

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 8  
5526530

BETWEEN MELISSA LOUISE McCARTY  
Applicant

A N D MINISTRY OF BUSINESS,  
INNOVATION AND  
EMPLOYMENT  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in Person  
Angela Graham, Representative of the Respondent

Investigation Meeting: 7 January 2015 at Auckland

Submissions Received: In person on 7 January 2015 from the Applicant  
In writing on 7 January 2015 from the Respondent

Date of Determination: 09 January 2015

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**DETERMINATION OF THE AUTHORITY**

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**A. The decision by the Ministry of Business, Innovation and Employment (MBIE) that the applicant, Ms McCarty, is not eligible for paid parental leave is confirmed.**

**B. There is no order as to costs.**

**Employment relationship problem**

[1] The applicant, Ms McCarty, wishes the Authority to review a decision of the Ministry of Business, Innovation and Employment (MBIE) pursuant to s.71ZB of the Parental Leave and Employment Protection Act 1987 (the PLEPA) that she is not eligible for paid parental leave.

**Relevant Facts**

[2] Ms McCarty has been employed by Downer as a business support manager from 1 August 2008.

[3] Ms McCarty was due to give birth on 22 March 2013. On 21 February 2013, Ms Sharon Brotherton, the National Processing Supervisor at Downer sent an email to Ms McCarty about her parental leave. In the email she said:

*Leave form to be completed for 25 days annual leave from 04 March to 04 April. This means your letter/paperwork needs to be changed to read something like this - from the 4<sup>th</sup> March you will be on annual leave for 25 days then you will start your maternity leave from the 08<sup>th</sup> April. Please note that your payments from IRD will not start until 08<sup>th</sup> April. Hope this makes sense? Just pop me a call or email me if you need to discuss the above.*

[4] On 28 February 2013, Ms McCarty and Ms Brotherton both signed Ms McCarty's application for paid parental leave for the Inland Revenue Department (the application). Ms McCarty says she made a special trip to Downer's East Tamaki office so that Ms Brotherton could sign the application.

[5] Ms McCarty copied the application for her records and then posted the original to the Inland Revenue Department. Ms McCarty says she posted the application at a post box near the New World supermarket in Botany Downs. Ms McCarty says she was keen, having completed the application, to send it off to the Inland Revenue Department straight away.

[6] Ms McCarty went on paid parental leave from 8 April 2013 and returned to work on 2 September 2013. Ms McCarty did not receive any parental leave payments during this time. Ms McCarty says she thought, having sent her application to the Inland Revenue Department, that she would receive the payments but that after discussing the matter with some other people, was initially of the view that the payments may just be late. Ms McCarty says she did not follow the matter up with the Inland Revenue Department before returning to work because she owed it tax and was not in a frame of mind to be able to discuss this having just had her baby.

[7] Approximately one year after returning to work, in September 2014, Ms McCarty made inquiries about the parental leave payments and was informed that

the Inland Revenue Department had never received her application. Ms McCarty then made a fresh application on 10 October 2014. This application was referred to the MBIE and was declined by it because it was made after Ms McCarty had returned to work. It is this decision Ms McCarty seeks the Authority to review.

### **Parental Leave and Employment Protection Act 1987 (the PLEPA)**

[8] Section 71CA of the PLEPA, sets out the eligibility criteria for employed persons. Under s.71I(2)(a) of the PLEPA, a paid parental leave application must be made before the date on which the employee or self-employed person returns to work or the parental leave otherwise ends.

[9] Ms McCarty returned to work on 2 September 2013 but her application was not received until well after that date on 10 October 2014. Therefore, MBIE decided that pursuant to s.71I(2)(a) Ms McCarty was not eligible to receive paid parental leave.

[10] Under s.71IA of the PLEPA, MBIE has a discretion to approve the making of a parental leave payment despite an irregularity in the application. MBIE considered the making of the application by Ms McCarty after her return to work to be an irregularity.

### **MBIE's decision**

[11] MBIE declined to exercise its discretion in Ms McCarty's favour because it considered the delays in filing the application by her were excessive and unreasonable. MBIE says that in exercising its discretion not to approve the application, it took into account the fact that Ms McCarty did not receive an acknowledgment from the Inland Revenue Department of receipt of her application, an acceptance letter, nor did she receive any payments. Further, Ms McCarty did not receive any correspondence from the Inland Revenue Department in relation to the paid parental leave issue and Ms McCarty did not make any inquiries as to her paid parental leave entitlement.

[12] Ms Graham, for MBIE, submitted that the Authority should follow a similar approach to this issue as in its decisions in *Clark v. Department of Labour* (AA522/10, ERA Auckland 20 December 2010) and *Jansen v. Department of Labour*

(CA142/10, ERA Christchurch 1 July 2010). In each of those cases the Authority found the delays in filing an application for paid parental leave to be unreasonable.

[13] Ms McCarty did in fact post her application to the Inland Revenue Department on or soon after 28 February 2013. I have no cause to disbelieve Ms McCarty. However, for whatever reason, the Inland Revenue Department did not receive the application. Unlike in the cases cited above, Ms McCarty did not forget to submit or delay submitting her application. Ms McCarty posted the application, it was just not received.

[14] When Ms McCarty discovered the application had not been received by the Inland Revenue Department, she submitted a fresh application on 10 October 2014, this was 13 months after Ms McCarty had returned to work and 18 months after parental leave was taken.

### **Determination**

[15] I do not accept as reasonable Ms McCarty's reasons for failing to take steps sooner to establish why she was not receiving the paid parental leave payments. In the email she received from Ms Brotherton on 21 February 2013, Ms McCarty knew to expect the paid parental leave payments from 08 April 2013. Ms McCarty made assumptions about why she had not received the payments from the Inland Revenue Department and chose not to follow up. The delays in doing so were excessive and unreasonable.

[16] I agree with Ms Graham's submissions that the purpose of the PLEPA is to entitle employees and self-employed persons to 14 weeks of paid parental leave payments when they take parental leave. As Ms Graham submits, this falls in line with the view that the intention of the PLEPA is that paid parental leave should be available to be taken from employment which is current and which would otherwise continue but for the pending birth of a child.

[17] I am not satisfied the irregularity of the application is reasonable. In coming to this view, I have taken into account the return to work by Ms McCarty well before any steps were taken to follow the payments up and the length of time to file a fresh application.

[18] I therefore confirm the MBIE's decision that Ms McCarty is not eligible for paid parental leave.

**Costs**

[19] There was no submission as to costs by the MBIE and I do not consider costs appropriate in this case in any event. There will be no order as to costs.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**