

BETWEEN ONDINE CROSBY
 Applicant

AND MINISTRY OF BUSINESS,
 INNOVATION &
 EMPLOYMENT
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Alex Leulu, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 28 February 2013 from Applicant
 None from Respondent

Determination: 18 March 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Ondine Crosby, applied for paid parental leave in accordance with the Parental Leave and Employment Protection Act 1987 (PLEPA) on 30 October 2012. Her application was referred by the Inland Revenue Department (IRD) to the Respondent, the Ministry of Business, Innovation and Employment (MBIE), in order to clarify her eligibility for paid parental leave.

[2] Ms Crosby was advised by MBIE by letter dated 23 November that she was: “*ineligible for parental leave payments*”.

[3] Ms Crosby, as advised by MBIE in that letter, has applied to the Authority for a review of that decision pursuant to s. 71ZB of the PLEPA.

[4] The parties agreed to the Authority determining this issue ‘on the papers’ based on the Statements of Problem and in Reply and on submissions from the parties.

Issues

[5] The issue for determination is whether Ms Crosby is entitled to receive paid parental leave in the particular circumstances in which she had been employed for the period preceding the expected date of delivery of her child.

Background Facts

[6] Ms Crosby had been employed by her own company, Kaisha New Zealand Limited (Kaisha), on 9 January 2012 when she had commenced working as a contractor at Auckland Council.

[7] Ms Crosby's engagement as a contractor at Auckland Council had continued until 1 April 2012. Following this period, and at the request of Auckland Council, Ms Crosby had agreed to change from engagement as a contractor to employment as a fixed term employee for Auckland Council.

[8] Ms Crosby had subsequently been employed by Auckland Council during the period 2 April until 20 December 2012.

[9] At the conclusion of the fixed term contract on 20 December 2012 Ms Crosby had resumed work as a contractor in the employment of Kaisha.

[10] On 30 October 2012 Ms Crosby lodged an application (the Application) for paid parental leave payments using the form designated for a self-employed person, accompanied by an attachment detailing the employers for whom she had worked during the period from 2 October 2011 until 1 March 2013.

[11] The employers listed on the attachment to the Application included Kaisha, for whom Ms Crosby had listed two periods of self-employment as a contractor, and Auckland Council, for whom Ms Crosby had listed a 38 week period as an employee. The two periods of self-employment with Kaisha preceded and proceeded the period of employment with Auckland Council.

Determination

[12] Entitlement to paid parental leave is determined in accordance with the provisions of the PLEPA. The purpose of the PLEPA is as stated in s 1A to: “*entitle certain employees and self-employed persons to up to 14 weeks of paid parental leave*”.

Entitlement as an employee

[13] Female employees are entitled to paid parental leave in accordance with s 7 of the PLEPA which states:

7 Entitlement of female employee to maternity leave

Except as otherwise provided in this Act, every female employee—

(a) who becomes pregnant; and

(b) who, at the expected date of delivery, will have been in the employment of the same employer for at least an average of 10 hours a week over—

(i) the immediately preceding 12 months; or

(ii) the immediately preceding 6 months,—

shall be entitled to maternity leave in accordance with this Act.

Eligibility as a self-employed person

[14] As a self-employed person, Ms Ondine was eligible to apply for paid parental leave. Eligibility for self-employed person is set out in s 71CB of the PLEPA which states:

71CB Definition of eligible self-employed person

(1) In this Part, eligible self-employed person means—

(a) a female self-employed person who—

(i) becomes pregnant; and

(ii) at the expected date of delivery, will have been self-employed for at least an average of 10 hours a week over the immediately preceding 6 months or the immediately preceding 12 months; and

(iii) takes parental leave from self-employment in respect of the child;

Ms Crosby's eligibility position

[15] Ms Crosby had been employed by Auckland Council from 2 April to 20 December 2012; however she had ceased to be employed by Auckland Council on 20 December 2012 and had resumed self-employment status with Kaisha from 24 December 2012. On this basis Ms Crosby did not qualify for paid parental leave pursuant to s 7 of the PLEPA.

[16] On 30 October 2012 when Ms Crosby lodged the Application, she stated on the Application that Kaisha would remain her employer until the time of the expected date of delivery of her baby on 16 March 2013.

[17] Ms Crosby's period of self-employment with Kaisha was for an expected period from 24 December 2012 until the expected date of delivery on 16 March 2012, a period of 3 months, less than the period of 6 or 12 months of self-employment required to qualify for paid parental leave under the PLEPA. On this basis Ms Crosby did not qualify for paid parental leave pursuant to s71CB of the PLEPA.

[18] I have considered whether Ms Crosby can combine the period of employment with Auckland Council with the period of employment with Kaisha in order to qualify for paid parental leave. Pursuant to s 2A of the PLEPA each period of employment must be treated separately:

2A multiple employments generally

An employee's entitlement to rights and benefits in respect of parental leave and parental leave payment must be determined by treating each of the employee's employments separately, if the employee has more than 1 employment.

[19] Treating each of Ms Crosby's employments separately I find that:

- the period of employment with Auckland Council is not an eligible period of employment pursuant to s7 PLEPA since it did not immediately precede the expected date of delivery stated to be 16 March 2013; and
- the period of employment on a self-employed basis with Kaisha is not an eligible period of employment pursuant to s 71CB as it would be less than 6 or 12 months at the expected date of delivery of 16 March 2013.

[20] Although Ms Crosby's status changed from that of employee to that of a self-employed person during the eligibility period as set out in the PLEPA, I observe that status is

not crucial to an assessment of eligibility of paid parental leave since both an employee and a self-employed person can obtain paid parental leave.

[21] The crucial element I find to be the length of either employment or self-employment with the same employer, for a period of the immediately preceding 6 or 12 months to the expected date of delivery pursuant to s 7 and s 71CB of the PLEPA.

Policy

[22] Ms Crosby requested that the determination by the Authority provide an explanation of the policy regarding eligibility periods.

[23] The qualifying period in the PLEPA, and indeed the 18 month qualifying period in its predecessor, The Maternity Leave and Employment Protection Bill 1980, had been set by recommendation of Select Committees

[24] The Bills had been passed without any commentary on the policy behind the qualifying period, however I note that in a Department of Labour 'Report to Labour Select Committee on the Parental Leave and Employment Protection Bill 1987', the Department noted that the requirement that the employee work for twelve months with the same employer was "*the most common qualifying period required in awards*", and further that: "*the proposed 12 months period is consistent with current NZ practice in both State and private sectors.*"

[25] Other than that, I am unable to assist Ms Crosby further.

Summary

[26] In accordance with the provisions of PLEPA I determine that Ms Crosby is not eligible for paid parental leave in accordance with the provisions of the PLEPA.

Eleanor Robinson
Member of the Employment Relations Authority