

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2020] NZERA 470  
3082952

BETWEEN                      STEPHANIE BIRCHALL  
   Applicant

AND                                MINISTRY OF BUSINESS,  
   INNOVATION AND  
   EMPLOYMENT  
   Respondent

Member of Authority:        Trish MacKinnon

Representatives:              Applicant in person  
   Ian Murray, Counsel for the Respondent

Investigation Meeting:        On the papers

Submissions Received:        6 July and 12 August 2020 from the Applicant  
   3 August 2020 from the Respondent

Date of Determination:        16 November 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        Stephanie Birchall’s application for paid parental leave (PPL) in respect of the daughter she and her husband adopted was declined. She asks the Authority to review that decision.

[2]        In the course of a case management conference with the parties in July 2020 it was agreed this matter would be determined on the papers. In accordance with the agreement reached with the parties, Ms Birchall provided an affidavit and supporting documentation and MBIE provided submissions.

[3] This determination has been issued outside the timeframe set out at s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

### **Relevant background**

[4] On 15 October 2019 Ms Birchall and her husband formally adopted the child they had been fostering since September 2015. Before the adoption date, Ms Birchall applied for PPL to commence on 1 November 2019 and for the leave to be transferred to Mr Birchall.

[5] Ms Birchall, who is self-employed, deposes that both she and Mr Birchall continued to work past the adoption date of their daughter on the basis of verbal advice given by IRD.

[6] IRD initially declined the application on 24 October 2019 on the basis that Ms Birchall had been the primary carer of the child since September 2015. IRD confirmed that decision, on review, on 7 November 2019. Its letter stated that, at IRD's request, MBIE had reviewed Ms Birchall's application and IRD's decision and had agreed IRD had correctly declined the application.

[7] MBIE's statement in reply states the reason for the declining of Ms Birchall's application was her not ceasing to work when her daughter came into her care. It says that, despite being an eligible employee who would otherwise have had an entitlement to PPL, she is no longer entitled to claim PPL because she did not comply with the statutory requirements of sections 71D and 71K of the Parental Leave and Employment Protection Act 1987 (PLEPA).

### **Payment for parental leave**

[8] Part 7A of PLEPA states the purpose of the provisions as being to entitle certain persons who become the primary carer in respect of a child, and who stop working or take a period of leave, to paid leave for a specified maximum number of weeks. In 2019 the specified period of payment was for up to 22 weeks and, although that has since changed, I will refer to that period in this determination.<sup>1</sup>

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<sup>1</sup> From 1 July 2020 the entitlement is 26 weeks.

[9] Section 71D sets out the eligibility conditions to PPL for employed and self-employed persons and s 71K specifies the time from which PPL starts, which, in this instance, was the date on which the person becomes the primary carer. Section 71E provides that an entitlement may be transferred to a partner, which Ms Birchall had applied for in this instance.

[10] Section 71J provides that PPL is payable for one continuous period not exceeding 22 weeks or, if part of the entitlement is transferred under s71E, for one continuous period per person, as long as both continuous periods do not together exceed 22 weeks.

[11] Section 71ZB provides that an employee or self-employed person may apply to the Authority for a review of an MBIE decision relating to the person's entitlement to PPL and related matters. The provision gives the Authority wide discretion to confirm, modify or reverse MBIE's decision.

### **Submissions and conclusion**

[12] MBIE submits that leaving work and going on parental leave at the time a person assumes care of a child is a prerequisite for eligibility to PPL. It acknowledges Ms Birchall was an eligible employee under the Part 7A requirements of PLEPA. It says, however, that she is not entitled to PPL because she must have either ceased work or been on parental leave on 15 October 2019, the day of the adoption order, which was the day her eligibility for PPL commenced.

[13] MBIE makes clear in its submissions it is not arguing that Ms Birchall is precluded from receiving PPL: it is saying that only the Authority can grant PPL under its s 68 PLEPA jurisdiction.

[14] Section 68 concerns non-compliance with the formal requirements of PLEPA and provides that the Authority may grant relief by amending or waiving an irregularity which, for the purposes of the section, is defined as:

- a. omitting to do something required by or under this Act or under the alternative provision under which the leave is taken; or
- b. doing something required by or under this Act or the alternative provision under which the leave is taken before or after the time when it is required to be done; or

c. otherwise doing anything irregularly in matter of form.

[15] MBIE does not contest that Ms Birchall acted in good faith and it acknowledges that, arguably, the act or omission in this case could fit under (a) or (b) of the definition of irregularity set out in s 68(2) of PLEPA, and in paragraph [9] above.

[16] I am satisfied, having considered the circumstances of this case, that it is just and reasonable to grant relief to Ms Birchall under the provisions of s 68(6) of PLEPA. Her application for PPL was first declined on the erroneous basis that she had been the primary carer of her adopted daughter since September 2015. Since then she has had her application declined for working on the day on and beyond the day on which she became the primary carer, which was the day the formal adoption order was made, being 15 October 2019.

[17] The practicalities of the situation Ms and Mr Birchall found themselves in, which I do not find necessary to detail here, made it impracticable for Ms Birchall as the applicant, or Mr Birchall as the intended transferee of the PPL, to comply with the requirement to cease working or be on parental leave on that date.

### **Relief granted**

[18] Ms Birchall is to advise IRD of the date she intends commencing her primary carer leave and/or the date from which she wishes entitlement to be transferred to her husband if that is still what they intend to happen. The entitlement to 22 weeks' paid parental leave payments will begin from that date and continue until Ms Birchall or her husband, depending which of them is receiving the payments, returns to work if that occurs earlier.

[19] As Ms Birchall represented herself, I understand there is no issue as to costs.

Trish MacKinnon  
Member of the Employment Relations Authority