

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 178
3336000

BETWEEN

QXC
Applicant

AND

MINISTRY OF BUSINESS,
INNOVATION, AND
EMPLOYMENT
Respondent

Member of Authority: Rowan Anderson

Representatives: Applicant in person
Greg La Hood, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and responses received: Up to and including 18 March 2025

Determination: 27 March 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

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

[2] QXC's application was declined on the basis that any entitlement ended when she returned to work after the birth of her child. QXC says that she would not have returned to work if incorrect information had not been provided by Inland Revenue when she made enquiries in advance of making her application for paid parental leave.

[3] MBIE contends that it was correct to decline the application because QXC's entitlement ended when she returned to work following the birth of her child and submits that it had no statutory discretion to approve the application.

Anonymisation

[4] I consider that, having regard to the nature of these proceedings, it is appropriate for the applicant's name to be anonymised. A random generator has been used to refer to the applicant in these proceedings. QXC is a randomly generated name and does not resemble the name of the applicant.

The Authority's Investigation

[5] A case management conference was held on 3 February 2025. It was agreed at the case management conference that further information, including relevant audio recordings related to the application, would be provided by the parties. A process for providing submissions was also discussed.

[6] Submissions were provided and the parties confirmed that they were content for the Authority to determine the matter on the papers without the need for an investigation meeting.

[7] 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

[8] The facts relevant to the application for review are largely uncontested. I am satisfied of the following matters:

- (a) QXC called Inland Revenue on 6 June 2024 to make enquiries about paid parental leave.
- (b) QXC's child was born on 14 June 2024.
- (c) Following the birth of her child, QXC first returned to work on 24 June 2024.
- (d) QXC's partner finished work on or about 1 August 2024.
- (e) Between 24 June 2024 and 2 August 2024 (inclusive) QXC worked a total of 29.75 hours.
- (f) An application for paid parental leave was made on 2 August 2024.
- (g) The application for paid parental leave was declined on 8 August 2024 on the basis that QXC did not stop work as soon as her child was born and did not apply before going back to work.

[9] The phone call with Inland Revenue on 6 June 2024 involved QXC asking whether paid parental leave would have to start from the date of her child's birth, or whether it could start at a few weeks later. She explained that her partner was going to apply for paid parental leave but that he was away completing work before doing so and that there would be a delay. QXC was advised that her partner could not apply for paid parental leave but that the entitlement could transfer to them from her. She explained she didn't want to take parental leave, and she would continue to work.

[10] During the call, QXC was told application could be made up to a year following the birth of the child and the application could be made whenever she wanted after the baby was born without conditions.

[11] Other communications relating to the matter were provided to the Authority. I do not consider those communications critical to the issues for determination and therefore I do not record them here.

The approach to parental leave payment issues

[12] 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

[13] 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.

[14] 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.

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].

Analysis and discussion

[15] The Full Court in *MBIE v Duan* considered the meaning of the term “returns to work” for the 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:⁴

...

- (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.

[16] 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.⁵ 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.

[17] In *MBIE v Duan* the Court also said:

[37] ...The Court agrees with MBIE’s interpretation of s 71K, being that it prescribes the criteria for an entitlement, requiring certain persons to do things at certain times to receive that entitlement. Section 71K does not impose when a person is to take parental leave. However, to be entitled to receive Government parental leave payments, their leave must align with the timing set out in s 71K.

[18] Having regard to the above, the starting point is that QXC is not entitled to parental leave payments under the PLEPA. Further, I consider the advice given by Inland Revenue on 6 June 2024 does not have the direct effect of creating an entitlement under the PLEPA where one does not otherwise exist. That would result in the entity responsible for the administration of the PLEPA inadvertently usurping the role of the legislature by creating entitlement through providing incorrect advice as to relevant entitlements.

[19] QXC asserts that she would have taken parental leave from her employment, and then would have transferred the entitlement to her partner when he was able to

⁴ *MBIE v Duan* at [39] to [41].

⁵ *MBIE v Duan* at [44].

finish work on of about 2 August 2024, had it not been for the incorrect advice she says she received from Inland Revenue. I accept that was the case.

[20] MBIE acknowledges that QXC contacted Inland Revenue and acted on incorrect or incomplete advice. It submits that in those circumstances, while MBIE had no discretion to approve the application made, it is for the Authority to consider whether QXC ineligibility was caused by an injustice and whether any discretion is available that should be exercised.

[21] The Authority must act as it thinks fit in equity and good conscience.⁶ That does not permit an approach that would have the effect of rewriting the relevant statutory provisions⁷ as to entitlement under the PLEPA. However, I consider that in the particular circumstances of this case that the entitlement under the PLEPA may be deemed to have arisen by the Authority, in equity and good conscience, having regard to its power to modify or reverse decisions made under the PLEPA. Such an approach does not involve a rewriting of the entitlement provisions, but rather consideration of the entitlement provisions based on an assessment of the facts that would have existed absent an injustice that would be caused by the incorrect provision of advice by the agent for the entity responsible for the administration of the PLEPA.

[22] I am satisfied that QXC relied on the advice given to her by Inland Revenue on 6 June 2024 and that that advice was incomplete and inaccurate. Critically, I consider QXC outlined her intentions and the relevant circumstances to ensure that there would be no impact on her entitlement to parental leave payments. This is not a case where the applicant was just given incorrect advice about an existing entitlement. Instead, the applicant here sought advice and confirmation, and was given incorrect advice, about a future entitlement. Arrangements impacting on the entitlement itself were then made to her detriment based on that advice.

[23] QXC sought the relevant confirmation and advice in advance of making an application and in circumstances where she would have made other arrangements to ensure entitlement and the compliant transfer of the same to her partner had an accurate response been provided in response to her confirming that she intended to continue working following the birth of her child.

⁶ Employment Relations Act 2000, s 157(3).

⁷ See, for example, *8i Corporation v Marino* [2017] NZEmpC 69 at [16].

[24] I address below each of the steps outlined in *MBIE v Duan* on the basis of what I deem to have been the position taking into account the reliance on the incorrect advice given.

Step 1 – eligibility

[25] The application made by QXC includes details of her income in the relevant period prior to the birth of her child. MBIE does not dispute that QXC meets the eligibility requirements of the PLEPA.

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

Step 2 – entitlement

[27] Following the birth of her child on 14 June 2024, QXC returned to work on 24 June 2024.⁸ I am satisfied that QXC was entitled to parental leave payments from 14 June 2024, that there would have been no disentitlement based on QXC’s continuation or return to work, and that the entitlement would have transferred to her partner as of 2 August 2024.

Step 3 – application

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

Steps 4 and 5 - start and end of period

[29] I find that QXC was entitled to parental leave payments from 14 June 2024, that being the date of confinement.⁹

[30] I find that the end of the parental leave payment period is either the end of 26 weeks from 14 June 2024, or the date on which QXC’s partner returned to work (if applicable).

[31] This determination does not consider the entitlement to ongoing parental leave payments from the transfer date of 2 August 2024. However, there is no indication that

⁸ The eligibility requirements are set out at s 71D of the PLEPA.

⁹ PLEPA, s71K(1)(a)(ii).

QXC's partners eligibility is in question nor that they would have become disentitled to parental leave payments prior to the expiry of the relevant 26-week period.

Conclusion and orders

[32] The decision declining parental leave payments is reversed.

[33] QXC's application is to be treated as approved, in amended form to the extent required, and QXC is entitled to parental leave payments from 14 June 2024. The entitlement to parental leave payments is deemed to have transferred from QXC to her partner on 2 August 2024.

[34] The parties are to confer as to any assessment of the entitlement from the date of transfer and may revert to the Authority should there be any dispute as to the ongoing entitlement during that period.

Rowan Anderson
Member of the Employment Relations Authority