

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 557
3150202

BETWEEN WENTING DUAN
 Applicant

AND MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
 Farah Hussein, Rochelle Hill and Amy Webster, counsel
 for the respondent

Investigation Meeting: On the papers

Submissions [and further 4 December 2021 and 9 September 2022
Information] Received: 17 and 24 December 2021 and 9 September 2022

Date of Determination: 28 October 2022

DETERMINATION OF THE AUTHORITY

- A. Wenting Duan’s review application is successful and she is to be paid the parental leave payments.**
- B. MBIE is to pay Ms Duan \$71.56 for the Authority’s filing fee within 28 days of the date of this determination.**

What is the Employment Relationship Problem?

[1] Wenting Duan seeks a review of a decision to decline her application for parental leave payments. The chief executive of the Ministry of Business, Innovation and

Employment (MBIE) delegates such decisions to officers of the Inland Revenue Department.

[2] The Authority is able to review paid parental leave decisions and confirm, modify or reverse those decisions.¹ Ms Duan wishes the decision to be reversed, giving her an entitlement to paid parental leave.

[3] The parties agreed that this matter could be determined on the papers. Information was sought and provided by both parties. The Authority sought and was provided with the recording of a conversation between Ms Duan and an IRD representative on 27 April 2021.

[4] Further information was obtained during a case management conference held on 9 September 2022.

[5] As permitted by s 174E of the Employment Relations Act 2000, this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result. I have carefully considered all the material provided.

What was the timeline?

[6] There was some lack of clarity regarding Ms Duan's situation however, I conclude that the following was the timeline of events:

- Ms Duan's baby was born on 1 April 2021
- Ms Duan took a few weeks' annual leave following the birth of her baby
- After the annual leave, she returned to working for her employer (from home), with a friend taking care of the baby whilst Ms Duan worked
- Communications between Ms Duan and the IRD occurred in late April 2021, as outlined below
- Her application for parental leave payments was made on 29 August 2021

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

- Further communications between the IRD and Ms Duan occurred in early September 2021
- The IRD declined the application on 2 September 2021
- The friend was no longer going to be available. Ms Duan stopped working in around mid-September 2021, resigning and receiving her last pay on 17 September
- Ms Duan remained away from work caring for her baby until she started a new part time job in February 2022.

[7] The April 2021 communications included:

- Ms Duan messaging the IRD on 22 April – “My baby had been born on the 1st of April 2021. And I haven’t applied for the Parental leave yet, because I am using my annual leave now. And I want to ask What is the latest time I can still apply for the Parental Leave? ...”
- IRD phoning Ms Duan on 27 April - the following is in IRD’s notes - “advised that as the mother, she can apply for PPL [*paid parental leave*] up to before baby’s 1st birthday but also cannot have returned to work in order to be eligible for PPL. ...Replied... confirming what we discussed as well as links on how to apply for PPL...”. The recording has the IRD representative saying to Ms Duan that she cannot have returned to work, she needs to apply before she returns to work.
- IRD emailing Ms Duan on 27 April – “...the latest you can apply for ...PPL... is before baby turns 1 year old. However, please bear in mind that you will need to apply for PPL before returning to work. If you apply before baby turns 1 year old, but have returned to work, you will no longer be eligible for PPL... Please note your PPL start date will be the day after your annual leave ends.”

[8] After the application was made the IRD asked for proof of expected due date. Ms Duan replied including:

And for my situation is that I was keep working since 15th of April to 1st of September 2021, and have my annual leave from 1st of September to 31st of September 2021. I am stopping working from 1st of September. As before I have a friend to help me to take care of my baby, however she is not available anymore. So I have to stop working and take care of the baby all by myself. So I want my PPL start from the 1st of October and last for 6 months.

[9] The IRD's decision was to decline payment because Ms Duan did not stop working or had already returned to work. The 2 September letter advised that to get paid parental leave the applicant must stop work as soon as their child is born and apply before going back to work.

What does Ms Duan say?

[10] Ms Duan describes working full time (40 hours a week) as an office manager for around two years before her baby was born. Salary payments were confirmed by her IRD summary.

[11] Ms Duan says she misunderstood the requirements, noting that English is her second language. She thought that she could not work while she was taking parental leave (which is largely correct). What she did not appreciate was that there was a difficulty with going back to work if she wanted to apply for paid parental leave.

[12] Ms Duan went back to work early and a family friend helped take care of the baby for a few months. However, once her friend was no longer available, Ms Duan stopped work to care for her baby. She became the primary carer in mid-September 2021.

What is MBIE's response?

[13] MBIE's position is that Ms Duan is not entitled to paid parental leave as she does not meet the timing requirement for the application. Reliance is placed on s 71I(2)(a)(i) of the Parental Leave and Employment Protection Act 1987 (the PLEP Act) which specifies that an application for parental leave payment must be made by the employee before the date on which the person returns to work.

[14] As Ms Duan had already returned to work by the time she made her application, her application is said to be too late.

[15] The discretion to approve payment despite irregularity is said to be limited to irregularities of form. Presumably MBIE did not see this as such a situation.

Was Ms Duan entitled to parental leave payments?

[16] The claim for parental leave relates to the period from September 2021 to February 2022.

[17] I look first at the definition of entitlement to parental leave payment in s 71D of the PLEP Act and whether Ms Duan meets it:

- (a) The person must be an eligible employee, as defined in s 71CA² – Ms Duan was eligible as she was the primary carer of her baby both for most of April 2021 and from mid/late September 2021 until February 2022;
- (b) Also, under s 71CA(1)(b) of the eligible employee definition, the person must meet the parental leave payment threshold test as defined in s 2BA(4) – Ms Duan was eligible as she had worked full time for around two years; and
- (c) During the period in relation to which the person receives parental leave payments the person is not employed (or self-employed) or takes parental leave from their employment³ – Ms Duan was not employed during the period she seeks parental leave payments for, namely from mid/late September 2021, as she resigned from her job before finishing work.

[18] So far, Ms Duan meets the requirements for a parental leave payment from September 2022. However, in addition there is the requirement regarding application. Under s 71I(2)(a) of the PLEP Act the application for payment must be made before the earliest of:

- (i) The date in which the person returns to work;
- (ii) The date in which the child attains the age of 12 months, where the child is born to the person applying; or
- (iii) The date that is the first anniversary of the first date on which the person became primary carer.

[19] MBIE assessed that as Ms Duan returned to work in mid/late April 2021, the first category applied and her application on 29 August 2021 was therefore too late.

[20] On the basis of the April 2021 period that approach is understandable. However, if the leave is seen as starting from mid/late September, the 29 August 2021 application is well in time under (i) above, before the child's first birthday and the first anniversary of

² Requirement from the PLEP Act, s 71D(1)(a)(i).

³ Requirement from the PLEP Act, s 71D(1)(b).

Ms Duan becoming primary carer. On that basis I conclude that there is no difficulty with the timing of the application.

[21] If I am wrong on that, under s 71IA of the PLEP Act there is a discretion to approve the making of a payment despite irregularity in the payment application. MBIE is required to have regard to:

- (a) The extent of the irregularity (including whether the extent of the irregularity was reasonable in all the circumstances); and
- (b) Whether the person was acting in good faith.⁴

[22] Irregularity is defined to include failing to make the application for payment before the relevant date in s 71I.⁵

[23] On the basis that the return to work date is seen as April 2021, that could be seen as the situation here. Ms Duan had some annual leave off work immediately after the birth of her child, returned to work and then resigned to care for her child, having time away from paid employment. The application was made before the further time off but Ms Duan did have a period off work without pay.

[24] Ms Duan had communications with MBIE from late April 2021. She was aware that she had not applied for the parental leave payment prior to her baby's birth. I accept that there were some uncertainties regarding her childcare arrangements and related return to work. She was informed that she could apply up to her baby's first birthday but could not have returned to work in order to be eligible for the parental leave payment. The IRD representative also said that the start date (seemingly for her parental leave payment) on the application should be the first day after her annual leave.

[25] English is not Ms Duan's first language although she is able to communicate reasonably well in English. However the PLEP Act is complex and she did not discuss with the IRD the possibility of starting work again and then having leave later. She may not have anticipated this during the April communications.

⁴ PLEP Act, s 71IA(2).

⁵ PLEP Act, s71I(5)(a).

[26] There were a few months between when Ms Duan initially went back to work and when she applied for a parental leave payment. The application was however made shortly before she again finished work to care for her baby. It appears she may not have been aware of the need to take over full time care until around that time when it became apparent that her friend was no longer to be available. On the evidence before me Ms Duan acted in good faith.

[27] I would have concluded that the discretion should have been exercised to allow Ms Duan's application to proceed.

[28] The decision to decline Ms Duan's application for parental leave payments is reversed and she is to be paid those payments as soon as practicable.

Costs

[29] Ms Duan has been successful in her application. Ms Duan has represented herself so the reimbursement of her costs is limited to the Authority's filing fee. Within 28 days of the date of this determination MBIE is to pay Ms Duan \$71.56 for that fee.

Nicola Craig
Member of the Employment Relations Authority