

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAURAU ROHE**

[2024] NZERA 163
3256300

BETWEEN

JUNGEUN DON
Applicant

AND

MINISTRY OF BUSIENSS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Natasha Szeto

Representatives: Applicant in person
Ella Rainthorpe, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 7 February and 11 March 2024 from the Applicant
1 February and 14 March 2024 from the Respondent

Determination: 20 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Don applies to the Authority for a review of the decision to decline her application for paid parental leave under the Parental Leave and Employment Protection Act 1987 (the PLEPA).

[2] Ms Don did not work an average of 10 hours per week for 26 of the 52 weeks immediately preceding the expected delivery date of her child. A delegated officer of the Ministry of Business Innovation and Employment (MBIE)¹ determined that Ms Don

¹ The delegated officer was from the Inland Revenue Department (IRD) and in this determination the Respondent is referred to as MBIE.

was not an eligible employee² because she did not meet the parental leave payment threshold test³ and was therefore not eligible for paid parental leave.

Background

[3] The parties agree on the following facts:

- (a) Ms Don's last day of employment in her previous job was 22 August 2022.
- (b) She then tried to obtain employment which took a number of months.
- (c) Ms Don started a new job on 9 March 2023, at which she worked more than an average of 10 hours per week.⁴
- (d) Ms Don was only employed for 23 weeks and 5 days in the 52 weeks prior to her expected date of delivery.

[4] On 9 July 2023, Ms Don applied for parental leave payments in relation to her child, based on her estimated date of delivery of 22 August 2023. Her application was declined because she had not worked long enough. MBIE advised Ms Don that to get paid parental leave, she needed to have worked at least 26 weeks of the 52 weeks before her expected due date. Ms Don applied again on 19 July 2023, and MBIE declined her application for the same reason.

[5] On 20 July 2023, MBIE wrote to Ms Don advising her she was not entitled to parental leave payments because she was not an eligible employee in that her eligibility would be calculated from 22 August 2022. MBIE stated this again in another message on 17 August 2023.

[6] On 9 October 2023, Ms Don filed an application in the Authority for a review of the decision to decline her application.⁵

² PLEPA, s71CA(1).

³ PLEPA, s2BA(4).

⁴ Ms Don's individual employment agreement records her working hours were between 20 and 40 per week.

⁵ PLEPA, s 71ZB.

The Issues

[7] The two issues for investigation and determination are:

- (a) Whether MBIE was correct to decide that Ms Don failed to meet the parental leave payment threshold test and was therefore not eligible for paid parental leave; and
- (b) If so, whether the Authority has the discretion to modify or reverse MBIE's decision.

[8] Ms Don and MBIE agreed this review could be determined 'on the papers', without the need to hold an Investigation Meeting. The Authority received information from both parties comprising of Ms Don's Statement of Problem, MBIE's Statement in Reply, submissions from MBIE, a brief further statement from Ms Don and confirmation from both parties about Ms Don's last day of employment in her previous job.

[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 but everything submitted has been considered.

The paid parental leave scheme

[10] The PLEPA sets out minimum entitlements with respect to parental leave, protects the rights of employees during pregnancy and parental leave, and entitles certain people to parental leave payments.

[11] 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.

[12] The PLEPA also sets out a test used to determine a person's entitlement to parental leave payments, known as the parental leave payment threshold test.⁶ In order

⁶ PLEPA, s 2BA(4).

to receive parental leave payments, the person must be both an “eligible employee” and “entitled” to parental leave payments in accordance with the PLEPA.

[13] An employee may apply to the Authority for a review of a decision relating to the person’s entitlement to a parental leave payment.⁷ The Authority may confirm, modify, or reverse the decision of the department.⁸

Analysis

[14] The 52-week period relevant to the parental leave payment threshold test for Ms Don was 22 August 2022 to 22 August 2023. Ms Don accepts that she is not entitled to parental leave payments because she was not employed for 26 out of the 52 weeks preceding her expected date of delivery. I therefore find the department was correct to decide that Ms Don failed to meet the parental leave payment threshold test and was not an eligible employee. She was therefore not entitled to parental leave payments.⁹

[15] However, Ms Don submits that the Authority should use its discretion to reverse or modify the department’s decision so that she receives some payment. She says the decision to decline her eligibility was unfair because she has worked in New Zealand for more than seven years and contributed to the New Zealand economy. She further submits that she does not understand why the test is limited to the 26 weeks prior to the expected due date, and it is a shame that she cannot get support.

[16] On review, the Authority may “confirm, modify or reverse” the decision of the department. The Authority also has general powers under the Act to make a determination according to the substantial merits of the case, without regard to technicalities¹⁰, and to act as it thinks fit in equity and good conscience¹¹.

[17] The Authority’s discretion should be exercised generously, but also in a principled way. The law must be interpreted and applied in accordance with the intention of the legislation and the scheme of the Act. It is not the Authority’s role to re-write legislation, and its approach must be based on relevant principles of statutory

⁷ PLEPA, s 71ZB(1)(a).

⁸ PLEPA, s 71ZB(3).

⁹ PLEPA, s 71D.

¹⁰ Employment Relations Act 2000, s 157(1).

¹¹ Employment Relations Act 2000, s 157(3).

interpretation. The Authority should not use the general power in the Act to make determinations that are contrary to express, prescriptive provisions of the PLEPA.¹²

[18] There is a threshold test for eligibility set out in the PLEPA. This means that Parliament intended for parental leave payments to be available for those that meet the test which sets out the minimum number of weeks and hours that an applicant must be in employment before she becomes the child's carer. Unfortunately in this case Ms Don does not meet that criteria. It is apparent from Ms Don's submissions that her objection to the decline is not directed at MBIE's decision, but at the law.

[19] While I acknowledge Ms Don's position, and the financial challenges of caring for a new baby, there is no legal basis for the Authority to overlook the specific statutory requirements for eligibility in these circumstances and to modify or reverse the decision of the department.

Outcome

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

[21] The Authority does not have the discretion to modify or reverse the department's decision.

Costs

[22] Applications under the Parental Leave and Employment Protection Act 1987 fall under one of the categories of matter that are not subject to the Authority's daily tariff. Accordingly, parties will bear their own costs.¹³

Natasha Szeto
Member of the Employment Relations Authority

¹² *Anaru v Ministry of Business Innovation and Employment* [2022] NZERA 375, *Liu v Ministry of Business, Innovation and Employment* [2021] NZERA 512, *Hood v Ministry of Business, Innovation and Employment* [2021] NZERA 105.

¹³ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi (February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>