

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 68
5402282

BETWEEN

LOUISE JOAN BELL
Applicant

A N D

MINISTRY OF BUSINESS
INNOVATION AND
EMPLOYMENT (formerly the
Department of Labour)
Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant self represented with assistance from Richard Bell
Greg La Hood for Respondent

Investigation Meeting: Determined on the papers by agreement of the parties

Submissions received: 29 January and 22 February 2013 from the Applicant
18 February 2013 from the Respondent

Date of Determination: 31 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Bell made a claim for paid parental leave. That claim was declined by the Ministry of Business, Innovation and Employment (formerly the Department of Labour) (“MBIE” or “the Ministry”). MBIE found that Ms Bell did not meet the requirements of s. 71D of the Parental Leave and Employment Protection Act 1987, which I will refer to as PLEPA or the Act.

[2] Ms Bell has applied to the Authority for a review of MBIE’s decision to decline her application for parental leave payments. The parties agreed, in the course of a telephone conference in January 2013, that the Authority could determine this matter on the papers. Both parties provided information and submissions to enable me to do so.

Background

[3] Ms Bell's partner is the biological father of their adopted son, who was born via a surrogate on 30 January 2012. Ms Bell submitted her application form for paid parental leave to her employer, Kidicorp Ltd, on 19 December 2011, leaving her employer to complete the required pay details and send the form to the Department of Inland Revenue ("IRD"). There is no evidence that Ms Bell separately provided her employer with written notice of her intention to take parental leave.

[4] Ms Bell was employed on a fixed term employment agreement due to end on 14 May 2012. She commenced maternity leave on 27 January 2012, at which time she had been working for Kidicorp for 1 year 3 months. Due to administrative error, Ms Bell's employer failed to forward the paid parental leave form to IRD until 4 April 2012.

[5] Ms Bell says there were complications around the birth that resulted in the surrogate mother having a lengthy hospital stay. Ms Bell cited this as the cause of the delay in commencing formal proceedings to adopt the child who had been in her care from 30 January 2012, or shortly thereafter. The adoption process was started in March 2012, and adoption applications were filed in the Family Court on 20 April 2012.

[6] The visit from a CYF social worker, necessary for gathering information for a report to the Family Court concerning the application to adopt the child, did not take place until August 2012. The delay appears to have been from a variety of causes, including delays in the return of documentation, miscommunications and the annual leave of the social worker.

[7] An interim order of adoption was granted to Ms and Mr Bell on 27 September 2012 and the adoption order was granted on 10 December 2012.

Entitlement to Paid Parental Leave

[8] For Ms Bell to have an entitlement to paid parental leave, she was required to:

- Give written notice to her employer of her wish to take parental leave within a prescribed time frame;
- Take parental leave; and

- Be an eligible employee.¹

Time frame

[9] Section 33 of PLEPA sets out, as follows, the timeframe for an adoptive parent to give written notice to her employer of her wish to take parental leave:

Where the employee is proposing to adopt a child, the notice required to be given by section 31(1) shall,-

- (a) *where the placing of the child in the home of the employee has been approved by a Social Worker under section 6(1)(a) of the Adoption Act 1955,-*
 - (i) *be given within 14 days after the date on which the employee receives notice that a child will be placed with the employee within the next 3 months with a view to adoption by the employee, or by the employee and the employee's spouse or partner jointly; and*
 - (ii) *be accompanied by a letter from a Social Worker (as defined in section 2 of the Adoption Act 1955) stating that the employee is keeping or will be keeping a child in the employee's home with a view to adoption:*
- (b) *where a court has made an interim order under section 6(1)(b) of the Adoption Act 1955,-*
 - (i) *be given within 14 days after the date on which the order is made; and*
 - (ii) *be accompanied by a certified copy of the order:*
- (c) *where the child is otherwise lawfully in the employee's home under section 6(4) of the Adoption Act 1955,-*
 - (i) *be given within 14 days after the date on which the employee makes a statutory declaration to the effect that the employee has assumed the care of the child with a view to adoption by the employee or by the employee and the employee's spouse or partner jointly; and*
 - (ii) *be accompanied by a copy of the declaration.*

[10] Neither s 33 (a) nor 33 (b) applies to Ms Bell's situation as she did not have social worker approval for the placement of the child in her home, nor did she have an interim adoption order. Ms Bell says she was unaware of the requirement to involve a social worker because the child was "a surrogate baby and what we believe was and is legally my husband's child". The most applicable section is 33 (c).

¹ Section 71D of PLEPA

[11] Section 33 (c) of PLEPA concerns s. 6 (4) of the Adoption Act 1955. That section provides exemptions, in certain specified situations, to the “*Restrictions on placing or keeping a child in a home for adoption*” that are imposed by s. 6 of the Adoption Act. Section 6 (4) (c) is the most relevant to Ms Bell’s situation and provides that the restrictions of s. 6 shall not apply in where “*the child is in the home of one of the child’s parents and a step-parent of the child*”.

[12] As Mr Bell is the biological father, it logically follows that he is a parent of the child and that, as his spouse, Ms Bell is the child’s step-parent (or was until she adopted the child). However, assuming I am correct about this, there are difficulties for Ms Bell concerning the time frame within which she applied for parental leave, and the documentation required by s. 33 of PLEPA. Those difficulties arise from the particular circumstances of the child’s conception and birth.

[13] Under s. 33 (c) of PLEPA, Ms Bell was required to give notice to her employer of her parental leave within 14 days after the date on which she made a statutory declaration to the effect that she had assumed the care of the child with a view to adoption. She was also required to provide her employer with a copy of the statutory declaration.

[14] Ms Bell did not provide the required statutory declaration, and she gave notice of parental leave to her employer, by applying for paid parental leave, approximately 6 weeks before she assumed the care of the child. This was because her situation does not fit the norm for an adoptive mother.

[15] I note that the submissions filed on behalf of MBIE place Ms Bell’s application for paid parental leave at 4 April 2012, which is when her employer forwarded to IRD the application Ms Bell had completed on 19 December 2011. I do not accept MBIE’s submission, because Ms Bell signed and dated her application on 19 December 2011 and the delay in forwarding it to IRD was not of her making. Kidicorp has taken responsibility for the administrative failure that led to the 3 ½ month delay. Ms Bell did all she could to ensure the application went to IRD in December 2011.

Taking of parental leave

[16] Ms Bell commenced her parental leave on 27 January 2012, and therefore fulfils that requirement for paid parental leave. She did not return to work during the

fourteen weeks of parental leave, and her fixed term employment with Kidicorp did not come to an end within that period.

Eligible employee

[17] To meet the requirements of an “eligible employee” Ms Bell had to:

- Assume (with a view to adoption by her or by her and her spouse or partner jointly) the care of a child who is not more than 5 years of age; and
- Meet specified, and immediately past, employment criteria.²

[18] Ms Bell says that she assumed care of the child with a view to adoption, and that she and her husband “*had a signed contract with the birth mother to maintain a level of confidence that the adoption would take place, for both parties*”. She did not provide a copy of the contract to the Authority.

[19] At the time Ms Bell first assumed care of her child she had been in employment for more than twenty hours a week for over twelve months and she met the immediately preceding employment criteria. There is no dispute that she met the employment criteria.

Discussion and findings

[20] MBIE says Ms Bell failed to comply with the eligibility requirements for paid parental leave under sections 8 and 33 of PLEPA. Section 8 concerns the entitlement of adoptive mothers to maternity leave and provides as follows:

- (1) Except as otherwise provided in this Act, every female employee –*
- a) who assumes (with a view to adoption by her or by her and her spouse or partner jointly) the care of a child who is not more than 5 years of age; and*
 - b) who, at the date on which she, with a view to adoption, first assumes the care of the child, will have been in the employment of the same employer for at least an average of 10 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.*

² Sections 71CA and 8 of PLEPA

(2) (Not relevant to this situation)

[21] MBIE says that Ms Bell had not completed the s. 33 requirements at the time she assumed care of the child. She had not commenced formal adoption proceedings and did not have an interim adoption order. She therefore could not be said to have assumed the care of the child “with a view to adoption”.

[22] The Ministry submits that the notice requirements of s. 33 are strict requirements and a matter of substance. If an applicant assumes care of a child without proving that there is a “view to adoption” as evidenced under s. 33, the applicant will not have taken parental leave in accordance with the requirements under s. 8, and this amounts to a failure of substance.

[23] I disagree with MBIE’s analysis of Ms Bell’s situation. I find the failure is one of process rather than substance, and occurred because of the unusual situation of the child’s birth. The fact that Mr Bell was the biological father of the child he and Ms Bell jointly adopted led them to believe the documentation required under s. 33 was not necessary. That does not disentitle Ms Bell to paid parental leave. The provisions of the Act do not bar the adoptive parent of a child born of a surrogate mother from parental leave.

[24] I find Ms Bell did assume the care of her child with a view to adoption. I accept her explanation for the delay in commencing adoption procedures.

[25] Section 68 (4) of the Act provides that:

The Employment Relations Authority or the Court must grant relief to an employee in respect of a failure to comply with the notice requirements of this Act or of the alternative provision under which the leave is taken if satisfied that –

- (a) *the employee’s failure to comply with the notice requirements was in good faith; and*
- (b) *the extent to which the employee did or did not comply with the notice requirements was reasonable in all of the circumstances of the case.*

[26] I find Ms Bell’s failure to comply with the notice requirements of s. 33 was in good faith, for the reasons given above, and that the extent to which she did not comply with those notice requirements was reasonable in all the circumstances.

[27] I therefore exercise my discretion under s. 68 (4) of the Act to grant relief in respect of a failure to comply with notice requirements.

Determination

[28] Ms Bell's application for a review of the Ministry's decision succeeds. I find that she is eligible for parental leave payments under Part 7A of the Act.

Costs

As Ms Bell represented herself with Mr Bell's assistance, there will be no order for costs.

Trish MacKinnon
Member of the Employment Relations Authority