

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 272  
**3153383**

BETWEEN

SOPHIE ALEXANDER  
Applicant

AND

MINISTRY OF BUSINESS,  
INNOVATION AND  
EMPLOYMENT  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: Applicant in person  
Oscar Upperton, counsel for the Respondent  
Investigation Meeting: On the papers  
Determination: 27 June 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Sophie Alexander, applied for parental leave payments. Her application was declined by the Inland Revenue Department (IRD) on the basis that Ms Alexander had applied for parental leave payments outside of the statutory time

[2] The Ministry of Business Innovation and Employment (MBIE) has authority to exercise a discretion and approve irregular applications. In this matter it declined to exercise its discretion on the basis that Ms Alexander's application for a parental leave payment was made significantly outside of the statutory time frame.

[3] On 13 October 2021 Ms Alexander filed a statement of problem in the Authority seeking a formal review of the decision.

**The Authority's Investigation**

[4] The parties agreed to this matter being determined 'on the papers' based on the Statements of Problem and in Reply, and on submissions from the parties.

## **Relevant Background**

[5] Ms Alexander worked as a self-employed fitness instructor at Rest Fitness, Epsom Village and Genesis Fitness between 30 October 2019 and 1 October 2020. During that period her average hours of work were 13.68 per week.

[6] Ms Alexander stopped working from 1 October 2020 in advance of the birth of her baby, the expected date of which was 16 October 2020.

[7] Ms Alexander's baby was born on 30 October 2020.

[8] On 31 March 2021 Ms Alexander filled in a paid parental leave application form, but she did not submit it.

[9] Ms Alexander returned to work at Epsom Village on 13 April 2021, working 45 minutes a week. In addition, she conducted classes for private clients one to two times a week.

[10] Ms Alexander registered for paid parental leave through myIR on 16 June 2021, but she did not complete the application.

[11] On 30 September 2021 Ms Alexander completed and submitted an application for parental leave payments. The following day, 1 October 2021, the IRD requested more information about her application from Ms Alexander.

[12] On 5 October 2021 the IRD declined Ms Alexander's application for parental leave payments on the basis that she did not stop working or returned to work prior to applying for parental leave payments.

## **Parental Leave Entitlements**

[13] Section 2BA(4) of the Parental Leave and Employment Protection Act 1987 (the PLEPA) sets out that an employee must meet the parental leave payment threshold test which requires 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:

### **2BA Thresholds for entitlements**

...

(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) ...

(b) a self-employed person meets the parental leave payment threshold test if he or she will have been self-employed 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 self-employed person or his or her spouse or partner); or
- (ii) the first date on which the self-employed person, or his or her spouse or partner becomes the primary carer in respect of the child (in any other case).

[14] MBIE found that Ms Alexander met the parental leave payment threshold test because she had been self-employed for at least 26 weeks out of the 52 weeks immediately prior to her baby's expected date of delivery and has averaged more than 10 hours of work as a self-employed person per week. She was therefore eligible for parental leave payments in accordance with PLEPA.

[15] However, an application for parental leave payments must be made in accordance with the time limits set out in PLEPA which states:

#### **71I Applications for payment**

(1) A person is not entitled to a parental leave payment unless he or she makes an application for payment in accordance with this section.

(2) The application must—

(a) be made by the employee or self-employed person before the earliest of the following:

- (i) the date on which the person returns to work;
- (ii) the date on which the child attains the age of 12 months (in the case of a child born to the person or to the person's spouse or partner);
- (iii) the date that is the first anniversary of the first date on which either the person or the person's spouse or partner became the primary carer in respect of the child (in any other case)

[16] Ms Alexander therefore needed to make her application before the earliest of either the date she returned to work, or the date on which her child attained the age of 12 months.

[17] In accordance with s 71CD of PLEPA a self-employed person is not to be treated as having returned to work because they:

- a) Receive income for work done before the period of parental leave; or
- b) Receive income because of work done by other people during the period of parental leave; or

- c) carry out work in the nature of oversight or occasional administrative tasks in the business in which the person is self-employed.

[18] Based on the information provided by Ms Alexander, MBIE found these circumstances did not apply because she returned to work which was of a substantive work of the kind she had done prior to the birth of her baby.

[19] Ms Alexander accordingly made a late application for parental leave five months outside of the statutory time limit pursuant to s 71I of PLEPA.

[20] MBIE has the discretion under s 71IA of PLEPA to approve irregular applications, including late applications. In so doing, MBIE must have regard to the extent of the irregularity (including whether the extent of the irregularity was reasonable in all of the circumstances); and whether the person was acting in good faith.

[21] Whilst MBIE considered Ms Alexander was acting in good faith, given the significant extent of the irregularity being five months, MBIE decided not to exercise its discretion.

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

[22] The Authority does have statutory discretion to make orders, pursuant to s 71ZB(3) of the PLEPA which gives the Authority the power to: “modify or reverse” any decision of MBIE.

[23] Ms Alexander has submitted in support of her application to the Authority that she misunderstood the criteria and believed she had a year after her baby’s birth to apply for the parental leave entitlement i.e. until 30 October 2021.

[24] Ms Alexander also submitted that she believed that she was entitled to keep in touch with her industry and work up to 64 hours and still be eligible for parental leave payments. She submitted she had worked less than 64 hours during 13 April and 30 October 2021.

[25] I find that these submissions would not support an exercising of the Authority’s discretion given the significant nature of the delay in making the application and since the requirements for eligibility are clearly set out in the relevant sections of PLEPA.

[26] Ms Alexander has further submitted that her personal circumstances made it difficult to apply for paid parental leave. These circumstances, the details of which have been provided to the Authority, include both personal considerations and the fact that Ms Alexander has a

diagnosed neurological condition which has impacted parts of her life and affected her ability to complete some simple tasks. Ms Alexander has provided a letter from her doctor in support.

[27] I am satisfied that Ms Alexander's submissions and supporting information provide an adequate explanation of extenuating circumstances to explain her late application.

[28] Accordingly, I consider it appropriate to exercise the Authority's discretion and to reverse the decision made by MBIE that Ms Alexander did not qualify for paid parental leave.

[29] MBIE should now take the necessary steps to ensure Ms Alexander receives the parental leave payments due to her.

### **Costs**

[30] Costs are reserved.

[31] 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**