

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 120
5462483

BETWEEN CATHRYN MARIE GREY
 Applicant

AND CHIEF EXECUTIVE, MINISTRY
 OF BUSINESS, INNOVATION
 AND EMPLOYMENT
 Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person
 G La Hood, Counsel for Respondent

Further information
received: 4 August and 4 November 2014 for the Applicant
 22 August 2014 for the Respondent

Investigation Meeting On the papers

Determination: 27 November 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 15 October 2013, Ms Cathryn Grey, was advised in writing by the Ministry of Business, Innovation and Employment (the Ministry) that she did not satisfy the “*hours test*” requirements set out at s.71CB of the Parental Leave and Employment Protection Act 1987 (PLEPA or the Act) and was therefore ineligible for parental leave payments.

[2] Ms Grey has since lodged a statement of problem with the Authority. She seeks a review of the Ministry’s decision and applies for an order that she is eligible

for parental leave payments. Her application is made pursuant to s.71ZB of the Act which authorises the Authority to confirm, modify or reverse the decision of the Ministry.

[3] During a telephone conference the parties agreed to have the Authority determine the matter ‘on the papers’ and an exchange of information was agreed.

Background information

[4] On 24 October 2013 Ms Grey and her husband assumed care of a child with a view to adopt.¹

[5] Prior to that event Ms Grey had been self-employed as a ‘Home Educator’. She provided services to PORSE In-Home Childcare Limited. Sometime before mid-August 2013 Ms Grey was selected to adopt a baby due to be born on 10 November 2013. Information provided by an Adoptions Social Worker of Child Youth and Family Services (“CYF”) states that in the lead up to the due date of birth Ms Grey set about “*sensitively transitioning children in her care...to other carer’s homes*”.

[6] Ms Grey stopped working on 1 September 2013. Her timesheet history provides that she was paid \$437.50 on 18 August 2013 and \$59.50 on 1 September 2013. CYF reports that Ms Grey’s sole reason for ceasing work was to care for the baby when he arrived.

[7] A copy of Ms Grey’s application for parental leave payments was not provided but it is clear there were ongoing discussions in September and early October 2013 between the Ministry and Ms Grey as to her eligibility for the entitlement.² There is some evidence that Ms Grey advised MBIE that she was contemplating working on a casual basis after having facilitated alternative placement for the children in her care, but she did not resume any other work after that period.

[8] On 15 October 2013 the Ministry formed a view that because Ms Grey had not “*engaged in any type of work since 19 August 2013*”³ she would not meet the hours test at the date [she planned] to assume care of the baby...”.

¹ Section 71CB(1)(b)(i)

² Referred to in the letter of 15 October 2014

³ On 1 October 2013 Ms Grey told the Ministry that she had finished working on 18 August 2013.

[9] It now appears Ms Grey finished work later than reported to the Ministry, and she assumed care for the baby 17 days prior to expectations⁴. The period of time between finishing work and assuming care of the child was approximately 7 1/2 weeks.

The law

[10] Part 7A of the Act governs who may be eligible to parental leave payments. Section 71DA(1)(a) provides that a self-employed person is entitled to a parental leave payment if the person is an ‘eligible self-employed person’.

[11] Section s.71CB defines who is an eligible self-employed person. With regards to the circumstances of adoption, s.71CB provides:

- 71CB Definition of eligible self-employed person
- (1) In this Part, **eligible self-employed person** means –
- ...
- (b) A self-employed person who –
- (i) Assumes (with a view to adoption by that self-employed person or by that person and that person’s spouse or partner jointly) the care of a child who is not more than five years of age; and
 - (ii) At the date on which he or she, with a view to adoption, first assumes the care of a child, will have been self-employed for at least an average of 10 hours a week over the immediately preceding six months or the immediately preceding 12 months; and
 - (iii) Takes parental leave from self-employment in respect of that child.

[12] There is no dispute that Ms Grey was self-employed and that she assumed (with a view to adopt) care of a child not more than 5 years of age. I am satisfied that she met the first of three (statutory) limbs required by s.71CB to establish eligibility for parental leave payments.

The issue

[13] In its statement in reply, the Ministry stated Ms Grey is not an eligible self-employed person [pursuant to s.71CB(1)(b)(ii)] because she had “*not [worked] as a self-employed person for at least an average of 10 hours a week over the immediately*

⁴ The baby was born 17 days before his estimated due date.

preceding six months or the immediately preceding 12 months” [of the date she assumed care of the child].

[14] Ms Grey’s position is that the plain meaning of the words used at s.71CB(1)(b)(ii), and the way she has applied them, provides for an assessment of the number of hours of work undertaken over either of the timeframes set out in the Act. She says the Act requires the total number of those hours to be averaged over the relevant same time frame. If this methodology is applied, Mr Grey states her average hours of work exceed 10 per week and she is eligible for parental leave payments.

Analysis and determination

[15] Ms Grey’s claim requires the Authority to examine and interpret what is required pursuant to s.71CB(1)(b)(ii) of the Act.

[16] The starting point is s.5(1) Interpretation Act 1999 which provides as follows:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment. ”

[17] In the Supreme Court judgement of *Commerce Commission v Fonterra Co-operative Group Ltd*⁵ Tipping J observed:

“It is necessary to bear in mind that s.5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s.5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment. ”

[18] No information as to how the Ministry interprets s.71CB(1)(b)(ii) was provided.

⁵ [2007] NZSC 36 at [22]

[19] In the absence of that information it has been difficult to assess the Ministry's position. I consider it likely that the Ministry construe's s.71CB(1)(b)(ii) as requiring a self-employed person to work either every week (even if for one hour), or a total of 40 hours per month. This approach complies with the provisions set out at s.72A which I shall return to later in this determination.

[20] Starting with the text, s.71CB(1)(b)(ii) sets out minimum hours that a self-employed person must have undertaken immediately preceding the date by which the self-employed person assumed care of the child.

[21] If I have correctly perceived the Ministry's interpretation of s.71CB(1)(b)(ii), I consider its approach strains the meaning of the relevant subsection. I do not consider that the words contained at s.71CB(1)(b)(ii) necessitate an otherwise eligible self-employed person to work *every* week as is perhaps the Ministry's view. If a self-employed applicant was obliged to work *every* week then the subsection would make that obligation express. Further, the requirement to assess hours of work over either 6 or 12 months so as to extrapolate a weekly average (as set out at s.71CB(1)(b)(ii)) would be obsolete if the Ministry's perceived interpretation was correct.

[22] The appropriate approach is to give ordinary meaning to the words used. In this matter the phrase "*for at least an average of 10 hours a week over [the immediately preceding one or other time periods]*", is critical. The requirement to *average* hours *over* the required time period set out in the statute is clear and means exactly what it says. In this respect I conclude that eligibility is established by averaging the total hours of work undertaken over one or other of the two statutory available time periods⁶, and is met if a minimum average of 10 hours in the weeks within that timeframe was worked.

[23] A plain interpretation of the words set out at s s.71CB(1)(b)(ii) favours Ms Grey's position. However it is useful to adopt Tipping J's recommendation to '*cross-check*' my provisional view against the purpose of the Act and other material sections within the Act.

Section 72A

⁶ 12 or 6 months

[24] At first blush s.72A(b) appears to provide an explanation for the Ministry's assumed position referred to a [19] of this determination. Section 72A prescribes and modifies the minimum work time requirements. Section 72A(b) provides that an employee will be regarded as satisfying the hours of work criteria if the employee is in the employment of the employer no less than an average of 10 hours a week (during one or other of the specified periods) "*and...either no less than 1 hour in every week during the period or no less than 40 hours in every month during that period*".⁷

[25] However s.72A applies solely and exclusively to employees. There is no equivalent section aimed at self-employed persons and there is no indication that the methodology used to ascertain work time as set out in s.72A applies also to self-employed persons. Section 72A makes no reference to self-employed persons.

[26] There may be an argument that Parliament is unlikely to have intended to apply differing criteria between employees and self-employed persons to access eligibility to parental leave payments. However, without express provision that the modifiers contained at s.72A are to be applied to self-employed persons I am unwilling to incorporate by implication that approach into the text of s.71CB.

Section 71CC

[27] In its letter of 15 October the Ministry referred Ms Grey to s.71CC which provides how entitlement to paid parental leave should be assessed when a self-employed person has engaged in multiple self-employment. Section 71CC(2)(b) the Act provides

- (1) This section applies for the purposes of determining the rights, in relation to a parental leave payment, of a person who is engaged in more than 1 type of work on a self-employed basis.
- (2) If a self-employed person is engaged in more than 1 type of work-
 - ...
 - (b) consecutively during a 6-month period or 12-month period, the work must be treated as 1 period of self-employment if the break between the types of work is no greater than 30 days.

[28] I accept that s.71CC(2)(b) supports an inference that over the course of either of the statutory specified periods in which hours of work will be assessed and

⁷ s.72A(b)

averaged, a self-employed person must engage in work within every 30 day juncture during one of those periods.

[29] However, it is clear s. 71CC cannot apply to Ms Grey's situation because she did not engage in more than 1 type of work on a self-employed basis, which is the sole criteria making this section applicable. Again, I am unwilling to accept that the contents of s.71CC(2)(b) should form an implied provision within s.71CB(1)(b)(ii).

[30] Having assessed both the relevant provision and surrounding sections of the Act I am unwilling to extend the meaning of s.71CB(1)(b)(ii) beyond the words contained in that section and the plain meaning that can be reasonably ascribed to those words.

[31] According to the construction of s.71CB(1)(b)(ii) I find that a self-employed person need only establish that the hours of work undertaken over either of the specified time periods can be averaged out as 10 (or above) per notional week within one or other of those timeframes. Ms Grey's time-sheet history establishes that she has satisfied this test. In these circumstances MBIE was not able to lawfully decline Ms Grey's application for paid parental leave for the reason it gave.

Was Ms Grey on parental leave at the time of her application for parental leave payments

[32] The third limb of s.71CB at (1)(b)(iii) is the requirement to take parental leave from self-employment in respect of the child. The interpretation provision (at s.2) provides a definition of "parental leave" as follows:

"means, for a self-employed person, a period during which the self-employed persons temporarily does not work because of the birth of a child or the assumption of care of a child by the person...

[33] The difficulty for Ms Grey is at the time she applied for parental leave payments she had ceased to work but had not yet assumed care of a child, which is a required condition for parental leave.

[34] Sections 10, 11, 12 and 37 of the Act provide time frames in which maternity leave may commence including that leave may begin prior to the expected date of delivery or assumption (with a view to adoption...) of the care of a child. I note maternity leave may begin in the case of adoption not more than 6 weeks before the

date of assumption of care of a child⁸. However, as with s.72A, each of these sections refer to the provisions as being available to employees. No reference is made in any of these provisions as applying to self-employed persons. In this respect there does not appear to be any provision in the Act which allows self-employed persons to commence parental leave prior to the expected date of delivery or assumption of care of a child with a view to adopt.

[35] I can only conclude that at the time Ms Grey was declined parental leave payments she cannot have been on parental leave because that entitlement was not yet available to her. She therefore did not satisfy the definition of an eligible self-employed person.

Determination

[36] Section 68 of Act allows the Authority to grant relief in respect of an irregularity if it thinks it is reasonable to do so having regard to the nature of the irregularity, the good faith or otherwise of the parties and any other matters that it thinks proper.

[37] Seven days after Ms Grey application for parental leave payments was declined she commenced a period during which she was not working because she had assumed care of the child. At that point she was on parental leave in accordance with the Act and met all the requirements of s.71CB.

[38] But for her early application Ms Grey would have been eligible for paid parental leave as at 24 October 2013. Had she re-applied for parental leave payments at that time her application should have been approved. I consider her early application can be characterised as a procedural irregularity from which relief may be available. Ms Grey has acted in good faith and this is a case in which it is reasonable for the Authority to grant relief.

[39] Under s.68(6) of the Act I confirm that Ms Grey has a right to parental leave payments and her application succeeds.

Michele Ryan
Member of the Employment Relations Authority

⁸ ss 11(b) and 10(b)