

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 135  
3266120

BETWEEN KIEREN GEORGINA GERA  
Applicant

AND MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT  
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Applicant in person  
Alistair Miller, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: Up to and including 21 February 2024

Determination: 7 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Kieren Gera says that she submitted an application for paid parental leave via myIR on 26 October 2023. On 8 November 2023, she received a letter from the Inland Revenue Department (IR) denying her application on the grounds she was not eligible to receive parental leave payments because she did not meet the parental leave payment threshold test.

[2] Ms Gera responded to IR’s decision asking for reconsideration because she says there were exceptional circumstances. However, IR advised her on 27 November 2023, they were upholding their original decision. The Ministry of Business, Innovation, and Employment (MBIE) have responded pointing out that IRD, in considering and declining the application for parental leave, was acting under the delegated authority of the Chief Executive of MBIE pursuant to s 71ZA of the Parental Leave and Employment Protection Act 1987 and s 41 of the State Sector Act 1988.

[3] MBIE says it was correct to decline Ms Gera's application for parental leave payments and not exercise its discretion pursuant to s 71IA of the Parental Leave and Employment Protection Act 1987.

### **Background**

[4] Ms Gera is a New Zealand citizen by descent. There appears to be no dispute between the parties in respect of the background to Ms Gera's application. Ms Gera had been living and working in the United Kingdom. She discovered she was pregnant with an expected delivery date of 8 November 2023.

[5] Because Ms Gera wished to ensure that her child has New Zealand citizenship, she returned to New Zealand on 25 August 2023 and commenced employment as a kaimātai matua – senior analyst at Te Puni Kōkiri, Ministry of Māori Development in Wellington on 4 September 2023. Ms Gera says exceptional circumstances existed because, after finding out she was pregnant, there was insufficient time for her to move back to New Zealand and find a job, in order to meet the 26-week working requirement to become eligible for paid parental leave.

[6] On 26 October 2023 Ms Gera submitted an application for parental leave payments. The application was declined by IR on the basis that Ms Gera had only worked for 9 of the 52 weeks immediately preceding the expected date of delivery of her child.

[7] On 4 December 2023 Ms Gera 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 Gera is entitled to receive parental leave payments under the Parental Leave Employment and Protection Act 1987 (the Act). The Authority can confirm, modify, or reverse a decision made by IR relating to Ms Gera's entitlement to a parental leave payment.<sup>1</sup> However, this general power does not give the Authority the power to make determinations that are contrary to express, prescriptive provisions of the Act.

[8] As the Court noted in *Ministry of Business, Innovation, and Employment v Wenting Duan*, the requirements concerning a person's eligibility and entitlement to receive parental leave payments from public money, contained in Part 7A, are rigid and

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

do not allow a great deal of autonomy for parents to arrange parental leave matters, including parental leave payments, in a way that they consider best suits their family, without putting their entitlement to risk.<sup>2</sup> The Court set out a roadmap of the approach that should be taken, commencing with eligibility.

*Step 1 – Eligibility to receive parental leave payments*

[9] Section 71CA provides a two limb test for a person to come within the definition of an “eligible employee” under Part 7A. An “eligible employee” means a person who:

- (a) Is the primary carer of a child<sup>3</sup>; and
- (b) Meets the parental leave payment threshold.<sup>4</sup>

[10] Accordingly, if Ms Gera is an “eligible employee” then the next step is to consider whether she is entitled to receive parental leave payments. This requires further steps to assess the entitlement to parental leave payments and then to consider the application made for parental leave payment. Finally, there would need to be consideration as to when the paid parental leave period was to start.

[11] In the current case, Ms Gera fails the eligibility test set out in step 1. This is because although Ms Gera is undoubtedly the primary carer of her child, s 2BA(4) provides that an employee meets the threshold if they 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 before the due date of their baby, or the date they or their partner becomes the primary carer of a child under six years permanently. Ms Gera accepts that she had an expected date of delivery of 8 November 2023 and accordingly, the 52-week period relevant to parental leave payments threshold test was 8 November 2022 to 8 November 2023.

[12] Ms Gera was working and living in the United Kingdom and only returned to New Zealand on 25 August 2023. She commenced her employment in New Zealand on 4 September 2023 and accordingly was employed for only nine weeks prior to her child’s expected date of delivery. Ms Gera therefore fails to meet step 1 – eligibility.

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<sup>2</sup> *Ministry of Business, Innovation, and Employment v Wenting Duan* [2023] NZEmpC 232 at [24].

<sup>3</sup> Section 7.

<sup>4</sup> Section 2BA(4).

Although she was the primary carer of her child, she did not meet the parental leave payment threshold.

[13] Ms Gera says that the situation she found herself in, having to return to New Zealand to ensure her child had New Zealand citizenship, was an exceptional circumstance. However, the simple fact of the matter is that Ms Gera does not meet the parental leave payment threshold under the Act.

[14] I accept MBIE's submission that although the Authority has a discretion to confirm, modify or reverse the decision of the Department, this discretion is limited to circumstances where the irregularity is a matter of form, such as the making of a late application or applying in a manner other than that prescribed in the regulations. IR's decision that Ms Gera's application did not meet the statutory eligibility criteria is a matter of substance, not form. The Authority should not be invited, by a general power, to make determinations that are contrary to express prescriptive provisions of the Act.

### **Conclusion**

[15] For the reasons given above, I confirm the decision of the Department to decline Ms Gera's application for paid parental leave payments on the basis she does not meet the parental leave payment threshold.

### **Costs**

[16] Applications under the Parental Leave and Employment Protection Act 1987 are one of the categories of matters that are not subject to the Authority's daily tariff and each party will bear their own costs.<sup>5</sup>

Geoff O'Sullivan  
Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).