

Note: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 421
3276859

BETWEEN NRT
Applicant

AND MINISTRY OF BUSINESS,
INNOVATION, AND
EMPLOYMENT
Respondent

Member of Authority: Rowan Anderson

Representatives: Applicant in person
Amy Webster, counsel for the Respondent

Investigation Meeting: 26 June 2024 by AVL

Submissions and responses received: Up to and including 4 July 2024 from Applicant
Up to and including 4 July 2024 from Respondent

Determination: 12 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] NRT seeks a review of a decision by the Ministry of Business, Innovation and Employment (MBIE) declining their application for parental leave payments under the Parental Leave and Employment Protection Act 1987 (the PLEPA).

[2] NRT's application was declined on the basis that NRT continued to work from the date that they became the primary carer for the relevant child, that child being NRT's grandchild.

[3] MBIE initially accepted that NRT met the parental leave payment threshold and that NRT was eligible for parental leave payments on the basis that NRT assumed primary care for the child from 15 December 2023. However, MBIE contended that Inland Revenue's decision declining NRT's application was correct because NRT continued on annual leave and/or returned to work after the parental leave payment period began on 15 December 2023.

[4] Following the provision of further information during the Authority's investigation, and for reasons recorded in this determination, MBIE's initial position changed (in my view appropriately). MBIE now contends that NRT did not become the child's primary care on 15 December 2023, but instead that that occurred at some stage between December 2023 and June 2024. It says that, having the benefit of NRT's further evidence, it accepts that NRT became the primary carer of the child from 1 April 2024.

Non-Publication

[5] I consider, having regard to the nature of the evidence in this matter relating to family arrangements and circumstances, that it is appropriate that an order for non-publication be made as to the name and any identifying details of the applicant. I do not consider there to be any significant wider public interest in the publication of NRT's identify. MBIE does not oppose the order being made.

[6] I order a prohibition on the publication of the name and any identifying details of NRT. This order is made pursuant to clause 10 of schedule 2 of the Employment Relations Act 2000.

[7] A random generator has been used to refer to the applicant in these proceedings. NRT is a randomly generated name and does not resemble the name of the applicant.

The Authority's Investigation

[8] A case management conference was held on 13 March 2024. It was agreed at the case management conference that the facts presented by NRT in the statement of problem were not contested and would be relied upon. A timetable was put in place for the exchange of any written submissions.

[9] On 8 April 2024, the parties were invited to provide any additional information and/or documents as to the timing of the assumption of primary care of the child. Following the provision of that information, I considered it necessary for a short investigation meeting to be convened for the purposes of asking NRT questions as to the circumstances related to the application and as to issues relevant to when NRT became the primary carer of the child.

[10] An investigation meeting was held, by telephone, on 26 June 2024. NRT answered questions under affirmation at the investigation meeting. The parties were also provided the opportunity to make any submissions, including in writing following the investigation meeting.

[11] As permitted by s 174E of the Employment Relations Act 2000 this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background and facts

[12] The facts relevant to the application for review, and to my determination, are largely uncontested. I am satisfied of the following matters:

- (a) NRT's grandchild was born on 4 July 2023.
- (b) NRT was employed on a permanent basis working 30 hours a week prior to 15 December 2023.
- (c) The child initially came into the care of NRT on or about 15 December 2023.
- (d) NRT continued to work in their employment until taking a period of annual leave between 24 December 2023 and 14 January 2024.
- (e) NRT applied for parental leave payments on 16 January 2024 on the basis that they assumed primary care of the child on 15 December 2023.
- (f) On 15 January 2024, NRT wrote to their employer seeking parental leave. NRT returned to work for the period 15 January 2024 to 29 January 2024.
- (g) On 16 January 2024, NRT's employer advised that they were unable to keep NRT's role open during any period of parental leave.
- (h) On 18 January 2024, Inland Revenue advised NRT that it was unable to process NRT's application for parental leave payments because NRT had not provided the correct evidence of care.

- (i) NRT provided further information in support of their application on 24 January 2024.
- (j) On 2 February 2024, Inland Revenue declined NRT's application because NRT "...continued to work from the date the child came into [NRT's] care up to 29 January 2024". NRT's application for parental leave payments was declined on the basis that NRT returned to work after having assumed permanent primary care for the child.

[13] NRT provided a statutory declaration, made on 23 January 2024, confirming that NRT had permanent primary responsibility for the care, development and upbringing of the child. The statutory declaration recorded that the child came into NRT's care as of 15 December 2023. NRT submitted that they unexpectedly became the child's primary carer on 15 December 2023 and applied for the unsupported child benefit.

[14] NRT, in answering questions at the investigation meeting, provided additional evidence. NRT's evidence is that the child came into their care following some concerns as to the child's welfare. Those concerns initially arose when the child and their mother were residing in NRT's home. When the child was approximately five months of age the issues became more serious in NRT's view and arrangements were trialled whereby NRT would look after the child.

[15] NRT said that when they returned to work after the Christmas period it was clear that continuing to both work and care for the child would not be possible. When NRT returned to work, they did so primarily because their employer wanted a handover completed.

[16] By or about approximately 15 December 2023, the child's mother was residing elsewhere while the child remained with NRT. NRT's evidence was that the arrangements were at that stage not intended to be permanent. The nature of the arrangement then changed at some point and NRT's evidence was that the child was, at the time of giving evidence, in NRT's care for the foreseeable future. Albeit that there was some uncertainty as to when the nature of the arrangements changed, NRT's evidence was that there was a change by Easter of 2024 following some consideration of the matter and a family gathering.

The approach to parental leave payment issues

[17] Section 71ZB of the PLEPA provides that application may be made to the Authority by a relevant person for review of the decision made by the department, including as to the person's entitlement to parental leave payments.¹ The Authority may confirm, modify, or reverse the decision of the MBIE.²

[18] In undertaking such a review, any discretion the Authority may exercise must be exercised in a principled way. It is not for the Authority to re-write the legislation and it must be approached based on the relevant principles of statutory interpretation. The Authority is unable to exercise discretion to simply approve an application where the person does not meet the eligibility requirements of the PLEPA.

[19] The Full Court of the of the Employment Court has provided guidance in the form of a roadmap for assessing eligibility and entitlement to receive parental leave payments under the PLEPA.³ That involves a five-step assessment process dealing with eligibility, entitlement, application, start date, and end date of the parental leave payment period.

Analysis and discussion

The initial application

[20] The issue in this matter would ultimately have been a narrow one that related to the requirements of the PLEPA in respect of entitlement based on whether NRT remained employed without taking parental leave⁴ or "returned to work" for the purposes of s 71L(1)(b) of the PLEPA after having become the primary carer of the child. In other words, based on the application as initially made, the question would have been whether NRT's ongoing employment or return to work had the effect of disentitling NRT.

[21] The Full Court in *MBIE v Duan*, albeit while dealing with an application involving a birth mother, considered the meaning of the term "returns to work" for the

¹ Parental Leave and Employment Protection Act 1987 (PLEPA), s 71ZB(1)(a).

² PLEPA, s 71ZB(3).

³ *Ministry of Business, Innovation and Employment v Wenting Duan* [2023] NZEmpC 232 (*MBIE v Duan*) from [23].

⁴ As per the entitlement requirements at s 71D(1)(b) of the PLEPA.

purposes of ss 71I and 71L of the PLEPA. Having considered the term as a matter of statutory interpretation, the Full Court found the term meant:⁵

...

- (a) in the case of a biological mother or their spouse or partner, the date on which the person returns to perform paid work after the birth of the child; and
- (b) in the case of non-biological primary carers, the date on which the person returns to perform paid work after becoming the primary carer of the child.

[22] The impact of the above was that while Ms Duan met the eligibility requirements as set out at s 71CA, her return to work after the birth of her child had the effect of disentitling her because the entitlement under s 71D required she not be employed or that she be on parental leave from her employment during the period of eligibility.⁶ Ms Duan was also not entitled to parental leave payments because the eligibility period started following the birth of the child and ended when she “returned to work” following the birth of the child.

[23] NRT’s application proceeded on the basis that NRT assumed primary care of the child on 15 December 2023. Following the reasoning of the Full Court, NRT’s application for parental leave payments could not have been granted given that the parental leave payment period would have begun on 15 December 2023 but that either NRT remained in employment and did not take parental leave from their employment,⁷ and otherwise on the basis that NRT’s entitlement would have ended when they returned to work on 15 January 2024.

[24] The disentanglement would have occurred despite NRT’s return to work being brief in nature and for the purposes of what NRT understood to be a duty to work out a contractual notice period. Such disentanglement would appear to be inherently unfair, particularly where the assumption of primary care came about with little or no notice. However, during my investigation, it became apparent that the date on which NRT became the primary carer of the child may not have been 15 December 2023. While NRT no doubt took care of the child from that date, it was unclear whether that arrangement met the meaning of primary carer for the purposes of the PLEPA.

⁵ *MBIE v Duan* at [39] to [41].

⁶ *MBIE v Duan* at [44].

⁷ The second limb of the entitlement test at s 71D(1)(b) of the PLEPA requires that, during the period in relation to which the person receives parental leave payments, that the person either not be employed or self-employed, or that the person takes parental leave.

When did NRT become the primary carer?

[25] The meaning of “primary carer” for the purposes of the PLEPA is set out at s 7 of the PLEPA. For present purposes,⁸ for NRT to be considered the primary carer, they would have to have had taken “...permanent primary responsibility for the care, development, and upbringing of a child who is under the age of 6 years...”⁹

[26] While NRT had been in receipt of unsupported child benefit from 15 December 2023, I do not consider that determinative of the time at which NRT became the primary carer of the child for the purposes of the PLEPA, including because of the need for “permanent” primary responsibility to have been taken. Further, while NRT provided a statutory declaration, I do not consider that conclusive of the issue either.

[27] MBIE, having the benefit of the evidence given by NRT at the investigation meeting, now takes the position that NRT did not become the primary carer of the child on 15 December 2023. While noting the circumstances were such that it would not always be possible to identify the specific time at which a care arrangement became “permanent”, MBIE submitted that it was willing to accept that occurred on 1 April 2024.

[28] I find that NRT only took permanent primary responsibility for the child as of 1 April 2024. The time at which NRT became the primary carer of the child was in fact after NRT had completed working out their ‘notice period’. I find it was only at that time that it became clear that the arrangement whereby NRT was to have primary responsibility for the child would be permanent rather than temporary.

[29] Having regard to the Authority’s power to modify any decision, I proceed to consider this matter on the basis that NRT’s application is taken to be amended to reflect that they became the primary carer of the child as of 1 April 2024.

Step 1 – eligibility

[30] NRT’s evidence is that they worked 30 hours per week until the time at which their employment ended. MBIE accepts that NRT meets the eligibility requirements of the PLEPA.

⁸ NRT not being the biological mother or her spouse or partner.

⁹ PLEPA, s 7(1)(c).

[31] I am satisfied that NRT is eligible for parental leave payments on the basis that NRT meets, at the least, the 12-month parental leave threshold test for an employee as provided for at s 2BA(1)(b) of the PLEPA.

Step 2 – entitlement

[32] Such that NRT, on becoming the primary carer of the child on 1 April 2024, was not employed or self-employed, or had otherwise taken parental leave from their employment or self-employment,¹⁰ I am satisfied that NRT is entitled to parental leave payments.

Step 3 – application

[33] I am satisfied that NRT made an application in accordance with s71I of the PLEPA.

Steps 4 and 5 - start and end of period

[34] I find that NRT is entitled to parental leave payments from 1 April 2024, that being the date on which they became the primary carer in respect of the child.¹¹

[35] I find that the end of the parental leave payment period will be either 29 September 2024, or otherwise at an earlier date should the period end due to either NRT returning to work or upon their ceasing to be the primary carer of the child.¹²

Conclusion and orders

[36] NRT’s application for parental leave payments is taken to be amended to reflect that they became the primary carer of the child from 1 April 2024.

[37] NRT’s application, in its amended form, is to be treated as approved and NRT is entitled to parental leave payments from 1 April 2024.

Rowan Anderson
Member of the Employment Relations Authority

¹⁰ The eligibility requirements are set out at s 71D of the PLEPA.

¹¹ PLEPA, s71K(1)(b).

¹² PLEPA, s71L(1)(b) and (c).