

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 614  
3163182

BETWEEN

ZIXIAN CHEN  
Applicant

AND

MINISTRY OF BUSINESS,  
INNOVATION, AND  
EMPLOYMENT  
Respondent

Member of Authority: Rowan Anderson

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

Investigation Meeting: On the papers

Submissions and further information received: 14 June 2022, 16 September 2022, 27 October 2022, and  
1 November 2022 from Applicant  
5 May 2022, 29 June 2022, 9 September 2022, and 22  
September 2022 from Respondent

Determination: 22 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Zixian Chen seeks a review of a decision by the Inland Revenue Department (Inland Revenue) declining an application by Ms Chen for parental leave payments under the Parental Leave and Employment Protection Act 1987 (the PLEP Act).

[2] Section 71ZB of the PLEP Act provides that application may be made to the Authority by a relevant person for review of the decision made by the department,

including as to the person's entitlement to parental leave payments.<sup>1</sup> The Authority may confirm, modify, or reverse the decision of the department.<sup>2</sup>

[3] In undertaking such a review, any discretion the Authority may exercise must be exercised in a principled way. It is not for the Authority to re-write the legislation and it must be approached based on the relevant principles of statutory interpretation.

[4] Ms Chen's application was declined by Inland Revenue on the basis that Ms Chen did not stop working or had already returned to work.<sup>3</sup> There are four broad grounds on which she seeks a review:

- (a) That, but for her returning to work for a short period following the birth of her child, she would have been eligible for parental leave payments and that declining the application was unfair;
- (b) That she qualified on the basis that she was a COVID-19 Response Worker; and
- (c) That Ms Chen's partner met the relevant eligibility requirements, and the entitlement should be deemed to have transferred between them.

[5] As permitted by s 174E of the Employment Relations Act 2000 this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Background and relevant facts**

[6] I received information from the parties on several occasions as my investigation progressed. The facts relevant to the application for review, and my determination, are largely uncontested. I am satisfied of the following matters:

- (a) Ms Chen, before the birth of her child, worked as a supervisor in a takeaway restaurant, Magic Kitchen Takeaway.
- (b) Ms Chen's last day of work prior to the birth of her child was 26 September 2021.
- (c) Ms Chen took annual leave between 27 September 2021 and 24 October 2021.
- (d) The estimated due date of 1 October 2021.

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<sup>1</sup> Section 71ZB(1)(a).

<sup>2</sup> Section 71ZB(3).

<sup>3</sup> Letter from Inland Revenue dated 22 December 2022.

- (e) Ms Chen's child was born on 3 October 2021.
- (f) Ms Chen returned to work, working full-time 50 hours per week, between 25 October 2021 and 19 December 2021.<sup>4</sup>
- (g) Ms Chen made application for parental leave payments on 20 December 2021.
- (h) Inland Revenue, by letter dated 22 December 2021, declined the application made by Ms Chen.
- (i) Residents of Auckland, where Ms Chen resided, were subject to various restrictions in late 2021 due to the COVID-19 pandemic.<sup>5</sup>
- (j) At the time Ms Chen returned to work, significant restrictions were in place and it was required that any workers who could work from home should do so.
- (k) Mo Zhencheng, Ms Chen's partner worked at least 26 weeks at an average of at least 10 hours a week, in the 52 weeks immediately before their child's expected delivery date.
- (l) Mr Zhencheng stopped working and took primary care of the child between 25 October 2021 and 19 December 2021.
- (m) Ms Chen stopped working from 20 December 2021 and resumed primary care of the child.

**Should Inland Revenue's decision be reversed on the basis the decision was unfair?**

[7] Section 71I of the PLEP Act specifies when an application for parental leave payments may be made and provides that an application must be made before the earlier of the date on which the person returns to work, or the date on which the child attains the age of 12 months.

[8] Ms Chen's evidence is that she used an "eligibility tool" on the IRD website to check her entitlement. She asserts that when used, and in answering the three questions involved, it indicated that she was eligible. Ms Chen considers that the tool was misleading and that there was no mention of returning to work acting as a disqualifying condition.

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<sup>4</sup> Ms Chen's responses to additional questions, lodged 14 June 2022.

<sup>5</sup> At and during the time Ms Chen returned to work, between approximately 25 October and 19 December 2021, Auckland was respectively subject to restrictions at "Alert Level 3" with some easing of restrictions, or at "Red".

[9] Ms Chen is of the view that the information that was available online did not provide clear enough guidance about the impact of returning to work on eligibility, and that she was led to believe she would be eligible at any time before her child turned 1 year old.

[10] Having reviewed the information provided, including as to Inland Revenue's website, I am not satisfied that the information is misleading. However, I accept Ms Chen's views are genuinely held. Although not misleading, the information viewed by Ms Chen did not give her cause to change her approach to the application in order to ensure it would be granted.

[11] Ms Chen's application was not made before the date on which she returned to work. I sympathise with Ms Chen's predicament, particularly given, as she pointed out, she had met the other requirements and had not understood that returning to work would impact a later application for parental leave payments provided made within one year of her child's birth. However, I am unable to reverse or modify the IRD's decision on that basis.

### **Was Ms Chen a COVID-19 Response Worker?**

[12] Ms Chen, during these proceedings, claimed that she may have been eligible for parental leave payments on the basis that she was a COVID-19 Response Worker.

[13] Part 3B was introduced to the PLEP Act by the COVID-19 Response (Further Management Measures) Legislation Act 2020 allowing for modifications to the PLEP Act so that workers could temporarily return to work to assist in response to COVID-19 without being disadvantaged by losing entitlements to leave and payments.<sup>6</sup>

[14] Section 30JF of the PLEP Act provides for applications to be made, in certain circumstances, for parental leave payments after a period of COVID-19 response work. Such work is required to have been performed during the "COVID-19 response period".<sup>7</sup> The work relevant work performed by Ms Chen occurred within that period.<sup>8</sup>

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<sup>6</sup> COVID-19 Response (Further Management Measures) Legislation Bill, Explanatory Note.

<sup>7</sup> See Parental Leave and Employment Protection Act 1987, s 30JC. The COVID-19 response period commenced on 25 March 2020 and ended 3 months after the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

<sup>8</sup> See Epidemic Preparedness (COVID-19) Notice 2020, Renewal Notice (No 3) 2022.

[15] There are two requirements prescribed by s 30JD(2) of the PLEP Act as to the circumstances in which a person is considered to be a COVID-19 response worker as follows:<sup>9</sup>

**30JD Meaning of COVID-19 response worker**

...

(2) A person to whom this section applies is a **COVID-19 response worker** if, in the circumstances related to the outbreak of COVID-19,—

- (a) their role cannot reasonably be filled by another person (because of the person’s skill, qualifications, or experience); or
- (b) there is higher demand than usual for workers doing their role.

[16] Ms Chen’s evidence was that she was happy to go back to work to assist the new supervisor and to help the shop at that busy time. The employer provided a letter outlining the relevant circumstances, including the following:

...Zixian came back to helped [sic] out during Covid 19 Level 3 when the takeaway is extremely busy and short staffed as always, as well as handing over her work to the other colleague.

[17] I consider that Ms Chen sought to do what she considered was the right thing by returning to work to help her employer. I accept there may have been some increased demand and that Ms Chen had an important role in the business. However, I am unable to find that there was a higher demand than usual for workers in her role or that her return to work related to the outbreak COVID-19. Additionally, I am unable to find that Ms Chen’s agreed to a temporary return “...to respond to circumstances related to the outbreak of COVID-19”.<sup>10</sup>

[18] Having considered the evidence provided by Ms Chen as to her role, and the circumstances at the relevant time, I find that Ms Chen was not a COVID-19 Response Worker for the purposes of Part 3B of the PLEP Act. As such, in relation to this ground for review, I do not consider there to be a proper basis on which the decision of the Inland Revenue should be modified or reversed.

**Should an entitlement to parental leave payments be deemed to have transferred to Ms Chen’s partner?**

[19] On 7 December 2021 Ms Chen made a phone call to Inland Revenue enquiring as to the possibility of transferring any entitlement to parental leave payments to her

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<sup>9</sup> Parental Leave and Employment Protection Act 1987, s 30JD.

<sup>10</sup> As required by s30JD(1)(b)(i) of the PLEP Act.

partner. Ms Chen seeks a review of Inland Revenue's decision on the basis that the entitlement should have transferred and given that both her and her partner would otherwise have been eligible for parental leave payments.

[20] Ms Chen finished a period of annual leave on 24 October 2021 and was then off work prior to the birth of her child on 3 October 2021. She then returned to work between 25 October and 19 December 2021. During that time, Mr Zhencheng stopped working and took primary care of the child. Ms Chen then stopped work again to take primary care of her child from 20 December 2021.

[21] I am satisfied that both Ms Chen and Mr Zhencheng met the relevant threshold tests as to prior employment or self-employment in terms of s 2BA of the PLEP Act. Looking objectively at the situation, it is apparent that but for issues as to the timing of application and transfer, Mr Chen's application would have been granted.

[22] It would be extraordinarily unfair to Ms Chen if she were to be deprived of the entitlement to parental leave payments due to a matter of form over substance. I consider it appropriate to exercise the Authority's discretion and to reverse the Inland Revenue's decision and to modify the decision such that Ms Chen's application be granted and her entitlement then transferred between her and her partner in line with the responsibility for primary care of the child.

### **Conclusion**

[23] For the reasons stated above, the decision of Inland Revenue is reversed and modified such that Ms Chen is to received parental leave payments as follows:

- (a) Ms Chen's application is granted from 25 October 2021, with the entitlement being immediately transferred to Mr Zhencheng; and
- (b) Ms Chen's entitlement is to be taken as having transferred to her from Mr Zhencheng from 20 December 2021.

Rowan Anderson  
Member of the Employment Relations Authority