

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 467  
3171705

BETWEEN                      NICOLLI RAMOS BARBOSA  
Applicant

AND                              MINISTRY OF BUSINESS  
INNOVATION AND  
EMPLOYMENT  
Respondent

Member of Authority:        Rachel Larmer

Representatives:             Applicant in person  
Oscar Upperton, counsel for the Respondent

Investigation Meeting:      On the papers

Submissions and Other      15 August 2022 from the parties  
Information Received:        13 September 2022 from the Respondent

Date of Determination:      16 September 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Ms Nicolli Ramos Barbosa, was declined parental leave payments for her child who was born on 22 October 2019. The applicant said she was informed by her accountant at the time that she was not entitled to parental leave payments because of her gross income, so she did not apply for parental leave payments.

[2]     In November or December 2021 the applicant engaged a new accountant who advised her that they would investigate whether she was entitled to parental leave payments in respect of her child who had been born in October 2019. The new accountant determined she was, so advised the applicant of that entitlement.

[3] On 16 March 2022 the applicant applied for parental leave payments for the child who was born on 22 October 2019, seeking payments for the period 21 October 2019 to 22 March 2020.

[4] On 17 March 2022 the applicant's parental leave payments application was declined by Inland Revenue Department (IRD) on the basis she had applied for parental leave payments more than a year after her child was born.

[5] The parties agree that the applicant fulfils the eligibility criteria for parental leave payments. Her application was only declined because it had been made one and a half years out of time, and not for any other reason.

[6] The respondent has a discretion to allow irregular applications, including late applications, under s 71IA of the Parental Leave and Employment Protection Act 1997 (PLEPA). However, the Ministry of Business, Innovation and Employment (MBIE) declined to exercise its discretion regarding the applicant's late application, on the basis that it was made too far out of time.

### **Authority's investigation**

[7] The parties agreed on the facts on which this determination should be based, so they filed a joint memorandum to that effect on 15 August 2022.

[8] In particular, the respondent accepted that the reason for the late parental leave payments application was because the applicant had been given incorrect advice by her former accountant. Had the application been made in time, it would have been granted.

### **Issues**

[9] The following issues are for determination:

- (a) Should the Authority reverse the respondent's decision to decline the applicant parental leave payments?
- (b) What, if any, costs should the successful party be awarded?

## Relevant law

[10] Section 71I of the Parental Leave and Employment Protection Act 1987 (the PLEPA) requires a parent to make their application for parental leave payments before the person returns to work, or their child has their first birthday, whichever is the earliest.

[11] Section 71IA of the PLEPA gives MBIE the discretion to approve an application for parental leave payments that is made later than the 12 months required by s 71I of the PLEPA. This discretion allows MBIE to approve irregular applications.

[12] In doing so, MBIE must have regard to the extent of the irregularity (including whether the extent of that irregularity was reasonable in all the circumstances) and whether the person was acting in good faith.<sup>1</sup>

[13] Section 71ZB of the PLEPA gives the Authority the power to review MBIE's decisions on parental leave payments applications. Section 71ZB(3) of the PLEPA allows the Authority to "*confirm, modify, or reverse the decision of the department*", meaning MBIE.

## Should the Authority reverse MBIE's decision not to grant the applicant parental leave payments?

[14] MBIE did not dispute that the applicant had acted in good faith, or that the "*irregularity*" (meaning delay in applying for parental leave payments) occurred because the applicant was incorrectly advised by her former accountant that she did not qualify for such payments.

[15] The issue is therefore whether the applicant's delay of 18 months in applying for parental leave payments was so extensive that the Authority should uphold MBIE's decision.

[16] The Authority considered there was a good reason for the applicant's delay, she was otherwise entitled to such payments and it finds the applicant has acted in good faith.

[17] The Authority has previously used its discretion in s 71ZB of the PLEPA to order parental leave payments be paid to parents who have been given incorrect information.

[18] In *Chalmers v Ministry of Business, Innovation and Employment* the Authority exercised its discretion to reverse MBIE's decision to decline leave to an applicant who had

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<sup>1</sup> Section 71IA(2) of the PLEPA.

been given incorrect advice by the IRD.<sup>2</sup> MBIE acknowledged the IRD's mistake but did not have statutory discretion to make the parental leave payments when the applicant did not meet the threshold.

[19] *Walton v Ministry of Business, Innovation and Employment* is another example of a case in which the IRD erroneously advised the applicant in that case that she was ineligible for paid parental leave.<sup>3</sup> The parent made an application for paid parental leave six months after she had returned to work. In that case the Authority exercised its discretion to reverse MBIE's decision.

[20] In *Williamson v Ministry of Business, Innovation and Employment* the Authority found that, in the absence of a compelling reason for the delay, a delay of four months was unreasonable.<sup>4</sup> In the case of *McCarty v Ministry of Business, Innovation and Employment* a delay of one year was unreasonable, in the absence of good reasons for that.<sup>5</sup> That shows the reason for the delay is material to the exercise of the Authority's discretion under s 71ZB of the PLEPA.

[21] However, in cases where the delay was reasonable due to extenuating circumstances, delays of five, six and nine and a half months were held to be reasonable and have resulted in the Authority exercising its discretion in favour of the parent who had applied for a review of MBIE's parental leave payment decisions.

[22] Examples of cases in which the Authority considered the delay was reasonable due to extenuating circumstances include *Alexander v Ministry of Business, Innovation and Employment*;<sup>6</sup> *Walton v Ministry of Business, Innovation and Employment*;<sup>7</sup> *Weber v Ministry of Business, Innovation and Employment*.<sup>8</sup>

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<sup>2</sup> [2021] NZERA 303.

<sup>3</sup> [2022] NZERA 278.

<sup>4</sup> [2015] NZERA Christchurch 96.

<sup>5</sup> [2015] NZERA Auckland 8.

<sup>6</sup> [2022] NZERA 272.

<sup>7</sup> [2022] NZERA 278.

<sup>8</sup> [2021] NZERA 183.

[23] The Authority has a wide discretion under s 71ZB(3) of the PLEPA.<sup>9</sup> MBIE has acknowledged that the Authority has a wider discretion than it does, because MBIE's discretion is confined to matters of "*form*" rather than substance.<sup>10</sup>

[24] The Authority considers it is equitable to remedy the incorrect advice that the applicant's account gave her by reversing MBIE's decision to decline the applicant's late application for parental leave payments.

[25] Accordingly, MBIE is ordered to exercise its discretion to approve the applicant's application for parental leave payments for her child who was born on 22 October 2019, so that she receives the same entitlements she would have, had her application been made within time.

**What, if any, costs should be awarded?**

[26] The applicant represented herself, so there is no issue as to legal costs.

[27] However, the applicant is entitled to be reimbursed \$71.56 for her filing fee. MBIE is therefore ordered to reimburse to the applicant \$71.56 within 28 days of the date of this determination.

**Rachel Larmer**  
**Member of the Employment Relations Authority**

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<sup>9</sup> *Birchall v Ministry of Business Innovation and Employment* [2020] NZERA 470; *Weber v Ministry of Business, Innovation and Employment* [2021] NZERA 183 and *Allcock v Ministry of Business Innovation and Employment* [2021] NZERA 105.

<sup>10</sup> Section 71IA of the PLEPA and *Fitzek v Ministry of Business, Innovation and Employment* [2021] NZERA 28.