IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 103
3323641

	BETWEEN	NICOLE CAMERON Applicant
	AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Member of Authority:	Helen van Druten
Representatives:	Neil Shaw, counsel for the Applicant Amy Webster, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	24 January and 11 February 2025 from Applicant 30 January 2025 from Respondent
Determination:	21 February 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an appeal under s 71ZB of the Parental Leave and Employment Protection Act 1987 (PLEPA) of the respondent's decision to terminate the applicant's parental leave payment and potential recovery of an overpayment.

[2] Ms Cameron started work as treasurer for a rural Waikato Rugby Football Club on 8 December 2023. This was a part-time position for about 10 hours per month requiring her to complete specific financial and administrative tasks, mostly from home and to attend meetings as required. She also worked in other paid employment.

[3] The facts are not in dispute as the parties helpfully prepared an agreed statement of facts.

(a) Ms Cameron applied for fortnightly paid parental leave (PPL) payments (for the period from 1 April 2024 to 29 September 2024). She received written approval from Inland Revenue on 29 February 2024 of her parental leave payment entitlement for this period.

(b) Ms Cameron commenced parental leave on 1 April 2024 and her baby was born on 16 April 2024.

(c) Between 2 May and 12 May (inclusive), Ms Cameron worked eight hours and 40 minutes of work for the Rugby Football Club.

(d) Ms Cameron worked these hours as Keeping in Touch (KIT) hours pursuant to s 71CE of the PLEPA and mistakenly thought the restriction on KIT days applied to the 28 days following the commencement of her PPL. However, the statutory restriction is the 28 days following the birth of the child meaning she could not perform paid work until after 14 May 2024.[1]

[4] When the respondent was made aware that Ms Cameron had worked before 14 May 2024, it terminated her parental leave payment entitlement and advised Ms Cameron that it required repayment of all parental leave payments (for the period 1 May 2024 to 29 September 2024) made to date.

[5] Ms Cameron seeks to retain her parental leave payments by order of the Authority under s 65 of the PLEPA.

The Authority's investigation

[6] This determination deals only with the issue of Ms Cameron's entitlement to parental leave payments and the respondent's decision not to exercise its statutory discretion on that decision.

[7] The parties agreed that the Authority should proceed to determine on these issues only. The issue whether Ms Cameron should be required to repay the parental

[1] PLEPA, s 71CE(2)(b).

leave payments made to her for the period 2 May 2024 to 27 May 2024 will remain a matter for the parties to determine in light of this decision.

[8] By consent, the investigation and determination of this employment relationship problem is made on the papers. The Authority has received information from the parties including submissions. Affidavit evidence was also filed and considered.

[9] As permitted by s 174E of the Employment Relations Act 2000 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 information received.

The issues

[10] The issues requiring investigation and determination were:

(a) was the respondent correct in stopping Ms Cameron's parental leave (PPL) payments and in not exercising its statutory discretion?

(b) should the Authority modify or reverse the decision?

Relevant Law

[11] Part 7 of the PLEPA covers entitlements, payments and statutory discretion.[2]

[12] Section 71ZB of the PLEPA enables an affected employee to apply to the Authority for a review of decisions made by MBIE relating to that person's entitlement to a parental leave payment. Under this section the Authority has a wide discretion to confirm, modify or reverse the respondent's decision.

[13] Section 71CE provides the employee an opportunity to perform limited paid work (KIT days) for their employer if "the day is not within 28 days after the date on which the child in respect of whom the employee took parental leave was born".[3]

Consideration of issues

Was the respondent correct in stopping Ms Cameron's parental leave (PPL) payments?

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[2] Particularly relevant here are ss 71D, 71I, 71L, 71CE(2)(b) and (3)(a) and the statutory discretion provisions in ss 71X and 71Y.

[3] PLEPA, s 71CE(2)(b).

[14] The respondent is required to stop PPL payments on the date on which the person returns to work as an employee.[4]

[15] For KIT days, an employee is treated as having returned to work if the employee performs paid work for his or her employer within 28 days after the date of birth of the child and –

> all parental leave payments received by the employee in respect of a period after the date on which the employee is treated as having returned to work are recoverable under s 71X as an overpayment.[5]

[16] The Court in Duan helpfully sets out the legislation within a 5-step "roadmap" for parental leave payment entitlement.[6]

> *Step 5 – end of period*
> Section 71L stipulates the date that Ms Duan's parental leave payment period ended. Section 71L(1) states the period ends on the earlier of either:
> (a) 26 weeks after the date on which the parental leave payments began in accordance with s 71K; or
> (b) the date on which the person returns to work as an employee; or
> (c) the date on which the person ceases to be the primary carer.
>
> While s 71K prescribes the date on which the parental leave payment period starts, s 71L(1)(b) sets the end of the parental leave payment period. In Ms Duan's situation her parental leave payment period ended when she first returned to work after the birth of her child.

[17] The Court further clarifies that "returns to work" means "the date on which the person returns to perform paid work after the birth of their child".[7]

[18] The respondent's view is that even if Ms Cameron genuinely misunderstood the law, she returned to work with the Rugby Club in early May in breach of the KIT requirements.[8] It considers that the respondent correctly followed the legislation when it ceased her payments and established an overpayment.

[19] Ms Cameron agrees that she engaged in paid work within 28 days of the birth of her baby.

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[4] And as otherwise provided in PLEPA, s 71L(a).
[5] PLEPA, s 71CE(3)(a).
[6] Ministry of Business, Innovation and Employment v Duan [2023] NZEmpC 232 at [56] and [57].
[7] At [39] and [40].
[8] PLEPA, s 71CE(3)(a).

[20] On the basis of the above, I conclude that the respondent was correct stopping Ms Cameron's PPL payments and establishing an overpayment when she returned to work.

W*as the respondent correct in not exercising its statutory discretion?*

[21] Under s 71IA of the PLEPA there is a discretion to approve the making of a payment despite "irregularity"[9] in the application. If so, the respondent is required to have regard to:

> (a) The extent of the irregularity (including whether the extent of the irregularity was reasonable in all the circumstances); and
> (b) Whether the person was acting in good faith.

[22] The respondent asserts that it does not have discretion to change or ignore the statutory requirements unless there is an irregularity in form,[10] even when that return has occurred due to a genuine mistake and in good faith.

[23] Ms Cameron suggests that this approach is a "simplistic" view and had she sought third party advice which led to a breach, she would "be in a better position as she could claim the protection due to that incorrect advice". She asserts that it shouldn't become a matter of substance because that advice wasn't sought.

[24] The Employment Court had a lengthier discussion of s 71IA discretion in Duan, including the distinction between irregularity of form and irregularity of substance, saying that:

> "if MBIE was being called upon to exercise its discretion, it would not have been because there was an irregularity in form or a difficulty with the timing. Rather, it would be a matter of substance, being that Ms Duan was not entitled to a parental leave payment".[11]

[25] While I have considered the application of s 71IA in Ms Cameron's case, the respondent is not being asked to use its discretion for an irregularity of form. The respondent is being asked to use its discretion to change the end date of Ms Cameron's PPL to another date not provided for by the legislation. It cannot move the end date

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[9] PLEPA, s 71IA.
[10] PLEPA, s 71IA(5).
[11] Duan at [61].

(even if she only worked for a few hours) as Ms Cameron's entitlement ended when she returned to paid work.

[26] Therefore, I find that the respondent's statutory discretion under s 71IA sits outside the scope of Ms Cameron's circumstances.

Should the Authority reverse or modify the decision?

[27] Ms Cameron has requested a review of the decision as she is entitled to do.[12] It then rests with the Authority to consider the decision made according to the substantial merits of the case without regard to technicalities.[13] While the Authority must consider its decision in line with its s 157(3) obligations, it also cannot make a determination inconsistent with the law.

[28] It is acknowledged that Ms Cameron made a genuine error by returning to work within the 28-day restriction period. Ms Cameron submits that the breach she made was minor and technical in nature and therefore should be reversed. There are several points that advance this argument:

(a) Both parties agree that Ms Cameron acted in good faith and did not intend to mislead or deceive the respondent by returning to work. There is nothing on the papers to suggest that Ms Cameron's hours worked in May were anything other than a genuine misunderstanding of the KIT requirements.

(b) Ms Cameron earned $294.84 gross for the work she did 2 May to 27 May for the rugby club.[14] This error resulted in a loss of over $10,000 gross in PPL payments that would otherwise have been payable to her (the exact amount seems to differ slightly within the documentation but is not material for the issues to be determined). The applicant submits that the penalty is out of all proportion to the error made by her.

[12] PLEPA, s 71ZB.
[13] Employment Relations Act 2000, s 157(1).
[14] This was stated as $273 gross in the Joint Memorandum and Agreed Statement of Facts of 18 December 2024.

(c) This was a secondary role for Ms Cameron and she was not provided with any information by her employer about KIT days or entitlements. In his affidavit the Club Director stated that:

> "if the Club had known, we would have ensured that Nicole was made aware that she could not carry out her employment duties within 28 days of the birth of her child, and we would have arranged for the previous treasurer to continue in that role until Nicole returned to work".

[29] I also considered whether Ms Cameron had been provided incorrect or inaccurate information by the respondent or her employer that could reasonably lead to a "misunderstanding" and warrant statutory discretion. I did not find evidence to support this.

[30] Ms Cameron has said that it is "unreasonable for any parent to have sufficient knowledge about parental leave entitlements and the KIT rules". Ms Cameron was advised of the KIT Day requirements in writing on the "other useful information" sheet included with her Inland Revenue approval letter sent on 29 February 2025 that said,

> "You can work limited KIT…you cannot work these hours in the first 4 weeks after giving birth, unless you're receiving payments for a premature baby".

[31] Information on KIT days is also provided online in several locations including the Inland Revenue and Employment New Zealand websites, saying:

> You're considered to be back at work if you:
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> - do more than 64 hours of paid work during your paid parental leave
> - do paid work for your employer within the first 28 days after the birth of the child you are taking parental leave for
> - start with a new employer
> - start self-employment.
>
> Once you're back at work, you will not be able to get any more parental leave payments. Any payments you get after you're back at work are treated as an overpayment (which you may have to repay).[15]

The Employment NZ website goes to the same Inland Revenue site and elsewhere provides that:

> You can do up to 64 hours of paid work for your employer during the time you're on parental leave, but not within the first 28 days after the birth of your child unless you have had a preterm baby and are receiving preterm baby payments.

[15] Inland Revenue www.ird.govt.nz.

> If you work more than 64 hours while you're on parental leave or do any work within the first 28 days after your child's birth, you're considered to be back at work. This means that you will not be able to get any more parental leave payments. Any parental leave payment you receive after you're considered to be back at work is treated as an overpayment that you will have to repay.[16]

[32] Despite the genuine mistake, Ms Cameron did return to work within the restricted period. Given the nature of her work, most likely Ms Cameron had access to online resources about KIT days and she had received the 29 February information sheet.

[33] Considering the information provided and available to Ms Cameron about KIT days, there was no indication that Ms Cameron's error was caused by any third-party advice given. The error was unfortunately hers alone.

[34] To allow Ms Cameron to retain her parental leave payments when she breached the requirements of her parental leave payment entitlement under the legislation, would neither be just nor fair to those who follow it.

[35] The prescriptive nature of the Act is recognised by the Court, noting

> "The requirements concerning a person's eligibility and entitlement to receive parental leave payments from public money contained in pt 7A are rigid and 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 at risk".[17]

[36] Ms Cameron has emphasised the unfairness of the respondent's decision and that "where a parent acts against their own self-interest and have acted honestly, they should be afforded protection by the Authority".

[37] Again, there is no suggestion that Ms Cameron tried to mislead. Regrettably, Ms Cameron misread the information she was provided. While it may seem unfair, any discretion the Authority has when reviewing the respondent's decision must be exercised in a principled way. Even if it is an honest error, the Authority cannot disregard the legislation to move an entitlement end date when the determination of the

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[16] www.employment.govt.nz.
[17] Duan at [24].

end date is clearly prescribed in law, payment entitlement is on that basis and it is more than an irregularity of form covered by the respondent's s 71IA discretion.[18]

[38] Ms Cameron's request for review of the respondent's decision to terminate the applicant's parental leave payment is therefore unsuccessful.

Observation on recovery of overpayment issue

[39] While the overpayment issue is outside scope of the issues to be determined at this stage, I note the respondent's reference to s 71Y, its openness to have the Authority close this matter for Ms Cameron and its recognition of Ms Cameron's genuine misunderstanding. I provide the following observation for the respondent's consideration.

[40] Ms Cameron says that she did not intentionally contribute to the error, received the payments in good faith and altered her position in reliance on the validity of the payment. There is no indication of any intent to mislead by Ms Cameron. Should the respondent seek to recover the overpayment, for the period from 2 May to 27 May 2024, it may wish to request further information from Ms Cameron before making this decision and Ms Cameron may choose to return to the Authority for a determination on this issue if not resolved between the parties.

Costs

[41] Costs lie where they fall.

Helen van Druten
Member of the Employment Relations Authority

[18] An example of this was in Anaru v Ministry of Business, Innovation and Employment [2022] NZERA 375 where the Authority declined to use its discretion to overlook the statutory requirements for parental leave eligibility.