

Attention is drawn to the order prohibiting publication of certain information in this matter.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 660
3389325

BETWEEN CQP
Applicant

AND MINISTRY OF BUSINESS INNOVATION
& EMPLOYMENT
Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant in person
Matthew Burden, counsel for the Respondent

Investigation: On the papers

Submissions/Further Information received: 16 September 2025 from the Applicant
6 October 2025 from the Respondent

Date of Determination: 21 October 2025

DETERMINATION OF THE AUTHORITY

[1] The applicant, an employee and a non-biological carer of a child under 6 years old, applies under s 71ZB(1)(b) of the Parental Leave and Employment Protection Act 1987 (PLEPA) to review a decision of the Ministry of Business, Innovation and Employment (MBIE).

[2] MBIE declined the applicant's eligibility for parental leave because they did not meet the threshold definition for eligibility of 'primary carer'¹ which is defined in the PLEPA under s 2 as 'having the meaning given in section 7' of the PLEPA.

[3] Section 7(1)(c) of the PLEPA defines 'primary carer' as:

a person, other than the biological mother or her spouse or partner, who takes *permanent*² primary responsibility for the care, development, and upbringing of a child who is under the age of 6 years.

[4] MBIE declined eligibility for the applicant because it decided based on information provided to it that the applicant had not taken the 'permanent' primary responsibility for the care of the child placed with them within days of the child's birth by the New Zealand Government Ministry which is called *Oranga Tamariki - Ministry for Children* (OT). OT had obtained Family Court Interim Custody Orders under s78 Oranga Tamariki Act 1989, a provision for orders made under urgency for care and protection purposes.³ The orders were made the day before birth placing the child in the care of OT and stating the duration as 'pending determination of the application for care or protection.' The applicant is a family friend of the biological mother of the child to which the orders refer. At an OT 'Family Group Conference' before birth, the biological mother had been involved in the decision that the applicant would take care of the child after birth.

The Authority's review process

[5] Under s 71ZB(3) of the PLEPA the Authority may 'confirm, modify, or reverse' MBIE's decision. This determination deals with the applicant's request to the Authority to reverse MBIE's decision. This matter is determined on the papers, a decision made after holding a phone conference call with the applicant and counsel for the respondent and then allowing time for the parties to provide more information and submissions.

¹ A threshold definition to eligibility for parental leave under the PLEP.

² Emphasis added.

³ Orders made by the Family Court pursuant to s78 Oranga Tamariki Act 1989 and provided to the Authority in copy by CQP in their Statement of Problem attached at page 1/3.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has reached conclusions as necessary to dispose of the matter and make appropriate orders.

Nonpublication orders

[7] To preserve confidentiality in circumstances that I am satisfied do not disrupt the notion of open justice in this particular case, and based on agreement between the parties to do so, I make nonpublication orders.⁴ The applicant's name and identifying details are not to be published in order to protect the publication of the child they care for, the circumstances surrounding why that care is needed as attached to individuals involved, and the protection of the identity of the biological mother and attaching to her circumstances. The applicant will be identified by the randomly selected letters of CQP or by referring to them as 'the applicant.' All details on the Authority file identifying the same material are also subject to this nonpublication order.

Background

[8] Having agreed to have the child placed with her by OT, records show that CQP made several calls to Inland Revenue⁵ (IRD) inquiring about parental leave as an employee which is recorded as including: 'Customer has advised that they will be applying as a primary care giver as they will be fostering through OT. Advised customer that they can only apply as PCG once baby has come into care. Advised customer in the meantime to get their proof of care from OT and I would set a follow up for Monday to see if anything needs to be adjusted on their registration.'

[9] IRD records show that six days later CQP had not yet submitted an application and that two days later she had rung and asked why someone did not follow up with her on the Monday. IRD asked CQP to make an application and to provide 'proof of care' explained as:

⁴ Employment Relations Act 2000, clause 10, Second Schedule.

⁵ The Government department that initially processes applications and refers to MBIE when eligibility is not clear as became the case here.

A letter from [OT] confirming the care arrangement, a certified copy of a court order placing the child in her care or attach a statutory declaration (IR880D) that the child is in your care.

[10] CQP made an application to IRD and provided a letter from an OT social worker dated 13 June 2025 which included the following:

- a. 'We consider parental support is a necessity to meet the needs of whanau, particularly when there are needs of a baby in our custody involved.'
- b. That CQP was currently employed full time and 'in order to meet the needs of a newborn baby, while still being able to meet the cost of her living expense, CQP must apply for parental leave.'
- c. That the biological mother is involved with OT because of 'drug use, family harm and unsafe associates.'
- d. That the situation 'is expected to be a long-term care arrangement unless there are significant and sustained changes demonstrated by [the child's biological mother].'
- e. That '... we are requesting that [CQP] is supported financially through all means necessary to care for the baby.'

[11] Five days later CQP was called by IRD to obtain more information about her employer and indicated the matter was being referred to MBIE. A letter that day from IRD to CQP reflects this and includes that 'We ask MBIE to review applications when eligibility is not clear'.⁶

[12] Just over two weeks later IRD records show that it communicated to CQP that her application had been declined by MBIE. Reasons were included in a letter to CQP dated 1 July 2025. This included that MBIE had the following information before it:

- a. Information before the IRD;

⁶ Letter IRD to CQP dated 16 June 2025.

- b. Information provided by CQP in a phone call on 18 June 2025 when CQP said the care arrangement was temporary for 12 months;
- c. Information provided by the OT social worker in their 13 June letter 2025 (referred to above at [10]);
- d. A phone call from the same OT social worker as above ‘on behalf of CQP’ on 24 June 2025 which included confirmation that the care was temporary and that the s 78 Interim Orders are only valid for 12 months, and that the placement of the child is intended to be permanent however it is unclear whether the arrangement is permanent.

[13] Based on the above MBIE then concluded in its written decision dated 1 July 2025 that it declined the application because ‘as this arrangement is not permanent, you are not a primary carer as defined by s 7 of the [PLEP]... evidence provided in respect to this application does not suffice to show that you are the primary caregiver in respect to this child under s 10 of the Act.’ The latter refers to the documents required to show evidence of a primary caregiver in respect of the child that appear to have been summarised above in the IRD records as needing to be provided.

[14] The above referred documents are listed in s 10(3) of the Parental Leave and Employment Protection Regulations 2016 under the heading *Document that must be provided* for someone not a biological mother to ‘evidence’ that they are the ‘primary carer’:

- (3) ... (a) if a court order has the effect of placing the child in the day-to day care or custody of the applicant, a certified copy of that order; or
- (b) if a court order places the child in the custody of the chief executive of the Ministry of Social Development, or an organisation or body approved under section 396 of the Oranga Tamariki Act 1989, a copy of a letter from the chief executive of that Ministry or that organisation or body confirming the date that the applicant became or will become the primary carer in respect of the child;
- (c) if neither paragraph (a) nor (b) applies, a statutory declaration in form 1 of Schedule 2 [Form 1 refers to a situation where the above do not apply]

[15] The OT social worker who penned a letter in support for CQP's application as apparent proof of care emailed MBIE in response to the decline of the application including that:

- a. 'We currently have "Interim custody" as this is the process for us, we are unable to obtain full custody of a child without going through interim custody proceedings. Interim custody can be held for years while there are court proceedings, not 12 months as outlined in the outcome letter attached. [CQP] is to be the caregiver of this child for the foreseeable future, and therefore should be considered the permanent caregiver.'
- b. 'We have provided as much financial support as possible, however, when an employee becomes the primary caregiver of a child and meets their 12-month employment time frame, then this becomes the responsibility of IRD.'
- c. 'I am aware that there are processes in place to ensure that funding goes to the right place however [CQP] has now been left out of pocket due to her compassion and genuine care for an infant that would otherwise be going into stranger, Oranga Tamariki Ministry care.'
- d. That CQP was employed full time as a caregiver in a care establishment and for that reason CQP sought paid parental leave from her employment.

[16] CQP applied to the Authority for this review.

[17] As part of this review I asked CQP to provide further support from OT when she explained at a phone conference call that her new social worker at OT was applying for the baby to have a 'home for life' with her. She indicated that she thought something was pending a decision about this. MBIE counsel agreed with my approach. I issued written directions that included the sort of level of proof required for a non-biological carer being that referenced above⁷ and that CQP should take my directions to the person assisting her at OT.

[18] CQP then provided to the Authority a letter in support from a second OT social worker (different to the one referenced above) that included:

- a. that the writer was a social worker involved with the baby in this matter; an outline of the care arrangements for the baby with CQP; that the baby was placed

⁷ Section 10(3) of the Parental Leave and Employment Protection Regulations 2016.

in the full time care of CQP and her husband from the hospital it was born in; that OT continues to hold a s78 interim custody order while paternity is awaiting confirmation; that OT continue to support CQP and her husband ‘during this period while we continue our assessment’; that CQP and her husband will continue to care for the baby ‘for the foreseeable future until a decision is made from OT in collaboration with the family court and counsel for the child on the long term placement, needs and support for [the baby]’.

The issues

[19] The issues:

- (a) Was MBIE correct to decline CQP’s application on the basis she was ineligible as a ‘primary carer’ under s 7(1)(c) of the PLEP Act?
- (b) Depending on the above should I exercise my discretion to confirm, modify or reverse the decision of MBIE under s71ZB(3) of the PLEP Act?

Was MBIE correct to decline CQP’s application on the basis she was ineligible as a ‘primary carer’ under s 7(1)(c) of the PLEP Act?

[20] MBIE’s position is that it declined eligibility because CQP’s role could not be interpreted as taking ‘*permanent primary*⁸ responsibility for the care, development, and upbringing of a child who is under the age of six years ...’ as specified under s 7(1)(c) of the Act. It submits that the information before it and now before the Authority indicates that CQP’s role is currently not permanent and that MBIE could not change the law as it is stated even though it acknowledges ‘from the outset’ the ‘lengths [CQP] has gone to in order to ensure [the baby] has a safe and secure home environment’. MBIE further includes that should matters become permanent CQP can reapply.

[21] MBIE’s discretion to allow some matters of eligibility is restricted to accepting ‘irregularities’ for lack of ‘form’ rather than ‘substance’ under s 71IA of the PLEPA. This has

⁸ Italics added for emphasis.

been confirmed by the Employment Court.⁹ I find that MBIE was not able to accept that CQP was a ‘caregiver’ under s 7 due to the non-permanent nature of the care she provides. That the care is not permanent is more than an irregularity of application and goes to the heart of a statutory definition of the type of care that a non-biological carer of a child has to meet. I find it noteworthy that second OT letter provided, after I asked for more information from CQP, included that matters remain subject to OT’s assessment with other specialist parties involved, and that only until that is resolved can there be a long term placement decision.

[22] I find that MBIE was correct to decline CQP’s application for paid parental leave because she did not meet the first threshold of being a primary caregiver in that as a non-biological mother of the child she has not taken ‘permanent primary responsibility for the care, development, and upbringing of a child who is under the age of six years ...’ under s 7(1)(c) of the PLEP Act.

Depending on the above should I exercise my discretion to confirm, modify or reverse the decision of MBIE under s 71ZB (3) of the PLEP Act?

[23] While the Authority’s discretion is considered to be wider than that of MBIE’s to correct matters of irregularity in parental leave applications,¹⁰ I am not satisfied that in the context of the specific wording of s 7(1)(c) of the PLEPA I can exercise my discretion to reverse MBIE’s decision as CQP wants me to do.

[24] There appear to be no cases that have dealt exactly with this particular issue. I also note that the legislative history of the 2016 amendment which added in the word ‘permanent’ to the above provision was part of a stated intention to tighten up eligibility to ‘permanent’ within the context of an intention to include wider concepts of care such as ‘home for life’ and whāngai arrangements.¹¹

[25] There is further support for this Parliamentary intention of clarity about permanence with the specific examples provided beneath s7(1)(C) PLEPA. MBIE says that the following statutorily included example is akin to CQP’s situation. I agree:

⁹ *Ministry of Innovation Business and Employment v Wenting Duan* [2023] NZEmpC at [15](c), Judge JC Holden, Judge Kathryn Beck and Judge M S King.

¹⁰ As above at note 9.

¹¹ Second Reading Employment Standards Legislation Bill (Parental Leave in Employment Protection Amendment Act 2016) 3 March 2016; Employment Standards Legislation Bill, pages 2-3.

Examples [at the end of s7 PLEPA]

...

If a child under the age of 6 is temporarily placed with a foster parent,
that person is not a primary carer because the placement is not permanent.

...

[26] Taking the above into consideration, I do not consider that the discretion I have extends to reversing MBIE's decision.

Outcome

[27] Under section 71ZB(1)(b) of the Parental Leave and Employment Protection Act 1987 I confirm MBIE's decision to decline CQP's application for paid parental leave because she does not at this stage meet the definition of 'primary carer' under ss 2 and 7(1)(c) of the Parental Leave and Employment Protection Act 1987.

[28] CQP's application is unsuccessful.

Antoinette Baker
Member of the Employment Relations Authority