

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2023] NZERA 204
3190719

BETWEEN LAITA CHIWAYA
 Applicant

AND MINISTRY OF BUSINESS
 INNOVATION AND
 EMPLOYMENT
 Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant in person
 Rochelle Hill, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 28 January 2023 from the applicant
 14 February 2023 from the respondent

Further information: 21 March 2023 from the applicant
 4 April 2023 from the respondent

Determination: 21 April 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Laita Chiwaya applies under s 71ZB of the Parental Leave and Employment Protection Act 1987 (the Act) to review a decision of Ministry of Business, Innovation and Employment (MBIE) that she was not entitled to be eligible for parental leave payments (PLP). Under s 71ZB (3) of the Act the Authority has the discretion to “confirm, modify, or reverse the decision” of MBIE.

[2] Ms Chiwaya is a seasonal worker at a freezing works (employer). She says she has worked there for approximately 4 years.

[3] To be eligible for parental leave payments an employee must be the primary carer of the child and meet the eligibility test under s 2BA (4) of the Act ¹ (eligibility test). The eligibility test is that she had to:

... have been employed by the same employer for at least an average of 10 hours a week in the 12 months immediately preceding the expected date of –

- a. delivery of the child (in the case of a child to be born to the employee or to the employee's spouse or partner); or
- b. assumption of responsibility for the care of the child (in any other case).

[4] Ms Chiwaya gave birth to her baby on 22 October 2021. This was two weeks earlier than the expected date of delivery which was 4 November 2021.

[5] Ms Chiwaya worked for her employer and was paid for hours of more than 10 hours per week for 24 weeks during the 12 months prior to her expected date of delivery. The 24 weeks included 12.25 hours in the week commencing before a month long seasonal lay off. The remaining 23 weeks came almost consecutively after this, also more than 10 hours per week. Her work with her employer ended that year in the week ending 22 May 2021 when another season came to an end. She did not work for her employer again until she returned to work in 2022 having been granted four months of maternity leave. This effectively gave her the ability to defer her option to accept work when the new season opened again.

[6] Ms Chiwaya made three separate applications to MBIE providing the same information and was declined entitlement.

[7] MBIE declined Ms Chiwaya's applications because she was not employed by the same employer for 26 weeks in the 12 months preceding her expected due date of delivery as required in the eligibility test.

¹ Section 71CA of the PLEPA.

The Authority's investigation

[8] Ms Chiwaya was unrepresented and without any assistance that I was aware of. It is not for me to advise her, but I did my best to explain the process.

[9] I held two conference calls in this matter, the second of which counsel for MBIE could not be contacted but apologised later that this was an oversight. The first call enabled me to better understand Ms Chiwaya's application and helped me to identify more information that she could supply which she then supplied.

[10] After the second conference call, I timetabled submissions and indicated the matter would be determined on the papers. After submissions were received, I obtained a copy of the collective agreement from Ms Chiwaya and her IRD earnings record. MBIE was then given time to comment after which I reserved my decision.

The issues

[11] The issues are:

- (a) Was MBIE correct in declining Ms Chiwaya's applications for PLP?
- (b) Depending on the above, whether I should confirm, modify or reverse MBIE's decision to decline?

Was MBIE correct in declining Ms Chiwaya's applications for PLP?

[12] I find that MBIE was correct to decline Ms Chiwaya's applications for reasons that I outline below.

Birth earlier than the expected date of delivery

[13] Ms Chiwaya has consistently stated in her application and submissions that she believes that the date for which her hours and weeks be assessed should be counted back from the actual date when her child was born. If this happened, her pay and bank records support she would have worked an extra two weeks and she would have reached the eligibility threshold of 26 weeks.

[14] Ms Chiwaya says to count back from the expected date of delivery is unfair because an early birth was outside of her control. She also says that the test should count back from when her baby was born because that is when he came ‘into her care’. As I understand it, she refers to ss 7 and 2BA(1)(b)(ii) of the Act which include definitions in relation to entitlements under the Act for people who may be assuming responsibility for the care of the child. However, this option does not apply to Ms Chiwaya. This is because s 7 of the Act defines ‘primary carer’ in three alternatives, but they are not alternatives to choose from. That is clear from the wording in that section. Ms Chiwaya falls into the definition of primary carer as the biological mother only.

[15] Section 2BA(1)(b)(ii) of the Act is also clear in its meaning expressing the entitlement counting from either the expected date of delivery of the child ‘in the case of a child born to the employee or the employee’s spouse or partner’ or ‘assumption of responsibility for the care of the child (in any other case)’. Again, as with s 7 above these are not choices for the biological mother.

[16] I accept MBIE’s submission that the due date of delivery test has been applied correctly counting back from the expected due date of delivery (4 November 2021) to assess Ms Chiwaya’s application. The Authority does not have the discretion to modify this part of MBIE’s decision because to do so, would be rewriting legislation which it cannot properly do.²

Does paid work Ms Chiwaya completed after May 2021 and before the expected due date of delivery change her eligibility?

[17] After the first conference call with MBIE’s counsel’s agreement, I asked Ms Chiwaya to provide further information to help me understand what she meant when she said she worked beyond May 2021.

[18] Ms Chiwaya provided what could be reasonably regarded as invoices that were dated in September and November 2021. The invoices refer simply to ‘hours worked’ and charged

² *Anaru v Ministry of Business, Innovation and Employment* [2022] NZERA 375 at [11]; *Kemp v Ministry of Business Innovation and Employment* [2021] NZERA 240 at [33]; *Hood v Ministry of Business, Innovation and Employment* [2021] NZERA 215at [17] and [46].

by a farm trust entity to a payee called ‘Chiwaya Family Trust’ which appears on Mr Chiwaya’s IRD record of earnings but not on Ms Chiwaya’s IRD earnings for that time. Ms Chiwaya’s name does not appear on these invoices although two invoices show money was paid into her bank account number.

[19] Unfortunately, this information does not support the eligibility premise of Ms Chiwaya being employed for the same employer for a further two weeks under s 2BA(4) of the PLEPA. I accept the submission from MBIE that it appears to show a commercial structure of earnings through a business. Section 2AD of the Act requires eligibility to be assessed by treating self-employment and employment separately. Section 2BA (b)(i) is also clear in that even if this was qualifying employment, it needs to be hours and weeks worked with the same employer.

[20] I do not find there are further weeks beyond May 2021, that could be considered as additional weeks to make up the qualifying threshold of 26 weeks. Accordingly, I find MBIE’s decision to decline Ms Chiwaya’s eligibility on this basis is correct.

The effect of the ‘seasonal lay off’ on Mrs Chiwaya’s eligibility

[21] MBIE in its submissions referred to Ms Chiwaya’s ‘payslips and bank records showing 24 wage payments in the relevant [eligibility test] 52-week period.’³ I find this is consistent with my analysis of the same material. Inconsistently, MBIE’s submission goes on to refer to ‘24 payments between 12 December 2020 and 22 May 2021’ and then the submission says, ‘25 payments’ in total, including the week before the seasonal lay off. The submission then contends that Ms Chiwaya was one week short of the entitlement threshold. I take the total count of 25 to be an inadvertent error. However, this error appears to have led to an invitation for the Authority to consider that being just one week short, I might disregard the gap and deem Ms Chiwaya’s employment continued through the seasonal lay off when she did not actually work.

[22] I do not consider that I can modify or reverse MBIE’s decision to decline Ms Chiwaya’s application on this basis. Ms Chiwaya had rights under her collective agreement to

³ Respondent’s submissions dated 14 February 2023 at paragraph 11.

be offered work when a new season began (subject to availability of work and seniority). A letter from her employer confirms she was granted ‘maternity leave’, which effectively extended her time, by four months, to take the opportunity to accept another season of work. However, the Employment Court has found by analogy, that a seasonal layoff in the meat industry is not continuous employment for the purpose of holiday leave entitlement calculations.⁴ Although not asked to decide on the correctness of that case the Supreme Court of New Zealand has noted that ‘absent ... express provision, we consider that the parties must be treated as having negotiated against the background that the seasonal employment in the meat industry was discontinuous.’⁵

[23] Against this background, I find I cannot reasonably exercise my discretion to reverse MBIE’s decision based on considering Ms Chiwaya was employed during the lay off season for at least the extra two weeks to meet the threshold of the eligibility test.

Should MBIE’s decision to decline be confirmed, modified or reversed?

[24] Based on the above, I confirm MBIE’s decision as correct to decline Mrs Chiwaya’s application for PPL.

Antoinette Baker
Member of the Employment Relations Authority

⁴ *New Zealand Meat Workers’ Union Inc v Alliance Group Limited* [2006] ERNZ 664 (EmpC).

⁵ *AFFCO New Zealand Limited v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [45].