

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 515
3286100

BETWEEN REBECCA EKETONE
Applicant

AND MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Mizba Jabbar, counsel for the Applicant
Claudia Milisi-Humm, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: Up to and including 29 May 2024

Determination: 27 August 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rebecca Eketone 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). Ms Eketone was employed by an Australian company Carsburg Earthmoving Pty Limited, however she is based in New Zealand and works remotely. She is a tax resident of New Zealand, a New Zealand citizen and declares her overseas income via an IR3 each year in New Zealand.

[2] Ms Eketone became pregnant with an expected due date of 14 December 2023. She applied to Inland Revenue (IR) for PPL on 28 July 2023 but was told, as it transpires incorrectly, that because her income was earned from an Australian company

she was not eligible. She later tried to apply online but found that the online application posed questions that did not apply to her circumstances entirely as a result of how she received overseas income.

[3] Ms Eketone's child was born on 16 December 2023 and Ms Eketone returned to work on 5 January 2024 following the Christmas closure.

[4] Ms Eketone's partner also tried to apply for PPL as the primary caregiver but was declined because Ms Eketone was found not to be eligible.

[5] Ms Eketone took further steps applying again on her own behalf on 6 February 2024 but was again declined because her income did not have a sufficient connection to New Zealand. In other words, once again Ms Eketone was given incorrect advice.

[6] Ms Eketone's case was passed onto MBIE who on 14 March 2024 wrote advising Ms Eketone that she indeed was entitled and eligible to receive PPL because she was an NZ citizen, a tax resident of NZ, and her income was declared annually to New Zealand IR. However her application could not be granted because she had in the interim returned to work and accordingly could not satisfy the requirements of s 7ID(1) of the Act.

[7] MBIE acknowledges that Ms Eketone had received incorrect advice and this directly impacted on her progressing her application for PPL. It is apparent that Ms Eketone took reasonable steps to progress her application.

[8] MBIE acknowledges the Authority has a wide discretion to confirm, modify or reverse a decision of the Inland Revenue under s 7IZB(3) of the Act. MBIE's position is that its discretion pursuant to s 71IA of the Act does not extend to provide the remedies sought by Ms Eketone under these circumstances.

[9] In *Ministry of Business, Innovation and Employment v Wenting Duan* the full Court set out a road map for assessing eligibility and entitlement to receive parental leave payments under the Act.¹ Step one requires an assessment of the eligibility to receive parental leave payments.

¹ [2023] NZEmpC 232.

[10] Section 71CA provides a two limb test for a person to become within the definition of an eligible employee under Part 7A. Specifically, an eligible employee means a person who:

- (a) Is a primary caregiver of a child; and
- (b) Meeting the parental leave payment threshold.

[11] The evidence establishes that Ms Eketone meets the definition of an eligible employee.

[12] The next step is to assess the entitlement to parental leave payments. Again Ms Eketone met the threshold test for an entitlement to parental leave payments.

[13] The third step concerns the application for parental leave payment. This required Ms Eketone to make an application for parental leave. Sections 71I requires an application to be made before the earliest of:

- (a) The date in which the person returns to work; or
- (b) The date in which the child attains the age of 12 months (in the case of a biological mother or their spouse or partner); or
- (c) The date that is the first anniversary of the date in which the person or person's spouse or partner became the primary carer (in the case of non-biological primary carers).

[14] As MBIE points out, Ms Eketone's last attempt to apply for PPL was made too late. However, Ms Eketone took all the necessary steps expected of her to apply for PPL. It would be wrong to penalise her for a mistake not of her own making, i.e. the incorrect advice she received regarding eligibility. Ms Eketone's application for PPL should have been straightforward. The difficulties she now faces are not of her own making. Her original attempts to apply were well within time.

[15] The Authority has jurisdiction to review decisions on PPL applications under s 71ZB of the Act. Under this section, the Authority may confirm, modify or reverse a decision of the Department.

[16] I consider it reasonable that at least initially Ms Eketone would accept the advice she was given by IR. The reason she now does not qualify is firmly rooted to the incorrect advice she has received.

Conclusion and orders

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

[18] Ms Eketone is entitled to paid parent leave payments in accordance with the Parental Leave and Employment Protection Act 1987.

[19] MBIE should now take the necessary steps to ensure Ms Eketone receives the paid parental leave payments due to her as soon as practicable.

Costs

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

Geoff O'Sullivan
Member of the Employment Relations Authority