IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 55
5370633

	BETWEEN	TERESA JAY AHIPENE Applicant
	A N D	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR Respondent

Member of Authority:	P R Stapp
Investigation Meeting:	On the papers
Submissions:	On the papers, including the statement of problem and statement in reply, by 20 April 2012
Date of Determination:	29 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application from Ms Ahipene for parental leave payments ("PPL payments") under the Parental Leave and Employment Protection Act 1987 ("PLEP").

[2] The Department of Labour had determined that Ms Ahipene was not eligible for PPL payments because she was not an *eligible employee* under the PLEP Act at the time. In other words, the Department concluded that Ms Ahipene had not been employed by her current employer, Care NZ, for either six or twelve months before the expected date of delivery of her baby. Also, the department contended that Schedule 1 of the PLEP Act does not apply in the current instance.

[3] The applicant seeks a review of the decision made by the Department of Labour that she is not entitled to PPL. The review application is made under s 71ZB

of the PLEP Act, which authorises the Authority to confirm, modify or reverse the decision of the department.

The issues

[4] Was Ms Ahipene an eligible employee under the PLEP Act to obtain parental leave payments under the Act?

The facts

[5] The relevant facts have not been contested and can be summarised as follows.

[6] The Inland Revenue Department (IRD) referred Ms Ahipene's application (16 and 22 November 2011) and (attachments to the statement of problem) for PPL payments to the Department of Labour (the Department) for determination.

[7] Ms Ahipene was formerly employed by Wairarapa Addiction Services ("WAS") as an Addictions Counsellor until being made redundant on 1 November 2011[1]. Ms Ahipene was re-employed by another employer called Care NZ on that date, doing the same work. That work related to a contract that first, WAS and then second, Care NZ had with the Wairarapa District Health Board ("the DHB")[2]. Ms Ahipene's expected date of delivery of her baby was 18 January 2012[3].

[8] The Department determined that Ms Ahipene was ineligible for PPL payments [referral for ineligibility dated 6 December 2011]. Its reasoning was that she was not an eligible employee under the PLEP Act. This was because Ms Ahipene had not been employed for either six or twelve months by Care NZ before the expected date of the delivery of her baby. Also the department says that the change of employer did not meet the transfer requirements under the schedule in the PLEP Act.

Discussion

[9] The primary issue for me to determine is whether Ms Ahipene is an eligible employee under the PLEP Act; s.71D (c). In other words, the Authority has to consider whether Ms Ahipene is *a female employee* who meets the criteria for maternity leave under s.7 PLEP Act. The section reads as follows

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1 Statement of problem
2 Paid parental leave application for an employee, at 1
3 Statement of problem

Except as otherwise provided in this Act, every female employee-

(a) who becomes pregnant; and

(b) who at the expected date of delivery, will have been in the employment of the same employer for at least an average of ten hours a week over

(i) the immediately preceding 12 months; or

(ii) the immediately preceding 6 months;-

shall be entitled to maternity leave in accordance with this Act.

[10] The purpose of s.71A PLEP Act is to provide entitlements to a defined class of person. Section 71A PLEP Act reads:

> *The purpose of this Part is to entitle certain employees and self-employed persons to up to 14 weeks parental leave payments out of public money when they take parental leave.*

[11] There is no provision to include any person who had transferred through a redundancy situation, from one employer to another because of a change in a contractual arrangement with the employers. The PLEP Act does not make provision for the situation where a new employer is involved in providing the same services that had been provided by a previous employer due to changes in contracts provided by a third party. Instead, it is clear under the criteria that it must be the same employer. The term *employer* has the same meaning as it does in s.5 of the Employment Relations Act 2000 (PLEP Act s.2). The DHB is the provider of the contract for the employer, and at the time was not a party to the employment relationship.

[12] The DHB was not the employer. It provided a contract to WAS and Care NZ. This is not contemplated by the change of employer provision, under clause 1 of the Schedule to the PLEP Act. That Schedule concerns the *transfer* of a *trade or business or an undertaking*. The relevant part of the schedule reads as follows:

Change of employer

(1) *If a trade or business or an undertaking (whether or not it is an undertaking established by or under an Act) is transferred from one person to another (whether before or after the date of the commencement of this Act),-*

> *(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer shall count as a period of employment with the transferee; and*
>
> *(b) the transfer shall not break the continuity of the period of employment of any employee in the trade or business or undertaking; and*
>
> *(c) any employer who employed any employee in the trade or business or undertaking at any time before the transfer and the transferee shall be deemed, in relation to the employee, to be the same employer.*

[13] I hold that this is a case that involves the DHB as a third party and a change of contract. The DHB contract was held by WAS and was given by the DHB to a new provider: Care NZ. This is a situation where Care NZ does almost identical work with the same staff, but is not the transfer contemplated by the Schedule of an entire *trade or business or an undertaking*. This is because the DHB contract does not fit as a *trade, business or an undertaking* because there were no transfer arrangements and no continuity of employment as envisaged under the Act. The key is the application of the above provisions that involve "*the period of employment of an employee in the trade or business or undertaking at the time of the transfer shall count as a period of employment with the transferee"* and "*the transfer shall not break the continuity of the period of employment of any employee"*. There is nothing to support that.

[14] For completeness I find there are no transfer arrangements for any continuity of service that might help in the application. In other words the documents support that there was an entirely new employer involved. For example the redundancy and employment termination letter from WAS, the offer of employment from Care NZ, and Care NZ and WAS had different and separate employment agreements. Furthermore the break of employment was confirmed with the final payment of holiday pay from WAS (27 September 2011).

[15] The Court held in *Phoenix Freight Ltd v Hodge* [1995] ERNZ 100 that there had to be a transfer, sale or purchase involving a business or undertaking of a sufficient character to qualify within clause 1 of the Schedule. This means that there would need to be some continuity provision between the undertakings. In other words there needs to be re-employment in circumstances of uninterrupted employment

continuity (p119, line8). On the evidence here that is not the case for Ms Ahipene because the change in arrangements involved her employment being severed. The Care NZ agreement fully superseded any prior agreements (clause 34). What has happened is that Care NZ was a new provider for a contract from the DHB and there was no continuity arrangement put in place. *Phoenix Freight Ltd v Hodge* held that there had to be a transfer, sale or purchase of the trade, business or undertaking. It is not enough that the work, the role and the pay were the same because Care NZ was an entirely new organisation that obtained the contract from the DHB. Hence there was no transfer, sale or purchase of the trade, business or undertaking.

[16] Moreover the vulnerable employee protection provision in the event of the sale, transfer or contracting out of the business did not apply. The characterisation required by the Court does not exist with the change involving Ms Ahipene and Care NZ where the definition of undertaking relates to the employer entities, and not the DHB contract.

[17] For the above reasons, I am not in a position to approve paid parental leave for Ms Ahipene under the PLEP Act because the trade, business or undertaking was not transferred. This is because there was no continuity applied to the employment between the parties involved.

[18] This is one of those cases where the Authority can not alter the underlying provisions of the Act. This is a situation where there is a policy gap in eligibility and a matter more for the department administering the Act to consider and ultimately a matter for Parliament

[19] Unfortunately for Ms Ahipene her circumstances do not fit the provisions of the current PLEP Act through no fault of hers.

[20] There is no issue as to costs.

P R Stapp
Member of the Employment Relations Authority