

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHU ROHE**

[2021] NZERA 28
3119232

BETWEEN KERRIE FITZEK
Applicant

AND THE MINISTRY OF BUSINESS
INNOVATION AND EMPLOYMENT
Respondent

Member of Authority: David G Beck

Representatives: Mary Jane Thomas, Counsel for the Applicant
Greg La Hood, Counsel the Respondent

Investigation Meeting: On the papers

Submissions Received: 21 December 2020 from the Applicant
22 December 2020 from the Respondent

Date of Determination: 25 January 2021

DETERMINATION OF THE AUTHORITY

Access to paid parental leave

[1] Kerrie Fitzek has applied to the Authority to review a decision which The Ministry of Business and Innovation and Employment (“MBIE”) has made under s 71IA(5) Parental Leave and Employment Protection Act 1987 (“PLEP”) to decline her application for paid parental leave. The decision was made on the basis that she had completed insufficient time working for her then employer to meet the act qualifying threshold set out in s 2BA(4) PLEP

which is that: an applicant must have worked for at least an average of 10 hours per week for a total of 26 weeks in the 52 weeks preceding the date of confinement.

[2] Ms Fitzek submits that she would have met the qualifying threshold had her employer not unjustifiably withheld available work pursuant to her employment agreement and prematurely brought her employment to an end, in circumstances that amounted to discrimination after she had advised her employer of her pregnancy.

The Authority Process

[3] Pursuant to s 174E of Employment Relations Act 2000 ('the Act') I make findings of fact and law and outline conclusions on matters to resolve the disputed issue and make an order but I do not record all evidence and submissions received.

Issues

[4] The Authority has discretion to either "confirm modify or reverse" MBIE's decision pursuant to s 71ZB PLEP.

What facts gave rise to the MBIE decision to decline Ms Fitzek's application?

[5] Ms Fitzek was employed at an Invercargill restaurant from 10 September 2019 as a manager pursuant to a permanent 'full time hours' employment agreement that guaranteed a minimum of 30 hours per week. Ms Fitzek was employed under a working visa that was tied to remaining with her identified employer.

[6] Upon disclosing to her employer on 27 January 2020 that she was pregnant the employer did not offer Ms Fitzek any more hours of work despite Ms Fitzek signalling her ongoing availability for such. Ms Fitzek, through counsel, raised a personal grievance that led to her employment ending on 26 May when her employer paid out outstanding holiday pay. No further hours were worked in the period 27 January to 26 May 2020. In total, Ms Fitzek worked for 20 weeks that met the average weekly hours qualifying requirement. The parties reached a full, final and confidential agreement on the personal grievance issue. Ms Fitzek's child was born on 19 June 2020.

[7] The application for paid parental leave was declined by MBIE by way of a letter to Ms Fitzek of 7 September 2020 citing her ineligibility on the sole ground of her not meeting the 26 weeks employment threshold. MBIE explained that in applying discretion available under s 71IA PLEP, the scope of such was to consider an “irregularity” in a person’s application and that being outside of the ‘weeks worked’ threshold requirement did not qualify. Whilst somewhat confusingly describing Ms Fitzek’s irregularity as too “substantial” the letter concluded “It is the view of this office that it is beyond the scope of the Ministry in applying its discretion”. The letter then advised Ms Fitzek of her right to apply to the Authority to have the decision reviewed.

MBIE’s submission

[8] Mr La Hood submitted that MBIE only had jurisdiction to review irregularities as defined in s 71IA(5) PLEP that states an irregularity means:

- (a) failing to make an application for payment before the relevant date in section 71IA or
- (b) applying in a manner other than prescribed in the regulations or
- (c) failing to specify all the matters or include all the documents prescribed in the regulations or
- (d) failing to state whether the person wishes to transfer all or part of the entitlement under section 71E or
- (e) otherwise applying irregularity in matter of form.

[9] Mr La Hood drew the distinction between an irregularity of ‘form’ and one of ‘substance’ and asserted that a “failure to meet the threshold test is a matter of substance” and is consequently outside of MBIE’s ability to exercise discretion.

[10] Mr La Hood then cited various Authority determinations that involved a failure to meet the qualifying threshold which had not been considered an irregularity. However, Mr La Hood also cited other Authority determinations where a broader approach had been adopted by the Authority using what he acknowledged was a wider discretionary provision under section 157 Employment Relations Act 2000 (“ER Act”) to review an MBIE decision that was otherwise confined in his view to a matter of ‘form’ and thus not an irregularity.

Ms Fitzek's submission

[11] Ms Thomas, after reciting the background to her client's situation and providing correspondence evidencing Ms Fitzek's former employer's intransigence, traversed authorities on the essentially two approaches the Authority has taken to what is an irregularity.

[12] Whilst some of the cases cited by both parties were the same, Ms Thomas sought to distinguish cases where the Authority had taken a strict approach to the distinction between substance and form by pointing to the fact that they involved situations where the applicants either voluntarily left their employment prior to meeting the threshold test or where an employer went into liquidation,¹ whereas Ms Fitzek's situation involved an unjustified termination of her employment directly linked to her being pregnant.

[13] Ms Thomas also made the valid point that Ms Fitzek's employment ended on 26 May 2020 when her employer paid out her holiday pay owed. I observe that this brings Ms Fitzek within the 26 weeks threshold of being "in employment" but an issue then arises out of the s 2BA PLEP threshold, requiring that during the 26 weeks the applicant must work an average of 10 hours per week.

[14] On the latter issue, it is not clear whether MBIE considered applying s 72A PLEP "Eligibility criteria based on average hours of work and allowing for periods of authorised leave" that allows for discretion to count periods of "authorised" leave toward the average ten hours per week qualifying threshold. Two provisions in this section could have been considered – s 72A(2)(b) covering leave without pay with the employer's agreement (on the facts, the employer in not providing hours of work to Ms Fitzek when her employment agreement required them to do so, was tacitly agreeing to leave without pay).

[15] Further, s 72A(2)(f) PLEP allows an MBIE Labour Inspector broad discretion to consider counting eligibility hours in "any other circumstances" that are considered "not to

¹ *Nuku v Department of Labour* [2010] Employment Relations Authority, Wellington 19/8/2010, Stapp Member WA 133/10, File No 5308922 and *Fairhall V Chief Executive of the Department of Labour* Employment Relations Authority, Auckland 15/4/2009, Ulrich Member AA119/09, File No 5241219.

disrupt the normal pattern of the employee's employment".² In this context, apart from Ms Fitzek having no culpability for her employer's discriminatory conduct, there is an issue of 'extraordinary' circumstances. The latter being the period under scrutiny also coincided with Covid-19 related restrictions (including a lockdown period from 23 March 2020) and Ms Fitzek's former employer facing a dramatic loss of custom. Ms Fitzek has disclosed that she "settled" her discrimination claim with her previous employer on 27 June 2020 with what has now turned out to be incorrect legal advice that she could also have an entitlement to paid parental leave.

[16] Whilst Ms Thomas has overall, acknowledged a failure to meet the threshold test "is generally a matter of form" she opined that it should be extended to matters of substance where the decision maker considers it would be "just to do so" and that MBIE declining Ms Fitzek's application displayed inequity. In setting out Ms Fitzek's view of the matter Ms Thomas succinctly noted that her application for review was essentially based upon MBIE failing to take into account that "but for the unlawful termination of her employment she would have met the payment threshold test".

Discussion

[17] The first issue I traverse is to broadly consider the purpose of the enactment of the PLEP (and allied provisions in both the Human Rights Act 1993³ and ER Act⁴) that essentially seek to afford protection to women facing discrimination during pregnancy.⁵ This was a case of 'direct discrimination' and whilst I accept MBIE where not charged with assisting on a complaint whilst the employment was ongoing, I think the overarching purpose of the Act should have been one factor guiding MBIE's decision making in exercising discretion and examining contextual matters Ms Fitzek had advanced that demonstrated no fault on her part.

² Section 72A Parental Leave and Employment Protection Act 1987.

³ Section 21 (1) (a) Human Rights Act 1993 that prohibits discrimination on the ground of "sex, which includes pregnancy and childbirth.

⁴ Section 105 Employment Relations Act 2000 that mirrors the above cited provision of the Human Rights Act 1993

⁵ Section 1A (b) 'Purpose' of the Parental Leave and Employment Protection Act 1987 is to "protect the rights of employees during pregnancy and parental leave".

[18] Had this matter have been before the Authority in the format of a claim of discrimination a “but for test” would have applied (i.e. would the employer have acted as is it did in restricting Ms Fitzek’s hours if she had not been pregnant). ⁶

[19] MBIE has, by uncritically citing decisions contrary to their position, tacitly accepted the wider “investigative” brief the Authority has under s 157 ER Act to approach matters before it:

... according to the substantial merits of the case, without regard to technicalities.
In addition, the Authority must act as it thinks fit in equity and good conscience but may not do anything that is inconsistent with the Employment Relations Act 2000.

[20] In this context, I am assisted by Member Hickey’s decision in *Kerapa* where she also applied a ‘but for’ test to reason that Ms Kerapa would have qualified for a parental leave payment had she not followed incorrect advice tendered by IRD. ⁷ Here had Ms Fitzek’s employer not discriminated against her it is more likely than not she would have worked an additional 6 weeks and brought herself within the PLEP qualifying threshold for paid parental leave.

[21] Further, in applying an equitable approach on the distinct facts of Ms Fitzek’s situation I find it would not offend the public interest and be consistent with the overall aim and scope of the PLEP and be just, to reverse MBIE’s decision and allow Ms Fitzek to receive paid parental leave. In making this decision I do not level any criticism of how MBIE applied the approach to ‘irregularity’ under s 71IA(5) PLEP in this context as it was a strictly correct approach but I have suggested that in future applications that involve extraordinary circumstances, MBIE may wish to look at other provisions in the act to ascertain if the qualifying threshold has been ‘deemed’ to have been met (as discussed above).

Conclusion

[22] In considering the overall circumstances of Ms Fitzek and the fact that she was the subject of direct discrimination, I find she is entitled to be paid 16 weeks paid parental leave and MBIE’s decision to not grant such is reversed.

⁶ *Trilford v Car Haulways Ltd* [1996] 2 ERNZ 351 (EC).

⁷ *Kerapa v Ministry of Business, Innovation and Employment* [2016] NZERA Christchurch, at [26].

Costs

[23] The parties are encouraged to come to an agreement on costs. If this is not possible the applicant can make a submission on costs within 14 days of this Determination being issued and the respondent has a further 14 days to provide a submission in response.

David G Beck

Member of the Employment Relations Authority