

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 748  
3251859

BETWEEN	TREYANA FAULKNER Applicant
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Ms Faulkner in person Rochelle Hill, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	31 October 2023 from Respondent
Determination:	14 December 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Faulkner applies to the Authority for review of the decision to decline her application for parental leave payments. Ms Faulkner and the Ministry of Business, Innovation and Employment (MBIE) agreed this review could be determined ‘on the papers’, comprising of Ms Faulkner’s statement of problem, MBIE’s statement in reply and submissions.

[2] The facts are not in dispute. Ms Faulkner’s application related to her two youngest children, twins, who were born on 16 July 2023. The twins estimated date of delivery was 14 September 2023, but they were instead born prematurely at 31 weeks gestation. Both the estimated date of delivery and the twins’ date of birth is less than

six months after a previous period of parental leave payments for an older child. That previous period finished on 14 April 2023 when Ms Faulkner returned to work.

[3] On 19 July 2023, Ms Faulkner applied for parental leave payments in relation to her twins based on the estimated date of delivery which was 14 September 2023. Her application was declined because the rule there must be at least six months between periods of parental leave was a bar to her qualifying for parental leave payments for her twins.

[4] On 16 August 2023, MBIE wrote to Ms Faulkner advising her she was not entitled to parental leave payments because not enough time had elapsed between two parental leave payment periods. Inland Revenue (IR) also later communicated to Ms Faulkner on 1 September 2023 advising that her application was declined because she had not worked long enough, in that she had not worked at least 26 weeks of the 52 weeks before her expected due date.

[5] That was an incorrect conclusion because Ms Faulkner had in fact worked the required 26 weeks of the last 52 weeks to ensure she was an “eligible employee” but nonetheless, the rule about six months between parental leave payments for different children, set out in the letter of 16 August 2023, still applied.

[6] On 28 August 2023, Ms Faulkner filed an application in the Authority for a review of the decision to decline her application. The issue requiring investigation and determination is whether Ms Faulkner is “entitled” to receive parental leave payments under the Parental Leave Employment and Protection Act 1987 (the Act). It is accepted she satisfied the test for eligibility.

[7] The Authority can confirm, modify or reverse a decision made by the department relating to Ms Faulkner’s entitlement to a parental leave payment.<sup>1</sup>

### **The paid parental leave scheme**

[8] The Act sets out minimum entitlements with respect to parental leave, protects the rights of employees during pregnancy and parental leave and entitles certain people to up to 26 weeks of parental leave payments.<sup>2</sup>

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<sup>1</sup> Parental Leave and Employment Protection Act 1987, s 71ZB.

<sup>2</sup> Above s 1A.

[9] A person who is the child’s primary carer may be entitled to parental leave payments depending on the length of time they were employed prior to the birth of their child.<sup>3</sup> Certain people who become the primary carer in respect of a child and who stop working or take a period of leave, are entitled to up to 26 weeks of parental leave payments out of public money.<sup>4</sup>

[10] In order to receive parental leave payments, the person must be both an “eligible employee” and “entitled” to parental leave payments in accordance with the Act. As set out above, Ms Faulkner meets the “eligible employee” criteria in the Act. The issue for her is whether she is entitled to the parental leave payment because of the six-month rule.

### **The six-month rule**

[11] The six-month rule is set out in section 71F of the Act as follows:

71F Subsequent parental leave payments

A person is not entitled to a parental leave payment in respect of a child if –

(a) Fewer than 6 months have elapsed after the end of the period for which the person received a parental leave payment for another child;

...

[12] This provision means if there are less than six months between periods of paid parental leave, an applicant cannot be “entitled” to another period of parental leave payments. This rule only applies to applicants for parental leave payments for subsequent children. A first-time parent or care-giver would not be caught by this provision.

[13] The start of a parental leave payment is defined in s 71K of the Act as being the period that begins on the earlier of either the date the person commences parental leave and the date of confinement. MBIE submits that in Ms Faulkner’s case because the twins were born early, the date of confinement is counted as the commencement date. That date is 16 July 2023 and is fewer than six months after the end of her previous parental leave entitlement which ended on 16 April 2023.

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<sup>3</sup> Above, section 1B.

<sup>4</sup> Above, Part 7A.

*Ms Faulkner's situation*

[14] Ms Faulkner was very deliberate about returning to work to ensure she was eligible in terms having worked for 26 weeks of the 52 weeks proceeding the estimated date of delivery of her twins. Their estimated date of delivery was 14 September 2023, but they were born prematurely on 16 July 2023 at 31 weeks. After two weeks paid sick leave she returned to full time work from the end of July while the twins remained in hospital to ensure she worked the requisite number of weeks to qualify for paid parental leave.

[15] Ms Faulkner therefore clearly met the eligibility criteria because she was employed for a total of 26 weeks in the relevant 52 weeks period which in her case was from 14 September 2022 to 14 September 2023. Despite that Ms Faulkner was not entitled to paid parental leave because of the six- month rule set out above in s 71K of the Act.

[16] While the Act does not specify when a period of paid parental leave commences for the purpose of the six-month rule MBIE points out that even if the estimated date of delivery was used as the start date for Ms Faulkner's next application, there would still have been fewer than six months between paid parental leave periods.<sup>5</sup> In this case, through no fault of Ms Faulkner, the rule requiring six months between separate periods of paid parental leave, means she could not be entitled to another period of paid parental leave unless the next period commenced after 16 October 2023.

[17] MBIE's submissions also helpfully considered other options such as the ability to take paid leave and then commence the parental leave payment period and the availability of "preterm parental leave payments" but concluded neither apply in Ms Faulkner's case. I accept that submission because the evidence provided was that Ms Faulkner only had 11.2 hours of annual leave owing.

[18] I was also reminded by way of MBIE's further submission that while the Authority can "confirm, modify or reverse" any decision of the Department as well as having the power to act without regard to technicalities and in equity and good

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<sup>5</sup> There are four months and four weeks between 16 April 2023 and 14 September 2023.

conscience<sup>6</sup>, the Authority should not be invited by the general power to make determinations that are contrary to express, prescriptive provisions of the Act.

[19] While I understand Ms Faulkner's position, given the clear statutory rule set out in s 71K of the Act, regarding a six month stand down between periods of parental leave payments, the Authority is unable to reverse or modify the decision of the department.

### **Outcome**

[20] For the reasons given, I confirm the decision of the department to decline Ms Faulkner's application for paid parental leave payments.

### **Costs**

[21] Applications under the Parental Leave and Employment Protection Act 1987 are one of the categories of matter that are not subject to the Authority's daily tariff and parties will bear their own costs.<sup>7</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>6</sup> Employment Relations Act 2000, s 157(3).

<sup>7</sup> <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>