

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 318
5460215

BETWEEN JAYNE SUSAN MONTFORD
 Applicant

A N D MINISTRY OF BUSINESS,
 INNOVATION & EMPLOYMENT
 (formerly the Department of
 Labour)
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Angela Graham, Counsel for the respondent

Submissions: 3 July 2014 from respondent, 10 July from applicant

Investigation Meeting: On the papers

Date of Determination: 22 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 23 April 2014, the Ministry of Business, Innovation and Employment (MBIE) informed the applicant, Ms Montford, that she did not satisfy the requirements of the Parental Leave and Employment Protection Act 1987(the PLEPA) and was ineligible for parental leave payments.

[2] On 14 May, Ms Montford filed a Statement of Problem in the Authority seeking a review of MBIE's decision and payment of paid parental leave. A Statement in Reply was filed by MBIE on 29 May. The parties agreed to have the Authority determine the matter on the papers. Subsequently, Ms Montford and her Adoptions Social Worker, Ms Petra Aust filed affidavits in support of the application and the parties exchanged submissions.

[3] On 13 February 2014, Ms Montford and her husband were approved by Child Youth and Family (CYF) as prospective adoptive applicants for the local adoption pool and were also approved as prospective home for life parents for a child in the custody of the Chief Executive of CYF. The Home for Life arrangement was confirmed by CYF in a letter to Mr and Mrs Montford dated 7 March 2014.

[4] On 12 March 2014, Ms Montford and her husband agreed to the permanent home for life placement of a child. Ms Montford immediately sought and obtained approval from her employer for parental leave. Relevantly, Ms Montford's letter to her employer dated 12 March, applying for parental leave, has as its subject heading, "*Adoptive Primary Carer*" and the first sentence is as follows:

My spouse and I intend to adopt a baby [or child under 6], and we have started the "Home for Life" process through the Court and will be applying for parental orders.

[5] At the time of placement, the child's biological parents had not consented to adoption by Mr and Mrs Montford.

[6] On 19 March, a form was completed by Ms Montford's employer for paid parental leave and submitted to Inland Revenue for processing. In this form, Ms Montford is asked if the application for paid parental leave is "*for an adopted child?*" to which Ms Montford's responded by ticking the "*yes*" box and noting "*Permanent Home and Life*".

[7] Ms Montford and child were discharged from Waikato Hospital on 28 March. At about the same time Ms Montford received a phone call from Ms Dehlia Schuster, the information officer at MBIE telling her she may not be eligible for paid parental leave. Ms Montford was shocked and referred Ms Schuster to her Adoptions Social Worker, Ms Aust to confirm that Ms Montford and her husband "*had assumed care of the child permanently and adoption would occur when and if the biological parents consent*".

[8] On 2 April 2014 in a letter to the Montfords, Ms Aust confirmed that the child "*... has been placed in your permanent care with a view to adoption providing his biological parents consent to an adoption in the future*".

[9] In a letter dated 23 April, MBIE informed Ms Montford that she was not entitled to paid parental leave because she was not able to satisfy the eligibility

criteria for parental leave payments. Essentially, MBIE claim that at the date Ms Montford assumed care for the child she did not have a “*view to adoption*”. This was because she had not taken steps to legally adopt the child when she assumed care of him. Ms Montford denies this and says she assumed the care of the child under a Home for Life arrangement but with a view to adopt if and when the biological parents consented.

Issue

Is Ms Montford eligible for and entitled to a paid parental leave payment?

[10] Under s.71D of the PLEPA, to be entitled to paid parental leave, Ms Montford was required to:

- Give written notice to her employer of her wish to take parental leave;
- Take parental leave; and
- Be an eligible employee¹.

[11] To be an eligible employee, Ms Montford was required to:

- Assume (with a view to adoption) the care of a child who is not more than five years of age; and
- Meet certain employment-related requirements².

[12] It is not disputed that Ms Montford gave written notice to her employer that she wished to take parental leave or that parental leave was granted by her employer.

[13] Section 31 of the PLEPA requires an employee to give notice to the employer of a wish to take parental leave. Section 33 of the PLEPA sets out what is required in the notice under s.31 when an employee is proposing to adopt a child. These requirements are summarised as follows:

- (a) 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, notice must be given within 14 days of the placement of the child and

¹ An eligible employee is defined at s.71CA

² Sections 71CA and 8 of the PLEPA

be accompanied by a letter stating the employee is keeping the child in the home with a view to adoption; or

- (b) Where a Court has made an interim order under s.6(1)(b) of the Adoption Act 1955, notice must be given within 14 days of the date of the order, and be accompanied by a certified copy of the order; or
- (c) Where the child is otherwise lawfully in the employee's home under s.6(4) of the Adoption Act 1955, notice must be given within 14 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.

[14] MBIE submits that Ms Montford's eligibility to obtain parental leave payments was dependent on the requirement that she assumed care of a child with a "*view to adoption*". MBIE submits that the phrase "*with a view to adoption*" has a particular meaning in the context of s.33 of the PLEPA.

[15] MBIE submits that Ms Montford has failed to show that she meets any of the requirements under s.33 of the PLEPA (and the requirements of s.6 of the Adoption Act 1955). MBIE claim there was no formal documentation (Court order or social worker placement endorsement) to show that the child in the care of Ms Montford was in accordance with the Adoption Act 1955. MBIE states that it does not have jurisdiction to waive the notice requirements under s33 of the PLEPA.

[16] It is apparent in my view, that Ms Montford assumed care of the child with a view to adoption if and when his biological parents give consent. This is clear from Ms Montford's letter of 12 March to her employer applying for parental leave, from the Inland Revenue form filled out by her on 18 March and submitted by her employer and from Ms Aust's affidavit evidence and letter to her dated 2 April.

[17] Ms Montford took the child home with the intention of adopting him and took leave from her employment to care for the child.

[18] Ms Montford did obtain the required approval from the social worker and this was notified to MBIE on 2 April within 14 days of the placement of the child.

[19] MBIE point to contradictory information provided to it regarding Ms Montford's intentions regarding the adoption of the child. I have reviewed this information and the affidavit evidence and I conclude that Ms Montford assumed care of the child with a "*view to adoption*". In the event the letter from the Social Worker dated 2 April was not strictly in accordance with the requirements of s33 of the PLEPA I conclude this is a matter of form, not substance and does not alter my decision as to Ms Montford's eligibility and entitlement.

Remedies

[20] I find that Ms Montford is entitled to parental leave payments.

[21] I order MBIE to reimburse \$71.56 to Ms Montford for the cost of her filing fee.

Costs

[22] As Ms Montford represented herself, there will be no order for costs.

Anna Fitzgibbon
Member of the Employment Relations Authority