

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 512
3133042

BETWEEN SIYU LIU
 Applicant

AND MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Respondent

Member of Authority: Robin Arthur

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

Submissions and further From the applicant on 3 August 2021 and 2 September
information: 2021 and from the Respondent on 19 August 2021 and
 1 September 2021

Determination: 19 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Siyu Liu sought a review of a decision by the Ministry of Business, Innovation and Employment to decline her application for 26 weeks of paid parental leave (PPL). A delegated officer of the Ministry had decided Ms Liu's circumstances did not meet the criteria to be eligible for those payments under the relevant provisions of the Parental Leave and Employment Protection Act 1987 (the PLEP Act).

[2] The PLEP Act allows the Employment Relations Authority to review such decisions.¹ The Authority has a discretionary power to confirm, modify or reverse the Ministry's decisions.

¹ Parental Leave and Employment Protection Act 1987 s 71ZB.

[3] Ms Liu and the Ministry agreed this review could be determined ‘on the papers’. Those papers included Ms Liu’s statement of problem, the Ministry’s statement in reply, submissions lodged by the Ministry and Ms Liu’s response, by email, to those submissions. They also included various relevant documents comprising bank statements, correspondence from the Ministry of Social Development about Covid-19 wage subsidies paid to Ms Liu, and a copy of an employment agreement between Ms Liu and a company owned by her husband.

[4] At issue was whether Ms Liu met the threshold test to be eligible for parental leave payments. The Ministry said there was not sufficient evidence that Ms Liu had been either employed or self-employed for long enough during the period set by the PLEP Act to establish that eligibility.

The statutory criteria

[5] At s 2BA(4) the PLEP Act sets the following threshold test:

(4) In this Act, the following test is used to determine a person’s entitlement to parental leave payments (the **parental leave payment threshold test**):

- (a) an employee meets the parental leave payment threshold test if he or she will have been employed as an employee for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding—
 - (i) the expected date of delivery of the child (in the case of a child to be born to the person or his or her spouse or partner); or
 - (ii) ...
- (b) a self-employed person meets the parental leave payment threshold test if he or she will have been self-employed for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding—
 - (i) the expected date of delivery of the child (in the case of a child to be born to the self-employed person or his or her spouse or partner); or
 - (ii) ...

What Ms Liu said about the working arrangement

[6] In her final submission, in response to the Ministry’s written submissions, Ms Liu gave the following summary of how she said she had met this threshold test.

[7] Ms Liu said she had worked as an office administrator in her husband's project management business for a total of 27 weeks in the 52-week period prior to the birth of child. The business operates through a registered company. Ms Liu said she worked as an independent contractor, that is on a self-employed basis, and invoiced the company for her hours. She said the relevant weeks comprised the following:

- From 24 March to 13 April 2020 paid by the company (3 weeks);
- From 14 April to 11 September 2020 paid by Covid-19 wage subsidy payments (21 weeks); and
- From 3 November to 23 November 2020 paid by the company (3 weeks).

[8] Among supporting documents Ms Liu provided was a bank statement dated 25 January 2020 for an account in her name. It showed a payment of \$3,618.40 being made to her by her husband on 20 January 2021. Five days later the same amount of \$3,618.40 was paid from that bank account, apparently for a joint internet bill shared by Ms Liu and her husband.

[9] Ms Liu also provided a table listing three payments of Covid-19 from the Ministry of Social Development, totalling \$12,887.60, and the hours she said she worked for her husband's business between 24 March and 17 November 2020. Hours of 26 or 30 per week were listed for three out of every four weeks in that period. Dividing the hours listed by what was said to be due as pay for each of those weeks, the pay rate appeared to be \$21 an hour. The hours listed for work on 27 weeks in that 34 week period totalled 786. At \$21 an hour the pay for those 786 hours would be \$16,506. Deducting the \$12,887.60 listed as received as Covid-19 subsidies from that amount of \$16,506 left a total of \$3,618.40.

[10] This total of \$3,618.40 was the amount shown on a copy of an invoice Ms Liu provided. The invoice, dated 19 December 2020, was from her to her husband's company. It had the invoice number of INV-001. As noted above, this was the amount paid to Ms Liu's bank statement on 20 January. Ms Liu explained that amount as being difference between what she should have been paid and what she had received as Covid-19 subsidies. There was no other information or evidence of any payment being made to Ms Liu by her husband's business during the period for which she said she worked.

[11] In a letter she sent to IRD in January 2021, after her PPL application was declined, Ms Liu explained she had been unable to find a job after the birth of her first

child in February 2020 and once she became pregnant again in April 2020. This situation was made worse for her and her husband's business by the Covid-19 emergency restrictions in place during that year. She said this forced her to work for her husband as his office administrator "to help wherever I could to support my husband". She said he could not afford to pay her and both had applied for the Covid wage subsidy in that period.

[12] As part of the exchange of information and documents arranged during this review Ms Liu also provided a copy of an employment agreement between her and her husband's company, signed by her and him and dated 20 March 2020. It described her employment in the position of office administrator as "proposed to commence on 24 March 2020".

The Ministry's submissions

[13] Against that background the Ministry submitted Ms Liu had given contradictory evidence about her working history in 2020 and had not reliably established she had met the 26-week test as either an employed or a self-employed person.

[14] It asked the Authority to determine whether the available information was sufficient to show Ms Liu had met the test.

Evaluation

[15] The PLEP Act describes its purpose as setting minimum entitlements to parental leave, protecting the rights of employees during pregnancy and parental leave and to entitle "certain persons" to up to 26 weeks of parental leave payments. As already noted, the "persons" entitled to those payments are employees and self-employed people who meet the threshold criteria set by the statute.

[16] Parliament has intended these provisions to better support parents and others who have assumed responsibility for the care of a child in providing that care in the earliest stage of the child's life. For that reason its requirements should generally be interpreted generously, consistent with the interests of the individual families and the wider social benefits that result from that support being provided. However this does not give the government officials deciding on applications, or the Authority in reviewing those decisions, license to approve payments where an application has not reliably met the criteria set by the PLEP Act.

[17] The information from Ms Liu showed she and her family had gone through a difficult and worrying time during 2020 and into this year. The additional financial support that parental leave payments might provide was very much needed. However it could not be granted without satisfying the clear requirements of the PLEP Act. In this case, as the Ministry submitted, the evidence did not reliably establish those criteria had been met.

[18] Ms Liu's self-generated description of the hours and weeks said to have been worked was not sufficient to confirm a relationship of employment or self-employment had begun and endured in the way and for the period described in her application. The March 2020 employment agreement and the January 2021 invoice rendered on a self-employed basis were contradictory. And, as the Ministry submitted, even if Ms Liu had worked in either capacity for the company in the way she described, she had not established that the Covid-19 subsidies paid to her were for separate and additional weeks of work (as Ms Liu described) rather than overlapping with the other weeks of work that she said were paid for by the company on her January 2021 invoice.

[19] Accordingly, the evidence did not establish Ms Liu had met the threshold test and was entitled to the parental leave payments.

Outcome

[20] For the reasons given, I confirm the Ministry's decision to decline Ms Liu's application for parental leave payments.

Robin Arthur
Member of the Employment Relations Authority