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

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 601
3311100

	BETWEEN	MLA Applicant
	AND	MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Respondent

Member of Authority:	Philip Cheyne
Representatives:	Applicant in person Rochelle Hill, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions:	From the respondent on 23 September 2024
Date of Determination:	9 October 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] MLA applied for parental leave payments in July 2024. Inland Revenue (IR) declined the application by letter dated 9 July 2024, based on its decision that MLA had not worked at least 26 weeks of the 52 weeks before her expected due date.

[2] MLA seeks a review of that decision.

The Authority's Investigation

[3] I convened a case management conference with MLA and with counsel for MBIE. As requested, MLA provided some further information. MBIE lodged submissions in response.

[4] This determination is based on the documents lodged with the application, the reply, the further information and counsel's submissions.

Non-publication

[5] I raised with MLA and MBIE whether it there should be a non-publication order for MLA.

[6] Counsel submits that circumstances here do not meet the test set out in *MW v Spiga Limited*.[1] That case concerned non-publication of the employee's name, on the employee's application to the Authority to enforce payments under a mediated record of settlement, entered into under s 149 of the Employment Relations Act 2000. Both mediation and the record of settlement had been confidential. The Employment Court more generally reviewed the approach to non-publication in the employment jurisdiction. The Court reinforced the principal of open justice and the need for sound reasons to depart from that approach.

[7] MLA is entitled to protect her private information about the circumstances of her employment and her financial position, provided in support of her application to IR. That should not be undermined by the present application to review that decision.

[8] There is no public interest in MLA's identity as the person seeking a review of IR's decision about her eligibility for paid parental leave. There may be public interest in whether MLA's circumstances entitle her to payment of paid parental leave. That public interest is met by the reference to those circumstances, alongside non-publication of the applicant's name.

[9] These are sound reasons to abrogate the principal of open justice by prohibiting the publication of the applicant's name. I will refer to her as MLA, letters which have been randomly generated.

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[1] *MW v Spiga Limited* [2024] NZEmpC 147.

Assessing MLA's eligibility and entitlement for paid parental leave

[10] Part 7A of the Parental Leave and Employment Protection Act 1987 (the PLEPA) is headed "Payment for parental leave". Its purpose is to entitle certain persons who become the primary carer of a child and who stop working or take leave, to up to 26 weeks of parental leave payments out of public money.[2] Such persons have to meet the eligibility and entitlement provisions.

[11] Under s 71CA of the PLEPA, an eligible employee means a person who is the primary carer in respect of a child and who meets the parental leave payment threshold test.

MLA is the primary carer

[12] MLA is the biological mother who was pregnant and gave birth to her child. She is therefore the primary carer of the child in accordance with s 7 of the PLEPA.

The parental leave payment threshold test

[13] An employee meets the test if they will have been employed as an employee for at least an average of 10 hours a week for any of the 26 of the 52 weeks immediately preceding the expected delivery date of the child.[3]

[14] The phrase "employed as an employee" is not separably defined. However, "employee" is defined by the PLEPA as a person who is an employee within the meaning of s 6 of the Employment Relations Act 2000 (the ERA).

[15] To paraphrase the ERA definition, "employee" means a person employed by an employer to do any work. That includes a person intending to work. That in turn means a person who has been offered and accepted work as an employee.[4]

MLA was an employee before 15 January 2024

[16] MLA had not worked in New Zealand before 15 January 2024.

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[2] Parental Leave and Employment Protection Act 1987 s 1A(c) and s 71A.
[3] Parental Leave and Employment Protection Act 1987 s 2BA(4).
[4] Employment Relations Act 2000 s 5.

[17] In her application, MLA said she had joined work on 15 January 2024 and her baby was due on 7 July 2024. Inland Revenue (IR) declined the paid parental leave application as MLA had not worked long enough. IR advised MLA that she needed to have worked at least 26 weeks of the 52 weeks before her expected due date. However, 15 January 2024 – 7 July 2024 is only 24 weeks 6 days.

[18] MLA was offered work as an employee on 14 April 2023. She accepted the offer on 17 April 2023. The offer was for a permanent .9FTE position, due to start on 4 September 2023. From April 2023, MLA was a person intending to work, so was an employee as defined by the ERA.

[19] MBIE submits that the existence of the employment relationship is not sufficient for MLA to have been employed as an employee for at least an average of 10 hours a week for any of 26 of the 52 weeks immediately preceding 7 July 2024. MBIE says that the employee must have "actually worked" each particular hour and week for it to count towards eligibility. I am referred to *Air New Zealand Ltd v McQueen* in support.[5]

[20] *McQueen* was a case about the meaning of s 23(b) in Part 3 of the PLEPA: whether the words "for the immediately preceding 12 months in the employment of the same employer for at least 10 hours in each week" meant the actual performance of work over that time or just required the existence of a contract of employment. The Employment Court held that actual work was required to entitle an employee to extended leave from their employment.

[21] *McQueen* construed the meaning of s 23(b) of the PLEPA as it was prior to amendments to that section effective from 1 July 2002 and from 1 April 2016. Also from 1 July 2022, the ERA definition of "employee" was inserted in the PLEPA in place of the PLEPA definition that did not include persons intending to work.[6] The phrase "employed as an employee" used in the payment threshold test introduced on 1 April 2016 differs from the phrase considered in *McQueen*. *McQueen* is not binding authority for the interpretation and application of Part 7A.

[22] MBIE also says that s 72A of the PLEPA determines whether each week can be counted towards the parental leave threshold test of any 26 weeks of the preceding 52 weeks.

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[5] *Air New Zealand Ltd v McQueen* [2001] ERNZ 731.
[6] Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002 s 7.

MBIE says that only if an employee's absence falls within the circumstances set out in s 72A can a non-worked week count towards the "any 26" requirement for the threshold test.

[23] As first enacted, s 72A included at subsection (1) a requirement to treat an employee as meeting the average hours a week threshold if they were in the employment of the employer for no less than an average of 10 hours a week and either no less than 1 hour every week or no less than 40 hours in every month.[7] That subsection was repealed on 1 April 2016.

[24] Section 72A(2) still provides that an employee is treated as being in the employment of an employer for an hour if they would have been working but for a range of specified circumstances for "that hour". Section 72A(2) deals with whether a specific unworked hour should nonetheless be included in calculating the average of 10 hours a week. It is not directed at identifying whether the employee will have been employed as an employee for any 26 of the 52 weeks preceding the expected delivery date of the child.

[25] MLA satisfies the requirement for an average of 10 hours a week without needing to apply s 72A(2) of the PLEPA as she actually worked 40 hours a week from the date she started work.

Summary and orders

[26] Section 71D confers entitlements to parental leave payments on eligible employees.[8] MLA was an eligible employee.

[27] MLA took parental leave. She was entitled to payment for the period she took leave. MLA told me that she returned to work on 10 August 2024 as she had been declined the parental leave payment.

[28] Section 71L of the PLEPA provides that parental leave payments end after 26 weeks or the date on which the person returns to work as an employee, whichever is earlier. I accept that MLA had to return to work because her application for the parental leave payment was

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[7] Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002 s 20.
[8] Parental Leave and Employment Protection Act 1987 s 71B((3A).

declined. However, the options to the Authority are to confirm, reverse or modify the decision made by IR.[9]

[29] MBIE submits that if MLA was entitled to a parental leave payment, s 71L of the PLEPA means that her entitlement must have ended when she returned to work. I agree.

[30] IR's decision to decline MLA's paid parental leave application is reversed. MLA is entitled to the payment from when she commenced leave until the date of her return to work. Leave is reserved if there is any difficulty with identifying the exact dates or calculation of the amount.

[31] MLA represented herself, so there is no issue about costs.

Philip Cheyne
Member of the Employment Relations Authority

[9] Parental Leave and Employment Protection Act 1987 s 71ZB(3).