

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 102
3062872

BETWEEN PALAK SHAH
Applicant

AND MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
Ian Murray, counsel for the respondent

Investigation Meeting: On the papers

Submissions and further 13 August, 20 September, 9 October and 2 December
information received: 2019 from the applicant
20 August 2019 from the respondent

Date of determination: 3 March 2020

DETERMINATION OF THE AUTHORITY

A. Palak Shah is not entitled to parental leave payments under the Parental Leave and Employment Protection Act 1987. The decision of the Ministry of Business, Innovation and Employment is confirmed.

B. Costs are reserved.

Employment Relationship Problem

[1] Palak Shah claims that she should have been granted parental leave payments (PLP) when she gave birth to her child in New Zealand. Broadly speaking, the PLP scheme provides for government payments to those stopping work or taking parental leave.

[2] I take this to be an application under s 71ZB of the Parental Leave and Employment Protection Act 1987 (PLEPA). That is, Ms Shah is seeking a review of the decision of Ministry of Business, Innovation and Employment (MBIE) that she was not entitled to PLP as she was not an employee in New Zealand for 26 weeks out of 52 weeks prior to making her application.

[3] At a case management conference it was agreed that this case could be decided on the papers. Submissions were received from both parties, along with some documents from Ms Shah. Ms Shah initially did not provide any submissions in reply, as she was permitted to do by the timetable. However, she subsequently indicated that she wished to do so and a date was set for her to do so. Nothing was received and a date was then set for any reply submissions or confirmation that Ms Shah did not intend to file anything further. Later Ms Shah indicated that she did not wish to file anything further.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.

Ms Shah's situation

[5] Ms Shah is a New Zealand citizen. For more than five years prior to 2013 she worked in New Zealand, paying taxes and making Kiwisaver contributions. In 2013 she moved to Australia and began working there. For some years leading up to 2019 Ms Shah worked for an Australian bank, was paid in Australian dollars into an Australian bank account and paid tax on that income in Australia. Ms Shah's employment contract states that it is governed by the laws of the State of Victoria.

[6] Ms Shah's employer or a related company owns a New Zealand bank. However, Ms Shah did not do any work for the New Zealand bank, nor did she undertake any work in New Zealand for the Australian bank.

[7] Ms Shah looked at the New Zealand Inland Revenue Department (IRD) website regarding PLP. She noticed there was no specified requirement to have worked in New Zealand for any particular period prior to the birth of a child to qualify for PLP. The website was silent on this issue.

[8] During her time in Australia, Ms Shah remained a taxpayer in New Zealand as she had earnings on a term deposit and her Kiwisaver account.

[9] Ms Shah took leave from her Australian job and returned to her home country New Zealand so she could deliver and look after her baby with her mother's support. She made her decision on the basis of the information available. Ms Shah gave birth in New Zealand on 10 March 2019.

[10] Ms Shah applied for PLP in New Zealand. The PLP application form, known as IRD 880, indicates that in many situations an employee must get a declaration from their employer regarding whether the employee worked the required number of hours and weeks and what their income is. Ms Shah's declaration was completed by a representative of her Australian employer. Ms Shah also completed a statutory declaration herself.

[11] The IRD rejected Ms Shah's application on the basis she was not making "tax contributions to the New Zealand government", stating she had to work in New Zealand to get PLP. MBIE subsequently advised Ms Shah that her work carried out in Australia would not make her eligible for payment in New Zealand as parental leave payments are "governed by New Zealand legislation".

Submissions from Ms Shah

[12] Ms Shah emphasises that she met the work requirements, namely working at least 10 hours per week for at least 26 weeks out of 52.

[13] She relies on the absence of any stated requirement in the PLEPA, the IRD website or the PLP application form that the work required to obtain PLP must be undertaken in New Zealand.

[14] Ms Shah's expectation that the IRD website would have made it clear if work in New Zealand was required. I accept in the modern era government websites are a very significant source of information. However, I cannot determine Ms Shah's entitlement on that basis and must rather focus on the PLEPA which is the legal source of her entitlement, if she has one.

[15] No information was provided about whether Ms Shah had an entitlement to parental leave type payments in Australia.

Submissions from MBIE

[16] Submissions on behalf of MBIE oppose Ms Shah's application. Counsel emphasises that paid parental leave can only be taken in the country where the job is based or the work is being carried out. An applicant cannot meet the work requirements for a PLP entitlement if she is not living or having income in New Zealand in the relevant period before her child's birth.

[17] Further, people should be the subject of the laws of their country of residence, regardless of employment or citizenship. Benefits are dependent on residence. Parental leave entitlements should depend on the laws that apply in their country of birth immediately prior to birth. There needs to be a nexus between New Zealand and the work and income.

[18] MBIE distinguished Ms Shah's situation from that in *Jensen v Chief Executive of the Department of Labour*¹. Ms Jensen was a citizen of Norway but lived in New Zealand with permanent residence, working here for a Norwegian company. She owned property in New Zealand. Although her employment was governed by the laws of Norway, she paid tax in New Zealand and filed tax returns here. The Authority concluded that she was entitled to PLP here.

The legislation

[19] The parental leave legislation is of some complexity. I will focus my discussion on the situation of a mother giving birth, recognising that the Act also covers people taking responsibility for children in other situations.

¹ *Jensen v Chief Executive of the Department of Labour* [2012] NZERA Auckland 244

[20] The purpose of the PLEPA includes to set minimum parental leave entitlements for employees and entitle certain employees and self-employed persons to paid parental leave.² The definition of employee does not include any requirement that the employee works in New Zealand.³

[21] Part 7A of the PLEPA covers parental leave payments. An eligible employee is defined in s 71CA to mean a person who is a primary caregiver of a child and meets the parental leave payment threshold. Any rights or benefits coming from non-statutory parental leave are ignored when considering eligibility.⁴

[22] A person is eligible for PLP under s 71D(1) if:

- (a) the person is—
 - (i) an eligible employee or an eligible self-employed person; or
 - (ii) a person to whom all or part of an entitlement to a parental leave payment is transferred under s 71E; or
 - (iii) a person who succeeds to all or part of an entitlement to a parental leave payment under s72B; and
- (b) during the period in relation to which the person receives parental leave payments, the person—
 - (i) is not employed or self-employed; or
 - (ii) takes parental leave from their employment or self-employment.

[23] Therefore to be eligible for payments employees must not be working or must take parental leave from their employment.

[24] Parental leave is defined under s 2(1) of PLEPA to mean primary carer leave, partner leave and extended leave, which the employee is entitled to under the Act. Primary carer leave applies to women who are pregnant or have given birth.⁵ An employee may take primary carer leave if they are the primary carer and meet the 6-month employment test or the 12-month employment test.⁶

[25] The 6 and 12-month tests require the employee to have worked at least an average of 10 hours per week for the same employer in that period.

² S 1A of the PLEPA.

³ Ss 2 and 5A of the PLEPA.

⁴ S 71CA(2) of the PLEPA.

⁵ S 7(1)(a) of the PLEPA.

⁶ S 8(1) of PLEPA.

[26] The parental leave payment threshold requires the person to have been an employee for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding the expected date of delivery.⁷

Case law

[27] It is a general principle of construction that legislation is prima facie territorial. This has been recognised by the New Zealand Supreme Court in *Poynter v Commerce Commission*⁸ and *Brown v New Zealand Basing Ltd*⁹.

[28] As noted above, the Authority in *Jensen v Chief Executive of the Department of Labour*, concluded that PLP should have been granted to a foreign citizen with permanent residence here, who worked and paid tax here but for did so for a foreign company governed by a foreign law.¹⁰

Discussion

[29] The PLEPA does not have express territorial restrictions in it. So, for example, there is no explicit requirement that the employee be based on New Zealand.

[30] However, following *Poynter* and *Brown*, prima facie the PLEPA is territorial in application, so it applies in New Zealand only. There is no provision in the Act extending its application to conduct or events elsewhere.

[31] Ms Shah is a New Zealand citizen but that on the face of the PLEPA is not a requirement of PLP. As noted by MBIE, social welfare benefits are available to permanent residents, even if they are not citizens.

[32] Ms Shah's baby was born in New Zealand. Is this enough?

[33] A superficial examination may suggest that Ms Shah meets the criteria for PLP. She could be seen as an eligible employee as she was the primary caregiver of a child. It seems that she took parental leave from her employment, although this would have been under the Australian legislation and/or her Australian employment contract. She

⁷ S 2BA(4) of the PLEPA.

⁸ *Poynter v Commerce Commission* [2010] NZSC 38

⁹ *Brown v New Zealand Basing Ltd* [2017] NZSC 139

¹⁰ Above n 1.

worked sufficient hours to meet the 12-month test and worked those hours on average over 26 of the 52 weeks immediately preceding the expected date of delivery, to meet the parental leave payment threshold.

[34] What she did not do, is do most of those things in New Zealand. In the absence of any extension of jurisdictional effect beyond New Zealand, I find that there must be a sufficient nexus between New Zealand and the work related aspects of those requirements.

[35] In order to be eligible for PLP Ms Shah must have taken parental leave. That parental leave must be under the New Zealand Act. It does not make sense that, in the absence of some trans-Tasman agreement, parental leave could be authorised and taken under the statute in one country and the payment to be required in under the scheme in a statute in the other country. The two may well have quite different regimes.

[36] If a country wanted to make eligibility wider than those residing in the country in the period before their child's birth it could do so, but that would need to be explicitly done and it has not been done in the PLEPA.

[37] There is no significant nexus between New Zealand and Ms Shah's work and income. She:

- (a) worked in Australia;
- (b) worked for an Australian company;
- (c) is party to an employment contract with a choice of law clause specifying Victorian law;
- (d) was paid in Australian dollars;
- (e) was paid into an Australian bank account; and
- (f) paid tax on those earnings in Australia.

[38] The connections she has to New Zealand, namely being a citizen and paying some tax here on income which does not come directly from her job, are not employment related. They are not sufficient to establish an entitlement under the PLEPA.

[39] The connection of her Australian employer owning a New Zealand company is also not sufficient given that she does not work for the New Zealand subsidiary.

[40] I conclude that Ms Shah was not entitled to parental leave payments under the PLEPA. The decision of MBIE is confirmed.

Costs

[41] Costs are reserved. Given the nature of the matter, this may be considered an appropriate case for costs to lie where they fall.

[42] However, in the event that MBIE wishes to pursue costs, the parties are invited to resolve the matter. A timetable would be set in the event that resolution does not occur.

Nicola Craig

Member of the Employment Relations Authority