

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 103
5533453

BETWEEN FAMINA KHAN
Applicant

A N D MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: M B Loftus

Representatives: Phil Payton, Counsel for the Applicant
Ella Tait, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 12 February and 26 March 2015 from the Respondent
11 March 2015 from the Applicant

Date of Determination: 23 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Famina Khan, applied for paid parental leave as an adoptive mother.

[2] The respondent, the Ministry of Business, Innovation and Employment (MBIE), declined the application on the grounds Mrs Khan had not met the requirements of s 71D of the Parental Leave and Employment Protection Act 1987 (the Act).

[3] Mrs Khan has challenged the decision and asks that the Authority confirm her right to paid parental leave.

[4] The parties agreed the claim be determined on the papers. They also agreed MBIE initiate the exchange.

Background

[5] Mrs Khan was employed by Oceania Group Limited (Oceania) as a payroll administrator in Christchurch. Oceania granted Mrs Khan parental leave which was scheduled to commence on 27 May 2014. She was to return on 25 May 2015.

[6] On 25 May 2014 Ms Khan completed an application for paid parental leave. The application confirmed Oceania had granted parental leave in respect of an adoption. It also advised the date Mrs Khan intended going on parental leave.

[7] Oceania's declaration was completed on 23 June 2014. It confirmed:

- a. Mrs Khan had been employed by Oceania for 4 years and 6 months as at the expected date of adoption;
- b. She had worked an average of 37.5 hours per week over the last six or twelve months;
- c. She had notified Oceania of an intention to take leave and it had been granted; and
- d. She had not taken parental leave in the six months prior to the expected date of adoption.

[8] On 16 June 2014 Mrs Khan completed a statutory declaration stating she had been in Fiji since 28 May 2014 upon which date she assumed care of a girl born on 25 May 2014. It went on to assert Mrs Khan and her husband intended adopting the girl but she had to remain in their care for three months before they could do so and they intended living in Fiji for that period of time.

[9] On 7 July 2014 the Inland Revenue Department sent a letter to Mrs Khan explaining it was unable to ascertain her eligibility for paid parental leave. Mrs Khan was advised her application would be referred to the Department of Labour (now MBIE) for determination.

[10] During July MBIE spoke by telephone with Mrs Khan, her husband and Oceania to establish her circumstances. In doing so they also ascertained the birth

mother was a family friend but not a blood relation and Mrs Khan could not organise a birth certificate and passport so as to bring the baby to New Zealand till after adoption had been granted.

[11] After considering Mrs Khan's circumstances MBIE concluded she was ineligible for paid parental leave pursuant. She was advised of this by letter dated 6 August 2014.

[12] The adoption was confirmed by the Magistrates Court at Nadi, Fiji on 14 November 2014.

Submissions

[13] Both parties have furnished comprehensive submissions and for that they are thanked. What follows therefore should be taken for what it is – a summation.

[14] For MBIE the argument is that to be eligible for paid parental leave an applicant must, amidst other things, give proper notice.¹ For Mrs Khan to do so it is argued she must have fulfilled one of the notice requirements of s 33 and be taking care of the child *with a view to adoption*.²

[15] It is submitted Mrs Khan can fill neither criteria as s 33 specifies only three ways notice can be given when contemplating adoption and Mrs Khan meets none. The inability to meet the requirements of s 33 also means Mrs Khan is incapable of complying with requirements of s 6 of the Adoption Act 1955 and it should follow that an inability to do this means Mrs Khan cannot be taking care of the child with a view to adoption under New Zealand legislation.

[16] In a reference to the Authority's ability to grant relief in respect of irregularities³ it is submitted these faults go to substance rather than form.

[17] Reference is then made to s 17 of the Adoption Act which allows some overseas adoptions to have the same effect as those made in New Zealand. Note is made of the fact it excludes adoptions in countries signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention) by a person habitually resident in New Zealand and to which the

¹ Section 71D(1)(a)

² Section 8(1)(a)

³ Section 68

Convention applies when it takes place in another contracting state on or after the date on which the Hague Convention became enforceable between New Zealand and that state.⁴ It is conceded there is insufficient information to ascertain whether or not this exclusion applies but if it does then it would appear the Convention's requirements have not been met.

[18] For the above reasons it is submitted MBIE's decision is correct and Mrs Khan is not eligible for paid parental leave.

[19] By way of response Mrs Khan submits MBIE is wrong in relying on an assertion her eligibility for paid parental leave is nullified by an inability to comply with the requirements of s 33 as that section assumes the proposed adoption is either occurring in accordance with New Zealand's Adoption Act or pursuant to the terms of the Hague Convention. It is submitted this approach is flawed as neither apply.

[20] Both Mrs Khan and her husband remain Fijian citizens and the adoption occurred under Fijian law, not New Zealand's. They assumed care of the child upon arrival home on 28 May. As required in Fiji they cared for her for some three months before applying to formalise the adoption. Their application was granted by the Magistrates Court in Nadi on 14 November 2014.

[21] It is submitted the Hague Convention does not apply for two reasons. Mrs Khan has been in New Zealand since 2007 but she remains on a work visa. A work visa is finite and means Mrs Khan cannot be considered a habitual resident. Habitual is defined as consistent and there is nothing consistent about an arrangement that is regularly reviewed and can be terminated. It is submitted this was recognised by the Fijian Court which noted her a temporary resident of Christchurch, New Zealand and granted the adoption under Fijian law and in a manner which implies it accepted the Hague Convention did not apply.

[22] It is submitted it is reasonable and appropriate for her to rely on the order and that is reinforced by s 17(2A) of the Adoption Act. That states a legally valid foreign adoption (which this is) is one to which the section applies.

⁴ Section 17(5) of the Adoption Act 1955

Conclusion and orders

[23] Having considered the submissions which, as already said are both significantly more detailed than the above summaries may suggest, I favour the applicant's approach.

[24] I am satisfied this is a properly authorised Fijian adoption by Fijian citizens. I am satisfied that when they applied for parental leave they were intending to complete the adoption process and that is what occurred. That, I conclude, overcomes any perceived deficiency concerning notice as the adoption is a Fijian one which is then accorded validity in New Zealand by virtue of s 17 of our Adoption Act. Section 33 is therefore circumvented and does not apply.

[25] My finding s 33 does not apply means there is no deficiency to which s 68 can be applied but I note for completeness that if wrong and given the circumstances this is a situation in which I would have undoubtedly applied s 68.

[26] As there is no suggestion the other eligibility criteria have not been satisfied nor that their Fijian citizenship disqualifies them from applying for paid parental leave under New Zealand law I conclude Mrs Khan should be eligible to receive paid parental leave and so order.

[27] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority