

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 147  
5409320

BETWEEN

TONI KIERNAN  
Applicant

AND

CHIEF EXECUTIVE OF THE  
DEPARTMENT OF  
BUSINESS INNOVATION  
AND EMPLOYMENT  
(formerly the Department of  
Labour)  
Respondent

Member of Authority: R A Monaghan  
Representatives: T Kiernan in person  
A Leulu, counsel for respondent  
Investigation meeting: On the papers  
Determination: 29 April 2013

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Toni Kiernan and her partner agreed with a member of her partner's family to adopt the child the family member was carrying. The child, a girl, was born on 8 September 2012.

[2] As agreed, Ms Kiernan took the child home on or about that day.

[3] Ms Kiernan, her partner and the child's birth parents had originally contemplated a whangai adoption, but later agreed Ms Kiernan and her partner would take on full and permanent status as parents under the Adoption Act 1955. When Ms Kiernan sought advice about processes under that Act, she was informed that no steps could be taken until after the child was born.

[4] Accordingly, upon the birth, Ms Kiernan sought to begin the adoption process and to that end secured an appointment with her solicitor on 1 October 2012.

[5] An application for an adoption order was filed in the Family Court on 21 January 2013. The delay occurred because of practical difficulties encountered in obtaining signatures on relevant supporting documents, from individuals who were not in New Zealand.

[6] Some three weeks after the child's birth Ms Kiernan had applied to the IRD for paid parental leave under the Parental Leave and Employment Protection Act 1987 (PLEPA). She had also sought parental leave from her employment. Twelve months' parental leave was granted by letter dated 2 October 2012.

[7] To be entitled to paid parental leave, Ms Kiernan was required to:

- give written notice to her employer of her wish to take parental leave;
- take parental leave; and
- be an eligible employee<sup>1</sup>.

[8] To be an 'eligible employee' Ms Kiernan was required to:

- assume (with a view to adoption) the care of a child who is not more than 5 years of age; and
- meet certain employment-related requirements.<sup>2</sup>

[9] There was a doubt about Ms Kiernan's eligibility for payment so the application was referred to the Department of Labour (now part of the Department of Business Innovation and Employment (MBIE)). By letter dated 14 November 2012 MBIE advised Ms Kiernan she was not an 'eligible employee' under the PLEPA, and she would not receive a payment. In essence, because Ms Kiernan had not taken certain formal steps under the Adoption Act at the time she took the child home, she had not assumed the care of the child 'with a view to adoption'.

[10] Ms Kiernan has asked the Authority to review MBIE's decision under s 71ZB of the PLEPA.

---

<sup>1</sup> s 71D of the PLEPA.

<sup>2</sup> s 71CA and s 8 of the PLEPA

### **The requirement to give notice**

[11] The PLEPA obliges an employee to give notice to the employer of a wish to take parental leave.<sup>3</sup> The requirements where a child is to be adopted are:

- when 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, notice must be given within 14 days of the placement and be accompanied by a letter stating the employee is keeping the child in the home with a view to adoption; or
- when a court has made an interim order under s 6(1)(b) of the Adoption Act, notice must be given within 14 days of the date of the order, and be accompanied by a copy of the order; or
- when the child is otherwise lawfully in the employee's home under s 6(4) of the Adoption Act, notice must be given within 14 days of the date of a 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 declaration.<sup>4</sup>

[12] Ms Kiernan made enquiries of Child, Youth and Family (CYF) before the child was born, and for present purposes I accept she was told in a general way that she could take the child home when the child was born. From this Ms Kiernan understood that she had obtained the necessary approval from a social worker. However the discussion did not in itself amount to the approval required under s 6(1)(a) of the Adoption Act, and no letter of confirmation was furnished. CYF did not become involved formally until after the application for an adoption order was referred to it in January 2013.

[13] No interim order had been made when Ms Kiernan took the child home.

[14] As for the third alternative, s 6(4) of the Adoption Act provides that a child may lawfully be in a home with a view to adoption if the child is in the home of a relative who is not prohibited from adopting.<sup>5</sup> The Adoption Act defines 'relative' as a grandparent, brother, sister, uncle or aunt, whether of full blood, half blood, or

---

<sup>3</sup> s 31

<sup>4</sup> s 33

<sup>5</sup> As well as in other circumstances not relevant here.

affinity<sup>6</sup>. Although there is a blood relationship between the birth mother and Ms Kiernan's partner, the relationship does not fall within any of these categories.

[15] None of the three alternatives was met in that none of the required documents was obtained or provided. Accordingly the notice Ms Kiernan gave her employer was at best defective, and at worst invalid. I return to the significance of that in a paid parental leave context later in this determination.

### **The requirement to take parental leave**

[16] Parental leave was granted and is being taken, as far as the parties to the employment relationship are concerned. However MBIE said the PLEPA presumes one of the above three alternatives is in place before notice is provided to the employer, and in that respect it reasoned that Ms Kiernan was not entitled to take parental leave until the notice requirement had been complied with.

[17] Arguably, in granting the leave the employer waived the obligation to comply with the notice requirements for the purposes of the employment relationship. I infer that it granted the leave because it accepted Ms Kiernan had taken a child into her home, and intended to adopt the child. It did not concern itself with whether a formal adoption process had commenced, or with whether the necessary supporting documentation was available.

[18] Again I return to the significance of that in a paid parental leave context later in this determination.

### **The requirement to be an eligible employee**

[19] When deciding whether Ms Kiernan was an 'eligible employee' in that she assumed the care of the child 'with a view to adoption', MBIE took into account the notice provisions mirror s 6 of the Adoption Act. Section 6 sets out restrictions on placing, receiving or keeping a child in a home for the purpose of adoption. A child can be placed or received or kept in a home for that purpose if one of the factors also reflected in the notice requirements under the PLEPA is present. MBIE reasoned that, if the child's presence in Ms Kiernan's home breached those restrictions, it could not

---

<sup>6</sup> s 2 Adoption Act

be said the child was lawfully in her home with a view to adoption. For Ms Kiernan's benefit, that does not mean the child was not lawfully in her home at all.

[20] The overall effect was a conclusion that, to be an eligible employee in the context of an adoption, an employee must have taken the steps suggested by s 6 of the Adoption Act at the time of the assumption of care of the child.

### **Should the Authority reverse the department's decision**

[21] Ms Kiernan took her child home with the intention of adopting her, took leave from her employment to allow her to care for the child, and took steps to commence the formal adoption process as promptly as she could after the child was born. However intending to adopt is not the same as having a 'view to adoption' for the purposes of the PLEPA. The latter requires the commencement of certain steps under the Adoption Act, and I accept MBIE's reasoning in that respect.

[22] The result is that, because Ms Kiernan took the child home immediately and without first obtaining written approval from a social worker or an interim order from the Family Court, MBIE has found she:

- did not comply with the notice provisions in the PLEPA regarding parental leave;
- is not entitled to parental leave; and
- did not assume the care of a child with a view to adoption, so is not eligible for paid parental leave.

[23] I resolve this matter by finding that, as between the parties to the employment relationship, Ms Kiernan is on parental leave. She is able to make an application for paid parental leave before the date on which she returns to work.<sup>7</sup> Her parental leave is to end in October 2013.

[24] I find it is open to her to make a fresh application for paid parental leave before then, provided she is able to furnish either the required letter from a social worker or a copy of an interim adoption order. I regard that as sufficient to make her an 'eligible employee'.

---

<sup>7</sup> s 71I PLEPA

[25] I do not overlook the fact that the written notice Ms Kiernan gave to her employer was deficient at the time it was given. However Ms Kiernan acted in good faith. For the purposes of the entitlement to paid parental leave the deficiency can be rendered one of form rather than substance if she also provides her employer with the required letter from a social worker or a copy of an interim adoption order.<sup>8</sup>

[26] For these reasons I order as follows:

- (a) before she returns to work, Ms Kiernan is to provide MBIE with either:
  - a letter from a social worker who has approved the child's placement in her home, and confirming that she is keeping the child in her home with a view to adoption, or
  - a copy of an interim adoption order of the court; and
- (b) at the same time as she provides either of the above documents to MBIE, Ms Kiernan is also to provide the appropriate document to her employer and confirm to MBIE that she has done so.

[27] If Ms Kiernan complies with the above, MBIE's receipt of the appropriate document will be deemed to be the receipt of an application for paid parental leave from an eligible employee. Ms Kiernan will then become entitled to a parental leave payment. I anticipate that the terms of the original ineligible application can otherwise be applied without practical difficulty to the new eligible application, but leave is reserved to raise the matter with the Authority if there is a difficulty.

### **Costs**

[28] Costs are reserved. If either party seeks an order for costs the party seeking the order shall have 28 days from the date of this determination in which to file and serve a written request, giving reasons. The other party shall have a further 14 days in which to file and serve a reply. I suggest, however, that it would be appropriate to allow costs to lie where they fall.

R A Monaghan

Member of the Employment Relations Authority

---

<sup>8</sup> s 68 PLEPA