

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 614
3298940

BETWEEN

DIVYA KAITHI
Applicant

AND

MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Ms Kaithi in person
Nigel Smith, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 25 July and 26 August 2024 from Applicant
12 August 2024 from Respondent

Determination: 14 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Kaithi applies to the Authority for review of the decision to decline her application for paid parental leave under the Parental Leave and Employment Protection Act 1987 (the Act). Ms Kaithi and the Ministry of Business, Innovation and Employment (MBIE) agreed this review could be determined ‘on the papers’ comprising of Ms Kaithi’s statement of problem and emails and MBIE’s statement in reply and submissions.

[2] The Authority can confirm, modify or reverse a decision made by the department under s 71ZB(3) of the Act.

[3] Ms Kaithi was a self-employed contractor and after the early birth of her child she applied for parental leave payments on 11 December 2023. Her application was declined on the basis she had not worked 26 out of the 52 weeks prior to her expected delivery date.

[4] Ms Kaithi then returned to work and says if her application for paid parental leave had not been declined, she would not have returned to work. Ms Kaithi applied a second time on 6 February 2024 because she was under the mistaken impression that paid parental leave could be applied for any time up until the baby turned one year old. The second application was also declined.

[5] On 20 March 2024, following receipt of further information confirming an earlier work start date, Inland Revenue (IR) referred the matter to MBIE. On 24 April 2024, MBIE told Ms Kaithi it had changed its decision. Ms Kaithi was now considered to be eligible for paid parental leave based on her earlier start work date because she had worked the requisite number of weeks.

[6] However, at the same time, MBIE also advised that despite now being eligible Ms Kaithi's period of paid parental leave had already ended because she returned to work in December 2023. MBIE allowed for keeping in touch days but even so found Ms Kaithi had exceeded the maximum 64 hours permitted. Ms Kaithi was deemed to have returned to work when her keeping in touch hours expired on 9 January 2024 and she was no longer entitled to receive paid parental leave after that date because she had returned to work.

[7] In its submission to the Authority MBIE now says Ms Kaithi was incorrectly treated as an employee when it calculated the keeping in touch days. The test for whether an applicant has returned to work for self-employed people is different and is not the same as "keeping in touch days" for employees. Ms Kaithi should have been assessed as returning to work on 13 December 2023 because the nature of Ms Kaithi's work after she returned was more than oversight or occasional administrative tasks.¹

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

¹ Parental Leave and Employment Protection Act 1987, s 71CD.

to up to 26 weeks of parental leave payments.² A person who is the child’s primary carer may be entitled to paid parental leave depending on the length of time they were employed prior to the birth of their child.³

[9] In order to receive parental leave payments, the person must be both “eligible” and “entitled” to parental leave payments in accordance with the Act. As set out above, Ms Kaithi met the eligibility criteria in the Act because she had worked the required number of weeks as a self-employed contractor in the required time frame. However, because Ms Kaithi returned to work after the birth of her child she was no longer entitled to paid parental leave because the period ends when the primary carer returns to work.

[10] In *Ministry of Business, Innovation and Employment v Duan* the full Court set out a road map for assessing eligibility and entitlement to receive parental leave payments under the Act.⁴ Step one requires assessment of eligibility and entitlement to receive parental leave payment.

[11] It is not disputed that Ms Kaithi meets the test for eligibility set out in s 71CA of the Act. She is the primary caregiver of a child and she met the parental leave threshold test for a self-employed person.

[12] The next step is to assess entitlement to parental leave payments. Under s 71D, an eligible self-employed person will be entitled to receive parental leave payments if during the relevant period they are not self-employed or they take parental leave from their self-employment.

[13] The third step if a person has passed through the steps above, being both eligible and entitled to parental leave payments, is for them to make an application for parental leave payments. Section 71I requires an application to be made before the earliest of:

- (a) The date on which the person returns to work;⁵ or
- (b) The date on which the child attains the age of 12 months;⁶ or

² Section 1A.

³ Section 1B.

⁴ *Ministry of Business, Innovation and Employment v Duan* [2023] NZEmpC 232.

⁵ Section 71I(2)(a)(i).

⁶ Section 71I(2)(a)(ii).

- (c) The date that is the first anniversary of the date on which the person became the primary carer.⁷

[14] Ms Kaithi complied with s71I because her initial application for parental leave payments was on 11 December 2023, and that was before she returned to work on 13 December 2023.

[15] The end of the parental leave period is set out on s 71L(1) being the earlier of:

- (a) 26 weeks after the date on which parental leave payments began; or
- (b) The date on which the person returns to work as an employee or a self-employed person; or
- (c) The date on which the person ceases to be the primary carer of the child.

Ms Kaithi's situation

[16] Ms Kaithi returned to work on 13 December 2023 as a contractor and worked a total of 120 hours from 13 December to 31 January 2024 before stopping work again. On 6 February 2024, Ms Kaithi again applied for paid parental leave because she was aware applications could be made up until her child turned one year old. She had not appreciated that returning to work meant she would no longer be entitled to paid parental leave. In any event her second application was declined for the same reason as her first application because she had not worked the required 26 weeks out of 52 weeks immediately preceding the date she became the primary carer.

[17] On or about 11 March 2024, in the process of reviewing the second application, IR became aware of Ms Kaithi's updated start date of 8 June 2023. The file was referred to a Labour Standards Officer for further consideration. It was established Ms Kaithi had worked the minimum required period, based on an earlier start work date.

[18] It was also decided that Ms Kaithi was entitled to preterm baby payments from 5 November 2023 to 8 November 2023 and paid parental leave from 9 November 2023 until she was deemed to have returned to work after using up "keeping in touch" hours.

⁷ Section 71I(2)(a)(iii).

Analysis

[19] Ms Kaithi met the test for entitlement to parental leave payments. Ms Kaithi says she would not have returned to work after the birth of her baby had the correct decision been made in the first instance. She also had the ability to return to work in a limited capacity as a self-employed person, so long as the work was in the nature of oversight or occasional administrative tasks in the business in which she was self-employed.

[20] The evidence establishes that, but for the wrong decision being made in the first instance about eligibility, Ms Kaithi would have received paid parental leave.

[21] MBIE acknowledges the first decision to decline paid parental leave was incorrect. Ms Kaithi was aware of this before she decided to return to work. I consider it reasonable Ms Kaithi would at least initially accept the advice given to her by IR. The reason Ms Kaithi is said not to be entitled to paid parental leave was a result of being wrongly declined paid parental leave entitlements.

Conclusion and orders

[22] In accordance with s71ZB of the Act, I consider it appropriate to exercise the Authority's discretion and reverse the decision that Ms Kaithi is not eligible for paid parental leave payments. Ms Kaithi is entitled to paid parental leave payments in accordance with the Parental Leave and Employment Protection Act 1987.

[23] MBIE should take the necessary steps to ensure Ms Kaithi receives the paid parental leave payment due to her as soon as practicable.

Costs

[24] Applications under the Parental Leave and Employment Protection Act 1987 is one of the categories of matter that are not subject to the Authority's daily tariff and parties will bear their own costs.⁸

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁸ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>