

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 317
3125796

BETWEEN

MINNIE BAWEJA
Applicant

AND

MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Greg La Hood, counsel for the Respondent

Investigation: On the papers

Determination: 23 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Minnie Baweja sought a review of a decision by the Ministry of Business, Innovation and Employment to decline her application for transfer of some of her parental leave entitlements to her husband Tanvir Khan. A delegated officer of the Ministry had decided the application was made too late and the transfer to Mr Khan was therefore not permitted under the relevant provisions of the Parental Leave and Employment Protection Act 1987 (the Act).

[2] The Act allows the Employment Relations Authority to review such decisions and to confirm, modify or reverse the Ministry's decision.¹

[3] As agreed with the parties this review has been carried out 'on the papers'. Those 'papers' comprised Ms Baweja's statement of problem, the Ministry's

¹ Parental Leave and Employment Protection Act 1987 s 71ZB.

statement in reply, written submissions from the Ministry and relevant background documents or records. These included Ms Baweja's transfer application, a letter from the Ministry declining her application and audio files of two telephone calls Ms Baweja had made to an Inland Revenue helpline to discuss the transfer application. One call was on 24 April 2020, before Ms Baweja applied for paid parental leave. The other was made on 28 November 2020 after her transfer application was declined. Ms Baweja said she had relied on what she was told in the first of those calls about when the application could be made. She said she was told she could transfer the entitlements to her husband "anytime" and was not advised this must be done before she returned to her paid employment.

[4] The calls were recorded as part of Inland Revenue's standard procedure. At the Authority's request counsel for the Ministry arranged for those recordings to be provided to the Authority. Ms Baweja and the Ministry each had the opportunity to comment further on what was said in those recordings but were each content for me to form my own view on listening to them.

What the Act allows

[5] An eligible employee or self-employed person is permitted to transfer all or part of their entitlement to parental leave payments to their spouse or partner. The spouse or partner picking up that period of the entitlements must intend to have day-to-day care of the child and meet the parental leave threshold test requirements for having worked a certain period for certain hours.²

[6] An eligible person is only entitled to receive parental leave payments while they are not employed (or self-employed) or are taking parental leave from their employment or self-employment.³

[7] The entitlement ends on the earliest of one of two dates – either on completion of the 26 weeks of entitlement or on the date on which the person returns to work.⁴

[8] The transfer provisions require the person seeking to transfer entitlements to have existing entitlements.⁵ They also state that any references to an employee's

² Sections 71E and 2BA.

³ Section 71D.

⁴ Section 71L(1)(b).

⁵ Sections 71E and 71EA.

entitlement to a parental leave entitlement are references to a spouse's entitlement.⁶ This makes the following provision relevant to the question of when an application for transfer must be made (emphasis added):

71I Applications for payment

- (1) A person is not entitled to a parental leave payment unless he or she makes an application for payment in accordance with this section.
- (2) The application must—
 - (a) be made by the employee or self-employed person before the earliest of the following:
 - (i) **the date on which the person returns to work:**
 - (ii) ...
 - (iii) ...
 - (b) ...
 - (c) ...
 - (d) **state whether or not the person wishes to transfer all or part of the entitlement** under section 71E.

[9] The Ministry is however empowered to “approve the making of a parental leave payment to a person despite an irregularity in his or her application for the payment”. In deciding whether to approve such an application the Ministry must have regard to the extent of the irregularity, including whether that was reasonable in all of the circumstances and whether the person was acting in good faith. This discretionary power granted by Parliament allows the Ministry to “amend or waive the irregularity or extend the time within which anything is to be or may be done”. The definition of “irregularity” includes failing to make an application for payment before the relevant date in s 71I and failing to state whether the person wishes to transfer all or part of the entitlement under s 71E.⁷

What happened?

[10] Before applying for paid parental leave (PPL) Ms Baweja rang an Inland Revenue helpline on 24 April 2020. In the course of asking other questions about making her application Ms Baweja asked what she needed to do if she wanted to transfer any of her PPL entitlements to her husband. She wanted to know if she had to make any decision about that at the time of making her application or could do so at

⁶ Section 71EA(a).

⁷ Section 71IA(5)(a) and (d).

a later stage. After explaining that her husband would have to meet the requirements for eligibility in respect of length of time and hours worked, the Inland Revenue advisor said the following (emphasis added):

... If he is able to do that it says here that you can choose to transfer to your partner when you do first apply or if you are not sure it does just specify **at any time while you are receiving the paid parental leave payments**. All you would need to do to transfer the entitlement is just complete the IR 881 form.

[11] The application for PPL that Ms Baweja submitted soon after said her leave would start from 15 June 2020. Her child was born on 2 July 2020. Ms Baweja returned to work on 17 September 2020 having taken 13 weeks' paid parental leave.

[12] On 15 October 2020 Ms Baweja applied to transfer PPL to Mr Khan. She asked for transfer of payments to her spouse from 17 September 2020 and said the parental leave period ended on 15 December 2020. This was the remaining 13 weeks in the maximum entitlement period of 26 weeks.

[13] Inland Revenue referred Ms Baweja's application to a Ministry Labour Standards Officer to assess whether she was entitled to transfer parental leave entitlements. After reviewing the application, and speaking with Ms Baweja and Mr Khan, the officer issued a decision saying Ms Baweja was not entitled to transfer the payments. After setting out the relevant sections of the Act the decision letter, dated 19 November 2020, gave this reason:

... [Y]ou have been found to be not entitled to transfer or continue receiving paid parental leave payments because you returned to work and thus your payments ceased. Your application to transfer paid parental leave payments to Mr [Khan] was made after you had returned to work. This means that as your payments had stopped upon your return to work, you had no entitlement to transfer to your husband. Therefore, he is not entitled to receive parental leave payments.

[14] The letter also advised Ms Baweja of her right to seek a review of that decision by the Authority.

What needs to be determined in this review?

[15] The issues for determination were:

- (a) In declining the application of Ms Baweja and Mr Khan for transfer of paid parental leave, was the Ministry's discretion to approve or not approve irregular applications exercised reasonably?

(b) If the discretion was not exercised reasonably, or for any other reason, should the Authority exercise its discretion to modify or reverse MBIE's decision (having regard to the provisions of s 71ZB of the Act)?

[16] Ms Baweja's application for transfer of her remaining entitlements was made four weeks after she returned to work. The Ministry's decision was correct in identifying her as therefore no longer having an entitlement. This was because she had failed to make an application for transfer of the payments "before the relevant date in section 71I", which in her case was the date on which she returned to work.

[17] The Ministry submitted that its discretion to approve a parental leave transfer could not be exercised in this particular situation because what had happened was not an irregularity of form. It submitted Ms Baweja's delay in making her transfer application had resulted in a substantive shift in whether or not she had any legal entitlement and that situation could be contrasted with an irregularity of form such as completing an application incorrectly.

[18] That submission was not persuasive. It was based on a reading of the discretion which was too narrow and limited. The Act plainly defines failing to make an application before the relevant date as an irregularity. The scope of the discretion to "amend or waive the irregularity or extend the time within which anything is to be or may be done" clearly reached to the situation of Ms Baweja making her transfer application after "the relevant date" of her return to work. Accordingly, it was within the scope of the discretion granted to the Ministry to at least consider waiving that irregularity and approving the transfer.⁸

[19] The questions the Ministry therefore should really have had regard to were whether the extent of the irregularity was reasonable in all the circumstances and whether Ms Baweja had acted in good faith. The answer given in the Ministry's decision about her application was, in effect, that the delay was not reasonable. For the following reasons that was a decision that the Ministry could reasonably have made in the exercise of its statutory discretion.

[20] Firstly, Ms Baweja's assertion about what she was told by an Inland Revenue advisor in April 2020 was not supported by listening to the recording of what was

⁸ See, for example, *Williamson v Ministry of Business, Innovation and Employment* [2015] NZERA Christchurch 96.

actually said in the call. Ms Baweja claimed she was told she “could transfer the PPL to my husband anytime”. However, as noted above, what the advisor said included an important qualification. She did not just say the application could be made at “any time”. She said it could be made at “any time while you are receiving the paid parental leave payments”.

[21] This was not a situation where Inland Revenue advisors had given inaccurate advice that resulted in the employee being misinformed.⁹

[22] Secondly, while it was true that the advisor did not expressly state the application had to be made before Ms Baweja returned to work, other material available to her made a clear link between a return to work and an end to entitlements.

[23] Her parental leave application, made in April 2020, included this declaration which she had signed:

... I understand if I return to work before I have received all of my paid parental leave (except for Keeping in Touch hours) I must notify Inland Revenue immediately because I'll no longer be entitled to receive PPL ...

[24] The front page of the PPL transfer form (IR881) has a heading with the question: who qualifies for a transfer? Under a further heading, “Exclusions” there is this question: “Have you ... returned to work (except for Keeping In Touch (KIT) hours?”. It then has an arrow pointing to this statement if the answer to that question is Yes: “You are not eligible”.

[25] The next page of the form provides the following information about when an application must be made (underlined emphasis added):

When to apply for a transfer

You as the spouse or partner of a mother or primary carer can apply to transfer PPL between you either at the time the mother or primary carer applies for it and at any time while PPL payments are being made.

[26] Ms Baweja asked for the Ministry’s decision to be put aside because she was a layperson and a first-time parent and the Inland Revenue advisor should have mentioned that the transfer of leave must be arranged prior to resuming work. In light

⁹ See, for example, *Chalmers v Ministry of Business, Innovation and Employment* [2021] NZERA 303 and *Kerapa v Ministry of Business, Innovation and Employment* [2016] NZERA Christchurch 41.

of the printed material available to her and what was actually said to her in the call, Ms Baweja has not established that the Ministry should have exercised its discretion to find that the irregularity in the timing of her application was reasonable in all the circumstances.

Outcome

[27] For the reasons given, I confirm the Ministry's decision to decline Ms Baweja's application for transfer of parental leave entitlements. The decision was consistent with the statutory provisions. The extent of the irregularity in her application, in all of the circumstances, was not such that the Ministry should have exercised its discretion and approved the transfer.

Robin Arthur
Member of the Employment Relations Authority