

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 416
3295739

BETWEEN

QHK
Applicant

AND

MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Nigel Smith, counsel for the Respondent
Investigation:	By telephone conference on 24 June 2024 and on the papers
Submissions and further information received:	From the applicant on 27 June, 8 July and 11 July 2024 and from the respondent on 5 July 2024
Determination:	11 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] QHK applied for a review of a decision by the Ministry of Business, Innovation and Employment (the Ministry) that she was entitled to paid parental leave for only one month.

[2] QHK had unexpectedly become the primary caregiver for three of her mokopuna during February 2024. In the first month of caring for them, before she knew she was able to get paid parental leave (PPL) on becoming their primary caregiver, QHK also worked 65.5 hours. QHK promptly applied for PPL when she learnt she

could qualify for it. Her application said she intended stopping work from 12 March 2024.

[3] Inland Revenue administers the PPL scheme for the Ministry and refers difficult cases to the Ministry for decision. IRD did so with QHK's application because it considered her eligibility was not clear. After checking information about her circumstances and work, the Ministry assessed QHK's entitlement to PPL as being limited to the period from 12 February to 12 March 2024.

[4] The starting date of 12 February was based on information available at the time to the Ministry as the date on which QHK became the primary carer of those three tamariki. The Parental Leave and Employment Protection Act 1987 (PLEPA) states the leave for a primary carer who is not the biological mother, or the partner or spouse of the mother, commences on the date on which the employee becomes the primary carer of the child.¹

[5] The end date for PPL entitlement was deemed to be 12 March because, by then, QHK had done 65.5 hours of paid work in the month from 12 February. The PLEPA allows up to 64 hours of 'keeping in touch' (KIT) time during a period of paid parental leave. If that limit is exceeded, the employee is treated as having returned to work.² The PPL entitlement ends when the person returns to work.³

[6] As QHK had exceeded the 64 hours KIT limit, the additional one-and-a-half hours of paid work were treated as her returning to work. On that basis the Ministry assessed QHK's entitlement to paid parental leave as having ended.

[7] QHK sought a review of the Ministry's decision, asking the Authority to exercise its discretion to modify or reverse the Ministry's decision.⁴

The review

[8] The review began by speaking with QHK and Ministry counsel by telephone conference, confirming the review would be carried out 'on the papers' and arranging for further information and submissions to be provided. It continued with considering:

¹ Parental Leave and Employment Protection Act 1987, s 10(b).

² Section 71CE(3)(b).

³ Section 71L(1)(b).

⁴ Section 71ZB and Employment Relations Act 2000, s 161(1)(s).

- QHK’s application to the Authority;
- the Ministry’s statement in reply;
- documents provided by both parties;
- recordings of calls QHK made to IRD to discuss her PPL application;
- further emails from QHK providing background information that the Authority had asked for; and
- submissions from Ministry counsel setting out an analysis of the application of relevant sections of the PLEPA and case law.

[9] QHK also provided, at the Authority’s request, a copy of orders made by the Family Court in relation to the other five mokopuna who were already in her care.

Prohibition on publication of some information

[10] QHK’s actual name, and identifying details of her employment, are prohibited from publication. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the ER Act) to protect the prospect of direct or indirect identification of the names of the tamariki involved in the circumstances whereby QHK became their permanent primary caregiver.

The circumstances of QHK and the children in her care

[11] QHK is a sole parent and currently the primary caregiver of ten children. Two of those children are her own. Eight are her mokopuna, the children of her daughter.

[12] Five of those mokopuna came into her ongoing daily care during 2023. This arrangement has recently been confirmed by formal parenting orders mad by the Family Court. QHK’s daughter was unable to care for those five children due to health issues associated with methamphetamine addiction.

[13] Around the same time in 2023 the father of the other three children, who are triplets aged five, came to live in QHK’s house. Around nine months later QHK found out the father was also “on methamphetamine and had been taking the children to places where they were not safe”. He agreed to hand over full-time care of those three children to QHK and leave her house.

[14] He confirmed this arrangement in a letter written and dated 12 February 2024. He moved out of the house on 13 February 2024 after saying goodbye to the children.

[15] Around 11 March 2024 QHK learned she could be entitled to PPL for taking over care of the triplets. She contacted Inland Revenue about making an application and completed it on 13 March, providing supporting information and a statutory declaration. On the same day IRD referred the application to the Ministry to consider.

[16] QHK's employer had supported her making the PPL application and had arranged a replacement worker to cover her role for what she and her employer expected would be a 26-week period from 12 March. It was some additional hours QHK did on 12 March to arrange 'handover' to the covering worker that, unbeknown to QHK or her employer at the time, would later be identified by the Ministry as going over the permitted limit of KIT hours and ending her entitlement to PPL.

[17] In the weeks after making her application QHK checked on its progress by calling IRD and was told its assessment had been referred to the Ministry due to the complexity of the circumstances. By letter on 15 April 2024 the Ministry advised QHK she was entitled only to payments from 12 February to 12 March 2024 because, by that later date, she exceeded the permitted 64 KIT hours and was considered to have "returned to work" from 12 March.

[18] The Ministry has some discretion to waive irregularities in when and how applications are made.⁵ In its 15 April letter the Ministry said QHK's application for PPL was, based on its assessment of hours she had worked between 12 February and 12 March, made after she had returned to work. It exercised its discretion to waive what it called the irregularity of the lateness of the application, that is on 13 March, but said that discretion did not extend beyond procedural matters so could not be applied to waive the issue of her working over the 64-hour KIT limit.

[19] As part of the Authority's review QHK was asked to provide more information about what happened when the three children came into her care.

[20] Her statutory declaration, provided as part of her PPL application, had said the three children came into her care on 12 February. The Ministry's assessment proceeded on that basis. However, in information provided at the Authority's request, QHK gave more detail of what had happened. This included explaining that, although he had written the letter about handing over care on 12 February, the children's father had not

⁵ Parental Leave and Employment Protection Act 1987, s 71IA.

moved out until 13 February. He and QHK had arranged that he would wait until the children had returned home from school that day so he could say farewell.

[21] QHK said the agreement made with the children's father to leave the triplets with her meant that all eight siblings could remain together. As she summarised the situation at that time: "There was no plan made or any time to muck around. It was either I take them or they would end up in the system or probably dead".

[22] On this account, it was on 13 February that QHK became the permanent primary care giver of the children, not 12 February as understood by the IRD and Ministry officers gathering and assessing the information used to make the Ministry's decision on when her PPL entitlement began and ended.

Assessment

[23] The Ministry's submissions set out the process followed in gathering information and the steps followed in applying the relevant sections of the PLEPA to QHK's circumstances as the Ministry understood them. It also referred to the Ministry's exercise of its discretion to excuse some irregularities in making applications for PPL but noted that this could not be extended to circumstances where the criteria for entitlements continuing had not been met.

[24] However the Ministry's submissions also acknowledged that an issue had arisen over whether QHK's parental leave period should have begun on 13 February 2024, explained in the following way:

If this was the correct date, the relevant period of entitlement would have commenced on 13 February 2024. If she became the primary caregiver on 13 February 2024, any [paid] work performed on the 12th of February would not be counted for the purposes of section 71CE [relating to "keeping-on-touch days].

On the 12th of February [QHK] worked 5.5 hours. If she became the primary caregiver pursuant to section 7 on the 13th of February instead of the 12th February, these hours would not be counted and [QHK] would have worked a total of 60 KIT hours only. [QHK] would not have exceeded the 64 KIT hours threshold, would not have been deemed to return to work and would maintain her entitlement under section 71D.

[25] The Ministry's submissions also noted that the Authority's power to confirm, modify or reverse any decision of the Ministry is exercised under its statutory role to resolve matters such as this by establishing the facts, making a determination according

to the substantial merits of the case and acting as the Authority thinks fit in equity and good conscience, but consistently with relevant statutory provisions.⁶

[26] QHK's more detailed explanation of when she took permanent care of the three children, sought as part of the Authority's review and given in her emails of 27 June and 8 July 2024, is accepted.⁷ For the following reasons and as a finding of fact, the relevant date is 13 February 2024.

[27] The PLEPA gives this definition of a primary carer such as QHK:⁸

A person, other than the biological mother or her spouse or partner, who takes permanent primary responsibility for the care, development and upbringing of a child who is under the age of 6 years ...

[28] The words from this section particularly relevant here are "takes permanent ... responsibility". Those words refer to the positive action of taking over responsibility for the children and doing so on a permanent basis. On the information now available to the Authority from QHK, this occurred on 13 February as the children's father left the house. From then QHK had permanent responsibility for the care, development and upbringing of those three mokopuna. The father's agreement to allow this to happen, given in a letter signed late the night before, was not that action. Put simply, while the father's agreement was given in a letter on 12 February, it was not put into effect and did not become an "permanent primary responsibility" of QHK until 13 February.

[29] If there was any doubt as to those details, the benefit of that doubt appropriately fell to QHK. There was no dispute she was put in a sudden, unlooked for situation of having to take primary responsibility for those three children. It was not the more typical situation of a pregnant woman who has more time to gather the necessary information and make an application.

[30] QHK is in a situation where, in a judgment making parenting orders about her other five mokopuna, a Family Court judge has said:⁹

the Court must acknowledge not only on behalf of the children's whānau but also our community, heartfelt thanks for your commitment to the children who will become responsible, contributing adults in our community.

⁶ Employment Relations Act 2000, s 157 and s 161(1)(s).

⁷ Section 160(2).

⁸ Parental Leave and Employment Protection Act 1987, s 7(1)(c).

⁹ A reference to that judgment is not footnoted as the judgment is subject to restrictions under the Family Court Act 1980 ss 11B – 11D.

[31] QHK has stepped forward to meet obligations of whanaungatanga and whakapapa to her mokopuna, as PLEPA s 7(1)(c) allows. Confirming her entitlement to paid parental leave, for the reasons given above, is consistent with the specific provisions of the PLEPA and its kaupapa of better supporting those who have assumed responsibility for the care of children in the earliest stages of their life.

Outcome

[32] QHK was entitled to paid parental leave from 13 February 2024.

[33] The Ministry decision under review had two elements. Firstly, it accepted she had an entitlement to paid parental leave. Secondly, it decided this entitlement was limited to the period from 12 February to 13 March 2024.

[34] For the reasons given, this determination should be treated as confirming the Ministry's decision that QHK was entitled to paid parental leave but modifying its decision as to the relevant period. The relevant period is from 13 February 2024 until the end of the 26 weeks of primary carer leave or, for some other reasons, QHK, otherwise ceases to be entitled to the leave during that period.

[35] The Ministry is to make the necessary arrangements for payment of the leave.

Costs

There is no order for costs. Parties are presumed to bear their own costs for review under the PLEPA.

Robin Arthur
Member of the Employment Relations Authority