers, she would still qualify for parental leave payments.

[24] The Authority decided that the combination of the two circumstances meant that Ms Kerapa had suffered an injustice, and reversed the decision.

[25] I find this is different to Ms Kemp's situation in that Parliament had indicated its intention to change the criteria preventing Ms Kerapa qualifying and did amend the relevant sections of the PLEPA. In addition the incorrect advice from the IRD was taken into consideration by the Authority.

[26] In another case in which the Authority exercised its discretion in the applicant's favour, *Fitzek v Ministry of Business, Innovation and Employment*, the employer had unjustifiably withheld work from Ms Fitzek after she advised her employer of her pregnancy.⁵ This was held to be an illegal act by the employer which prematurely brought Ms Fitzek's employment to an end.

[27] I find this is different to Ms Kemp's situation because her employer, Real Journeys, had not acted illegally.

[28] A recent case which is relevant because of the similarity of circumstances is *Hood v Ministry of Business, Innovation and Employment*. In that case Covid-19 had been partly the

⁵ *Fitzek v v Ministry of Business, Innovation and Employment* [2021]NZERA 28

reason why the applicant had not completed the requirements of the parental leave payment threshold.⁶

[29] In *Hood* the Authority noted that the government funded parental leave payment scheme was to support families whilst the primary carers are not working due to the fact that they are caring for a new baby. It was also noted that the PLEPA sets out the eligibility criteria that an employee must meet in order to qualify for the entitlement, namely being the primary carer and meeting the parental leave payment threshold test.

[30] Further noted was the fact that Parliament had amended the PLEPA to allow Covid-19 workers to return to work during their parental pay period in certain circumstances without losing the protections and entitlements under PLEPA.⁷

[31] The Authority declined Ms Hood's application to reverse MBIE's decision on the basis that it could not: "find any legal basis that would allow the Authority to overlook the specified statutory requirement for eligibility in these circumstances."

[32] I have considered Ms Kemp's application and have sympathy with the situation in which Covid-19 which triggered the early finish for Real Journey's season 'but for' which she would have fulfilled both limbs of the eligibility criteria set out in s 71CA.

[33] However I observe that Parliament had not chosen to change this aspect of the PLEPA in light of Covid-19, although it had made amendments to another section in May 2020 which was during the Level 4 lockdown.

[34] In light of the fact that Parliament had not chosen to alter the statutory eligibility criteria, I find that there is no legal basis which would permit the Authority to set aside the statutory eligibility criteria.

[35] Accordingly I decline to modify or reverse the decision of MBIE in respect of Ms Kemp.

Costs

[36] Costs are reserved. Given the extent to which both parties have been successful, I consider that costs should lie where they fall.

⁶ *Hood v Ministry of Business, Innovation and Employment* [2021] NZERA 215

⁷ Above n1, s 30JD: inserted on 16 May 2020, by section 3 of the COVID-19 Response (Further Management Measures) legislation Act 2020 (2020 no 13)

[37] 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