

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 7
3197799

BETWEEN JENNER FELDBERG
 Applicant

AND MINISTRY OF BUSINESS
 INNOVATION AND
 EMPLOYMENT
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Luke McLeay, advocate for the Applicant
 Natasha Self, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 December 2022 from the Applicant
 15 December 2022 from the Respondent

Date of Determination: 11 January 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jenner Feldberg applies to the Employment Relations Authority for a review of the decision to decline her application for paid parental leave (PPL) under the Parental Leave and Employment Protection Act 1987 (the Act). For the reasons that follow, the Authority reverses the decision of the Ministry of Business Innovation and Employment (MBIE) to decline PPL and orders it to take the necessary steps so that Ms Feldberg receives her parental leave entitlements.

The facts

[2] Ms Feldberg was a self-employed person for the purposes of the application. Her work included two to three hours of work across the day and she received a shareholder employee salary of \$43,600 together with Government subsidies of \$7,000 in the financial year ending 31 March 2021.

[3] Ms Feldberg gave birth to her child on 7 May 2021. She returned to work on reduced hours in October 2021 and resumed her full hours in December 2021.

[4] On 6 May 2022, Ms Feldberg applied to Inland Revenue (IR) for paid parental leave payments. IR declined the application on the basis that Ms Feldberg wasn't entitled to paid parental leave under the Act because she had returned to work prior to making the application.

[5] Ms Feldberg says that the situation arose because of her misunderstanding regarding paid parental leave. She says she had discussed parental leave with her accountant who had assisted her with previous PPL applications. Accounts for the 2020 – 2021 year had not been completed and her understanding was that she could not process her PPL application until she knew what her income had been. She did not turn her mind to the fact she may have been running out of time and had an understanding that she could make a PPL application any time prior to her child's first birthday. She misunderstood the Act.

[6] As it transpired, Ms Feldberg's accountants did not finalise company financial statements and tax returns until 4 May 2022 after which she immediately applied for PPL.

[7] In its submissions, MBIE correctly sets out the entitlement for paid parental leave. MBIE acknowledges that Ms Feldberg was likely to meet the criteria as an eligible self-employed person however states the Ms Feldberg is not entitled to paid parental leave because she returned to work prior to making her application for paid parental leave and accordingly cannot satisfy the requirements of s 71D (1) of the Act. MBIE acknowledges that MBIE it has a discretion to approve an application despite an irregularity but points out in exercising this, it must have regard to the extent of the irregularity or whether the person was acting in good faith. It felt it could not exercise this discretion in this case.

[8] MBIE acknowledges that Ms Feldberg received advice from her accountant and believed she needed to file her 2021 income tax return prior to making the application. MBIE notes however that Ms Feldberg did not take any other steps or seek advice on her application

other than through her accountant. It felt that the legislation, and the information provided online to assist applicants such as Ms Feldberg with paid parental leave would have alerted her to the correct process if she had looked.

[9] MBIE acknowledges the Authority has a wide discretion to confirm, modify or reverse the decision of the Inland Revenue under s 71ZB(3) of the Act.

Discussion

[10] It is clear that had Ms Feldberg filed her PPL application in time, she would have met the parental leave threshold test. It is correct as MBIE notes, that under s 71I of the Act, a person is not entitled to PPL unless they make an application before the earliest of the date on which the person returns to work or the date on which the child reaches the age of 12 months old. MBIE also accepts that Ms Feldberg either received incorrect advice or misunderstood the advice from her accountant but in any event believed she could not file the application until her company's tax return had been filed.

[11] As noted by MBIE, the Authority has jurisdiction to review decisions on PPL application under 71ZB of the Act. Under the section, the Authority may confirm, modify or reverse a decision of the Department.

[12] The Authority also has the discretion to grant relief under s 68(5) of the Act. In respect of irregularities when considering the nature of the irregularity, good faith of the parties and any other matters it considers proper.

[13] Bearing in mind Ms Feldberg's approach to previous PPL applications, I consider it reasonable that she would rely on the perceived advice she received from her accountant. What is clear, is her understanding of that advice, is the sole reason for not making the application in time.

Conclusion and orders

[14] In accordance with s 71ZB of the Act, I consider it appropriate to exercise the Authority's discretion and reverse the decision that Ms Feldberg is not eligible for paid parental leave entitlements.

[15] Jenner Feldberg is entitled to paid parental leave payments in accordance with the Parental Leave and Employment Protection Act 1987.

[16] MBIE should now take the necessary steps to ensure Jenner Feldberg receives the paid parental leave payments due to her as soon as practicable.

Costs

[17] This is a situation where Ms Feldberg is asking the Authority to exercise its statutory discretion. Although the Authority has accepted Ms Feldberg's explanation as to why her PPL application was not filed in accordance with the Act and exercise this discretion, I feel this is a situation where costs should lie where they fall. Accordingly, no order in respect of costs Ms Feldberg may have incurred in filing her application is made.

Geoff O'Sullivan
Member of the Employment Relations Authority