

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 41
5605977

BETWEEN NATASHA KERAPA
Applicant

A N D MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Christine Hickey

Representatives: Applicant in person
Catherine Milnes, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: Last correspondence from MBIE's counsel received on
17 March 2016

Date of Determination: 6 April 2016

DETERMINATION OF THE AUTHORITY

- A. The Ministry of Business, Innovation and Employment's decision is reversed and Natasha Kerepa is eligible for paid parental leave.**
- B. Costs lie where they fall.**

Employment relationship problem

[1] Natasha Kerapa has applied to the Authority to overturn the decision of the Ministry of Business, Innovation and Employment (MBIE) that she is not eligible for paid parental leave. MBIE conveyed its decision to Ms Kerapa by letter dated 18 January 2016. The reason given is that she would have been employed by her current employer for less than six months at her expected date of delivery (2 March 2016).

[2] Ms Kerapa submits that due to erroneous advice given to her by the IRD she made a decision to change employers during her pregnancy. It was this change of employment that MBIE decided renders her ineligible for parental leave payments.

[3] She asks me to review MBIE's decision.

[4] The parties have agreed to this being determined on the papers and have not made formal written submissions. MBIE is happy for me to rely on its decision letter, which clearly outlines its reasoning and its statement in reply. Ms Kerapa has provided some evidence I have taken into account. MBIE did not wish to make submissions on that evidence.

Background facts

[5] Natasha Kerapa was employed by Randstad Limited (Randstad) on an ongoing temporary contract with Spark New Zealand Trading Limited (Spark) from June 2015 as a Business Solutions Representative. Ms Kerapa became aware of her pregnancy in August 2015 during that engagement.

[6] In September 2015, Spark offered to employ Ms Kerapa directly in the same position.

[7] Ms Kerapa knew that her baby was due in March 2016. She intended to take paid parental leave. Before she decided whether to accept Spark's offer she made enquiries of the IRD, the government agency that makes parental leave payments.

[8] She wanted to ensure that if she changed employers her ability to receive paid parental leave would not be compromised. Ms Kerapa supplied me recordings of the three conversations she had with IRD staff on 10 and 18 September 2015. I have listened to the recordings.

[9] Ms Kerapa specifically asked, more than once, if she needed to be working for the same employer for 6 months prior to taking her parental leave to be eligible for paid parental leave. She outlined her concerns that if she accepted the Spark offer by the time she went on parental leave she would have been working for less than six months for her current employer.

[10] The information Ms Kerapa elicited during the first call was slightly ambiguous. In response to a question from Ms Kerapa about working for a temping

agency and whether she had to be with the same employer for 6 months, the IRD staff member answered, *yes, so long as you are with the same employer for 6 months it doesn't matter if it is temporary or permanent.* That did not sufficiently clarify the situation for Ms Kerepa and she called again.

[11] During the second call a different IRD staff member specifically checked whether she needed to be with the same employer for six months. He told her she only needed *six to twelve months of work history* and that did not need to be for one employer.

[12] In the third call, a third IRD staff member told Ms Kerepa that she needed to have 6 to 12 months of work history but that did not need to be with the same employer.

[13] On 19 October 2015, Ms Kerapa began employment with Spark as a Business Solutions Representative. This was the same role she had been in on her ongoing temporary assignment.

The law

[14] As at the date Ms Kerapa would have become eligible to receive paid parental leave, s.7 of the Parental Leave and Employment Protection Act 1987 (PLEPA) provided that every female employee who becomes pregnant and:

... 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.

[15] Female employees who are entitled to maternity leave under s.7 also become entitled to paid parental leave under s.71CA.

[16] Under s.71I of PLEPA, an employee becomes entitled to a parental leave payment once she has made application for payment in accordance with this section. The application is to be made to MBIE.

[17] For eligibility that crystallised before 1 April 2016, payments are made for up to 16 weeks after the date of commencement of parental leave.

MBIE's position

[18] In MBIE's statement in reply Ms Milnes wrote that Ms Kerapa is not entitled to paid parental leave because by virtue of her new employment with Spark she is outside the statutory criteria.

[19] MBIE also says that, unfortunately, there is no mechanism within the PLEPA for MBIE to make good the issue for Ms Kerapa. Section 71IA of the PLEPA gives MBIE the discretion to approve payment of parental leave despite an irregularity in an application for payment. However, such irregularity is confined to matters of form. Ms Kerapa's situation is not a matter of form so MBIE could not exercise its discretion to decide she should be eligible for paid leave.

[20] MBIE's submissions are entirely correct. It made the decision by applying the law to the facts of Ms Kerapa's case. Section 71IA does not apply in Ms Kerapa's case.

Determination

[21] The Authority's power to consider Ms Kerapa's claim comes from s.71ZB of PLEPA. The Authority has the power to either confirm, modify, or reverse MBIE's decision.

[22] The Authority is an investigative body that has the role of solving employment relationship problems by making a determination¹:

... 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.

[23] It is not correct to say that MBIE's decision was wrong. However, I consider that Ms Kerapa has been greatly disadvantaged by her reliance on advice from the IRD.

[24] I note that on 1 April 2016 amendments to PLEPA came into effect. Prior to those amendments, an employee had to be employed by the same employer for at least an average of 10 hours a week over at least the immediately preceding six months

¹ Section 157, Employment Relations Act 2000

before she became entitled to take parental leave. That is the situation that applies to Ms Kerapa, whose baby was due on 2 March 2016.

[25] However, as of 1 April 2016, a female employee became eligible for parental leave even if she had not been working for only one employer during the preceding six months. For example if she, like Ms Kerapa, had recently changed jobs.

[26] The information given to Ms Kerapa by at least two IRD staff members appears to have been correct as at 1 April 2016. However, it did not apply to Ms Kerapa's situation and the advice was not correct when it was given.

[27] I have no doubt that had Ms Kerapa been correctly advised by the IRD she would have remained employed by Randstad until her parental leave began. I have come to that conclusion in reliance on Ms Kerapa's calls to the IRD, her submission to that effect and on the following two letters.

[28] On 8 March 2016, Brooke Nelson, the National Manager of Randstad's Contact Centre, Assessment Centre and Business Support, wrote to the Authority:

I am writing once again in support of Natasha Kerapa's claim to paid parental leave. Natasha was originally employed through Randstad at Spark from June 2015 on an ongoing temporary contract until October 2015. Natasha was then offered a permanent contract with Spark. We were happy to continue her employment on an on-going assignment at Spark up to February 2016, during and after paid parental leave to ensure entitlement would be paid. However Natasha rang the IRD and was advised that due to this being six months or more of continuous service with the same employer, she would have the right to claim PPL.

Further to this, going on maternity leave would not have terminated her employment with Randstad as temporary employees are entitled to PPL and this was an ongoing assignment.

[29] In addition, Greg Price, Team Leader from Spark Home, Mobile and Business, wrote on 8 March 2016:

This letter certifies that Natasha Kerapa is currently employed by Spark NZ Trading. Natasha commenced employment with the Company (or one of its subsidiaries) on 19.10.2015.

Natasha is employed in the position of Business Solutions Representative.

Prior to this permanent employment with us she had worked with us as a Temp via Randstad which began in June 2015.

If it had been known in October 2015 that Natasha was pregnant, and if she had not accepted the permanent contract offered, we would have been happy to retain her in the temp role via Randstad up to her parental leave in Feb 2016.

[30] If Ms Kerepa had remained employed by Randstad but engaged at Spark up until the date she began her parental leave she would have been eligible for 16 weeks of paid parental leave.

[31] I consider that s.157 of ER Act empowers me to exercise my discretion to review MBIE's decision in my equity and good conscience jurisdiction without being bound by the technicality of Ms Kerapa's case.

[32] The combined result of IRD's advice to Ms Kerapa and MBIE's decision to render her ineligible for paid parental leave is that she has suffered an injustice.

[33] A factor that I have taken into account is that if Ms Kerapa's expected date of delivery was 31 days later, on 1 April 2016 or later, she would have been eligible for paid parental leave despite having changed employers in October 2015.

[34] It is not against the public interest and MBIE will not be disadvantaged if Ms Kerapa receives paid parental leave. I consider it is in the public interest to allow Ms Kerapa to have the number of weeks of paid parental leave she would have been entitled to had she been given the correct advice by the IRD during September 2015.

Conclusion

[35] In all the circumstances, I consider it just to reverse MBIE's decision of 18 January 2016. That means that Natasha Kerapa is entitled to paid parental leave for 16 weeks from the date of the start of her parental leave. Ms Kerapa should confirm that date and notify MBIE and the Authority as soon as possible after this determination is issued.

Costs

[36] This is a case where costs should lie where they fall. In coming to that decision I have considered the following circumstances:

- the determination has been made on the papers,
- Ms Kerapa is not legally represented,

- MBIE's decision was correct, and
- MBIE did not have to make legal submissions

Christine Hickey
Member of the Employment Relations Authority