

This determination includes an order prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 433
3278559

BETWEEN SRF
Applicant

AND MINISTRY OF BUSINESS
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Helen Doyle

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

Investigation Meeting: On the papers

Submissions Received: 4 June from the Applicant
27 May and 24 June 2024 from the Respondent

Determination: 19 July 2024

DETERMINATION OF THE AUTHORITY

Non publication

[1] I intend to make an order under clause 10 (1) of schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting from publication the name of the applicant.

[2] I have had regard to the nature of the application and the purpose and outline of the Parental Leave and Employment Protection Act 1987 (PLEPA). The names of those who review decisions about entitlements under the PLEPA are unlikely to be of interest to the wider public. Publication could impact other family members including children.

[3] MBIE has adopted a neutral position and do not therefore oppose an order for non-publication.

[4] I shall refer to the applicant as SRF which is a randomly generated three letter string.

Employment Relationship Problem

[5] SRF has applied to the Authority for a review of the Ministry of Business, Innovation, and Employment (MBIE) decision relating to the amount of the paid parental leave payments (PPL) made to her.¹

[6] SRF was paid her final pay in two payments on 25 and 31 July 2023 and says the payment was not properly accounted for in the calculation of her entitlements. She would like her PPL entitlement to be re-calculated.

Authority investigation

[7] During a case management conference it was agreed that the review of MBIE's decision could be determined on the documents already before the Authority including the statement of problem, statement in reply and attachments to them.² Submissions were timetabled and received from SRF and MBIE.

The decision under review

[8] SRF worked part-time before her paternal leave. Her estimated date of delivery (EDD) was 20 July 2023 and her baby was born on that date.

[9] SRF raised concerns with Inland Revenue (IR) on 31 July 2023 about the amount of her PPL payments and was advised on 4 August 2023 that her remaining payments would increase to \$958.68 gross per fortnight.

[10] On 11 August 2023 SRF telephoned IR to query the payment again and explained that the two payments received in late July 2023 related to her final pay period and she believed they should be included in the calculation of her PPL entitlements. It is likely that IR understood from the telephone call that the payments were for hours worked.

[11] On 29 August 2023 IR referred the matter to MBIE for a decision. The Authority understands it is standard practice for complex cases to be referred to MBIE

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

² Case management conference 6 May 2024.

as the department is ultimately responsible for administration of the Parental Leave and Employment Protection Act 1987 (PLEPA). The referral was made because SRF was asking for payments received after her EDD to be taken into account and IR believed that one of the payments after that date was a lump sum leave payment.

[12] A Labour Standards Officer from MBIE conducted the review and explained her decision in a letter to SRF dated 18 October 2023.

[13] For current purposes the material aspects of the decision are as follows:

- (a) Only gross earnings that are earned prior to the EDD can be taken into account.
- (b) Wages and public holiday for the payment on 23 July 2023 could be counted. Two days of leave only were possible between the last day of work for SRF and her EDD. Adding up the payment for wages, public holiday and possible annual leave resulted in a figure of \$834.47. This pay did fall within the highest 26 weeks of earning and made a difference to SRF's payment amount.
- (c) The payment on 31 July 2023 cannot be considered towards the gross earnings as this leave was "taken" and as such earned after the EDD.
- (d) The PPL entitlement was assessed by MBIE at \$480.01 gross per week and thereafter actioned by IR.

The issues

[14] The Authority may on a review confirm, modify, or reverse the decision MBIE made.³

[15] The Authority needs to review the calculation of SRF's PPL entitlement.

³ PLEPA section 71(3).

Material background

[16] On 11 June 2023, SRF applied for paid parental leave (PPL) by submitting an application to IR. She provided her EDD as 20 July 2023 and applied for her PPL payments to start on that date.

[17] On 12 June 2023, IR approved the application.

[18] On 17 July 2023, SRF worked her final day before going on parental leave.

[19] On 20 July 2023, SRF had her baby and started receiving PPL entitlements.

[20] Prior to commencing parental leave, SRF worked for her employer as a process worker. She was employed to work three days a week, 3.5 hours a day, which equated to 10.5 hours a week or 21 hours a fortnight.

[21] There is some dispute between the parties as to whether SRF's usual days of work were Monday, Friday and either Wednesday or Thursday. Ms Webster placed reliance on what the payslips show for payment for public holidays in assessing the usual day of work. SRF is correct that her employment agreement does not specifically refer to her days of work. It provides in clause 6 under hours of work that they are to be generally worked between the hours of 6 am and 7 pm Monday to Friday. Clause 6.1 provides that no one day of a week can be considered a permanent workday.

[22] SRF was offered and accepted additional work, which resulted in her working inconsistent hours each week. The highest number of hours in a fortnight was 41.63 hours in the pay period ending 8 January 2023.

[23] SRF was paid on a fortnightly cycle and records were kept by her employer.

[24] In the weeks leading up to her EDD and the start of her parental leave she did not take any annual leave.

[25] SRF believed her annual leave would "lose its value" once she went on parental leave and asked for all her annual leave to be paid to her.

[26] Her employer agreed and paid out the annual leave in two tranches:

- (a) 10 hours on 23 July 2023; and
- (b) 45 hours on 31 July 2023.

How should SRF's PPL entitlements be calculated?

[27] SRF was entitled to receive the lesser of \$712.17 per week and the greater of ordinary weekly pay (OWP) or her average weekly income (AWI).⁴

[28] Neither party's calculations resulted in \$712.17 or higher, so the focus for the Authority in reviewing the payments is the greater of OWP or AWI.

Cashed out annual holidays

[29] SRF submits that if she had been told she was only eligible for one week of annual leave to be cashed out and the rest had to be taken her final pay would have been different. She says that annual leave would have been taken before her EDD and she could not have worked. The impact of that on her parental leave calculation would have been a positive one.

[30] I agree with MBIE's submission that an employer could not be expected to have advised SRF about any impact on the parental leave payment with the cashing up of leave. I also agree with Ms Webster's submission that an employer could be expected to decline a request to cash up more than one week's leave.

[31] Ms Webster accepts that the Authority has in some matters exercised its discretion where there was a direct causal connection between an unlawful act by an employer, such as an unjustified dismissal, and the applicant not meeting the 26-week eligibility test.⁵ There has also been an exercise of discretion in an applicant's favour where an employee has received incorrect advice from IR and where there was incorrect advice from a third party and subsequent timing issues.⁶

[32] For a direct causal connection to be established the Authority would need to be satisfied that the employer agreed to cash up leave in time to enable SRF to have taken annual leave for the last two weeks of employment. Further, that the annual leave would likely have been approved if requested.

⁴ PLEPA section 71M as at 1 July 2023.

⁵ *Fitzek v MBIE* [2021] NZERA 28.

⁶ *Kerapa v MBIE* [2016] NZERA Christchurch 41, *Murphy v MBIE* [2022] NZERA 211, *Stirling v MBIE* NZERA 576, *Chambers v MBIE* [2021] NZERA 303 and

[33] There appears from the documentation a dispute about when there was a request to cash up leave. SRF submits that she made one request for all her leave to be cashed out as a final payment and due to giving birth on 20 July 2023 the final payment for that fortnight was not until 23 July 2023 and she rung the office to ask why the pay was not correct.

[34] The information provided by the employer to MBIE was that SRF asked for one week cashed up annual leave initially and the remainder was requested later by her after the 23 July 2023 pay run resulting in the final payment of cashed up leave on 31 July 2023.

[35] Even if a direct causal connection could be established from further information obtained and the Authority was to treat the final two weeks as leave, Ms Webster submits it would not provide a result more than what MBIE has accepted is owed once required amendments are made to SRF's calculations.

[36] There are some difficulties with SRF's calculations of two weeks leave for the final pay period. It is accepted that a week should have been calculated at 10.5 hours. The employer from the payroll information appears to account for SRF's variable hours differently for public holidays and leave. Public holidays use average hours at normal hourly rate. For Matariki SRF was paid for a 5.06 day at \$28 hour but the week of cashed out leave was 10 hours at \$40.48. As Ms Webster sets out in her submission the same result is achieved either way.

[37] It does seem from SRF's first table of calculation that there is an attempt to have both higher hourly rate and higher average hours which is not correct.

[38] SRF also calculated two full weeks of leave which seems to include the payment for Matariki which is not correct because annual leave and a public holiday cannot be received for the same day.

[39] There is a difficulty with calculating a full week of leave for the second week because the EDD was part way through that week. For the calculation of AWI the relevant 52-week period is that period immediately preceding the EDD.⁷

⁷ PLEPA 71CAA (2)(a).

[40] SRF says that she would have taken leave when an audit on 13 July that she was to attend was cancelled at short notice as the auditor was sick. The audit was completed five weeks after the baby was born and SRF attended that audit as part of her staying in touch hours. I accept that suggested her presence at the audit was important.

[41] SRF in her submission states that that she was expected to work 7.5 hours for the audit and those hours should have been paid as annual leave as she was expected to work. The following day was a public holiday.

[42] Ms Webster submits there is some difficulty with that approach. Arguably if the shift is cancelled there is no work to take leave from. Even if annual leave had been requested for that day it is not sufficiently clear that it would have been granted.

[43] Those issues impact the calculations SRF has made to arrive at an AWI of \$536.17. With the amendments made to the calculations if annual leave was taken for the final two weeks Ms Webster arrives at a total of \$708.38 gross compared to SRF's \$1,297.67. Ms Webster's calculations exclude annual leave for 13 July 2023.

[44] I conclude that MBIE's calculations putting for the moment 13 July 2023 to one side are correct. They show that if the final two weeks were treated as leave it would not produce a result more than what MBIE accept is owing.

[45] I am not persuaded if the request for cashed up leave had been agreed before 13 July 2023 it is more likely annual leave would have been agreed to by her employer for that day. Other determinations where there has been the exercise of a discretion more usually about eligibility are distinguishable to the current situation.

[46] I do not consider that I need to request more information in those circumstances.

Calculation of OWP

[47] OWP is defined in the PLEPA and is calculated in accordance with the formula in s 8 of the Holidays Act 2003.⁸

⁸ PLEPA section 71C.

[48] The formula to calculate OWP is $(A - B) \div 4$.⁹ A is the employee's gross earnings for the 4 calendar weeks before the end of the pay period immediately before the calculation is made. B is the discretionary payments.¹⁰

Plain words approach

[49] In the decision under review calculations for OWP were undertaken in accordance with the plain words of s 8 in the Holidays Act using the last four weeks of SRF's employment for pay periods 9 July and 23 July 2023.

[50] The payment received for the fortnightly pay period 9 July 2023 was \$847 gross for 30.25 hours of work.

[51] One payment was received for the pay period 10 July – 23 July 2023. That consisted of payment for 12.33 hours wages, 10 hours annual leave and 5.06 hours for the public holiday for Matariki.

[52] The second payment received on 31 July 2003 was \$1,847.53 gross which was 45 hours of cashed out annual leave. The meaning of gross earnings in the Holidays Act specifically excludes payment for annual holidays paid out under s 28B of the Act.¹¹

[53] The approach was taken that if SRF had been informed by her employer that she could not lawfully cash up more than one week of annual leave she would have chosen to take what annual leave she could prior to her EDD. This approach was not altogether inconsistent with what SRF now suggests in her submission, but the calculation was more limited. Two days on that basis were calculated as annual leave. SRF's last day of work was 17 July 2023 and the following two days 18 and 19 July 2023 were calculated on the basis that they were annual leave and the public holiday payment was also taken into account during this period. This resulted in an OWP of \$420.37.

Purposive approach

[54] SRF's parental leave started part way through the pay period ending 23 July 2023. I accept as Ms Webster submits that the final period of work is not likely to

⁹ Holidays Act 2003 s 8(contains the formula).

¹⁰ Holidays Act 2003 s 8(1)(c)(i) to (iii).

¹¹ Holidays Act 2003 s 14 (c)(iv).

reflect hours of work in that situation and could potentially undermine the purpose of the formula in the Holidays Act.

[55] SRF's argument with necessary amendments that the final two weeks of work is leave would result in OWP of \$388.85.

[56] A purposive approach to interpretation would result in the calculation being undertaken in the pay period in which the first day of parental leave actually falls. This would ensure a part worked week before going on leave is put to one side. I consider that is the correct approach. Ms Webster supported such an approach in her submissions.

[57] The pay periods for 25 June 2023 and 9 July 2023 result in total gross earnings of \$1,986.04 which divided by four is \$496.51 which is the OWP.

AWI calculations

[58] The AWI is calculated by dividing the gross income earned by SRF in her highest paid 26 weeks in the 52 weeks before EDD by 26.¹² As SRF is paid fortnightly the formula used is gross income in the highest paid 13 pay periods divided by 26.

[59] The only disagreement is whether the 13th highest pay period was 19 March 2023 or 23 July 2023. There is no issue with the other 12 pay periods.

[60] Accepting SRF's argument about annual leave with some necessary amendments and putting 13 July 2023 to one side the final pay period ending 23 July 2023 is not one of the highest. That means 19 March 2023 needs to be assessed in the calculation.

[61] The total of gross income for the 13 highest paid fortnightly periods is \$12,462.24 which divided by 26 is \$479.32.

[62] OWP is the greater of the two because it is \$496.51 and that is what SRF was entitled to receive as her PPL entitlement.

¹² PLEPA section 71CAA.

Conclusions

[63] The decision of MBIE is modified to the extent that the PPL entitlements are increased from \$480.01 per week to \$496.51 per week.

[64] MBIE has agreed if this is the result arrived at that it will ensure IR recalculates and pays SRF for the underpayment. It is to make the necessary arrangements for this to occur.

Costs

[65] The parties are presumed to bear their own costs. I therefore make no order as to costs.

Helen Doyle
Member of the Employment Relations Authority