

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 225
3176347

BETWEEN

SAM TRUBRIDGE
Applicant

AND

MINISTRY OF BUSINESS,
INNOVATION, AND
EMPLOYMENT
Respondent

Member of Authority: Rowan Anderson

Representatives: Applicant in person
Amy Webster, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and responses received: 18 January 2023 and 9 February 2023 from Applicant
9 December 2022 from Respondent

Determination: 5 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sam Trubridge seeks a review of a decision by the Ministry of Business, Innovation and Employment (MBIE) declining an application by Mr Trubridge for parental leave payments under the Parental Leave and Employment Protection Act 1987 (the PLEP Act).

[2] Mr Trubridge's application was declined on the basis Mr Trubridge did not meet the criteria for being a primary carer for the purposes of paid parental leave as defined in the PLEP Act.

[3] Mr Trubridge has sought a review asking the Authority to modify or reverse MBIE's decision "...because it unfairly discriminates against fathers and/or men".

The Authority's Investigation

[4] The Authority scheduled two case management conferences at which Mr Trubridge did not appear. At the second of those conferences counsel for MBIE helpfully offered to discuss the relevant administrative matters with Mr Trubridge. The parties were able to agree on a process for the conduct of this matter, subject to approval by the Authority.

[5] As a result of the above steps an agreed statement of facts dated 4 November 2022 was provided to the Authority by the parties. The parties also agreed on a proposed timetable for the lodgement and exchange of written submissions and agreed that the matter should be dealt with 'on the papers' without the need for an investigation meeting.

[6] Submissions were received from MBIE on 9 December 2022. Mr Trubridge did not file submissions as such, relying instead to the content of his statement of problem. Mr Trubridge confirmed on 9 February 2023 that he did not wish to make any further submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background and agreed facts

[8] The facts relevant to the application for review, and to my determination, are largely uncontested. I am satisfied of the following matters:

- (a) Mr Trubridge's child was born on 23 October 2021.
- (b) Mr Trubridge's partner, the biological mother of the child, was not eligible for paid parental leave as she did not meet the parental leave payment threshold.
- (c) Mr Trubridge was granted 18 weeks parental leave by his employer and his last day of work was 6 May 2022.
- (d) Mr Trubridge assumed primary responsibility for the child as of 14 April 2022, prior to his finishing work but whilst able to work from home.

- (e) Mr Trubridge applied for paid parental leave on 3 May 2022 with a further application being made on 23 May 2023. Those applications were declined on 9 May 2022 and 26 May 2022 respectively.
- (f) Mr Trubridge returned to work on 5 September 2022.
- (g) Mr Trubridge assumed responsibility for the child in order to enable his partner to return to work and to keep her career afloat.
- (h) Mr Trubridge's partner remained involved in the care of the child's care, development and upbringing between May and September of 2022 when Mr Trubridge was off work.
- (i) Mr Trubridge's family came under significant financial stress having budgeted on the basis that paid parental leave would be available.

The basis on which Mr Trubridge's application was declined by MBIE

[9] Mr Trubridge's application was declined on the basis that he did not meet the criteria for being a primary carer for paid parental leave as defined in the PLEP Act.

[10] Mr Trubridge's partner, the child's biological mother, did not meet the parental leave payment threshold and as such no entitlement transferred from them to Mr Trubridge. Mr Trubridge is not a person who succeeded to an entitlement to parental leave payments.¹

[11] In the absence of any entitlement transferring from his partner, Mr Trubridge's entitlement to parental leave payments was dependent on whether Mr Trubridge was an 'eligible employee' for the purposes of Part 7A of the PLEP Act.²

[12] Section 71CA of the PLEP Act defines 'eligible employee' and requires both that the person be the primary carer in respect of the child and that they meet the parental leave threshold test.³ MBIE concedes that Mr Trubridge would have no difficulty meeting the parental leave threshold test but submits that he was not a 'primary carer' as defined in the Act. As such, the primary issue relates to whether Mr Trubridge was a primary carer for the purposes of the PLEP Act.

¹ Parental Leave and Employment Protection Act 1987, s 71D(1)(a).

² Parental Leave and Employment Protection Act 1987, s 71D(1)(a)(i).

³ Parental Leave and Employment Protection Act 1987, s 71CA.

Mr Trubridge's application to the Authority and submissions

[13] Section 71ZB of the PLEP Act provide that application may be made to the Authority by a relevant person for review of the decision made by the department, including as to the person's entitlement to parental leave payments.⁴ The Authority may confirm, modify, or reverse the decision of the MBIE.⁵

[14] In undertaking such a review, any discretion the Authority may exercise must be exercised in a principled way. It is not for the Authority to re-write the legislation and it must be approached based on the relevant principles of statutory interpretation.

[15] Mr Trubridge's submissions, as set out in the statement of problem can be summarised as follows:

- (a) Mr Trubridge says he should be entitled to parental leave payments on his own merits, and that he should be entitled despite any lack of entitlement his partner has.
- (b) There is an inequity in the system relating to parental leave payments that acts as a deterrent and obstacle to fathers accessing parental leave payments.
- (c) The PLEP Act unfairly discriminates against fathers/men.

[16] It is apparent from the above that Mr Trubridge's objection is not actually directed at the decision made by MBIE itself but is instead made on the basis that the PLEP Act unfairly discriminates against fathers/men generally by excluding them from eligibility on their own account in circumstances such as Mr Trubridge has encountered.

[17] MBIE submits that the decision declining Mr Trubridge's application for parental leave payments was correct, that the Authority's exercise of discretion in other cases exhibits a justified hesitancy where eligibility criteria have not been met, and that Mr Trubridge was not otherwise eligible for paid parental leave under the PLEP Act. MBIE says that Mr Trubridge was not entitled to parental leave payments as his partner was not eligible, and that he was not otherwise the 'primary carer' for the purposes of the PLEP Act.

⁴ Section 71ZB(1)(a).

⁵ Section 71ZB(3).

[18] MBIE, referring to Mr Trubridge's statement of problem alleging discrimination, also provided submissions as to s 19 of the New Zealand Bill of Rights Act 1990 (NZBORA) and the right to freedom from discrimination.

[19] In summary, those submissions assert that Parliament intended, in relation to the meaning of 'primary carer' and s 7(1)(b)(iii) of the PLEP Act, that there be a specific exception providing for eligibility of spouses or partners in their own right only where the biological mother is prevented from being involved in the care, development, and upbringing of the child for the foreseeable future. It also submits that if Parliament had intended to include a broader basis for eligibility on the part of a partner or spouse where the biological mother had returned to work, then it would have done so.

[20] MBIE's submissions proceed on the basis that the ground for discrimination claimed by Mr Trubridge is that of "sex" for the purposes of s 21 of the Human Rights Act 1993. It submits that the discrimination claim cannot succeed as no finding of differential treatment could be made on the basis that the appropriate comparator group to male partners or spouses of biological mothers would be other partners or spouses of biological mothers. On that basis, it says that the PLEP Act is not inconsistent with s 19 of the NZBORA which deals with freedom from discrimination by reference to the Human Rights Act 1993.

Is Mr Trubridge an 'eligible employee' for the purposes of the PLEP Act?

Mr Trubridge's application

[21] The discretion of the department to approve irregular applications is largely limited to an ability to approve applications that are irregular in form or as to timing.⁶ That was not the case here and I find that MBIE was unable to approve the application on a discretionary basis.

[22] The Authority may confirm, modify, or reverse the decision of the department.⁷ Whilst the Authority has broader discretion in relation to the consideration of, and granting of relief in relation to, irregularities, it is unable to simply exercise discretion to approve an application where the person does not meet the eligibility requirements of the PLEP Act.

⁶ Parental Leave and Employment Protection Act 1987, s 711A(5).

⁷ Section 71ZB(3).

[23] Section 7 of the PLEP Act defines ‘primary carer’ for the purposes of the PLEP Act and sets out limited circumstances in which the spouse or partner of the biological mother can be considered the primary carer. For present purposes⁸, for Mr Trubridge to be considered the primary carer he would have to have “taken permanent primary responsibility for the care, development, and upbringing of the child to the exclusion of the biological mother”.

[24] Whilst Mr Trubridge took primary responsibility for the child, it was neither on a permanent basis nor to the exclusion of the biological mother and as such Mr Trubridge was not a primary carer for the purposes of the PLEP Act. Therefore, I find he was not an eligible employee for the purposes of the PLEP Act. However, Mr Trubridge claims that his ineligibility under the PLEP is discriminatory.

New Zealand Bill of Rights Act 1990 and discrimination

[25] MBIE lodged submissions as to the application of the NZBORA. Mr Trubridge has not set out the legal basis of his claim of discrimination. However, I have nonetheless considered the submissions made by MBIE as to the application of the NZBORA.

[26] Section 6 of the NZBORA provides as follows:

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[27] Section 19 of the NZBORA provides that “[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993”.

[28] The only prohibited grounds of discrimination relevant to Mr Trubridge’s claim is that of sex.

⁸ Noting that Mr Trubridge was not the biological mother, cannot be considered to have succeeded to the biological mother’s entitlement, and that there cannot have been a transfer of entitlement from the biological mother. Those being other potential means of establishing status as a primary carer at s 7(1) see s 7(1) of the Parental Leave and Employment Protection Act 1987.

[29] In submissions, MBIE referred to the six-step exercise, as to considering the interpretation of enactments and the application of the NZBORA, set out by Tipping J in the Supreme Court.⁹

[30] That six-step exercise applies to the interrelationship between ss 4, 5 and 6 of the NZBORA and would involve assessing Parliament's intended meaning as to the relevant provisions of the PLEP Act and determining whether those intentions would be inconsistent with the right to freedom from discrimination based on sex. The six-step test might then involve ascertaining whether any inconsistency was a justified limitation for the purposes of s 5 of the NZBORA. If applicable, other steps would then be required to examine the matter further and, if reasonably possible, to find a consistent or less inconsistent meaning.

[31] I consider it clear that the PLEP Act only provides for eligibility of a partner or spouse of a biological mother in very limited circumstances where the partner or spouse has taken on permanent care of a child to the exclusion of the mother, including in the event of the death of the biological mother. That is a very clear limitation in terms of the eligibility of spouses or partners of biological mothers.

[32] Mr Trubridge's claim of discrimination proceeds on the basis that he is not entitled to parental leave payments under the PLEP Act. It is not a claim that the PLEP Act, interpreted consistently with s 6 of the NZBORA, provides him an entitlement to parental leave payments.

[33] Regard must be had to the jurisdiction of the Authority in relation to parental leave payments in terms of s 71ZB of the PLEP Act and s 161(s) of the Employment Relations Act 2000.¹⁰ The Authority is able to review a decision by MBIE relating to a person's entitlement to a parental leave payment. That necessarily requires an assessment of a person's entitlement to parental leave payments under the PLEP Act. However, I do not consider the Authority has jurisdiction to consider whether Mr Trubridge's right to freedom from discrimination under s 19 of the NZBORA is breached by operation of the PLEP Act or the decision made to decline his application.¹¹

⁹ *Hansen v R* [2007] NZSC 7 at [92].

¹⁰ Section 68 of the PLEP Act sets out relief that may, or must in some cases, be granted in relation to various irregularities.

¹¹ See, for example, *Employees v Attorney-General* [2021] NZEmpC 141 and *McClure v Ministry of Business, Innovation and Employment* [2022] NZERA 654.

[34] MBIE submits that, in relation to any claimed discrimination based on the prohibited ground of sex, that the claimed discrimination would be against males and that the appropriate comparator group would be non-male partners and spouses of biological mothers. Such persons are excluded from eligibility on the same basis and the exclusion from eligibility is not restricted to male partners and spouses. As such, I would otherwise have found that the claim of discrimination could not succeed and that there was no inconsistency as between Parliament's intended meaning in terms of eligibility under the PLEP Act and s 19 of the NZBORA.

[35] Mr Trubridge and his family find themselves in an unfortunate position, especially so given the expectation that they would receive parental leave payments and the consequential financial stresses that have resulted from their not doing so.

[36] It is also apparent that their intention, at least in part, was to have Mr Trubridge assume care of the child so that his partner could return to work to, as Mr Trubridge submitted, keep her 'career afloat'. That intention is perfectly understandable. However, I am unable to find other than that the PLEP Act, in circumstances such as Mr Trubridge finds himself in, does not provide partners and spouses eligibility for parental leave payments on their own account.

[37] I find that, having regard to the eligibility criteria in the PLEP Act, MBIE's decision declining Mr Trubridge's application for parental leave payments was correct.

Conclusion

[38] Mr Trubridge's application for review is not successful and MBIE's decision is confirmed.

Rowan Anderson
Member of the Employment Relations Authority