

Note: This determination includes an order prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 529
3112922

BETWEEN	TDK Applicant
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Oscar Upperton, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 16 October 2020 from the Respondent
30 October 2020 from the Applicant

Determination: 21 December 2020

DETERMINATION OF THE AUTHORITY

- A. Under s71ZB of the Parental Leave and Employment Protection Act 1987 the decision of the Ministry of Business, Innovation and Employment on the parental leave application of TDK is reversed. TDK was entitled to a parental leave payment.**

Order prohibiting publication of certain information

[1] This determination refers to the applicant by the randomly selected letters TDK. Her actual name and the names and other identifying details of the child, the child's parents and other members of her whānau referred to in the statement of

problem, statement in reply, submissions and relevant documents provided to the Authority in this matter are prohibited from publication in relation to this proceeding and determination. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 to protect the identity of a child who is subject to protective orders made by the Family Court under the Oranga Tamariki Act 1989.

Application for review

[2] TDK asked the Authority to review a decision made on 16 July 2020 by the Ministry of Business, Innovation and Employment (MBIE) that she was not entitled to any parental leave payments under the Parental Leave and Employment Protection Act 1987 (the PLEPA).

[3] During a case management conference about her application the parties agreed the Authority's review would be completed 'on the papers' after receiving written submissions from them both and some additional documents sought from TDK.

[4] This determination has stated the resulting findings of fact and law, expressed conclusions and specified orders made but has not needed to record all evidence and submissions received.¹

The issues

[5] TDK's request for review of MBIE's decision raised two questions. Firstly, in making its decision, did the MBIE officer assessing TDK's application for parental leave entitlements properly apply the relevant PLEPA criteria to her circumstances, including the discretion to approve an application despite some "irregularity" in it? Secondly, should the Authority exercise a discretion granted to it in the PLEPA to confirm, modify or reverse MBIE's decision?

[6] In exercising its discretion during such a review the Authority's role is to resolve the problem according to the substantial merits of the case, without regard to technicalities, and to act as it thinks fit in equity and good conscience but not inconsistently with the relevant legislation.² This includes considering PLEPA's declared purpose of entitling certain persons who become a primary caregiver, and who stop working or take a period of leave, to a defined period of parental leave

¹ Employment Relations Act 2000, s 174E.

² Employment Relations Act 2000, s 157 and Parental Leave and Employment Protection Act 1987, s 71ZB.

payments out of public money.³ At the time of TDK's application those payments could be made for a period of up to 22 weeks. From 1 July 2020 that period has increased to 26 weeks.

How these issues arose

[7] This determination has not needed to set out all the complex circumstances in which TDK became a primary caregiver of the child. She was present when her great niece gave birth to the child in hospital on 3 March 2020. Oranga Tamariki social workers were involved in the situation. Discussions TDK and her sister then had with the social workers resulted in an arrangement for the child to be placed in TDK's care from 4 March. The placement was on a temporary basis.

[8] At the time TDK had a full time job. She had not expected or planned for the sudden arrangement in which she had care of a new born child for an unknown but temporary length of time. She was initially able to take some annual leave but by mid-March continued with her work commitments, fitting them in with care of the child. From 25 March until 13 May New Zealand was in a state of national emergency starting with a Covid-19 Alert Level 4 lockdown and continued restrictions under a move to Alert Level 3. During those weeks TDK was able to work from home while continuing to care for the child.

[9] On 25 May TDK contacted Oranga Tamariki to ask how long the child would be in her care. By letter sent to her on 26 May a representative of the agency advised TDK was "the primary caregiver for [the child] for the foreseeable future".

[10] In an email she later sent to the MBIE officer considering her review application TDK said the 26 May letter from Oranga Tamariki was the first time she was aware the baby would be in her care for the foreseeable future and was "quite frankly blindsided". However she said she and her employer at least then knew she was a permanent caregiver and could look at the options available to her.

[11] On the same day TDK completed a paid parental leave application for submission to Inland Revenue. On this form TDK identified 9 June as when her leave period would start. That date was 14 days from when she had become aware on 26 May that she effectively had permanent primary responsibility for the child.

³ Parental Leave and Employment Protection Act 1987, s 71A.

[12] She also sought her employer's approval for parental leave. Her employer did so by letter on 4 June. The employer's letter approved her request for annual leave from 15 June to 26 June (that is two weeks' leave) with 22 weeks parental leave then starting from 29 June until 27 November. The letter noted she was expected to return to work on 30 November.

[13] TDK stopped work on 15 June.

[14] When Inland Revenue declined TDK's application she requested the MBIE review. After getting MBIE's decision of 16 July saying she was not entitled to parental leave payments, TDK made arrangements to return to work. According to information she provided at the Authority's case management conference, TDK then worked 20 hours a week from 27 July onwards. Those were fewer hours than she had worked in her earlier full time role because her employer had, understandably, already redistributed her other hours to other employees for the weeks she was expected to be away on parental leave. At the time of her application to the Authority TDK expected her employer would return to providing her full time hours from 30 November onwards.

[15] In Family Court orders made on 8 August Oranga Tamariki's chief executive was granted custody and additional guardianship of the child who, under plans made in a family group conference with member of her wider whānau on 8 July, remained in the care of TDK.

Analysis

[16] There was no disagreement that TDK became eligible to apply for paid parental leave for the period from 26 May 2020 onwards. She met the PLEPA criteria of being an eligible employee who had worked the necessary period and hours to qualify for the leave. She met the requirement of being a primary carer because she was a person, other than the biological mother and partner, who took permanent primary responsibility for the child's care from that date.⁴

[17] The sole point of dispute was not the eligibility generated that day but rather whether TDK then acted in a way that extinguished her entitlement to any paid parental leave entitlements. MBIE submitted that reading s 71K(1)(b) and s 71D

⁴ Sections 7(1)(c) and 71CA.

together meant TDK “needed to stop working on 26 May 2020” in order to be entitled to the parental leave payments provided for in s 71D.

[18] The parts of s 71K relevant in this case provide that a parental leave payment is payable for the period “that begins ... on the date on which the person becomes the primary carer in respect of the child”. MBIE’s decision said, by continuing to work after that date of 26 May in her case, TDK was “not able to satisfy the entitlement criteria for parental leave payments”.

[19] It also relied on the provision in s 71D requiring the eligible employee to take parental leave from their employment “during the period in relation to which the person receives parental leave payments”.

[20] The period referred to is important because, broadly read, the PLEPA (at the time relevant to TDK’s application) allowed for payments of “**up to 22 weeks**” and payments are allowed for a duration “**not exceeding 22 weeks**” (bold emphasis added).⁵ Whatever payment is made must be for “1 continuous period”, unless shared with a partner or spouse when two continuous periods not exceeding 22 weeks are then permitted.⁶

[21] Two difficulties arose from the analysis MBIE applied to the particular facts and circumstances of TDK’s situation.

[22] Firstly, the paid parental leave application form TDK submitted to Inland Revenue said her PPL period would start on 9 June – which was neither the date she had found she was effectively the child’s permanent primary carer (26 May) nor the date from which the leave period approved by her employer was to begin (on 15 June, being two weeks annual leave, with parental leave to then follow from 29 June).

[23] The two weeks’ annual leave complicates the description in this review but PLEPA expressly allows an employee to start their period of parental leave by taking paid annual leave. In those situations the start of the parental leave period is postponed until the paid annual leave ends. The period of parental leave, and payments permitted for it, then run from that later date.⁷

⁵ Section 71D.

⁶ Section 71J.

⁷ Section 71K(2) and (3).

[24] The second, and most significant, difficulty is what appears to be a conflation in MBIE's application of the statutory provisions between the date on when her eligibility arose and the date on which she would or did meet the criteria to actually receive payments, specifically by beginning the period of leave during which those payments could be made. In most cases those dates of eligibility and entitlement would be the same but, on a closer look at the statutory provisions as they related to TDK's situation, they need not be.

[25] If the view of the MBIE decision maker in this case was correct, TDK would needed to have stopped work immediately on receiving the surprise news on 26 May that she was regarded as the permanent primary caregiver (at least "for the foreseeable future"). On that view, if TDK did not, she lost any entitlement to any paid parental leave payments for the entire 22 weeks.

[26] As MBIE submitted, no actual payment of parental leave payments could be made to TDK from the period she worked from 26 May to 15 June. To do so would have breached the requirement of s 71D(1)(b) that the person must be taking parental leave at the time of getting the payments. Put plainly, a person must stop work to get them.⁸ However the emphasis in the particular provisions on entitlement to the payments is on what the state of affairs must be at the time the person actually gets them. The relevant statutory provisions on both eligibility and entitlement, read as a whole, do not appear to intend TDK should have lost her potential payment entitlements for the whole 22 week period simply because she was not ready to immediately start her possible period of parental leave from the date she became eligible.

[27] Explaining this distinction required closer examination of the dates relevant in various sections:

- (i) the date on which TDK became eligible, as a primary caregiver (PLEPA s 7(c) and s 71D(1)) – this was 26 May, on receipt of that information from Oranga Tamariki;
- (ii) the start date from which parental leave payments were permitted to be paid in those circumstances (PLEPA s 71K(1)(b)) which is "the date on which the person becomes the primary carer in respect of the child" – this, again, was 26 May; and

⁸ Section 71D and Employment Standards Legislation Bill (53-1) clause 56 explanatory note.

- (iii) the date on which TDK actually would have met the requirement for receiving parental leave payments under her parental leave arrangement with her employer (PLEPA s 71D(b)(ii)) – that was 29 June, after completing her two weeks’ annual leave from 15 June.

[28] Three conclusions flow from that examination.

[29] Firstly, on 26 May TDK became eligible for parental leave payments provided that, by the date she received any such payments, she was actually taking parental leave from her employment.

[30] Secondly, the period for which such payments could lawfully be paid started on 26 May and ran for the following 22 weeks, that was until 26 October. This period could be extended by any paid annual leave taken at the start of the parental leave, which in this case became until 10 November.

[31] Thirdly, under the leave approved by her employer, TDK did not actually start her parental leave until 29 June, after the two weeks annual leave taken from 15 June. It was not until that later date, by which time she was actually on parental leave, that TDK met the criteria for receiving statutory parental leave payments. By then, however, there were only 19 weeks left to run in the period during which she was entitled to receive parental leave payments.

[32] This is consistent with the reference to the leave being available for “up to” and “not exceeding” the statutory period. The paid period may be shorter. More usually this is because a person’s circumstances change, by returning to work or by ceasing to be a primary carer, so they end their leave before its expiry. In TDK’s situation, the leave could be shorter because her period of eligibility had begun to run for some weeks before she had arranged her affairs to meet the criteria and trigger start of the payments for whatever was left of that period.

[33] Once started, she could legitimately have received those payments up until 10 November, if she had remained on parental leave continuously throughout that period.⁹ As it happened TDK broke that continuous period of parental leave, once MBIE said she was not entitled to any parental leave payments, by returning to work from 27 July.

⁹ Section 71J(1)(a).

[34] On this analysis MBIE was correct to tell TDK she had no entitlement to payments for the weeks from 26 May to 15 June during which she continued to work. However it was also clear that there were errors in her application, apparent from the dates on the application form she submitted, the content of her employer's letter about when her leave ran and from the information she provided to MBIE by telephone and email. She had no entitlement to receive parental leave payments until 29 June and then only for the remainder of the 22 week period that had begun running from 26 May (and the permitted extension to allow for annual leave taken). Her application could have been amended under MBIE's discretion to approve irregular applications by amending, as matters of form, the errors in the dates given. Having regard to the criteria for exercising that discretion, it would have been reasonable to do so in the difficult circumstances in which TDK had unexpectedly been advised of her ongoing primary carer role and because, as MBIE fairly accepted throughout, TDK had acted in good faith.¹⁰ Instead, TDK was told because she had not stopped work immediately as of 26 May, on the day of the surprise news, she had no eligibility at all.

Outcome

[35] Accordingly, this particular situation was one where the Authority could appropriately exercise its discretion to reverse MBIE's decision that TDK was "not entitled to receive parental leave payments" and "not able to satisfy the entitlement criteria for parental leave payments".

[36] MBIE will now need to address what payments remain due to TDK as a result of her entitlement. This requires an assessment of what is permitted under PLEPA s 71D(1) and s 71L(1)(b) and, albeit in response to what has now been held to be an incorrect decision made and communicated to her, the effect of TDK's return to work from 27 July. Even if that return restricted what payments are permitted, TDK is entitled parental leave payments for at least the continuous four week period from 29 June to 27 July.

Robin Arthur

¹⁰ Section 71A(2).

Member of the Employment Relations Authority