

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 535  
3233219

BETWEEN	CHANTAL LILLAS Applicant
AND	MINISTRY OF BUSINESS, INNOVATION, AND EMPLOYMENT Respondent

Member of Authority:	Davinnia Tan
Representatives:	Applicant in person Claudia Milesi-Humm and Rochelle Hill, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	No submissions from the Applicant 14 September 2023 from the Respondent
Determination:	18 September 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Lillas applied for a parental leave payment on 9 May 2023 and was declined by Inland Revenue (IRD), the government department responsible for the administration of parental leave payments on behalf of the Ministry of Business, Innovation and Employment (MBIE), on the basis that (i) she had not worked for “26 of the 52 weeks immediately preceding the expected date of delivery of the child” as required under section 2BA of the Parental Leave and Employment Protection Act 1987 (PLEPA) and (ii) that she had previously received a parental leave payment for the

period 7 November 2022 to 7 May 2023 (first PPL period) and was not entitled to a subsequent parental leave payment period under section 71F(a) of the PLEPA.

### **Relevant Law**

[2] Section 2BA(4)(a) of the PLEA provides that:

In this Act, the following test is used to determine a person's entitlement to parental leave payments (the parental leave payment threshold test):

An employee meets the parental leave payment threshold test if he or she will have been employed as an employee 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 person or his or her spouse or partner) [...]

[3] Section 71F(a) of the PLEPA provides that:

A person is not entitled to a parental payment in respect of a child if – fewer than 6 months have elapsed after the end of the period for which the person received a parental leave payment for another child.

### **Background to the claim**

[4] Ms Lillas' first pregnancy had resulted in a still birth on 6 August 2022 at 23 weeks, but during the first PPL period, she became pregnant again with an expected due date of 24 July 2023 for her second pregnancy. She did not return to work during this time. Tragically however, on 23 March 2023 her baby was delivered prematurely at 22 weeks gestation and passed away that same day. Ms Lillas was encouraged by her midwife to review the decision declining Ms Lillas' second application for paid parental leave.

[5] Ms Lillas accepts that less than six months had passed since the end of her first PPL period and acknowledges that she had not worked for any of the 26 weeks of the 52 weeks immediately preceding the expected date of delivery from her second pregnancy. However Ms Lillas considers that MBIE is able to exercise its discretion under section 71IA of the PLEPA to approve irregular applications on the basis that her second application for a parental leave payment arose from extenuating circumstances.

[6] Section 71IA states:

#### **Discretion to approve irregular applications**

(1) The department may approve the making of a parental leave payment to a person despite an irregularity in his or her application for the payment.

- (2) In deciding whether to approve the making of a parental leave payment under subsection (1), the department must have regard to—
- (a) the extent of the irregularity (including whether the extent of the irregularity was reasonable in all of the circumstances); and
  - (b) whether the person was acting in good faith.
- (3) However, the department may not exercise its discretion under this section if the matter giving rise to the irregularity is disputed between an employee and an employer.
- (4) The department may, in order to approve the application, amend or waive the irregularity or extend the time within which anything is to be or may be done, subject to terms, if any, that the department thinks fit in the circumstances of the application.
- (5) In this section, **irregularity** means—
- (a) failing to make the application for payment before the relevant date in section 71I; or
  - (b) applying in a manner other than that prescribed in the regulations; or
  - (c) failing to specify all the matters or include all the documents prescribed in the regulations; or
  - (d) failing to state whether the person wishes to transfer all or part of the entitlement under section 71E; or
  - (e) otherwise applying irregularly in matter of form.

[7] On 1 June 2023, Ms Lillas lodged a statement of problem with the Authority.

### **The Authority's investigation**

[8] On 17 August 2023, a case management conference was held with Ms Lillas and counsel for MBIE in which they agreed to have the Authority investigate and determine the matter on the papers.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) 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.

### **The issues**

[10] The issues requiring investigation and determination are:

- (a) Whether the decision to decline Ms Lillas' second application for a parental leave payment under the PLEPA was correct; and

- (b) Whether the discretion to approve an ‘irregular’ application under section 71IA of the PLEPA applies in these circumstances.

**Whether the decision to decline Ms Lillas’ second application for parental leave payment under the PLEPA was correct**

[11] Ms Lillas does not dispute the fact that less than six months had elapsed since her last parental leave payment and that she did not return to work before her second application for parental leave payment on 9 May 2023.

[12] MBIE submitted that when determining whether a person is an ‘eligible employee’ and ‘entitled’ to parental leave payments under the PLEPA, the first consideration is section 71CA of the PLEPA. MBIE says that the definition of ‘eligible employee’ requires that the person meets the parental leave payment threshold test which is set out in section 2BA(4) of the PLEPA. This requires the person to work at least an average of 10 hours a week in 26 of the 52 weeks immediately preceding the expected date of delivery. In Ms Lillas’ case, she did not return to work following the first PPL period, but MBIE notes that even if she had returned to work, there were fewer than 26 weeks immediately preceding her second expected date of delivery, so she could not have met this part of the statutory requirement. Ms Lillas is therefore not eligible to receive parental leave payments.

[13] MBIE also submitted that only 79 days had passed since the end of Ms Lillas’ first PPL period and her second expected due date of 24 July 2023 which meant she was not entitled to parental leave payments under section 71F of the PLEPA.

[14] I agree with MBIE’s submissions. Sections 71CA and 2BA(4) require that Ms Lillas meets the parental leave payment threshold test which she does not, and this is not a disputed fact. Further, section 71F of the PLEPA is also unequivocal that a person is not entitled to parental leave payments in these circumstances where less than six months has elapsed since the end of the last PPL period. Accordingly, I find the decision declining Ms Lillas’ second application for parental leave payment is correct.

**Whether the discretion to approve an ‘irregular’ application under section 71IA of the PLEPA applies**

[15] The discretion under section 71IA of the PLEPA is not an unlimited discretion as it only applies to irregular applications. Section 71IA(5) limits the definition of

‘irregularity’ to 5 categories. These categories are restricted to form, manner, and process in which an application is made. There is no general discretion to waive the requirements on compassionate grounds.

[16] MBIE submits that its discretion is limited to irregularities of form and does not extend to matters of substance. MBIE considers that a failure to meet the eligibility and entitlement provisions, such as the parental leave payment threshold test and section 71F, as is the case here, are matters of substance and that it does not have a discretion to approve the making of a parental leave payment in these circumstances.

[17] I consider that none of the definitions of ‘irregularity’ apply in Ms Lillas’ circumstances. Her application was made within time, in the manner prescribed, and included relevant documents, did not relate to the transfer of entitlement and was not otherwise ‘irregular’ because of the form in which it was made. In other words, the circumstances which Ms Lillas believes give rise to some form of ‘irregularity’ are not ones contemplated or defined by statute.

[18] Parliament would not have intended for a discretionary power to be exercised contrary to the clear prohibition in section 71F. If it had, section 71IA would include express qualifying words such as “notwithstanding any other provision of this Act”, or section 71F would state it was “subject to section 71IA”, but neither section contains such words to that effect. It is clear that Parliament intended to limit the discretion to approve an irregular application to applications that were faulty in some way because of the form of the application, rather than the substance or circumstances of an application. The discretion under section 71IA does not extend to Ms Lillas’ circumstances.

[19] Even if Ms Lillas’ second pregnancy had progressed to a full-term delivery, she still would not have been eligible for a second parental leave payment because the legislation, as it stands, does not provide eligibility for a subsequent parental leave payment within 6 months of the last parental leave payment.

[20] Finally, MBIE submits that while the Authority has a discretion under section 71ZB(3) of the PLEPA to “confirm, modify, or reverse the decision of the department”, it should not do so where the outcome would be contrary to the express and prescriptive provisions of the PLEPA.

[21] I agree with MBIE that the Authority's discretion under section 71ZB(3) of the PLEPA should not be exercised in these circumstances given that any modification or reversal of the decision declining Ms Lillas' second application for parental leave payment would be directly contrary to the provisions discussed above.

### **Outcome**

[22] I find that the decision declining Ms Lillas' second application for parental leave payment is correct. I also find that the discretion to approve irregular applications under section 71IA does not apply in these circumstances.

[23] As such Ms Lillas' claim is not made out. No orders are made.

### **Costs**

[24] Applications under the PLEPA are not subject to the daily tariff and parties will bear their own costs.<sup>1</sup>

Davinnia Tan  
Member of the Employment Relations Authority

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<sup>1</sup> [Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi](#), pages 5-6.