

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 152
3180099

BETWEEN

MARYAM NESAMI
Applicant

AND

CHIEF EXECUTIVE OF THE
MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Natasha Self, counsel for the Respondent

Investigation: On the papers

Determination: 27 March 2023

DETERMINATION OF THE AUTHORITY

**A. The decision to decline paid parental leave payments to Maryam
Nesami is confirmed.**

Employment Relationship Problem

[1] Maryam Nesami sought a review of a decision that she was not entitled to parental leave payments following the birth of her daughter on 5 June 2022. The decision was made by an officer of Inland Revenue (the department) exercising powers delegated by the chief executive of the Ministry of Business, Innovation and Employment (the Ministry).

[2] The Parental Leave and Employment Protection Act 1987 (the Act) allows the Employment Relations Authority to review such decisions.¹ The Authority may

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

confirm, modify or reverse the decision.

[3] Dr Nesami and the Ministry agreed this review could be determined ‘on the papers’. Those papers comprised Dr Nesami’s statement of problem, the Ministry’s statement in reply, additional information Dr Nesami provided about her work history in the relevant period, submissions made by the Ministry in light of that additional information and a submission in reply from Dr Nesami.

[4] Following receipt of those submissions I had some additional research carried out regarding a relevant section of the Act and its legislative history. The Inspector’s counsel and Dr Nesami were then provided with a copy of that material and an opportunity to comment on it. The Inspector’s counsel lodged some additional submissions about the legislative history and what light that might shed, if any, on how the relevant section could be applied to the circumstances of Dr Nesami’s application.

[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.

Why the department declined parental leave payments

[6] Dr Nesami is an artistic researcher, working mostly under short term contracts as a teacher and researcher. During the period relevant for this review she carried out work for universities in New Zealand, Australia and Scandinavia, an Auckland high school and a performance event. In some instances her work was done as an employee, in others she was engaged on a contractor basis.

[7] Dr Nesami made her parental leave application in March 2022. She provided information showing she had worked 22 weeks in the year prior to her then-expected due date of late May 2022 and that she anticipated working a further 11 weeks before then. On that basis the department automatically approved her application. Its approval letter noted that to be entitled to the payments she had to work an average of at least 10 hours a week in 26 of any of the 52 weeks before her due date. The letter also said she had to let the department know if she did not work those 26 weeks before her expected due date.

[8] Dr Nesami provided no further information but contacted the department soon after the birth of her daughter because she had received no payments. She was advised the payments were cancelled as the department's analysis of her income information indicated she had not worked the required minimum of 10 hours a week over 26 weeks. Dr Nesami was advised of her right to seek a review of that decision. In her review application Dr Nesami said she thought the department had miscalculated her hours because the nature of her employment, including short-term contracts with universities, meant it was not straightforward to work out her average hours over that period.

[9] The Ministry's statement in reply set out detailed calculations made from information Dr Nesami had provided for various periods of employment and self-employment. It noted that she had to be either an eligible employee or an eligible self-employed person to be entitled to receive parental leave payments.² It also noted that the Act did not allow an applicant to combine a period of employment with a period of self-employment to meet the weekly average of ten hours.³ On its calculations of the information Dr Nesami provided, the Ministry concluded she was employed for an average of 7.4 hours a week for 22 weeks in the relevant period and was self-employed for 24 weeks. Neither tally of hours and weeks met the test to be eligible for the payments.

[10] The Ministry's statement in reply also helpfully identified where some information was incomplete. As part of the Authority's review process in this case Dr Nesami was then given an opportunity to provide some additional information in order to better identify whether the hours, she had actually worked were sufficient to meet the qualification threshold.

[11] After Dr Nesami had provided some additional details, the Ministry lodged submissions which included calculations incorporating that information. Some of the hours of work she identified did not have supporting documentation or were for self-employment with universities outside New Zealand so may not form part of the total needed to test eligibility for paid parental leave entitlements.⁴ However, even allowing for those hours did not bring Dr Nesami's work history in the relevant period to the total necessary to trigger eligibility. On the Ministry's tally, Dr Nesami worked as a

² Parental Leave and Employment Protection Act 1987, s 71D(1)(a).

³ Section 2AD.

⁴ *Anaru v Ministry of Business, Innovation and Employment* [2022] NZERA 375 at [8].

“self-employed” person for 26 weeks, averaging 3.7 hours of work across those weeks and as an “employed” person for 21 weeks, averaging 14.1 hours across those weeks.

[12] In response to those submissions Dr Nesami said she did not see any difference between her self-employed and employed jobs as, in her view, they were of the same nature. She asked for the hours for both types of work to be combined in order to meet the threshold of an average of 10 hours a week over 26 weeks in one year. She also questioned why there was “an unfair binary result, either yes or no” that applied both to someone who did no work and someone who had worked, in one capacity or another, for 25 weeks.

Evaluation

[13] The Act describes its purpose as setting minimum entitlements to parental leave, protecting the rights of employees during pregnancy and parental leave and to entitle “certain persons” to up to 26 weeks of parental leave payments. As already noted, the “persons” entitled to those payments are employees and self-employed people who meet the threshold criteria set by the Act.

[14] Parliament has intended these provisions to better support parents and others who have assumed responsibility for providing care in the earliest stage of a child’s life. For that reason the Act’s provisions should generally be interpreted generously, consistent with the interests of the individual families and the wider social benefits that result from that support being provided. However, this does not give license to the government officials making decisions about those applications, or the Authority in reviewing those decisions, to approve payments where an application has not reliably met the criteria set by the Act.

[15] In this case Dr Nesami’s eligibility for leave appeared to fall at two hurdles. The first was not meeting the required level of hours as an employee and the required number of weeks as a self-employed person, so she did not qualify in either category. The second was the statutory prohibition against combining the hours worked in either category of employment set in s 2AD of the Act:

2AD Concurrent employment and self-employment

- (1) This section applies to a person who is an employee and a self-employed person.

- (2) The person's entitlement to rights and benefits in respect of parental leave must be determined by treating the person's employment and self-employment separately.
- (3) This section is subject to section 2A.

[16] While s 71IA of the Act allows officials of the department and the Ministry to approve some irregular applications, that discretion cannot extend to overriding the mandatory limit in s 2AD of the Act.

Checking legislative history

[17] The department's decision in Dr Nesami's case appeared to be consistent with a plain application of s 2AD. However, in this review, a further check of the legislative history and policy has been undertaken because of Dr Nesami's concern that she was denied any entitlement at all when she had, as a matter of fact, worked a number of hours over a number of weeks that would have generated an entitlement if the work had been arranged differently.

[18] The first iteration of s 2AD was inserted in the Act in 2006 as part of amendments that extended paid parental leave entitlements to self-employed people.

[19] At the time one MP expressed concern that the provision would discriminate against workers who, because of their precarious employment situation, move, even concurrently at times, between self-employed and employee status. The member expressed the view those "workers' entitlements should be based on the sum total of their work, not just one status or the other".⁵ Subsequent references in the parliamentary debates on the 2006 bill suggested the concern raised had been addressed by changes made through a supplementary order paper. Another MP described the changes as meaning that a person who was employed and self-employed could receive "a combined entitlement from their two vocations, up to a maximum amount".⁶

[20] However, as noted in the additional submissions made by the Ministry on the legal and policy issues in this case, references in the parliamentary reports and debates used the word "entitlement" in a broad way that could cause confusion in analysing the

⁵ (2 May 2006) 630 NZPD 2620 (Parental Leave and Employment Protection (Paid Parental Leave for Self-Employed Persons) Amendment Bill – Second Reading, Sue Bradford).

⁶ (10 May 2006) 631 NZPD 2930 (Parental Leave and Employment Protection (Paid Parental Leave for Self-Employed Persons) Amendment Bill – Third Reading, Peter Brown).

changes made in 2006 and in later amendments made to the Act in 2016. In one sense, the word refers to “a right to something”. In other senses, it may mean “the amount to which a person has a right”. Rather than using the word broadly, it was more useful to consider what the provisions meant for eligibility to leave, eligibility for payments and then how entitlement to levels of payment are calculated.

[21] The eligibility to leave is firmly divided into clear categories of employment or self-employment, with separate definitions of the threshold tests for parental leave payments.⁷ Provisions for calculation of the amount of parental leave payments are similarly separated into the categories of “eligible employees” and “eligible self-employed persons”. As submitted by the Ministry, if the parliamentary intention was that the hours and weeks as an employee and self-employed person could be combined to meet the eligibility threshold and that income previously earned in both categories could be combined to maximise calculation of the level of payment, the relevant sections would have been expressed differently to allow combination of hours and combination of income from all sources of work as an employee and as a self-employed person.

[22] While there may be soundly based policy arguments for Parliament amending the legislation to allow for such combinations, to better allow for the precarious and fluid nature of working arrangements for many parents-to-be in the modern labour market, it is not what the Act currently provides. Absent such amendments, the department must apply the terms of the present provisions in making decisions about whether a person has met the relevant threshold for eligibility.

Different outcome in other reviews

[23] The Authority has considered the effect of s 2AD in two other reviews.⁸ In both cases the Authority reversed the department’s decision to decline parental leave payments. However, the facts of what had happened in both of those cases differed significantly from Dr Nesami’s situation.

[24] In one case the applicant had been self-employed for two months before then going on to work as an employee for 25 weeks. She had telephoned the department to

⁷ Parental Leave and Employment Protection Act 1987, s 2BA(4).

⁸ *Stirling v Ministry of Business, Innovation and Employment* [2021] NZERA 576 and *Chalmers v Ministry of Business, Innovation and Employment* [2021] NZERA 303.

ask if she could combine those two periods to make up the required 26 weeks. The department incorrectly advised her this was possible and the applicant, relying on that advice, finished work earlier than intended as she believed she had completed the necessary 26-week time span.

[25] In the other case the applicant was employed for 13 weeks and was self-employed for 16 weeks in the year before giving birth. While still an employee, she had rung the department three times to ask if she could combine work as an employee and as a self-employed person to reach the parental leave threshold. She was told she could. Relying on that advice, she had left her employment and taken up a self-employed contracting role for part of the 26 weeks immediately prior to her delivery date. If she had been told this would not meet the leave eligibility threshold, she would have continued in her employed role. Because she had relied on incorrect advice from the department, the Authority found it would be inequitable to deny parental leave payments to her.

[26] Dr Nesami's situation was different because she had not relied on incorrect advice from the department in making decisions about her work arrangements in taking up various periods or projects as an employee and a self-employed person.

Outcome

[27] In reviewing a departmental decision about a parental leave application, the Authority has a wider discretion than the statutory discretion provided to the public servants administering the Act. The Authority's discretion must nevertheless be exercised on a principled basis having regard to the policy and purpose of the Act. The evidence and submissions from Dr Nesami and the Ministry established that the decision to decline her parental leave application had correctly applied the relevant provisions of the Act. There were no other factors which would have reasonably allowed the Authority to modify or reverse the department's decision.

[28] For the reasons given, the department's decision is confirmed.

Robin Arthur
Member of the Employment Relations Authority