

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 76
5405053

BETWEEN JOHANNA YVONNE PECK
 Applicant

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

Member of Authority: Michele Ryan

Representatives: Applicant in Person
 A Leulu, Counsel for the Respondent

Investigation Meeting: On the papers

Determination: 3 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 20 November 2012 the Ministry of Business, Innovation and Employment (the Ministry) advised the applicant, Ms Johanna Peck, that she did not satisfy the requirements of the Parental Leave and Employment Protection Act 1987 (referred to as PLEPA or the Act) and was not eligible for parental leave payments.

[2] Ms Peck seeks a review of the Ministry's decision and has applied for an order that she be paid parental leave payments. The review application is made under s 71ZB of the Act, which authorises the Authority to confirm, modify or reverse the decision of the department.

[3] The parties agreed to have the Authority determine the matter on the papers provided.

Relevant information

[4] On 7 August 2012 Ms Peck and her husband received approval from Child Youth and Family (CYF) to participate in its adoption pool. In or around this time Ms Peck also agreed to adopt the child her niece was then carrying.

[5] Ms Peck set about making arrangements in anticipation of the adoption. She sought and received approval from her employer for parental leave. A form was completed by Ms Peck's employer on 13 September 2012 and submitted to Inland Revenue for processing. Inland Revenue accepted the application and sent Ms Peck a letter dated 25 September 2012 informing her of her weekly entitlement and when payments would commence.

[6] The Ministry submits that on further examination it was determined that Ms Peck was not entitled to paid parental leave because documentation in relation to notice requirements pursuant to s.33 of the Act had not been provided.

[7] On 8 October 2012 Ms Peck's grand-nephew was born and Ms Peck assumed care of the child with her niece's permission. Proceedings to adopt were filed in the Family Court on or about 16 November 2012.

[8] It is accepted that during October and November 2011 there was a series of discussions between the Ministry and Ms Peck. Ms Peck says she was initially told to provide a statutory declaration and later advised that she needed to provide an order from the Court for Interim Adoption. Later still she says she was told neither of these documents would suffice.

[9] The Ministry says it was agreed with Ms Peck that she would make a further application for parental leave payments once she had obtained an order for Interim Adoption.

[10] On 30 October 2012 Ms Peck submitted an alternative application to the Ministry for parental leave payments. She attached a statutory declaration dated 17 October 2012 which confirmed the child was in Ms Peck and her husband's care and that they intended to adopt.

[11] On 20 November 2012 the Ministry advised by letter that Ms Peck that she was not entitled to paid parental leave because she had not complied with s.33

requirements when she gave notice to her employer that she wanted to take parental leave.

[12] Ms Peck says she received vague and confusing information as to what was required to properly obtain parental leave payments and says she had been disadvantaged as a consequence.

Analysis

[13] Section 71D provides that an employee is entitled to paid parental leave if the employee has:

- (a) given written notice to his or her employer of the wish to take parental leave;
- (b) takes parental leave; and
- (c) is an eligible employee¹.

[14] In the circumstances of this matter an “*eligible employee*” is an employee who at the date on which he or she, with a view to adoption, first assumes care of the child, and has been in employment for at least an average of 10 hours a week in the immediate preceding six or 12 months.²

[15] It is not disputed Ms Peck gave written notice to her employer that she wished to take parental leave or that parental leave was granted by her employer. I have not received any documentation which evidences concern by Ms Peck’s employer that she did not provide it with the appropriate documentation. In this respect the Ministry acknowledges that Ms Peck’s employer appears to have “*waived the requirement to view the documentation when granting ...parental leave.*”

[16] Section 31 of the Act requires an employee to give notice to the employer of a wish to take parental leave.

[17] Section 33 refers to the required notice when an employee is proposing to adopt a child. These are summarised as follows:

- i. where the child’s placement in the employee’s home has been approved by a social worker under s.6(1)(a) of the Adoption Act 1955.

¹ An eligible employee is defined at s. 71CA.

² s. 8 and s. 71CA of the Parental Leave and Employment Protection Act

Notice must be given within fourteen days of the placement of the child and be accompanied by a letter stating the employee is keeping the child in the home with a view to adoption, or

- ii. when a court has made an interim order under s.6(1)(b) of the Adoption Act notice must be given within fourteen days of the date of the order, and be accompanied by a copy of the order; or
- iii. when the child is otherwise lawfully in the employee's home under s.6(4) of the Adoption Act, notice must be given within fourteen days of the date of the statutory declaration to the effect that the employee has assumed care of a child with a view to adoption, and be accompanied by a copy of the statutory declaration.

[18] In regards to the first method to adopt, Ms Peck says she did not obtain approval from a CYF social worker to have the child placed in her home because she was advised the child was regarded as a family member.

[19] No interim order existed when Ms Peck assumed care of the child and took him home.

[20] Section 6 of the Adoption Act 1955 restricts placement or keeping a child in the home for adoption unless certain criteria are met. Section 6(4) sets out circumstances where the restrictions don't apply including where the child is in the home of a relative. The Adoption Act defines "relative" as a grand-parent, brother, sister, uncle or aunt, whether of full blood, half blood or affinity.³

[21] Ms Peck reasonably concluded her grand-nephew is a relative and that she was not subject to the restrictions. However the familial relationship of grand-nephew does not fall within the category of "relative" in the Adoption Act.

[22] None of the three possible mechanisms as regards adoption at s.33 of Act were met at the time Ms Peck notified her employer of her wish for parental leave.

[23] The Ministry submits that Ms Peck's eligibility to obtain parental leave payments was dependent on the requirement that she assumed care of a child with a

³ Section 2 Adoption Act.

view to adoption⁴. The Ministry says the phrase “with a view to adoption” has a particular meaning in the context of section 33. It says s. 33 presumes that documentation necessary for lawful placement of a child in the home (pursuant to s. 6 Adoption Act) will be place before notice is given to an employer. The Ministry submits that because Ms Peck did not take action under the Adoption Act, she did not assume care of the child with a view to adopt for the purposes of s.33.

[24] The Ministry also says that despite the employer’s waiver to view required documentation, the Act’s subsections 33(a) and (b) each require notice to the employer to be given within 14 days of receiving the relevant documentation. It submits that Ms Peck did not provide essential documentation to the employer being either approval by a social worker⁵ or an interim adoption order⁶ to evidence that the child will be lawfully placed in the home.

[25] The essence of the Ministry’s submissions is that Ms Peck did not comply with her obligations to provide proper notice according to the Act. The Ministry further submits that it does not have jurisdiction to waive the notice requirements under the Act.

Determination

[26] Ms Peck was eligible for parental leave having worked for her employer at least an average of 10 hours a week in the immediately preceding 12 months before commencing leave. There is no dispute that Ms Peck complied with this aspect of eligibility.

[27] Ms Peck’s employer accepted that she wished to care for her grand-nephew and consented to 12 months leave commencing 29 October 2012. I understand Ms Peck remains on parental leave at the time of this determination.

[28] It is also apparent that Ms Peck assumed care of the child based on an honestly held but mistaken belief that he was a family member and no other formal steps were required to take the child home.

[29] Ms Peck and her husband commenced proceedings in the Family Court on or about 16 November 2012 to become legal parents of the child.

⁴ Section 8 and s. 71CA of the Parental Leave and Employment Protection Act

⁵ Section 33(a) Parental of the Parental Leave and Employment Protection Act

⁶ Section 33(b) of the Parental Leave and Employment Protection Act

[30] I accept the Ministry's submissions that the notice Ms Peck gave to her employer was not in accordance with s. 33 of the Act that she did not assume the care of the child with a view to adoption pursuant to the processes set out at s. 6 Adoption Act.

[31] Ms Peck acknowledges that she did not meet the legal requirements of the Act. She attributes the failing to vague and confusing advice about the processes required to assume care for her grand-nephew and the information she was required to provide. Ms Peck says she has formally complained to her MP about the Ministry's website and provided a letter from him that includes the statement: "*the website information could have been clearer and has in fact been re-drafted and published on the website regarding process for adoption.*"

[32] 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.

[33] Ms Peck did not comply with the notice requirements of the Act but I find she acted in good faith.

[34] I am in no doubt that Ms Peck sought to comply with notice and documentation requirements. The information Ms Peck initially provided to her employer would (with the exception of short notice due to the nature of adoption) have satisfied notice requirements had she been the birth mother. Further, had the child been a relative as defined by the Adoption Act, the statutory declaration attached to her resubmitted application for parental leave payments may have satisfied legislative requirements.

[35] While inclusion to CYF's adoption pool does not satisfy s.6 Adoption Act approval by a social worker or s. 33(a) notice, I accept the inference that had the information on the Ministry's website been clearer Ms Peck was able to and would have obtained the necessary endorsements. In this respect I regard Ms Peck's failure to

comply with notice requirements was technical rather than a matter of substance and reasonable in the circumstances.

[36] I am persuaded in the circumstances of this matter that I should grant relief to Ms Peck in respect to her failure to comply with the notice requirements of the Act.

Remedies

[37] I find Ms Peck is entitled to parental leave payments.

[38] I order the Ministry to reimburse \$71.56 to Ms Peck for the cost of her filing fee.

[39] Ms Peck has requested I order an apology from the Ministry. The Authority has no jurisdiction to order this remedy.

Michele Ryan
Member of the Employment Relations Authority